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

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

FRESNO COUNTY DEPARTMENT OF  
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

JOEY C.,

Defendant and Appellant.

F064512

(Super. Ct. No. 0097996-3)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Brian Arax,  
Judge.

Maureen L. Keaney, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kevin Briggs, County Counsel, William G. Smith, Deputy County Counsel for  
Plaintiff and Respondent.

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\* Before Wiseman, Acting P.J., Levy, J., and Franson, J.

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Joey C. (mother) appeals from an order terminating parental rights (Welf. & Inst. Code, § 366.26) to her eight-year-old son, Hector M.<sup>1</sup> Mother contends that there was no substantial evidence to support the juvenile court's finding that the parent-child relationship exception did not apply. She also contends that the court improperly took into consideration the care provider's willingness to permit visits between mother and Hector in reaching its decision. We disagree and affirm the court's order.

### **FACTUAL AND PROCEDURAL HISTORIES**

Hector was born in 2004. His parents are not married. (Hector's father, who has been described as a "career criminal" and was arrested for a parole violation during the pendency of this case, is not a party to this appeal.

Mother has a history with the Fresno County Department of Social Services (Department). In a previous juvenile dependency case initiated in 2001, two of mother's children were removed from the home because of physical abuse and general neglect. Mother was found to have issues with domestic violence, anger management, and substance abuse. Mother did not comply with court-ordered services and failed to reunify with her children. In the permanent plan, the children were placed with maternal relatives, who became the children's legal guardians.

In the current case, Hector was placed on protective hold by Fresno Police on February 18, 2010. On that day, Hector was found with bruises on his legs from being hit by mother. He told a social worker that when his mother is angry, she hits him everywhere and he pointed to his arms, legs, and back. Mother reported that she has post-traumatic stress disorder and severe anger-management issues. She told a social worker that, on an occasion in 2009, she became very angry with her roommates and broke a

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<sup>1</sup>Subsequent statutory references are to the Welfare and Institutions Code.

window, resulting in her hospitalization pursuant to section 5150. Hector was in her care at the time.

Hector was placed with his paternal uncle. Hector's father's whereabouts were unknown.

On February 22, 2010, the Department filed a juvenile dependency petition on behalf of Hector, alleging that he had suffered serious physical harm inflicted nonaccidentally by mother (§ 300, subd. (a); count a-1); he was at substantial risk of serious physical harm or illness because of mother's anger management issues and mental health issues (§ 300, subd. (b); count b-1); and previously, Hector's half siblings were found to be neglected and abused by mother and mother was not able to reunify with them, and Hector was at substantial risk of suffering similar abuse or neglect (§ 300, subd. (j); count j-1). The petition also alleged that Hector came within the jurisdiction of the juvenile court under section 300, subdivision (g), failure to support, but no facts were alleged in connection with this allegation.

At a detention hearing the next day, the juvenile court ordered Hector removed from mother's home. The court ordered Hector to remain with his paternal uncle. At a jurisdictional hearing on May 18, 2010, the juvenile court found the allegations of counts a-1, b-1 as amended by agreement,<sup>2</sup> and j-1 to be true.

Social worker Lori Dobbs prepared a disposition report on behalf of the Department. As noted, mother previously failed to reunify with two older children. The report stated that mother was very receptive to family reunification services and was open to change, but she "is in denial of her needs and she continues to state she has not 'done anything' to her son, Hector that would have caused him harm." Mother reported that she

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<sup>2</sup>Mother participated in mediation and agreed to submit to count b-1, amended to include the sentence, "Hector is at risk of abuse or neglect until [mother] resolves her substance abuse issues and anger control issues." Mother also submitted to count j-1. She contested count a-1, the allegation that she inflicted serious physical harm, however.

needed services, stating that even though she had completed services previously, “I must have missed something.”” Hector remained in the custody of his paternal uncle.

Mother said that she felt safe knowing that Hector was living with his uncle, but she wanted Hector to be with her. Dobbs observed mother’s visits with Hector and reported that mother was affectionate and responsive to her son’s needs. Hector’s uncle was willing to be Hector’s permanent guardian. The uncle reported that Hector was doing well, and Hector said he enjoyed living with his uncle. Hector also stated that he wanted to return home to his mother.

