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

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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

SAN BERNARDINO COUNTY  
CHILDREN AND FAMILY SERVICES,  
Plaintiff and Respondent;

v.

P.D.,

Defendant and Appellant.

E061084

(Super.Ct.No. J248294)

OPINION

APPEAL from the Superior Court of San Bernardino County. Lily Sinfield,  
Judge. Affirmed.

Karen J. Dodd, under appointment by the Court of Appeal, for Defendant and  
Appellant P. D. (mother).

Jene-Rene Basle, County Counsel, and Adam E. Ebright, Deputy County Counsel,  
for Plaintiff and Respondent.

The San Bernardino County Children and Family Services Agency (CFS) removed  
two-year-old Z.D. from mother after finding them homeless in a parking garage. The  
juvenile court established jurisdiction based on mental illness and substance abuse (Welf.

& Inst. Code,<sup>1</sup> § 300, subd. (b)), failure to provide support (§ 300, subd. (g)), and neglect of siblings. (§ 300, subd. (j).) The court denied reunification services based on mother's prior failure to reunify with Z.D.'s half-siblings in prior dependencies (§ 361.5, subds. (b)(10), (11)), and set a hearing to select and implement a permanent plan of adoption. At the time of the selection and implementation hearing (§ 366.26), the court found no exceptions to the preference for adoption and the juvenile court terminated mother's parental rights to Z.D., who now appeals.

On appeal, mother argues that (a) her due process rights were violated because her inability to visit frequently was not her fault and prevented her from proving the existence of a beneficial parent-child relationship; (b) there is insufficient evidence to support the court's finding that the exception was not established; and (c) the court erred in finding that the benefit of adoption outweighed the detriment of termination where the finding assumed there would be post-adoption contact. We affirm.

### **BACKGROUND**

In March 2013, police found mother and her two-year-old son, Z.D. in a parking structure where they had been living. Mother had an outstanding warrant and was arrested, so Z.D. was referred to CFS. Mother had a long history with the department: four older children had been previously adjudicated as dependent children, and mother's

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

parental rights to three of those children had been terminated prior the current case.<sup>2</sup> In each of the prior dependencies, the children came to CFS's attention due to mother's homelessness, mental illness, and substance abuse.

Mother denied any mental health problems and claimed to have no current problems with substance abuse. However, she did admit to a history of methamphetamine and cocaine use, and at the jurisdictional hearing, she admitted to recent use of drugs. On April 23, 2013, mother tested positive for methamphetamines, and records from the dependencies of the older children showed mother had been hospitalized on several occasions related to a diagnosis of paranoid schizophrenia with psychosis.

A juvenile dependency petition was filed alleging neglect based on mother's failure to provide food, clothing, and shelter, and that mother was unable to provide regular care due to her mental illness and substance abuse. (§ 300, subd. (b).) The petition also alleged mother's arrest constituted leaving the child without provision for support (§ 300, subd. (j)), and that the neglect or abuse of the minor's siblings placed Z.D. at risk. (§ 300, subd. (j).) Z.D., along with A.D. and I.D., was detained<sup>3</sup> with the maternal grandmother.

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<sup>2</sup> In addition to Z.D. and the four older children, two additional children, A.D. and I.D., were in need of formal placement in the current proceedings. However, A.D. and I.D. were living with their maternal grandmother, who had custody of the older children, so a guardianship was established for them. This appeal involves Z.D. only.

<sup>3</sup> The court ordered the removal of the minors and placed them in the temporary custody of CFS. However, prior to the adjudicatory hearing where jurisdiction is

*[footnote continued on next page]*

On May 20, 2013, the court conducted a combined jurisdictional and dispositional hearing. The court found Z.D. came within the provisions of section 300, subdivisions (b) and (j).<sup>4</sup> It declared Z.D. a dependent child, removed custody of the minor from the parents, placing Z.D. with his maternal grandmother. The court made findings pursuant to section 361.5, subdivisions (b) (10) (termination of reunification services for any siblings or half-siblings) and (b)(11) (parental rights over any sibling or half-sibling had been permanently severed), and denied reunification services to mother. The court granted mother one supervised visit per month with Z.D., and set a hearing to select and implement a permanent plan of adoption.

