Filed 8/19/13 In re D.Q. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.Q. et al., Persons Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. H.G., Defendant and Appellant.	E058196 (Super.Ct.No. RIJ1200157) OPINION

APPEAL from the Superior Court of Riverside County. Tamara L. Wagner, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and Appellant.

Pamela J. Walls, County Counsel, Anna M. Deckert and Carole A. Nunes Fong, Deputy County Counsel, for Plaintiff and Respondent.

H.G. (the mother) appeals from an order terminating parental rights to two of her sons — D.Q., now aged two, and J.C., now aged one. She contends that the juvenile court erred by refusing to find that "beneficial parental relationship" exception applied with respect to D.Q. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).) She further contends that this error also requires reversal with respect to J.C. We find no error. Hence, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

Prior to the dependency, the mother lived with her mother (i.e., the maternal grandmother). In November 2010, the mother gave birth to D.Q. In February 2012, she gave birth to J.C. Both the mother and J.C. tested positive for amphetamines. The mother admitted using methamphetamine for about five years and drinking alcohol daily. She also admitted suffering from postpartum depression after D.Q. was born.

As a result, the children were detained, and Riverside County Department of Public Social Services (the Department) filed a dependency petition regarding them. The whereabouts of their respective fathers remained unknown throughout the dependency. The children were placed with the maternal grandmother. Consistent with the juvenile court's orders allowing the mother only supervised visitation, the mother moved out of the maternal grandmother's home.

In March 2013, at the jurisdictional/dispositional hearing, the juvenile court found that it had jurisdiction based on failure to protect (Welf. & Inst. Code, § 300, subd. (b)) and, solely as to the fathers, failure to support (*id*., subd. (g)). It formally removed the children from their parents' custody and ordered that the mother be provided with reunification services.

The mother failed to comply with her substance abuse and mental health treatment programs. Accordingly, in October 2012, at the six-month review hearing, the juvenile court terminated reunification services and set a hearing pursuant to Welfare and Institutions Code section 366.26 (section 366.26).

Meanwhile, the maternal grandmother and her husband expressed an interest in adopting both children. In March 2013, at the section 366.26 hearing, the juvenile court found that the children were adoptable and there was no applicable exception to termination. Accordingly, it terminated parental rights.

II

THE BENEFICIAL PARENTAL RELATIONSHIP EXCEPTION

A. *Additional Factual and Procedural Background*.

The evidence before the juvenile court at the section 366.26 hearing consisted of one specified social worker's report, plus the mother's oral testimony. We confine our review to this evidence (see Welf. & Inst. Code, § 366.26, subd. (c)(1)), which showed the following.

D.Q. had lived with the mother for about a year before the dependency. J.C. had never lived with her. The children had been placed with the maternal grandmother since the outset of the dependency, over a year before the section 366.26 hearing. The maternal grandmother had been "an active part of the children's life" even before the dependency.

The prospective adoptive parents and the children had "a mutually positive [p]arent-child bond." The children were "adjusting very well" in the home. "They both liked to be hugged and held by the prospective adoptive parents. When they were held by their prospective adoptive parents they looked content and happy."

The mother had supervised visitation in the maternal grandmother's home. During most of the dependency, she visited about three times a week, for four hours at a time. Three or four months before the section 366.26 hearing, however, she moved to Los Angeles and had to switch to visiting only once a week, for 12 hours at a time.

The children were happy to see her. They would run to her. D.Q. called her "mom" or "mommy." D.Q. said he wanted to come back home with her. The mother would bring toys, clothes, and snacks. She would read to D.Q. and work on letters, numbers, shapes, and colors with him. Sometimes, D.Q. would get jealous when the mother paid attention to J.C. Other times, he would "act out" — for example, crying for the mother to pick him up. At the end of their visits, D.Q. would get "very angry," and both children would cry. To prevent this, the mother started putting the children to bed before leaving.

In July and August 2012, the mother was in an inpatient drug treatment program and unable to visit with the children. During July, D.Q. would "wake up in the middle of the night crying and screaming." In August, he was still whining, crying, and asking for the mother.

At the section 366.26 hearing, the mother's counsel asked the juvenile court to find that the beneficial parental relationship exception applied. She argued, among other things, "There's a strong emotional bond due to the fact that when the mother tries to leave the visitation, the children cry and do not want her to leave."