The Department did not believe it was in Hector’s best interest to return him to the care of mother and recommended that Hector remain with his paternal uncle. In July 2010, a panel of social work supervisors and social workers determined that mother met the criteria for section 361.5, subdivision (b)(10), which meant that reunification services were not required.<sup>3</sup> The panel, nonetheless, recommended that reunification services be provided to mother, determining that providing services would be in Hector’s best interest. The panel also recommended reunification services for the father.

Subsequently, the Department prepared and filed an addendum report. In September 2010, a panel of social work supervisors and social workers met to review Hector’s case again. This time, the panel determined that it would not be in Hector’s best interest to provide reunification services to his parents. The report stated, “Neither parent has been participating in visitation and/or offered services since the removal of their child. The minor, Hector is entitled to a prospective permanent family, in a sober, stable, nurturing, loving, and drug free environment.” The report stated that, when he was placed with his paternal uncle, Hector began displaying disturbing behavior such as being

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<sup>3</sup>Section 361.5, subdivision (b)(10), authorizes a juvenile court to deny a parent reunification services when it finds, by clear and convincing evidence, that the parent’s reunification services for any siblings or half siblings of the child were terminated and the parent “has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of [the] child from that parent or guardian.”

harmful and cruel to animals, bedwetting, and hoarding food. Hector's behavior had improved since then, in the "safe and sober placement" with his uncle.

The Department also was concerned about mother's ability to benefit from services since she had failed to benefit from court-ordered services in the past. The Department noted that mother still had not accepted responsibility for her actions, as she denied that she physically abused her son.

On October 20, 2010, the court held a dispositional hearing and ordered no reunification services for mother, pursuant to section 361.5, subdivision (b)(10). The father was to receive reunification services, however. The court's order also provided that the six-month status review would be held in conjunction with the section 366.26 hearing.

In a status review report dated April 5, 2011, the Department stated that monthly court-ordered visits between mother and Hector appeared to be going well, and they "appeared to enjoy each other's company." In a subsequent report dated June 7, 2011, the Department reported that visits between mother and Hector were still going well. Mother requested visits supervised by a third party (i.e., not a social worker), and the paternal uncle indicated he would be willing to supervise visits at a neutral place such as McDonald's. The Department recommended granting mother visits with Hector supervised by the uncle.

At a review hearing on August 16, 2011, the juvenile court terminated reunification services for Hector's father. The court ordered the Department to observe visits between mother and Hector and provide an opinion on the bond between them.

In a report prepared for the section 366.26 hearing, social worker Anna Woiwor-Bradley stated that she had observed three visits between mother and Hector. She observed a bond between mother and son and reported that they appeared to enjoy each other's company and interacted positively with each other.

The social worker also compared Hector's interactions with his mother to his interactions with his care provider, the paternal uncle. In supervised visits, Hector appeared calm and followed mother's lead during activities, but mother did not demonstrate consistency in taking on the parental role and setting clear boundaries. Hector's paternal uncle, on the other hand, set clear boundaries, and Hector seemed to know that there were rules to follow. In addition, "Hector [was] observed to look to the care provider for guidance, comfort, and meeting his needs." Mother was observed to have "great skills in engaging Hector" and demonstrated patience while teaching him how to play a game. The paternal uncle also had "excellent skills" in engaging Hector and set age-appropriate tasks for Hector and offered guidance and positive reinforcement.

The Department determined that Hector was generally adoptable, considering his young age, health, and the fact that he was developmentally on target. He appeared to have a strong, healthy attachment with his care provider. His paternal uncle reported that, before Hector became a dependent of the court, he had been caring for Hector on and off since his birth. The paternal uncle was willing to provide a permanent plan of adoption for Hector. Hector indicated that he liked living in his paternal uncle's home and expressed his desire to be adopted by him. Woiwor-Bradley felt that Hector and his paternal uncle had developed a positive and loving relationship. His uncle reported that Hector's behavior had improved greatly since his initial placement, and he appeared to be happy and comfortable in the home.

