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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

D.H.,

Defendant and Appellant.

E064663

(Super.Ct.No. SWJ1300445)

OPINION

APPEAL from the Superior Court of Riverside County. Timothy F. Freer,
Judge. Affirmed.

Jacob I. Olson, under appointment by the Court of Appeal, for Defendant and
Appellant.

Gregory P. Priamos, County Counsel, James E. Brown, Guy B. Pittman and
Larisa A. Reithmeier-McKenna, Deputy County Counsel for Plaintiff and Respondent.

The juvenile court terminated the parental rights of defendant and appellant D.H. (Mother) to two of her five children, M.S. and J.S. (Welf. & Inst. Code, § 366.26, subd. (b).)¹ Mother contends the juvenile court erred by failing to exercise its discretion prior to concluding the sibling relationship exception was inapplicable. (§ 366.26, subd. (c)(1)(B)(v).) We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Mother has five children: T.W. (female, born 1999), C.S. (male, born 2005), K.S. (female, born 2008), M.S. (male, born 2009), and J.S. (male, born 2012). All five children were removed from Mother's care on July 6, 2013. The two female children were placed in one foster home, and the three male children were placed in a second foster home.

The children were returned to Mother's care in stages in December 2013 and January 2014. The children were removed again in September 2014. The children were placed in three separate foster homes: (1) T.W. and K.S., the girls, were placed in one home; (2) C.S. was placed in a second home; and (3) M.S. and J.S. were placed in a third home.

The children and Mother visited together once per week for two hours at a local park. "Often" during the visits, "the children [would] bicker over the use of the mother's phone." The children also fought over water and snacks. T.W. appeared more interested in Mother's cell phone than in visiting with the family. During one visit, for

¹ All subsequent statutory references will be to the Welfare and Institutions Code unless otherwise indicated.

“no real apparent reason,” T.W. called C.S. “stupid and retarded numerous times.” C.S. played with one of the foster parent’s children and other children in the park. C.S. had to be instructed to play with his siblings. During one visit, K.S. was ready to leave 15 minutes early, and C.S. was ready to leave five minutes early.

On February 10, 2015, the juvenile court terminated Mother’s reunification services, and scheduled a hearing to terminate Mother’s parental rights. M.S. and J.S.’s foster parents were willing to adopt the two boys. A preliminary adoptive assessment was conducted for M.S. and J.S. The adoption social worker recommended the court proceed with adoption planning for M.S. and J.S. T.W. and K.S.’s foster parents were willing to adopt the girls, but were unlikely to pass an adoptive home study “due to income requirements and other concerns.” C.S.’s nonrelated extended family member (NREFM) was in the process of being assessed for C.S.’s adoption placement, and the Riverside County Department of Public Social Services (the Department) requested a 120-day continuance to finalize the report.

Mother filed requests to change a court order related to the children. (§ 388.) Mother requested the children be returned to her custody.

On September 1, 2015, the juvenile court held a combined hearing on (1) Mother’s requests to change a court order, and (2) the termination of parental rights. T.W. testified at the hearing. T.W. said she was worried that she might not be allowed to see M.S. and J.S. following their adoption. T.W. would be “very” upset if she were unable to visit M.S. and J.S. following their adoption because she had been closely bonded with her siblings but now M.S. and J.S. “are distant.” T.W. explained, “It’s just

really hard to see how they are now because I'll hug him and he'll push me away, and I want to cry because usually he runs to me and hugs me.”²

A Department social worker also testified at the hearing. The social worker explained that C.S. had stopped visiting with Mother and his siblings, but the four other children still visited once per week for two hours. The social worker opined that M.S. was bonded to his siblings, and J.S. was also bonded to his siblings but less so than M.S.—J.S. was younger than M.S. The social worker also believed K.S. and T.W. were bonded to their siblings and that they all wanted to maintain relationships.

The social worker explained that M.S. and J.S.'s prospective adoptive parents were “very much” willing to allow postadoption sibling contact with K.S. and T.W. The social worker had not yet discussed a postadoption mediation contract with the prospective adoptive parents, but noted the boys' prospective adoptive mother was, on her own, allowing contact with K.S. and T.W.

The juvenile court denied Mother's request to change a court order as to T.W., C.S., M.S. and J.S., because the court concluded the change would not benefit the four children. However, the court granted Mother's request as to K.S. The court granted Mother reunification services as to K.S.

The court then turned to the issue of terminating parental rights. M.S. and J.S.'s attorney requested the juvenile court “order the Department to refer the caretakers of [M.S.] and [J.S.] to a contract that would ensure sibling contact. And I think we can do

² It is unclear in the record if “he” refers to M.S. or J.S.

that [as to C.S.]’s caretaker, as well as [T.W.’s] caretaker, and leave it open with regard to [K.S.] as well.” The court responded, “All right.” M.S. and J.S.’s attorney then said, “Although, I do know that they are not interested in a post-adoption contract agreement with the mother. But also, just to add to my prior argument, there’s no exceptions that apply to termination.”

T.W. and K.S.’s attorney objected to the termination of parental rights because the girls “are concerned about not being able to maintain contact with their siblings, and very much would like the Court to select a lesser plan so that they have some assurance that they will be able to maintain contact with their siblings.” Mother joined in the argument made by the girls’ attorney. The court asked, “Are you referring to [M.S.] and [J.S.] or all of the children?”

T.W. and K.S.’s attorney said, “Your Honor, on behalf of my client, they’re objecting to the Court terminating parental rights as to their siblings, because they are concerned that it will interfere with them being able to maintain a relationship with their siblings.”

