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

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

TULARE COUNTY HEALTH AND HUMAN
SERVICES AGENCY,

Plaintiff and Respondent,

v.

M.Z.,

Defendant and Appellant.

F064604

(Super. Ct. No. JJV060010)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Charlotte A. Wittig, Judge.

M. Elizabeth Handy, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Kathleen Bales-Lange, County Counsel, John A. Rozum, Chief Deputy County Counsel, Carol E. Holding, Deputy County Counsel, for Plaintiff and Respondent.

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M.Z. (mother) appeals from an order terminating parental rights (Welf. & Inst. Code, § 366.26) to her son D.S. III.¹ Mother contends that the trial court erred in finding that the sibling-relationship exception did not apply. (§ 366.26, subd. (c)(1)(B)(v).)

We disagree and affirm the court's order.

FACTUAL AND PROCEDURAL HISTORIES

Mother has four children, S.Z. (born in 2004), D.S. III (born in 2005), C.S. (born in 2006), and E.S. (born in 2008). D.S. (father) is the presumed father of D.S. III, C.S., and E.S.

Mother has a history with the Tulare County Health and Human Services Agency (Agency). When D.S. III was born, he and mother tested positive for controlled substances. Mother and father agreed to participate in voluntary family maintenance services, but after they both tested positive for controlled substances, S.Z. and D.S. III were detained. The Agency filed a juvenile dependency petition on behalf of S.Z. and D.S. III, alleging failure to protect. (§ 300, subd. (b).) In October 2005, mother and father admitted the allegations of the petition, and the juvenile court sustained the petition. S.Z. and D.S. III were removed from the parents' custody, and reunification services were provided.

In April 2006, the court ordered S.Z. and D.S. III placed with mother, although they continued to be dependents of the court. Later that year, C.S. was born healthy and with no signs of drug use by mother. In October 2006, the court granted mother sole legal and physical custody of S.Z. and D.S. III and dismissed the dependency proceeding.

¹Subsequent statutory references are to the Welfare and Institutions Code.

The current case was initiated on September 13, 2010, by a juvenile dependency petition filed on behalf of S.Z., D.S. III, C.S., and E.S. The petition alleged that mother and father had a history of substance abuse and, on September 10, 2010, they smoked marijuana in the presence of the children. About half a pound of marijuana was found in the children's dresser. A glass pipe was found in mother's purse. It was alleged that the parents' drug abuse endangered the children, and prior services had failed to ameliorate the situation. The children were detained and placed together in a foster family agency home. On October 5, 2010, the court adjudged the children dependents of the court and ordered family reunification services for mother. The children remained in foster care.

The four children were placed together in three different foster homes from September 10 to November 22, 2010. D.S. III went to another placement with S.Z. and then two placements by himself before being placed in a home by himself in Porterville in February 2011.

The children had behavior problems during visits and at their foster homes. A court-appointed special advocate (CASA) representative visited the children in their foster home in September 2010. The CASA representative observed that all the children were constantly trying to seek the foster mother's attention and they "appeared unfamiliar to rules and structure." The children insulted each other—for example S.Z. told C.S. she was fat and had ugly hair—and the foster mother reported that the children "used every swear word." The foster mother also expressed concern about S.Z.'s sexualized behavior and reportedly saw "[S.Z.] tell [D.S. III] to bite her in the private area." In November 2010, a CASA representative observed supervised visitation between mother and the children. During the visit, D.S. III and S.Z. yelled at each other. Later, D.S. III pushed E.S. down to the floor for taking his toys and E.S. hit him back. In response, mother laughed and was proud that E.S. was defending herself. At a family visit on December 7, 2010, D.S. III told E.S. and S.Z. to shut up and kicked E.S. twice in the stomach because

she tried to stop him from saying bad words. At a visit on December 11, 2010, when D.S. III saw S.Z. in her new glasses, he told her she looked ugly.

There were some better times during family visits. At a visit on November 13, 2010, mother, the children, and their grandmother walked to the store holding hands. At a visit on December 18, 2010, the children hugged and kissed mother, and D.S. III and S.Z. did a little musical performance. At a visit on January 7, 2011, C.S. began to cry and D.S. III picked her up to hug and comfort her. (Mother, however, told him to let her down because she would fall.)