By August 2013, the maternal grandmother was struggling to care for Z.D. Z.D.'s negative behavior included cursing, slapping and hitting the grandmother, as well as his

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*[footnote continued from previous page]*

established, a juvenile court lacks authority to “remove” a child from a parent’s custody. A child may be taken into temporary custody by a peace officer or social worker (§§ 305, 306), and at the detention hearing, the court is empowered to determine whether the minor shall be “further detained.” (§ 315.) It is only after the jurisdictional hearing that a court may consider whether it should “limit the control to be exercised over the dependent child” at the disposition phase. (§ 361, subd. (a)(1).) Our interpretation is buttressed by the fact that despite any actual temporary removal of a child from the parent’s physical custody between the initial detention and the dispositional hearing, section 361.5 is inapplicable in the absence of a disposition hearing ordering a placement with someone other than a parent. (*In re A.C.* (2008) 169 Cal.App.4th 636, 650.) A court is not authorized to conduct a disposition hearing unless and until it has conducted an adjudication of the dependency petition and found that the child comes within one of the statutory definitions of a dependent child. (§ 300.) Because “removal” is a milestone in juvenile court proceedings, it is important to accurately reflect the court’s actions in the minutes.

<sup>4</sup> The clerk’s minutes state that the court found the minor comes within section 300, subdivisions (b), (g), and (j). However, the court dismissed both the section 300, subdivision (g) allegations.

siblings, and having tantrums. Eventually, a non-relative extended family member (a close friend of the father's ex-wife) agreed to accept placement of Z.D., where he was placed in September 2013. The new caretakers were not ready to commit to adoption, so the social worker's initial report pursuant to section 366.26 indicated there were compelling reasons not to recommend termination of parental rights.

In the meantime, mother visited Z.D. consistently, although Z.D. played independently or with his sibling, A.D., during visits. Mother had difficulty redirecting Z.D. when he acted inappropriately, which required prompting by the CFS visitation supervisor. The social worker noted that Z.D.'s siblings intervened sooner than mother did, and did so inappropriately at times, hitting Z.D. after he hit them.

Between October 2013 and January 2014, mother filed several petitions seeking to modify prior orders. (§ 388.) In the first petition, mother sought increased visits with A.D., I.D. and Z.D., as well as a new attorney. The court calendared this petition for a *Marsden*<sup>5</sup> hearing only, because the petition failed to state any change of circumstances. On November 19, 2013, mother filed another section 388 petition, requesting a new attorney. However, during the hearing, mother's attorney advised the court that mother no longer sought a new attorney and indicated she would assist mother in filing another section 388 petition. On the issue of visitation, county counsel asked the court to reaffirm the previous order granting one visit per month, with authority for CFS to liberalize, although mother was actually receiving one visit every other week already.

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<sup>5</sup> Referring to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

By January 2014, the caretakers of Z.D. informed the social worker they had changed their minds and wanted to adopt Z.D. On January 13, 2014, mother filed another section 388 petition requesting another *Marsden* hearing. That same day, she filed a separate 388 petition asking the court to consider Z.D.'s age, seeking an order keeping her in Z.D.'s life, and requesting bus passes so she could make an effort to be in Z.D.'s everyday life and become a "pillar in [the] community." On January 23, 2014, the court set a hearing on the petition seeking new counsel, but denied the section 388 petition asking the court to consider Z.D.'s age because the petition did not allege a change of circumstances or new evidence.

On March 7, 2014, the social worker submitted a section 366.26 report, recommending termination of parental rights. The report indicated that Z.D. was very attached to his caretakers and considered them parental figures. The report also indicated that Z.D.'s negative behaviors had improved since being placed in the home, although the caretakers reported that Z.D. acted out during and after visits with mother and could be aggressive. Z.D. was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and "wraparound"<sup>6</sup> services had been arranged for him.

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<sup>6</sup> "Wraparound" services, provided by section 18250, are "community-based intervention services that emphasize the strengths of the child and family and includes the delivery of coordinated, highly individualized unconditional services to address needs and achieve positive outcomes in their lives." (§ 18251, subd. (d).) The apparent goal of the program is to access federal funds and coordinate various services to prevent group home placements for children with emotional or behavioral problems. (California Dept. of Social Services web page, <http://www.childsworld.ca.gov/PG1320.htm>, as of September 22, 2014.)

For her part, mother continued to visit consistently, every other week, and her interactions were appropriate. The adoptive parents indicated a willingness to allow Z.D. to maintain a relationship with his birth parents and siblings so long as it was in his best interests. On April 22, 2014, mother filed another section 388 petition seeking an order establishing a guardianship with a new caretaker. Mother's request sought to maintain her bond with the child through guardianship. The court summarily denied the petition because the request did not show new evidence or a change of circumstances.

On April 29 and April 30, 2014, the court conducted the selection and implementation hearing pursuant to section 366.26. After hearing the testimony of mother and the social workers, the court found by clear and convincing evidence that Z.D. was adoptable and terminated parental rights. Mother timely appealed.