Mother reported that she had been involved in an argument in September 2011 with her older son (who is an adult) that escalated to the point that police were called. Woiwor-Bradley expressed concern that there would be a safety risk to Hector if he were to return to his mother's care because she was still struggling with anger-management issues. The social worker concluded that the "visits [between mother and Hector] do not seem to outweigh the parent-child relationship Hector has developed with his current care provider."

The report stated that the paternal uncle “is committed to maintaining contact between Hector ... and family members when appropriate.” However, he was concerned about Hector’s older brother, who uses drugs and lives with mother.

The Department recommended finding adoption to be the appropriate permanent plan for Hector. It recommended that the court terminate the parental rights of both parents and order Hector placed for adoption.

On January 17, 2012, the juvenile court held a hearing pursuant to section 366.26. Mother did not testify but read a statement to the court. She told the court that she had grown as an individual and into a stronger person with her son as her focus. Since the start of the case, she had continued with her education and therapy and was active in her church community. Mother asked the court not to sever her parental rights and to order legal guardianship instead of adoption.

The Department attorney argued that Hector should be freed for adoption by his paternal uncle, pointing out that Hector looked to his uncle to meet his needs for shelter, clothing, acceptance, guidance, and affection and it was Hector’s wish to be adopted.

The attorney representing Hector told the court that the parties had reached a mediated consortium agreement regarding visitation. (The record does not indicate the details of the agreement.) She recognized that mother had found a way to participate in services “and was making success” even though no reunification services were provided. Regarding post-adoption visitation, the attorney stated: “I know that the paternal uncle and the mother do get along quite well, and I am hoping they will be able to continue that amicable relationship even post-adoption. And, as I stated earlier, there is a post agreement consortium in how the visits should be conducted once the adoption is finalized.”

The court announced its ruling on mother’s request not to terminate parental rights under the beneficial-relationship exception. (§ 366.26, subd. (c)(1)(B)(i).) First, the court determined that mother had maintained regular visitation and contact with Hector.

Second, the court addressed whether mother established that the benefit of maintaining the parent-child relationship outweighed the benefit of adoption.

The court explained the applicable law:

“The seminal case, I believe is [*In re*] *Autumn H.* [(1994) 27 Cal.App.4th 567] and the language is instructive in that case. It’s the burden on the parent to demonstrate that the relationship 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. 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.

“The Court’s to take into account the age of the child, the portion of the child’s life spent with the parent, the parent and the child’s interactions, and the child’s needs.”

The court commended mother for her efforts to improve herself and wished her good luck. It acknowledged mother’s relationship with Hector, noting that the boy accepted affection from mother and gave affection in return. The court determined, however, that the parent-child relationship did not outweigh the benefits of adoption in this case. The court stated, “The question, though, is if that [relationship] is so powerful and so overwhelming as to outweigh the preference for adoption.... [¶] ... There is benefit for the child to remain in contact with the mother, but not so much as to outweigh the placement for adoption ....”

The court then observed:

“I don’t think that I am going to weigh this formally, about the open adoption and the visitation. But it is worthy of at least noting that there is likely to be some contact between mother and child through family arrangements, which would probably enhance the stability of the existing placement, where the child is in now, and likely enhance the relationship with the mother as she continues to evolve and become the person that she

wishes to be. [¶] So the Department has met its burden for adoption with termination of parental rights, and that has not been overcome by mother, given everything I have said, and I'll make those findings.”

The court ordered the termination of parental rights and referred Hector for adoptive placement.

### **DISCUSSION**

The purpose of a section 366.26 hearing is to select and implement a permanent plan for the dependent child. (*In re S.B.* (2009) 46 Cal.4th 529, 532.) The Legislature's preferred permanent plan is adoption. (*In re D.M.* (2012) 205 Cal.App.4th 283, 290.) “At a section 366.26 hearing, the court must terminate parental rights and free the child for adoption if [1] it determines by clear and convincing evidence the child is adoptable within a reasonable time, and [2] the parents have not shown that termination of parental rights would be detrimental to the child under any of the statutory exceptions to adoption found in section 366.26, subdivision (c)(1)(B)(i) through (vi). (§ 366.26, subd. (c)(1).)” (*Id.* at p. 290.)

In this case, mother does not dispute that Hector is adoptable; she contends only that the parent-child relationship exception applies. (§ 366.26, subd. (c)(1)(B)(i).)

