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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re H.H., a Person Coming Under the  
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT  
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

M.V.,

Defendant and Appellant.

E059649

(Super.Ct.No. SWJ001172)

OPINION

APPEAL from the Superior Court of Riverside County. John M. Monterosso,  
Judge. Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Pamela J. Walls, County Counsel, and Julie Koons Jarvi, Deputy County Counsel,  
for Plaintiff and Respondent.

## I

### INTRODUCTION

M.V. (mother) appeals from the juvenile court's order terminating her parental rights in September 2013 under Welfare and Institutions Code section 366.26<sup>1</sup> to her son H.H. At that time, H.H, who was four years old, had not been in mother's care for about 20 months, nearly half his life.

On appeal, mother raises a *Marsden*<sup>2</sup> issue and contends the court abused its discretion in not applying the beneficial parental relationship exception. (§ 366.26, subd. (c)(1)(B)(i).) We reject both these claims and affirm the judgment.

## II

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *Termination of Reunification Services*

##### 1. *September 2010 to January 2012*

H.H. was born in January 2009 and first detained in September 2010 when DPSS<sup>3</sup> received reports of domestic violence involving both parents. Mother had several injuries

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless stated otherwise.

<sup>2</sup> *People v. Marsden* (1970) 2 Cal.3d 118.

<sup>3</sup> Riverside County Department of Public Social Services.

from an earlier altercation with father.<sup>4</sup> Mother refused to leave father and move to a shelter. H.H. displayed behaviors that suggested a diagnosis of autism.

Both parents tested positive for marijuana use. Mother had a medical marijuana card and smoked marijuana twice a week to treat insomnia, anxiety, and to increase her appetite as she was underweight. She did not view her use of marijuana to be a problem. Both parents had criminal histories for theft and drug crimes. In addition, father had convictions for domestic violence. In 2002 and 2003, mother's oldest child was the subject of a dependency proceeding for substantiated allegations of general neglect. Mother no longer had custody of her two older children and father did not have custody of his older child. These children were from other relationships.

At the November 2010 jurisdictional hearing, the juvenile court found the allegations of the amended petition to be true and removed H.H. from the parents. The court also ordered that reunification services be provided to mother.

In May 2011, DPSS concluded that mother had made only minimal progress toward the completion of her plan, and that she was uncooperative and unwilling to communicate with the social worker although she had participated in counseling, programs, and visitation. DPSS filed an addendum report in June 2011, recommending that reunification services be terminated after mother had refused to participate in random drug testing.

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<sup>4</sup> Father was convicted of violating Penal Code section 273.5, subdivision (a). The juvenile court terminated reunification services for him at the contested review hearing in July 2011. Father is not a party to this appeal.

DPSS filed another addendum in July 2011, reporting that mother continued to refuse random drug testing and could not be assigned to a therapist because she had not demonstrated 30 days of sobriety. In a psychological evaluation she was diagnosed with a personality disorder and narcissistic, antisocial and borderline traits. The psychologist proposed mother would require extensive psychotherapy beyond the scope of the mental health services that could be provided during reunification. At the review hearing in July 2011, the juvenile court continued reunification services for mother, ordering therapy and random drug testing.

In September 2011, mother was arrested for driving under the influence of methamphetamine and a probation violation. Mother admitted to police that the methamphetamine and a pipe were hers. She also admitted trading sexual favors for drugs and selling methamphetamine to supplement her income.

Mother posted a “You Tube” video entitled “Judges, Public Defenders and Foster Homes,” protesting DPSS practices and her son’s removal. She ended the video with a statement reading “all this for a plant”—apparently referring to marijuana.

In addition, mother tested positive for marijuana three times and was a “no-show” four other times since June 2011. Mother admitted that, on July 26, 2011, she was under the influence of Klonopin (or Clonazepam) and had passed out. This drug had apparently been prescribed to reduce anxiety.

Subsequently, mother’s behavior improved. She tested negative for all substances as of October 27, 2011, attended 12-step meetings, and participated in anger management

classes, as well as individual counseling. She immediately enrolled in the Family Preservation Court program, and, as of December 2011, she was in compliance.

