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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

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

KERN COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Respondent,

v.

B.O.,

Defendant and Appellant.

F062935

(Super. Ct. Nos. JD104929-02,
JD120243-01 & JD120244-01)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Robert J.
Anspach, Judge.

Karen J. Dodd, under appointment by the Court of Appeal, for Defendant and
Appellant.

Theresa A. Goldner, County Counsel, and Jennifer E. Feige, Deputy County
Counsel, for Plaintiff and Respondent.

B.O. (mother) appeals from an order terminating her parental rights (Welf. & Inst. Code, § 366.26)¹ to her three daughters (the children). Mother contends the juvenile court erred by not applying the “parental benefit” exception (§ 366.26, subd. (c)(1)(B)(i)) and the “sibling relationship” exception (§ 366.26, subd. (c)(1)(B)(v)) to the statutory preference for adoption. We will affirm.

PROCEDURAL AND FACTUAL HISTORY

In February 2009, the Kern County Department of Human Services (the department) filed section 300 petitions on behalf of mother’s four children, three of whom are the subject of this appeal. M.K. was born in September 2004, R.C. was born in October 2005, and L.C. was born in November 2007. The petitions alleged mother was failing to provide adequate care due to her substance abuse. Mother’s home was found to be in unlivable condition. Trash, old food, and clothing were found throughout the house, which smelled like urine and appeared not to have been vacuumed for months. A small bag of methamphetamine and a glass pipe were within reach of the children. The children were detained and the court ordered biweekly sibling visits.

In March 2009, the juvenile court found the allegations true and adjudged the children dependents of the court. Mother and father were granted reunification services, and the court ordered mother to participate in counseling for child neglect, parenting, and substance abuse.

In March 2010, mother tested positive for drugs and was ordered to enroll in substance abuse counseling.

In August 2010, after an incident of domestic violence between mother and father, the children were detained from father and placed with mother. The department alleged that mother failed to protect the children from domestic violence. Mother was ordered to

¹ All statutory references are to the Welfare and Institutions Code unless otherwise noted.

participate in counseling for anger management and to submit to drug testing. Upon a positive test, mother was ordered to enroll in substance abuse counseling. Reunification services were terminated for father.

When the children were placed in mother's home, the Court Appointed Special Advocate (CASA) observed that mother was inattentive to them and frequently shouted at them to be quiet and leave her alone. She would roll her eyes and act frustrated when she dealt with them. They were dirty and inappropriately dressed for cold weather. They wore short sleeves and no shoes, despite the cold weather and lack of heat in the home. They were congested and coughing, with green mucous running from their noses. The children often requested food because they were hungry. Mother would either ignore their requests or give them cookies. The children were often sick, tired, and irritable. On one occasion, mother admitted to the CASA that one child was still sick, but when the CASA asked mother if she had taken the child to the doctor, mother refused to answer.

In January 2011, the department filed petitions pursuant to sections 387 and 342, based on mother's drug abuse, failure to provide care, and failure to supervise or protect the children from the children's custodian. Mother had allowed father to return to the home after the domestic violence incident, and she had failed to drug test on four occasions. In February 2011, the children were detained from mother. The court ordered weekly one-hour visits between mother and the children.

In March 2011, the court found the allegations true, removed the children from mother's physical custody, and terminated reunification services after 18 months of services. The court ordered one hour per month visitation for mother, and biweekly visits for the siblings. Since becoming dependents in 2009, M.K. had been in six different placements, R.C. in seven, and L.C. in five. During supervised visits with mother, social workers observed that the visits were calm. Mother and the children hugged and appeared happy to see each other. The social worker's report summarized that mother had maintained a consistent visiting schedule with the children and the visits were

generally reported to be positive. But the children did not look to mother for their daily, emotional, or physical needs. It seemed they looked to her as more of a “friendly visitor in their lives.” The report concluded that the benefits of adoption would outweigh any short-term loss the children might suffer as a result of terminating mother’s parental rights; thus, adoption was in the children’s best interest. The children had participated in a total of 10 sibling visits, which were reportedly positive. The report concluded the children would benefit from sibling contact after adoption because of their strong relationships. Although there was no plan to place the siblings together, the caretakers had expressed a commitment to maintaining their relationships.

