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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re E.S. et al., Persons Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

P.S.,

Defendant and Appellant.

E059284

(Super.Ct.No. RIJ106582)

OPINION

APPEAL from the Superior Court of Riverside County. Jacqueline C. Jackson,
Judge. Affirmed.

Grace Clark, under appointment by the Court of Appeal, for Defendant and
Appellant.

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

P.S. (mother), the mother of A.S. and her brother E.S., appeals from an order terminating her parental rights to these two children. On appeal, she contends that the court erred in terminating her rights to E.S. because they shared a beneficial parent-child relationship.¹ We conclude mother did not bear her burden of proving that the beneficial parent-child exception to adoption applies and therefore affirm the judgment.

PROCEDURAL FACTS AND HISTORY

Mother and father, who are not married, have had a long history with the dependency court.² They had five older children together, and mother had one additional child by a different father. All of these children had been dependents of the court and were never returned to parental custody. Parental rights to all of them were terminated. During the initial investigation by the social worker in this case, mother falsely reported that another child, later determined to be E.S., was in guardianship with a maternal aunt in the State of Washington.

¹ Father is not a party to this appeal. Mother makes no claim of error concerning A.S. in her briefing. We will treat the appeal as to A.S. as abandoned. (*Wall Street Network, Ltd. v New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177.) Consequently, we will only address whether the court erred in terminating her rights to E.S.

² Mother also has a felony conviction in 2008 for assault with a deadly weapon against father.

On November 10, 2011, the social worker went to the hospital to respond to an immediate response referral alleging general neglect. Mother had given birth to A.S. She had not received any prenatal care and reported that she discovered she was five to six months pregnant when she visited the doctor to see why her birth control was not working. Mother reported that she wanted a paternal aunt to care for the child because she could not care for her and did not want the child to be taken into custody by the Department of Public Social Services (Department). At the time of A.S's birth, her brother E.S. was 14 months old.

Mother reported that she had a brain tumor removed when she was 16 years old, which has caused cognitive delays and, as a consequence, she was slow at everything she does. She suffered from blackouts, balance problems and severe headaches. The social worker observed that mother had difficulty staying on task and she was slow at processing information. She told the social worker that she was going to stay with a paternal aunt upon release from the hospital.

After consulting with a supervisor, the social worker devised a plan with mother by which mother could leave the hospital with the child provided she would reside in the paternal aunt's home with all of the usual provisions a newborn needs, and mother and the paternal aunt would go to the courthouse the following Monday to file for a legal guardianship with the aunt.

The social worker visited the paternal aunt's home and observed a small child there. She asked who the child was, and the aunt responded that it was mother's son, E.S. When told that mother had reported the child was subject to a guardianship in

Washington with a maternal aunt, the paternal aunt said that information was correct but that she had been caring for E.S. for a few weeks, and she had no doubt that the other aunt would return for him.

Mother left the hospital but did not follow the safety plan as she had agreed. She returned to the hospital without the paternal aunt and attempted to take A.S. The social worker decided to detain A.S.

Later, the paternal aunt called the social worker and stated that the father wanted nothing to do with the child and that she wanted custody of A.S. She related that she had been told by father that mother had a plan to kidnap the child from the hospital. The paternal aunt told the social worker that when E.S. was born, the maternal aunt took custody of him but immediately gave him back to mother. She had kept this information from the social worker. She reported that she provides necessities for E.S. because the parents do not have the means to. The social worker decided to take E.S. into protective custody also.

The social worker went to mother's residence with a police officer to gain custody of E.S. Mother appeared at the door with E.S. Both appeared disheveled, and E.S. needed a diaper change. Mother tried to pry E.S. from the social worker's arms as both mother and father shouted obscenities. She also attempted to prevent his removal by biting his clothing.

A petition was filed as to both children on November 15, 2011, alleging that the children came within the provisions of Welfare and Institutions Code section 300,

subdivision (b).³ Both children were ordered removed from parental custody at the detention hearing held the following day.

The jurisdictional/dispositional hearing was held on January 25, 2012. The court sustained the petition. Because mother and father failed to reunify with their other children, the court ordered that no reunification services would be provided. (§ 361.5, subd. (b)(11).) A section 366.26 hearing was set for May 24, 2012. No visitation with A.S. was ordered.⁴ The selection and implementation hearing was continued many times while the Department searched for an adoptive home for the children.⁵

On April 15, 2013, the two children were placed in their prospective adoptive home after a series of supervised, unsupervised and then extended weekend visits.

Mother filed a section 388 changed circumstances petition as to both children seeking reunification services on July 19, 2013, a few days before the scheduled selection and implementation hearing.

The court denied the petition without conducting an evidentiary hearing on July 23, 2013. The section 366.26 hearing was conducted immediately thereafter. Mother was not present. The parties submitted on the reports prepared for the hearing

³ All further statutory references are to the Welfare and Institutions Code.

⁴ Father, who has mental health issues, refused to communicate with or make himself available to anyone from the Department, and mother had told the social worker that she had no interest in reunifying with A.S. She said she wanted A.S. to be adopted. At one visit, mother said that A.S. looked like a rat.