*2. January 2012 to August 2012*

At the 12-month status review hearing in January 2012, the juvenile court ordered H.H. returned to mother's care and custody and DPSS to provide family maintenance services. On July 11, 2012, DPSS reported that mother had made excellent progress and recommended that she receive an additional six months of family maintenance services.

*3. August 2012 to January 2013*

Unfortunately, mother relapsed and DPSS filed a supplemental petition under section 387 in August 2012. Mother had admitted smoking marijuana and using methamphetamine with her roommates within one week after moving in on July 20, 2012. She expressed concern about parenting H.H. due to his developmental problems. She acknowledged having formed a romantic relationship with a man from her support group.

Initially it was agreed H.H. would remain in mother's care with continued court involvement. Mother signed a relapse prevention plan and new living arrangements were found for her and H.H. Soon, however, the case manager received an anonymous report that mother had not stayed the previous night in the new residence but had spent the night with a man who was a known drug user. Mother confirmed she had not stayed the night at the new residence and had been with a man. When asked why she had used, mother responded, "You don't understand. It has been so stressful lately. [H.H.] is a handful. You just don't understand how hard it is to take care of him." At this point, she was

terminated from the court program. Mother left the courtroom and refused to inform social workers of her son's whereabouts. After deputies intervened, mother revealed H.H.'s whereabouts, and he was taken into protective custody later that day.

At the detention hearing in August 2012, the court ordered that mother receive reunification services and authorized H.H.'s return to mother upon a suitable home evaluation, and mother being clean and following her case plan.

Mother had a positive drug test on September 5, 2012. On September 12, 2012, mother asserted her intention to complete a 45-day residential substance abuse treatment program and return to Family Preservation Court. Because of mother's two-year history of failures, DPSS recommended mother's reunification services should be terminated in spite of the bond between H.H. and mother.

Mother left the residential program on September 19, 2012, claiming it was unsuitable. During a visitation with H.H., mother apparently coached him to claim his foster family was hitting and kicking him. During an unannounced visit to H.H.'s foster home, the social worker observed H.H. showed no signs of abuse. Mother had another positive drug test on October 28, 2012.

Mother entered a residential program in late October 2012, and completed the program on December 9, 2012. Thereafter, she participated in outpatient programs and services.

In November 2012, H.H. was placed in a foster-adopt home. H.H. was thriving in that placement and strongly bonded with his caregiver. H.H. stated he did not want to visit with mother.

#### *4. January 2013 Hearing*

Because three of mother's appointed attorneys declared a conflict in succession, the contested jurisdictional hearing on the supplemental petition was not heard until January 2013. Mother testified that, in addition to participating in an aftercare program, she had obtained employment, maintained a residence, regularly attended 12-step meetings, and maintained contact with her sponsor and her son.

At the conclusion of the hearing, the juvenile court made the requisite jurisdictional findings and terminated reunification services. The court commented that mother's entire history—with dependency proceedings going back 10 years to 2002—had to be considered in order to evaluate her substance abuse problem and to determine whether H.H. could be safely returned to her care. In view of her history, DPSS would have been justified to remove H.H. in August 2012 instead of devising a safety plan. However, mother did not comply with the plan, resulting in termination from Family Preservation Court. From late August to late October 2012, mother continued to use drugs. Eventually, she did get into a program and had been clean for 77 days but the court noted that mother was not independent and could not deal with stressful situations. The court concluded there still existed a substantial risk of harm if H.H. were placed back in mother's care.