In April 2011, Adoption Social Worker Theodore Richard spoke to the children about adoption and guardianship. He asked M.K. to explain adoption to him. She said she would live with her foster mom and dad forever and would not go home to mother. When Richard asked her who she would like to live with, M.K. said she wanted to live with mother. And if she could not live with mother, she wanted to live with grandmother. When Richard asked M.K. how she would feel if she could no longer see mother and father, she started to cry and said she would be sad. She said she was crying because she missed mother. Richard asked if she wanted him to stop asking questions and she said, “Yes.”

When Richard spoke to R.C., she was not able to explain adoption, but she said she wanted to live with mother. She said she liked visiting mother and father, and she would be sad if she could not see them. She said she did not like living with her caretakers because she got in trouble for not listening. She had to stand in the corner and could not go outside to play.²

² Richard was not able to interview L.C. alone because she appeared to be uncomfortable in his presence.

The CASA observed that mother hugged and kissed the children when she left the visits, but the children did not seem upset by her departure. When the caretakers arrived, the children would run to them and tell them about their day and ask if they could go home now.

In May 2011, during a supervised visit at McDonald's, the social worker told mother she would now be required to pay for her drug tests, and she gave mother some forms. Mother seemed unhappy. When the CASA questioned mother about the forms, she was upset and said, "I did not know [the social worker] was going to do this." At the end of the visit, mother told the CASA, "I'm leaving[;] they are your problem now." She laughed and walked out of the McDonald's.

In June 2011, mother reportedly had not conducted any drug testing or enrolled in substance abuse counseling. She was again living with father. The social worker believed mother had not mitigated the circumstances that led to the children's removal from her care, had not demonstrated a commitment to sobriety, and continued to place the children at risk by living with father.

A supplemental report stated that the children had a positive relationship with their older brother, T.S., and severing the relationship with him could have a negative impact on the children. The social worker felt, however, that the benefits of adoption would outweigh the negative impact the children might experience. Adoption would allow them an opportunity to grow up in a stable household. Furthermore, the children's caretakers had expressed a commitment to maintaining the sibling relationships after adoption.

The CASA stated it was in the children's best interest to be adopted by their current caretakers. The CASA reported that, since being in the care of their current caretakers, the children had improved in health, physical appearance, communication and

reading skills, school attendance, anger management, and overall behavior.³ M.K. and R.C., were placed together. They hugged their caretakers frequently, told them they loved them, and called them “mom” and “dad.” They helped set the table, enjoyed healthy meals, and interacted well with their caretakers. The youngest child, L.C., lived with a caretaker who was in the process of adopting an infant. L.C. liked being a big sister to the baby and enjoyed playing and helping with the baby. The caretaker was attentive and affectionate to L.C., who returned hugs and kisses and called the caretaker “mommy.” All of the caretakers had a good relationship with each other and they got the children together at least one time per month. They also intended to maintain the children’s relationship with their older brother, T.S. Despite the two children’s statements that they wanted to live with mother, the CASA firmly believed it was in their best interest to be adopted by their caretakers.

At the section 366.26 hearing on June 23, 2011, mother testified she missed her drug tests because of a medical condition that prevented her from urinating and also affected her ability to keep her appointments. She had since undergone surgery for that condition. Her last use of any illegal substance was in February 2009. She explained that the children were always glad to see her when they visited at McDonald’s. When father was able to join the visit, the children were happy to see him. A few times, the children cried when the visits were coming to an end. Once in a while, the children asked to come home with mother. Mother had trouble explaining to them why they could not.

Mother testified that her anger management counseling had helped reduce the arguing she and father engaged in. She learned skills to help her understand what made her angry and to resolve those issues before anything happened. She explained it would be in the children’s best interest to be returned to her care because of “[a] lot of different

³ The CASA noted that mother had not provided the required dental care or immunizations.

things.” She said, “I know I’m not a perfect parent, but I love my children very much, and I struggled the last five months to put myself where I am now. I’ve maintained a stable home. I’ve maintain[ed] a stable job. I’ve taken the counseling I’ve needed. I’ve accepted it, and it’s worked very well. I just feel the best interest for my children is to be with their parents.” She conceded that the children had been removed from her multiple times, but she believed she was ready to have all of them back with her now because her thoughts and feelings were different. She had taken her children for granted and was sorry for it. Her goal was to do everything in her power to give her children what they needed.