To avoid termination of parental rights under the parent-child relationship exception, the juvenile court must find “a compelling reason for determining that termination would be detrimental to the child” due to the circumstance that “[t]he 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).) It is the parent's burden to prove the exception applies. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 574.)

As the juvenile court correctly described, the Court of Appeal in *In re Autumn H.*, *supra*, 27 Cal.App.4th 567, interpreted the parent-child relationship exception to require a finding that the parent-child “relationship 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.” (*Id.* at p. 575.) “[T]he 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." (*Ibid.*)

The parent-child relationship exception requires the parent to show more than frequent and loving contact or pleasant visits. (*In re C.F.* (2011) 193 Cal.App.4th 549, 555; *In re C.B.* (2010) 190 Cal.App.4th 102, 126; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.) "The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment between child and parent. [Citations.] Further, to establish the section 366.26, subdivision (c)(1)(B)(i) exception the parent must show the child would suffer detriment if his or her relationship with the parent were terminated. [Citation.]" (*In re C.F.*, *supra*, at p. 555.)

We review the court's ruling under the abuse of discretion standard. This means that we review the court's findings of fact for substantial evidence and its conclusions of law de novo, and we reverse its application of law to facts only if it is arbitrary and capricious. (*In re C.B.*, *supra*, 190 Cal.App.4th at p. 123.)

Mother argues that she met her burden to show that Hector has a significant, positive, emotional attachment sufficient to avoid termination of parental rights. The juvenile court disagreed, finding that mother and child shared affection, but that the relationship did not outweigh the benefit of adoption. Where, as in this case, the appellant had the burden of proof at trial, "the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law." (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.) The issue is whether the appellant's evidence was uncontradicted, unimpeached, and of such weight as to leave no room for a judicial determination that it was insufficient to support a finding. (*Ibid.*)

Mother relies on *In re S.B.* (2008) 164 Cal.App.4th 289, 301, in which the Court of Appeal concluded that the only reasonable inference from the record was that the father had established the parent-child relationship exception. In *In re S.B.*, after S.B. was removed from her parents' custody because of their drug use, the father visited her three days per week. (*Id.* at pp. 293-294.) During the visits, the father demonstrated empathy and the ability to recognize his daughter's needs. S.B. became upset when the visits ended and wanted to leave with her father. In a status review report, the agency stated, "It pains the Agency not to be able to reunify [the father] and his daughter ... because of his consistent efforts to alleviate and or mitigate the reasons his family was brought to the attention of the court." (*Id.* at p. 294.) In another report, a social worker stated that S.B. had a consistent and positive relationship with the father. During a bonding study, S.B. told her father she loved him and spontaneously said, "I wish I lived with you and Mommy and Nana." (*Id.* at p. 295.) The doctor who conducted the bonding study believed that father's relationship with S.B. vacillated between parental and peer-like. The doctor opined that, given the fairly strong bond between S.B. and her father, there was a potential for harm to S.B. if she were to lose the relationship. (*Id.* at p. 296.)

Here, in contrast, mother visited her son only once a month, and there was no indication that Hector became upset when the visits ended. To the contrary, the social worker who observed the visits reported that Hector walked away to his care provider at the end of visits. While "mother would seek out a good-bye hug or get Hector's attention to say good-bye," the social worker believed that Hector was "indifferent to his mother's nurturing attempts." Mother does not point to any evidence in the record demonstrating that Hector had a consistent and positive relationship with her similar to the parent-child relationship in *In re S.B.* Nor was there testimony or other evidence in the record demonstrating a potential for harm if Hector were to lose the relationship with his mother. In sum, the facts of this case are not similar to the facts of *In re S.B.*, and mother's

reliance on *In re S.B.* is misplaced. (See *In re C.F.*, *supra*, 193 Cal.App.4th at pp. 558-559 [*In re S.B.* was “confined to its extraordinary facts”].)