H.H. had been originally removed September 26, 2010, and had been in dependency for 28 months. The court found that DPSS had provided reasonable services. In spite of some concerns about H.H.'s development, the court commented that his behavior was similar to any three or four year old, as confirmed by an assessment by the

Inland Regional Center. Thus, contrary to mother's suggestion, DPSS had not simply placed an extremely troubled child in her care without adequate support and instruction. The court terminated reunification services and ordered visitation reduced.<sup>5</sup>

*B. Termination of Parental Rights*

*1. Section 366.3 Post-Permanency and Section 366.26 Selection and Implementation Reports*

In April 2013, DPSS recommended termination of parental rights. H.H. was described as an active, energetic, playful child who enjoyed preschool. An assessment had ruled out autism, retardation, or any condition qualifying him for services from the Inland Regional Center. H.H. was receiving behavioral therapy and his episodes of tantrums had diminished. He did not volunteer information about mother although he enjoyed his visits with her. H.H. was visiting and developing a bond with his newly identified prospective adoptive parents and their children to ease his transition to their home.

During supervised visitation, mother plied H.H. with candy, doughnuts, and soda. She began to criticize H.H. and his attire and protested that he was "covered in bruises, emaciated[,] and had discharge in his eyes." She spent her visits with H.H. inspecting him for bruises. On April 3, 2013, mother tested positive for methamphetamine. She behaved more appropriately and affectionately with H.H. on April 17. However, on May 1, 2013, mother was highly disruptive and refused to relinquish H.H. H.H.'s foster parent

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<sup>5</sup> This court denied mother's writ petition on March 29, 2013.

from November 2012 to May 2013 wrote a letter describing how H.H. expressed anxiety about visiting his mother but was very enthusiastic about his prospective adoptive family.

At the hearing on May 10, 2013, the juvenile court characterized mother's mental state as "deteriorating" and reduced visitation to once a month with supervision. The same day, H.H. was placed with the prospective adoptive family.

## 2. *Section 366.26 hearing*

In the addendum report for September 2013, DPSS described H.H. as strongly attached to his adoptive parents and their children. He was flourishing in their care. Mother and H.H. had enjoyed three affectionate and positive visits in June, July, and August 2013. On September 4, 2013, mother communicated to DPSS that she felt backed into a corner and could not be a good mother to H.H. She stated that relinquishing her parental rights would be best for both of them.

At the section 366.26 hearing, mother changed her mind about relinquishment and asked to continue the hearing to hire private counsel, a request the court denied. The court found that H.H. was adoptable and no exception applied because of the detriment to H.H. Therefore, the court terminated parental rights.

### III

#### *MARSDEN INQUIRY*

On appeal, mother contends the juvenile court failed to make a reasonable *Marsden* inquiry. (*In re James S.* (1991) 227 Cal.App.3d 930, 935, fn. 13; *In re Z.N.* (2009) 181 Cal.App.4th 282, 293-294.) The record does not support her argument.

At the beginning of the section 366.26 hearing in September 2013, after three years of dependency proceedings and representation by five different lawyers, mother stated, “I’d like to fire counsel or at least . . . have a [*Marsden*] hearing, because I think there’s a conflict right now. I’m going to be hiring private counsel.” The court denied mother’s request for a continuance to hire private counsel. Then the court asked mother to clarify whether she was asking the court to “consider appointing a different lawyer” than her court-appointed lawyer. Mother said, “No.”

Mother’s history of dissatisfaction with counsel—leading to two earlier *Marsden* hearings and four attorney substitutions—illustrates that mother was fully cognizant of the procedures for obtaining new counsel. However, in this instance, the record demonstrates that she did not ask for a *Marsden* hearing. (*People v. Richardson* (2009) 171 Cal.App.4th 479, 484; *People v. Sanchez* (2011) 53 Cal.4th 80, 89-90.) Instead—in what appears to have been a last-ditch effort to delay termination of parental rights—mother proposed another continuance to allow her to hire private counsel. When that was denied she expressly refused to make a change in her court-appointed lawyer. Based on this record in which mother showed extreme dilatoriness, there was no *Marsden* error. (*Sanchez*, at pp. 89-90.)

#### IV

##### SECTION 366.26, SUBDIVISION (c)(1)(B)(i)

Mother argues the juvenile court should have applied the beneficial parental relationship to adoption. We affirm the trial court’s finding the exception does not apply because mother cannot demonstrate a credible benefit or corresponding detriment to H.H.

would be caused by severing their relationship. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343, 1345.)