Mother testified she had heard the children calling their caretakers “mommy” and “daddy,” and she had directed the children not to do that.

When asked about the domestic violence incident with father, mother explained: “There had been times when we argue[d] and we might have pushed each other away from each other and walked away, but it was never no knock down, drag out punch-you-in-the-face stuff.” The incident in question was “an argument.” She said, “I pushed him away from me. I was cooking dinner. I was around hot grease. He came toward me. I pushed him away, and he spit at me, and that’s when he knocked me in the eye a little bit.” She explained, “It wasn’t physical domestic violence to me. It was keeping distance from somebody. [¶] ... [¶] He didn’t really pop me in the eye. He poked me in the eye with his finger.”

M.K. testified that she wanted to live with mother because she was her mom, and M.K. would feel sad if she could not see her again. M.K. said she would cry and be really sad. She looked forward to her visits with mother and wished they could have more. Similarly, she would cry and be sad if she never got to see her siblings again. M.K. explained that her caretakers read to her, put her to bed, and took her to see her siblings. She sometimes called her caretaker “mommy.” M.K. said she was doing better in school, reading more, and working on her behavior.

T.S., who is not a subject of this appeal, testified that he did not know with whom he would want to live if he had the choice. Then he stated he wanted to live with mother. He also wanted to live with father (who is not his father) because father helped mother, and also helped him with homework and gave him advice. T.S. said it was okay with him if his sisters were adopted, provided he could continue to see them. He denied that it was better for him in the foster home, but he agreed the foster home was clean, he got food there, and his caretaker made him dinner. He remembered that he had been removed from mother's home because it was dirty or because mother was using drugs or creating some other danger to him, but he believed living with her was now safe.

DISCUSSION

I. Adoption

Once reunification services to the natural parents have been terminated and the dependency proceedings reach the section 366.26 hearing, the focus shifts to the needs of the children for permanency and stability, and adoption is the preferred permanent plan decreed by the Legislature. (§ 366.26, subd. (b); *In re Marilyn H.* (1993) 5 Cal.4th 295, 309; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) A section 366.26 hearing is designed to protect children's compelling rights to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child. (*In re Marilyn H.*, *supra*, at p. 306.)

If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds a compelling reason for determining that termination of parental rights would be detrimental to the child under one or more of the enumerated statutory exceptions. (§ 366.26, subd. (c)(1); *In re Celine R.* (2003) 31 Cal.4th 45, 53.) The statutory exceptions merely permit the court, in *exceptional circumstances*, to choose an option other than adoption. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348-1349; *In re Celine R.*, *supra*, at p. 53.) “[T]he party claiming an exception to adoption has the

burden of proof of establishing by a preponderance of evidence that the exception applies.” (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449.) “Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*In re Jasmine D., supra*, at p. 1350.)

We review the juvenile court’s decision regarding the applicability of exceptions to the adoption preference for an abuse of discretion. (See *In re C.B.* (2010) 190 Cal.App.4th 102, 123; *In re Jasmine D., supra*, 78 Cal.App.4th at p. 1351.) “When applying the deferential abuse of discretion standard, ‘the trial court’s findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.’ [Citations.]” (*In re C.B., supra*, at p. 123.)

II. Parental Benefit Exception

“An exception to the adoption preference applies if termination of parental rights would be detrimental to the child because 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).)” (*In re C.F.* (2011) 193 Cal.App.4th 549, 553.) The “benefit” prong of the 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. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the 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.” (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.)

“A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent.” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) “[T]he parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits. [Citation.] The parent must ... prove he or she occupies a parental role in the child’s life, resulting in a significant, positive emotional attachment of the child to the parent.” (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.) “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.”⁴ (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.) “The Legislature emphasized the exceptional nature of all the circumstances identified in section 366.26, subdivision (c)(1) by revising the statute in 1998 to require the court to find not only that one of the listed circumstances exists, but also that it provide ‘a compelling reason for determining that termination would be detrimental to the child.’ [Citation.] This amendment ... makes it plain that a parent may not claim entitlement to the exception provided by subdivision (c)(1)(A) simply by demonstrating some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights.” (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1349.) “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

⁴ “Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.)