According to an Agency status review report dated March 16, 2011, mother had made only minimal progress on her case plan. She completed a substance abuse program but failed to comply with court-ordered random drug testing and refused to participate in the aftercare portion of the substance abuse program. The social worker who prepared the report observed mother to be angry and unremorseful. The social worker also opined that mother had failed to establish any structure or boundaries with her children and that she lacked motivation to make substantial progress.

With respect to D.S. III, the social worker reported that he had had multiple foster care placements due to his behavior problems.² He was referred to Visalia Youth Services because he was “having a challenging time stabilizing in one placement.” D.S. III was provided therapeutic behavioral services (TBS) “to alleviate the behaviors such as the defiance, restlessness, impulsivity, and the threats of harm to self and others.” In his most recent placement, D.S. III “continue[d] to hit, kick, curse and spit at others in the home as well as at school, but the foster parents [were] open to assistance in the home in the form of TBS services to alleviate the behaviors.”

²For example, one foster parent asked to have S.Z. and D.S. III removed from her home because D.S. III and his sister hit each other and others, did not follow directions or rules, urinated on one another, and used bad language.

The Agency terminated reunification services for mother and set a section 366.26 hearing. At a hearing on April 15, 2011, the juvenile court did not follow the Agency's recommendation and instead ordered continuation of reunification services for mother, including a new substance abuse treatment evaluation and services to address mother's inappropriate behaviors during visitation. The court expressed concern that the status review report did not provide sufficient information to determine the closeness and the strength of the sibling bond, the detriment to the youngest child if the sibling ties were not maintained, and the likelihood of finding a permanent home for the sibling group.

In a status review report dated September 23, 2011, the Agency again recommended that mother's services be terminated because she had made minimal progress. The Agency recommended that the permanent plan living arrangement for the children be longer-term foster care with the goal of guardianship.

Although D.S. III's caretakers had previously reported that he hit, kicked, cursed, and spit at other children, and he "exposed his private body parts to other children," D.S. III's behavior had improved since he began receiving TBS services. He "made significant changes and ... responded positively to participation with TBS." The Agency noted that therapists for D.S. III and S.Z. indicated that it would not be in the children's best interests to be placed together because of concerns that the children were acting out sexually with each other.

D.S. III was reported to be adjusting well in his current placement, which began in June 2011, and he appeared to get along with the other children in the home. D.S. III's school, however, reported that he sometimes became aggressive with his peers and hit them. With respect to visitation with mother and his siblings, D.S. III's foster parent reported that it had become more difficult to take D.S. III to his visits as he refused to get in the car or participate in visits. He would say things like, "I don't want to see those people." D.S. III appeared disconnected during family visits, and he focused on playing by himself. A foster family agency social worker observed, "[D.S. III] does not appear to

have a connection to his biological family.” He had minimal interaction with his mother and siblings, only occasionally visiting with his older sister S.Z. D.S. III said he would rather stay home with his mom, referring to his foster mother.

An adoption assessment prepared in September 2011 noted that adoption had not been discussed with any of the children’s current caretakers because the children were all in new placements. (D.S. III had been placed in his current foster home on June 1, 2011, and his sisters’ current placements were all more recent than his.) The assessment recommended a permanent plan of long-term foster care with the goal of guardianship.

At the 12-month review hearing on October 27, 2011, the juvenile court terminated reunification services for mother and ordered a section 366.26 to be set to determine a permanent plan for the children. The court stated that it was unable to make a finding that mother had demonstrated the capacity and ability to complete the objectives of her treatment plan and to provide for her children’s safety and physical and emotional well-being. The court ordered monthly visitation with the children for mother and ordered sibling visits to occur at the time of mother’s visits.

In a section 366.26 report filed on February 2, 2012, the Agency recommended that parental rights be terminated for D.S. III and that adoption be the plan identified as in his best interest. D.S. III’s foster parents had a strong commitment to him and a clear desire to adopt him. He had made great progress in his current placement and expressed his desire to be adopted by his foster parents. The social worker who prepared the section 366.26 report observed that D.S. III was comfortable in his foster home, and his desire to remain in the home was clear.