⁵ Shortly after her birth, A.S. was determined to have a heart condition that required surgery and a “patch.” As she grows, she will need additional surgeries since the patch does not grow with her.

and orally argued against termination and adoption. There was no bonding study, and no testimony was given. The court found adoption to be in the best interests of the children, and terminated parental rights to both children. It found that termination of rights would not be detrimental to the children, and none of the exceptions to adoption were applicable.

DISCUSSION

Mother contends the parent-child benefit exception applies because she visited E.S. regularly, and they have a bond that if terminated would be detrimental to E.S. (§ 366.26, subd. (c)(1)(B)(i).) She contends that the court erred by finding it did not apply and in terminating her parental rights. We disagree.

Once reunification services have been terminated, the focus shifts to the needs of the child for permanency and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Adoption is the Legislature's preferred plan for a child who cannot be returned to parental custody because it provides the permanency which other alternatives, such as guardianship or long-term foster care, cannot. (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.) The statutory exceptions to the preferred plan of adoption merely permit the court in exceptional circumstances to choose an option other than the norm, which is adoption. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.)

The parent has the burden of proving that one of the exceptions to adoption applies. (*In re Scott B.*, *supra*, 188 Cal.App.4th at p. 469.)

The applicable standard of review on appeal is somewhat muddled. Some courts have used an abuse of discretion standard while others have used a substantial evidence

standard. (*In re Scott B.*, *supra*, 188 Cal.App.4th at p. 469.) Recent cases have applied a substantial evidence standard to the court's factual determination of whether there is a parent-child beneficial relationship and an abuse of discretion standard to the court's determination that termination of rights would not be detrimental to the child. (*In re K.P.* (2012) 203 Cal.App.4th 614, 621-622, citing *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) As a practical matter, it makes no difference which iteration of the standard we apply in this case. Whether we apply an abuse of discretion standard of review or a substantial evidence standard of review, or a combination of those, we find the court did not err in finding the exception did not apply and in terminating parental rights in this case.

While mother was at times inconsistent in visitation by missing a number of scheduled visits, generally speaking mother regularly visited the child, and respondent effectively concedes as much. The pertinent issue then becomes whether the second prong of the exception applies, i.e., whether the child would derive a greater benefit from continuing the parent-child relationship with mother than he would from being adopted. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1234-1235.)

In re Autumn H. (1994) 27 Cal.App.4th 567, is the seminal case regarding exceptions to the preference for adoption. There, the court held that parent-child relationships that can prevent termination of parental rights are ones that promote "... 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. In other words, the court balances the strength and quality of the natural parent/child relationship in

a tenuous placement against the security and sense of belonging a new family would confer. 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.)

"The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between the parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.)

Adoption cannot be thwarted simply because a child would derive some benefit from continuing the parent-child relationship, and adoption should be ordered when the court finds that the relationship maintained through visitation does not benefit the child significantly enough to outweigh the strong preference for adoption. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) The juvenile court may reject the parent's claim simply by finding that the relationship maintained during the visitation does not benefit the child significantly enough to outweigh the strong preference for adoption. To apply the exception, the court must find compelling reasons to apply the exception. Only in an extraordinary case will the preservation of parental rights prevail over the Legislature's preference for adoption. (*Ibid.*)

This is not that compelling or extraordinary case. E.S. was about 14 months old when taken from mother's custody. At the time of the permanency planning hearing when parental rights were terminated, he had been out of her custody for about 18 months. The monthly visits never progressed to unsupervised visits. In the progression of visits, there was some improvement in the quality of the visits with mother bringing food and toys to interact, but there is nothing in the nature and quality of those visits to indicate that E.S. would be harmed by termination of parental rights. Nothing really suggests bonding or even significant reciprocal affection between them. Early on, there was very little interaction between mother and child, and the child had to be coaxed to interact with mother. E.S. would seek out the foster mother to meet his needs and comfort when he cried. At the end of visits, mother left abruptly without exchanges of affection. During the very last visits, mother would read to E.S. while he sat on her lap, and mother hugged and kissed him. Overall, her interaction was described as docile and passive. The last two visits appeared to be enjoyable for mother and child, but pleasant visits are not enough to apply the exception. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.)

E.S. and A.S. were placed together in their prospective adoptive home about three months before the section 366.26 hearing. The foster parents want to adopt them both. The children have adjusted to the home and are affectionate with them, calling them mom and dad. The foster parents have three biological children, ages eight, five, and three. They also have a six-year-old adopted child. These children are affectionate toward A.S. and E.S. and want them to be part of their family.

It is clear on this record that it is in the best interests of A.S. and E.S. to be adopted, and there is no compelling reason to apply the beneficial parent-child relationship exception to the statutory preference for adoption. Nothing in the record suggests that severing parental rights will be detrimental to E.S. or A.S. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853.) The court did not err in finding adoption to be the preferred plan and severing parental rights.

DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.