## **DISCUSSION**

### *1. Mother's Due Process Rights Were Not Violated.*

At the selection and implementation hearing, the trial court found there was more than ample evidence showing that Z.D. was adoptable, and turned its attention to the question of whether there was a beneficial parent-child relationship or a sibling bond. The court agreed that mother visited consistently and stated it "was not the fault of the mother;" however, it concluded mother's role in the child's life did not rise to the level that would overcome the preference for adoption. Focusing on the court's statement that it was "not the fault of the mother," mother argues that her due process rights were violated by the failure to apply the beneficial parent-child exception where she maintained a bond to the fullest extent permitted. We disagree.

Parental rights are a fundamental liberty interest; in evaluating the procedure by which those interests are severed permanently, courts must weigh the private interests affected, and the risk of error created by the state's chosen procedure, and the countervailing governmental interest supporting the procedure. (*Santosky v. Kramer* (1982) 455 U.S. 745, 753-754 [71 L.Ed.2d 599, 102 S.Ct. 1388]; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 251.) Due process guarantees apply to dependency proceedings. (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1006.)

The statutory procedures used for termination of parental rights in this state satisfy due process requirements only because of the demanding requirements and multiple safeguards built into the dependency scheme at the early stages of the process. (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1505 (*Hunter S.*), citing *Cynthia D.*, *supra*, 5 Cal.4th at p. 256; *In re Marilyn H.* (1993) 5 Cal.4th 295, 307-308.) If a parent is denied those safeguards through no fault of her own, her due process rights are compromised. (*In re Hunter S.*, *supra*, 142 Cal.App.4th at p. 1504.)

A parent seeking to establish a beneficial parent-child relationship sufficient to avoid the termination of parental rights must show, by a preponderance of the evidence, that he or she has maintained regular visitation and contact and that the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i); *In re Valerie A.*, *supra*, 152 Cal.App.4th at p. 1007.) In this context, a lack of visitation may virtually assure the erosion (and termination) of any meaningful relationship between mother and child. (*In re Hunter S.*, *supra*, 142 Cal.App.4th at p. 1504.) Thus, if a parent is deprived of visitation with his or her child, the parent is not going to be able to establish the

exception or have any meaningful opportunity to avoid the termination of parental rights under section 366.26, subdivision (c)(1)(B)(i).

In *Hunter S.*, the trial court had granted the mother monitored visitation “as can be arranged,” but no visitation occurred because the child was given complete discretion to veto all contact and visitation. (*Hunter S.*, *supra*, 142 Cal.App.4th at p. 1505.) The reviewing court concluded that a visitation order which failed to protect a parent’s right to visit was illusory, and held there had been an improper delegation to the child of unlimited discretion to determine whether visitation would occur. (*Ibid.*)

In the present case, the court ordered visitation at a minimum of once per month, and granted authority to CFS to liberalize visits. Although mother’s section 388 petitions seeking increased visits were denied, she did, in fact, receive increased visitation. At the hearing on one of the section 388 petitions, the parties acknowledged in open court that visitation occurred twice per month, demonstrating that visits were liberalized. This means she was not denied visitation. Mother attended visits consistently, so she was not prevented from establishing a significant emotional attachment by the denial of visitation, and there is no evidence the relationship eroded due to the frequency of visitation. To the contrary, it is reasonable to infer that the relationship eroded due to mother’s failure to interact with Z.D. when visits were initiated.

In these significant respects, this case is distinguishable from *Hunter S.* The visitation order successfully protected the mother’s right to visitation, and was not illusory. Mother was not denied the safeguards built into the dependency scheme, and was not deprived of the opportunity to litigate the beneficial parent-child relationship

exception. She simply was unable to prove the existence of an emotionally significant relationship.

Mother also argues that by virtue of the limited visitation she was granted, the court failed to apply the beneficial parent-child relationship exception. We disagree. The court *did* apply the exception, but due to the lack of evidence of significant emotional attachment, it simply determined the parent-child relationship did not rise to the level that would render termination of parental rights detrimental to the minor. That lack of significant relationship was more a function of mother's minimal interaction with the child during earlier visits than to the frequency of visitation. As the social worker testified at the hearing, mother did not interact as much in the beginning, but had improved over time.

The fact that mother lacked a sufficient relationship with Z.D. to overcome the preference for adoption was not attributable to a denial or lack of visitation. Mother's due process rights were not violated.