While it is not disputed that Hector enjoyed his monthly visits with mother, mother was not consistent in taking on the parental role and setting clear boundaries. Hector looked to his paternal uncle for guidance, comfort, and meeting his needs. Further, mother was denied reunification services at least in part because she did not accept responsibility for her actions and denied that she hurt her son. Under these circumstances, the juvenile court did not abuse its discretion by finding that mother failed to establish that the parent-child relationship exception applied in this case. Stated differently, we cannot say that the record compels a finding that mother “occupies a parental role in [Hector’s] life, resulting in a significant, positive, emotional attachment” such that Hector would suffer detriment if his relationship with mother were terminated. (*In re C.F.*, *supra*, 193 Cal.App.4th at p. 555.)

On appeal, mother also contends that the juvenile court improperly considered the paternal uncle’s willingness to permit ongoing contact between mother and Hector in reaching its decision to terminate parental rights. In *In re C.B.*, *supra*, 190 Cal.App.4th at page 128, the Court of Appeal held the possibility of post-adoption contact between the child and his or her birth parent is an improper factor in weighing whether to terminate parental rights. The court explained:

“We conclude that if a juvenile court determines that a parent has ‘maintained regular visitation and contact’ (§ 366.26, subd. (c)(1)(B)(i)), that there is a ‘substantial, positive emotional attachment’ between child and parent benefitting the child [citation], and that the benefit from continuing that parent-child relationship in a tenuous placement ‘promotes the well-being of the child to such a degree as to outweigh’ the benefit that child would gain from the stability and permanency of adoption [citation], then the parent-child relationship exception is established. In those circumstances, the court cannot nevertheless terminate parental rights based upon an unenforceable expectation that the prospective adoptive parents will voluntarily permit future contact between the child and a biological parent, even if substantial evidence supports that expectation. The purpose

of the parent-child relationship exception is to protect the parent-child relationship when its continuation is more beneficial to the dependent child than a permanent plan of adoption and, in such case, a court cannot leave the protection of such a relationship dependent upon the hoped for goodwill of the prospective adoptive parents.” (*In re C.B.*, *supra*, 109 Cal.App.4th at pp. 128-129.)

In the present case, the juvenile court stated, “There is benefit for the child to remain in contact with the mother, but not so much as to outweigh the placement for adoption ....” Thus, without considering the improper factor of the paternal uncle’s willingness to allow visits, the court determined that the parent-child relationship exception was *not* established. As the respondent argues, nothing in *In re C.B.* requires the reversal of an order terminating parental rights where the parent has failed to carry her burden of establishing the parent-child relationship exception.

Mother argues that the juvenile court must have taken into consideration the post-adoption-consortium agreement for visitation mentioned by Hector’s attorney at the hearing in deciding whether the parent-child relationship exception applied. We disagree. The court specifically stated that the benefit “to remain in contact with the mother” did not outweigh the benefits of adoption. This shows that the court correctly understood that termination of parental rights would mean the termination of contact (or visitation) between mother and Hector. (See *In re Noreen G.* (2010) 181 Cal.App.4th 1359, 1391 [an order terminating parental rights “frees the child from all parental rights, custody or control, and does not sanction the maintenance of reasonable visitation”].)<sup>4</sup>

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<sup>4</sup>We do not mean to imply that a birth parent can never have an enforceable right to visitation after parental rights have been terminated. “Agreements that provide for birth parents to continue visitation with their children following termination of parental rights or adoption are also recognized by statute and enforceable, but any such agreements must be in writing and must be found by the court to be in the best interests of the children.” (*In re Noreen G.*, *supra*, 181 Cal.App.4th at p. 1394; see Fam. Code, § 8616.5.)

Further, as the Department points out, the court expressly stated that it was not considering the paternal uncle's willingness to allow continued contact between Hector and mother. The court stated: "I don't think that I am going to weigh this formally, about the open adoption and the visitation. But it is worthy of at least noting that there is likely to be some contact between mother and child through family arrangements, which would probably enhance the stability of the existing placement, where the child is in now, and likely enhance the relationship with the mother as she continues to evolve and become the person that she wishes to be." Absent evidence to the contrary, we assume the court meant what it said and did not weigh the uncle's willingness to allow visitation in deciding whether the parent-child relationship exception applied. For these reasons, we reject mother's contention that the termination order was based on an improper consideration.

**DISPOSITION**

The juvenile court's order is affirmed.