‘negative’ effect of interaction between 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.) “‘While friendships are important, a child needs at least one parent. Where a biological parent ... is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent.’ [Citation.] Thus, a child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child’s need for a parent. It would make no sense to forgo adoption in order to preserve parental rights in the absence of a real parental relationship.” (*In re Jasmine D.*, *supra*, at p. 1350.)

Mother asserts that she visited the children regularly and maintained a meaningful bond with them. They missed her, were happy to see her, and showed affection for her. They referred to her as their mother and they asked to come home with her. She says the conclusion that she was just a “friendly visitor” was unsupported. Mother contends the only reasonable inference from the record is that the children would be greatly harmed by the loss of the significant, primary relationship they shared with her. She maintains that this case was truly one of the exceptional cases and an archetype for application of this exception.

At the contested section 366.26 hearing, mother had the burden to establish both prongs of the parental relationship exception. She had to show she had maintained regular contact with the children, and that they would benefit from a continued parental relationship with her. (§ 366.26, subd. (c)(1)(B)(i).)

Mother satisfied the first prong by showing she had maintained regular visitation with the children. As to the second prong of the exception, however, the record supports the court’s determination that mother failed to make the requisite showing. Mother did have pleasant visits with the children and they were happy to see her. They did refer to her as their mother, but they also referred to their caretakers as their mothers, even in

front of mother, causing her to correct them. Mother often seemed frustrated by their need for attention and even told the CASA the children were her problem now. The children were obviously attached to mother and claimed they wanted to live with her because she was their mother, but they also recognized that their circumstances were better. When the caretakers arrived, the children ran to them and told them about their days, even before their visits were over, and the children did not seem upset by mother's departure. The caretakers were providing for the children's needs for physical care, nourishment, comfort, and education as mother had never done. Mother had lost custody of the children repeatedly, was back with father, and now claimed everything was different. Although she had made efforts to improve her situation by getting a job and getting more counseling, we cannot say the juvenile court abused its discretion in concluding she did not carry her burden of proving that her relationship with the children promoted their well-being to such a degree as to outweigh the well-being they would gain in a permanent home with new, adoptive parents. The children, despite their love for mother, thrived under the care and stability of their caretakers—and suffered when returned to mother's inadequate care. Mother did not show that her relationship with the children, while of some benefit, was worth denying them an opportunity for a stable and loving home with a real parental relationship. The caretakers, not mother, provided for the needs of the children and occupied parental roles for them. No abuse of discretion has been shown.

III. Sibling Relationship Exception

Section 366.26, subdivision (c)(1)(B)(v), provides another exception to the preference for adoption when “[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 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." In considering the availability of this exception, the court is directed "to determine whether terminating parental rights would substantially interfere with the sibling relationship by evaluating the nature and extent of the relationship, including whether the child and sibling were raised in the same house, shared significant common experiences or have existing close and strong bonds. [Citation.] If the court determines terminating parental rights would substantially interfere with the sibling relationship, the court is then directed to weigh the child's best interest in continuing that sibling relationship against the benefit the child would receive by the permanency of adoption." (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 951-952; accord, *In re Celine R.*, *supra*, 31 Cal.4th at p. 61.) "[T]he concern is the best interests of the child being considered for adoption, not the interests of that child's siblings." (*In re Naomi P.* (2005) 132 Cal.App.4th 808, 822; *In re Celine R.*, *supra*, at pp. 49-50.)

Mother claims the sibling bond outweighs the benefits of adoption, and the caretakers' promise to maintain the children's contact with their siblings cannot be enforced following adoption. Again, mother failed to carry her burden on this exception. Indeed, the evidence was overwhelming that the siblings would have continuing contact with each other. The caretakers voiced their commitment to it, and had been implementing the contact for some time. Two of the children were placed together, and there was a possibility that T.S. would join them in the future. L.C. was very young, but her caretaker was also committed to continuing contact. There was simply no evidence that termination of mother's parental rights would substantially interfere with the children's sibling relationships. Thus, the juvenile court did not abuse its discretion in concluding this exception also did not apply.

DISPOSITION

The juvenile court's orders are affirmed.

Kane, Acting P.J.

WE CONCUR:

Poochigian, J.

Detjen, J.