The Department's counsel and the minor's counsel opposed such a finding. Minor's counsel argued, "They have some type of bond with her, but it's not a parent/child bond, that if that bond is broken that it would somehow create a detriment to them . . . ." The Department's counsel argued that the mother "has been unable to complete her drug treatment program . . . and it's certainly not beneficial to the children at this time . . . . [T]hey have waited about a year for stability and they have found that stability with the maternal grandparents . . . ."

The juvenile court found that none of the exceptions to termination of parental rights applied and that termination of parental rights would not be detrimental to the children.

B. *Analysis*.

As a general rule, at a section 366.26 hearing, if the juvenile court finds that the child is adoptable, it must terminate parental rights. (§ 366.26, subds. (b)(1) & (c)(1).)

There is an exception to this rule, however, if "[t]he court finds a compelling reason for determining that termination would be detrimental to the child" (*id.*, subd. (c)(1)(B)) for one of six specified statutory reasons. (*Id.*, subd. (c)(1)(B)(i)-(vi).) One such reason is that "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (*Id.*, subd. (c)(1)(B)(i).)

"The 'benefit' prong of th[is] exception requires the parent to prove his or her relationship with the child 'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.' [Citations.]" (*In re K.P.* (2012) 203 Cal.App.4th 614, 621.)

"To meet the burden of proving the section 366.26, subdivision (c)(1)(B)(i) exception the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits — the parent must show that he or she occupies a parental role in the life of the child. [Citation.]" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.) "'Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.' [Citation.]" (*In re Jason J.* (2009) 175 Cal.App.4th 922, 936.)

"'The burden falls to the parent to show that the termination of parental rights would be detrimental to the child under one of the exceptions. [Citation.]' [Citations.]" (*In re C.B.* (2010) 190 Cal.App.4th 102, 122.)

In *In re Autumn H*. (1994) 27 Cal.App.4th 567, the court stated, "If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be *greatly harmed*, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Id*. at p. 575, italics added.) In other words, a showing that the child would be "greatly harmed" is sufficient to carry the parent's burden. Some cases have gone beyond this and indicated that the parent *must* show that the child would be greatly harmed. For example, in *In re Angel B*. (2002) 97 Cal.App.4th 454, the court said, "To overcome the preference for adoption and avoid termination of the natural parent's rights, the parent must show that severing the natural parent-child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed. [Citations.]" (*Id*. at p. 466.)

The mother argues that this "great harm" standard has no statutory basis. We may assume, without deciding, that the juvenile court need only find that termination would be detrimental, not that it would be "greatly" detrimental. Even if so, however, a showing of some minimal detriment does not necessarily require the juvenile court to find that the exception applies. The determination is still fundamentally a weighing process — the parent must show that it would be *more* detrimental to terminate parental rights than it

would be to deny the child permanence. Moreover, the juvenile court still must find that the benefit to the child from continuing the relationship is a "*compelling reason*" for finding that termination would be detrimental.

The existence of a beneficial parent-child relationship is a factual issue; we review the trial court's findings on this issue for substantial evidence. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) "'On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order.' [Citation.]" (*In re C.F.* (2011) 193 Cal.App.4th 549, 553.) Thus, "a challenge to a juvenile court's finding that there is no beneficial relationship amounts to a contention that the 'undisputed facts lead to only one conclusion.' [Citation.] Unless the undisputed facts established the existence of a beneficial parental . . . relationship, a substantial evidence challenge to this component of the juvenile court's determination cannot succeed." (*Bailey J.*, at p. 1314.)

Here, the mother did not demonstrate that she played a parental role in D.Q.'s life. He had been in her custody for a little over a year; even during that time, however, the maternal grandmother had been part of his life, and he had been in the exclusive custody of the maternal grandmother for another year after that. The mother visited for roughly 12 hours a week; this allowed her to play with him, to teach him, and to put him to bed, but it was the maternal grandmother who dealt with his daily needs. The beneficial

parental relationship exception is best fitted to an older child who has had only one caretaker for most of his or her life. That does not describe D.Q.

Also, the mother did not demonstrate that termination of parental rights would be prohibitively detrimental. D.Q. had a "[p]arent-child bond" with the maternal grandmother. He appeared to be "content and happy" with her. The mother points out that, when she was in inpatient treatment and unable to visit, D.Q. woke up in the middle of the night crying and screaming. However, that was in July; by August, he was still crying and asking for her, but it was not reported that he was waking up in the middle of the night or screaming. It was fairly inferable that he was starting to adjust to her absence. Likewise, when the visitation went from three times a week to once a week, he evidently was not distressed. The mother also points out that, at the end of visits, he would get "very angry" and cry. However, if she put him to bed before leaving, it was not reported that he was upset the next day. The mother did not request a bonding study, so there was no expert testimony that termination would be detrimental.