*2. There Is Substantial Evidence Supporting the Court's Finding that the Beneficial Parent-Child Relationship Exception Did Not Apply.*

Mother argues there is insufficient evidence to support the trial court's determination that she had not established that termination of parental rights would be detrimental to Z.D. by virtue of the beneficial parent-child relationship exception. We disagree.

Once the court determines a child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental under one of the

exceptions listed in section 366.26, subdivision (c)(1)(B). (*In re S.B.* (2008) 164 Cal.App.4th 289, 297 (*In re S.B.*); *In re Zachary G.* (1999) 77 Cal.App.4th 799, 809, citing *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.) We must affirm a trial court's rejection of the exceptions if the ruling is supported by substantial evidence. (*In re Zachary G., supra*, at p. 809.)

One compelling reason for determining that termination would be detrimental to the child applies when the parents have maintained regular visitation and contact with the child, and the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i).) This exception applies only when the relationship with a natural parent 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. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

A parent's "frequent and loving contact" with the child was not enough to sustain a finding that the exception would apply, when the parents "had not occupied a parental role in relation to them at any time during their lives." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) To establish that the parents have occupied a "parental role, it is not necessary for a parent to show day-to-day contact and interaction. (*In re S.B.* (2008) 164 Cal.App.4th 289, 299; *In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) As the court observed in *In re S.B.*, if that were the standard, the rule would swallow the exception. (*Ibid.*) Instead, the court determines whether the parent has maintained a parental relationship, or an emotionally significant relationship, with the child, through

consistent contact and visitation. (*In re S.B.*, *supra*, 164 Cal.App.4th at pp. 298, 300-301.)

The factors to be considered when determining whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child's particular needs. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467; see also, *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315.)

We examine each of these factors: Z.D. was removed at the age of two. While he was in mother's care for the first two years, both mother and child lived with the maternal grandmother during the majority of that time, so mother did not care for him independently or exclusively. For one-third of Z.D.'s life, he had been placed out of mother's home, with either his maternal grandmother or the adoptive parents. The portion of Z.D.'s life spent in the parent's custody does not militate against adoption. Regarding mother's interaction with Z.D., while she had begun paying more attention to Z.D. during later visits, the child continued to display negative behavior toward mother during and after visits, which mother had difficulty managing, according to the visitation supervisor and the caretakers. As for the minor's particular needs, Z.D.'s behavior problems and ADHD are particular needs that mother has not demonstrated the ability to address. None of the factors support a finding that termination of parental rights would be detrimental.

The social worker's report, prepared for the section 366.26 hearing, concluded that Z.D. was very attached to the adoptive parents; he went to them for hugs, kisses, and to

have his needs met, and considered them his parental figures. Under the circumstances, the trial court's finding that none of the exceptions existed that would render termination of parental rights detrimental to the minor is supported by substantial evidence.

*3. The Court Did Not Err in Finding Adoption Would Not Be Detrimental Based On An Assumption of Post-Adoption Contact.*

Mother points to the court's statement that the caretakers were willing to continue sibling contact after adoption and had no objection to mother's continued contact as an erroneous determination that adoption would not be detrimental due to the post adoption contact. We disagree.

We have already determined that mother failed to establish the existence of a substantial, positive emotional attachment of the child to mother, sufficient to show by a preponderance of the evidence that severance of the relationship would be detrimental to Z.D. Where a parent establishes that the child has a strong, positive and significant relationship to the parent such that he or she would be greatly harmed by termination of parental rights, the adoptive parents' unenforceable promise to allow parental contact with the child does justify a finding that termination would not be detrimental. (*In re S.B.*, *supra*, 164 Cal.App.4th at pp. 299-300.)

As an abstract legal principle, we agree with this reasoning, but it does not apply to the facts of this case. There was no evidence of a strong positive relationship between Z.D. and mother, and the trial court did not find that Z.D. would benefit from continuing his relationship to mother. The court found there was a sibling bond, and noted the caretakers were willing to continue the sibling contact, as well as contact with mother,

but it did not find that either the sibling bond or the parent-child relationship was a compelling reason to find adoption would be detrimental, within the meaning of section 366.26, subdivision (c)(1)(B).

At no point in the proceedings did the court rely upon an unenforceable promise of visitation with mother to justify its conclusion that termination of parental rights would not be detrimental. Instead, the court found that the exceptions have not risen to the degree that overcomes the preference for adoption as the basis for its determination that termination would not be detrimental to the child. There was no error.

**DISPOSITION**

The judgment is affirmed.

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RAMIREZ  
P. J.

We concur:

McKINSTER  
J.

CODRINGTON  
J.