The Department’s attorney said, “Your Honor, for right now, it’s for [M.S.] and [J.S.]. And my understanding is that the caregivers are willing to do sibling visitation, but not visitation with the mother or the father. And I would request for it to be an authorization as opposed to an order for the caregivers to provide visitation.”

Mother’s attorney said, “My only comment, that County Counsel’s request that there not be an order for sibling visits, but an authorization speaks volumes about the probability of that actually occurring in the future.”

The juvenile court announced its findings. The court said, “[T]ermination of parental rights is not detrimental to the minor, that none of the exceptions contained in . . . Section 366.26, subdivision (c), subsection (1), paragraph A and/or B are applicable in this case.” After making its findings, the court announced its orders. In its orders, the court said, “I’m going to go ahead and make an order, not an authorization, for the sibling contact, [Department’s attorney], between [J.S.] and [M.S.] and for the remaining children as well. Post-adoption sibling contact between [J.S.], [M.S.], and [T.W.], and [C.S.] as well, and [K.S.]”

DISCUSSION

Mother contends the juvenile court failed to exercise its discretion in finding the sibling relationship exception to be inapplicable because the juvenile court mistakenly believed it had the authority to unilaterally order postadoption sibling contact.³

If a juvenile court finds a dependent child is adoptable, then it will terminate parental rights unless one of the statutorily enumerated exceptions is applicable. (§ 366.26, subd. (c)(1).) One of the enumerated exceptions provides that parental rights shall not be terminated if “[t]here would be substantial interference with a child’s sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close

³ The law for postadoption sibling contact provides, in relevant part, “With the *consent* of the adoptive parent or parents, the court may include in the *final adoption order* provisions for the adoptive parent or parents to facilitate postadoptive sibling contact.” (§ 366.29, subd. (a), italics added.)

and strong bonds with a sibling, and whether ongoing contact is in the child’s best interest, including the child’s long-term emotional interest, as compared to the benefit of legal permanence through adoption.” (§ 366.26, subd. (c)(1)(B)(v).)

There is a split of authority as to which standard of review is applicable to a decision to not apply the parent-child bond exception, and it appears the same split would apply to a decision regarding the sibling relationship exception because the decisions are similar in nature—(1) substantial evidence; (2) abuse of discretion; or (3) a hybrid of substantial evidence and abuse of discretion. (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 424-425 [Fourth Dist., Div. Three applied the substantial evidence standard]; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 [Fourth Dist., Div. One applied the substantial evidence standard]; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [First Dist., Div. Three applying the abuse of discretion standard]; *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449 [Second Dist., Div. Eight applying the abuse of discretion standard]; *In re K.P.* (2012) 203 Cal.App.4th 614, 621-622 [Second Dist., Div. Seven applying the hybrid standard]; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315 [Sixth Dist. applying the hybrid standard].) Mother contends the juvenile court failed to exercise its discretion, so we will focus on the abuse of discretion standard of review. (*In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 515 [“A trial court’s failure to exercise discretion is itself an abuse of discretion”].)

When the juvenile court announced its finding that the sibling relationship exception (§ 366.26, subd. (c)(1)(B)(v)) is inapplicable in this case, it did not make any reference to postadoption sibling contact (§ 366.29). In other words, there is nothing

indicating that the trial court's sibling relationship exception finding was tainted by the possibility of postadoption sibling contact. The trial court made all of its findings, including the finding concerning the sibling relationship exception, and then made its orders, including the order concerning postadoption sibling contact. There is nothing indicating that one influenced the other.

For example, the juvenile court did not jointly discuss the sibling exception and postadoption contact. Rather, the court found the sibling relationship exception did not apply, found adoption was in J.S.'s and M.S.'s best interests, ordered parental rights be severed, ordered the Department to refer J.S. and M.S. to a licensed adoption agency, ordered an application by J.S. and M.S.'s foster parents be given preference over other applications, ordered that no petition for adoption be heard until Mother's and the father's appellate rights were exhausted, ordered M.S. and J.S. continue to be dependents of the court, and then ordered the Department be responsible for M.S.'s and J.S.'s care until the petition for adoption was granted. The court then scheduled the postpermanency review hearing. (§ 366.3.) After all that, the juvenile court made the postadoption sibling contact order.

Given all the intervening findings, orders, and scheduling, we cannot presume from this silent record that the juvenile court was thinking about ordering postadoption sibling contact when finding the sibling relationship exception to be inapplicable. The record is silent because the juvenile court's reasons for finding the sibling relationship exception to be inapplicable are not stated on the record. The trial court said when making its finding, "Four, termination of parental rights is not detrimental to the minor,

that none of the exceptions contained in . . . Section 366.26, subdivision (c), subsection (1), paragraph A and/or B are applicable in this case.”

The rule concerning silent records is as follows: “A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; see also *In re Manuel G.* (1997) 16 Cal.4th 805, 823 [relying on the foregoing rule from *Denham*].)

As explained *ante*, we do not know why the juvenile court found the sibling relationship exception to be inapplicable. Because we do not know the juvenile court’s reasons, we must presume they are legally valid reasons. We cannot presume, on this silent record, that the juvenile court incorrectly relied on the prospect of ordering postadoption sibling contact. Accordingly, we conclude the juvenile court did not err.

DISPOSITION

The judgment is affirmed.

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MILLER
Acting P. J.

We concur:

CODRINGTON
J.

SLOUGH
J.