Adoption is the preferred permanent plan for a dependent child once family reunification efforts have proven unsuccessful. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) Section 366.26 provides that, once the juvenile court determines that a dependent child is likely to be adopted, it shall terminate parental rights unless one of the seven enumerated exceptions to adoption applies. (§ 366.26, subd. (c)(1).) Section 366.26, subdivision (c)(1)(B)(i), provides the preference for adoption is overcome, and another permanent plan should be selected, where the parent establishes she has maintained regular visitation and contact with the child, the child would benefit from continuing that relationship, and terminating the relationship would cause the child to suffer detriment. (*In re S.B.* (2008) 164 Cal.App.4th 289, 300-301.)

The applicability of the exceptions to adoption is reviewed under a hybrid substantial evidence and abuse of discretion standard. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314; *In re K.P.* (2012) 203 Cal.App.4th 614, 621-622.) The questions for the reviewing court are “whether the evidence compels a finding in favor of the appellant as a matter of law” as to the factual questions of whether the parent maintained regular visitation with the child, whether a beneficial parent-child relationship exists, and whether the juvenile court’s application of the law to the facts was arbitrary or capricious. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528; *In re C.B.* (2010) 190

Cal.App.4th 102, 123.) The benefit exception is “almost always a loser.” (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1255, fn. 5.)

In order to establish the element of “regular visitation,” a parent must show more than “frequent and loving” or “pleasant” contact. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) Sporadic visitation is not enough. (*Elizabeth M.*, at p. 324; *In re C.F.* (2011) 193 Cal.App.4th 549, 554.) Furthermore, the benefit to the child must outweigh the value of a permanent home. (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108-1109.)

Here the record shows that mother’s visitation was often erratic and traumatic for H.H. In one of their last visits in May 2013, H.H. had to be forcibly extricated from mother’s grasp. Often their visits were consumed with mother’s obsessive search to find evidence that H.H. was being abused. Nevertheless, even if mother could be said to have engaged in regular visitation, she cannot establish the benefit of a relationship with H.H. outweighs the detriment to him of losing a permanent stable home.

In *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575, the Court of Appeal described the beneficial parent-child relationship as the significant attachment from child to parents that results from the adult’s attention to the child’s needs for physical care, nourishment, comfort, affection, stimulation, companionship and shared experiences. The four factors to be considered in determining whether the parent occupies a parental role in the child’s life are “[t]he 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 parent and child, and the child’s

particular needs[.]” (*Id.* at p. 576; *In re S.B.*, *supra*, 164 Cal.App.4th at p. 299; *In re Casey D.* (1999) 70 Cal.App.4th 38, 51.)

Although there was certainly affection between mother and H.H., the record does not show that mother provided physical care, nourishment, comfort, affection, stimulation, companionship, and shared experiences, and occupied a true parental role in H.H.’s life. After H.H. was removed in September 2010, he was out of mother’s care for three years until September 2013 except for the seven-month period from February to August 2012. Outside of mother’s care, H.H. improved dramatically. Beginning in November 2012, he developed strong bonds with his caretaker, and subsequently with his adoptive family where, at age four, he had finally achieved the promise of a secure home. Under these circumstances, the juvenile court did not abuse its discretion when it found the benefits of adoption outweighed any detriment caused to H.H. by termination of parental rights. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.)

## V

### VISITATION

Mother finally argues the trial court erred in not ordering postadoption visitation when terminating parental rights. Even if mother had standing to raise this issue, section 366.26, subdivision (j), grants DPSS exclusive discretion on the issue of visitation until the juvenile court terminates dependency jurisdiction under section 362.4. Dependency jurisdiction has not been terminated in this case. The question of postadoption contact may still be addressed, if at all, in subsequent proceedings as provided in Family Code section 8616.5.

VI

DISPOSITION

We hold there was no *Marsden* error and mother did not establish the beneficial parental relationship exception to adoption. We affirm the findings and orders of the juvenile court.

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CODRINGTON  
J.

We concur:

RAMIREZ  
P. J.

MILLER  
J.