It is also significant that minor's counsel opposed a finding that the beneficial parental relationship exception applied. Minor's counsel is charged with representing the child's interests and has a duty to investigate the facts. (Welf. & Inst. Code, § 317, subd. (e).) "[C]ounsel is required to make a factual investigation and may 'make recommendations to the court concerning the child's welfare . . . .' [Citation.]" (*In re Kristen B.* (2008) 163 Cal.App.4th 1535, 1541.) We do not mean to say that the arguments of counsel are a substitute for evidence. Neither do we mean to give minor's

counsel the power to veto a finding that the beneficial relationship exception applies. However, if the trial court is in doubt as to whether the exception applies or not, the opposition of minor's counsel is certainly a factor it may take into account.

This case resembles *In re C.F.*, *supra*, 193 Cal.App.4th 549. There, the children enjoyed visits. They "appeared to have an emotional connection with" the mother. (*Id*. at p. 556.) Two of the three children were able to verbalize their feelings; one said he would be "mad" if he could not see her anymore, and the other said she would be "sad." (*Ibid*.) At the end of visits, one of the children would ask her to stay longer. (*Ibid*.) Nevertheless, the appellate court upheld a finding that the beneficial parental relationship exception applied. It stated: "[T]here is no bonding study or other evidence that shows [the mother] occupied a parental role in their lives, that they would suffer any actual detriment on the termination of parental rights, or that the benefits of continuing the parental relationship outweighed the benefits of permanent placement with family members who are ready to give them a permanent home. While the two older children preferred to keep visiting [the mother], it is apparent that all the children look to the maternal aunt and grandmother to fulfill all of their emotional and physical needs . . . . The children are entitled to stability and permanence through adoption." (*Id*. at p. 557.)

Cases reversing a refusal to apply the beneficial relationship exception are few and far between, and they all featured far more compelling facts than those before us. For example, in *In re Scott B*. (2010) 188 Cal.App.4th 452, the child was 11 years old. (*Id*. at p. 471.) He repeatedly said that he wanted to live with the mother; he did not want to be

adopted; and if he were adopted, he would run away. (*Id*. at pp. 462, 466.) A court-appointed special advocate (CASA) "opined that it is imperative that when Scott is adopted he maintain contact with Mother as it is clear that Mother and Scott are extremely close and it would be detrimental for their relationship to be disrupted." (*Id*. at p. 465.) There are no such facts here.

The mother asks us to consider her own efforts to participate in reunification services. She asserts that "[a] parent's efforts to regain custody, even if unsuccessful, can support a beneficial parental relationship finding . . . ." Such efforts may have some marginal relevance to whether the child's future relationship with the parent is likely to be beneficial. (See, e.g., *In re S.B.* (2008) 164 Cal.App.4th 289, 300 ["Here, Michael maintained a parental relationship with S.B. through consistent contact and visitation. His devotion to S.B. was constant, as evinced by his full compliance with his case plan and continued efforts to regain his physical and psychological health"]; *In re Amber M*. (2002) 103 Cal.App.4th 681, 690 ["[s]he was devoted to them and did virtually all that was asked of her to regain custody"].) Unsuccessful efforts, however, are far less persuasive than successful efforts. And even successful efforts, standing alone, do not suffice to support a finding that the exception does apply.

The mother argues that this case "slip[ped] through the cracks" and that the juvenile court failed to carry out the required weighing process. Drawing a colorful analogy to an airport metal detector, she suggests that because most parents who raise the beneficial parental relationship exception do so frivolously, the courts pay no attention to

parents who (supposedly like her) have a meritorious claim. We appreciate the zealous advocacy, but we reject the suggestion. The issue was expressly raised and thoroughly aired. The juvenile court then made an express finding on the issue. It was not required to explain its thinking further on the record.

Arguably, the mother carried her burden of producing evidence — in other words, she introduced sufficient evidence to support a finding that the beneficial parental relationship exception applied. However, she failed to carry her burden of persuasion. Her evidence was not so compelling as to absolutely require the juvenile court to find that the exception applied.

III

DISPOSITION

The order appealed from is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P. J.

KING
J.