D.S. III did not attend the monthly family visit in November 2011. He had told his therapist and others that he did not want to visit mother. D.S. III attended a visit in December 2011 and was observed to be very quiet and withdrawn. He and S.Z. isolated themselves and did not talk much to their sisters or mother. D.S. III attended a family visit in January 2012, although he only expressed interest in visiting with his sisters and

was not excited about seeing mother. When the visit was over, he kept hugging his youngest sister E.S. The Agency observed that, while D.S. III did miss his sisters, he was functioning much better since they had separated.

On February 10, 2012, after the section 366.26 report was filed, mother filed a section 388 petition asking the court to return the children to her care or, in the alternative, reopen reunification services. The Agency then filed an addendum report on February 15, 2012. The report concluded: “While [D.S. III] does have a relationship with his siblings, his need for a permanent home is essential. [He] has settled into his current home and is comfortable there and has expressed his desire to be adopted by his current caretakers. [D.S. III’s] relationship with his siblings does not supersede his need for permanence with his current prospective adoptive parents.”

On March 20, 2012, the juvenile court held a hearing on mother’s section 388 petition as to all the children and the section 366.26 hearing as to D.S. III only. The court denied mother’s section 388 petition, finding there had not been a change in circumstances. The court further found, “[B]ased on the behaviors of these children, ... the positive changes that they exhibited since placement in foster care, the mother’s conduct during visitation, the fact that the children have visit issues after visitation ... even if there were a change ... in circumstance it would not be in the best interest of the children to grant mother’s 388”

The court then proceeded to D.S. III’s section 366.26 hearing. Mother’s counsel asked the court not to terminate parental rights, arguing that D.S. III had a beneficial relationship with both mother and his siblings. Mother testified that, at family visits, the sisters would run to D.S. III and hug him and he would hug them back. She admitted that, before the children were detained in September 2010, S.Z. and E.S. lived with their maternal grandmother and only D.S. III and C.S. lived with mother. She testified that D.S. III was close to C.S. She described D.S. III’s relationship with C.S. and his other

sisters: “He’s always made sure she was okay. If she would fall or, you know, any one of them fall, he would pick them up, ‘Are you okay?’ He always picks flowers and stuff.”

D.S. III’s counsel agreed with the Agency’s recommendation to terminate parental rights, stating, “I think there is a bond between [D.S. III] and his siblings, but not to the extent that the sibling exemptions should apply.”

The juvenile court found that D.S. III was likely to be adopted. Addressing whether any exceptions applied to avoid termination of parental rights, the court found that mother had not met her burden of establishing that the exception under section 366.26, subdivision (c)(1)(B)(i)—the parent-child-relationship exception—applied. It was clear to the court that D.S. III did not have a good relationship with mother and visits were not beneficial to him.

The court then considered the exception under section 366.26, subdivision (c)(1)(B)(v)—the sibling-relationship exception—and concluded that this exception did not apply either. The court explained:

“While [D.S. III] enjoys visiting with his siblings, it does not appear that those visits are always beneficial to him. What’s clear to the Court is that [D.S. III] has made, as counsel argued, great strides in his current placement and the Court is finding that the benefits of permanent placement and the stability he is receiving outweigh the benefit of continuing the sibling relationship.

“The Court would certainly hope that [D.S. III] may continue his sibling relationship, but the Court in making the decision the Court must make and cannot assume that that will occur and the Court does not assume that that will occur. [¶] The Court is well aware that it may be that the adoptive parents decide not to continue that sibling relationship. Given the complete picture in this case, the Court is finding that 366.26(c)(1)[(B)(v)] is not applicable as well.”

The court terminated mother’s parental rights and referred D.S. III to the county adoption agency 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 Celine R.* (2003) 31 Cal.4th 45, 52.) The Legislature’s preferred permanent plan is adoption. (*Id.* at p. 53.) If a child is adoptable, “the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to the child. The specified statutory circumstances—actually, *exceptions* to the general rule that the court must choose adoption where possible—‘must be considered in view of the legislative preference for adoption when reunification efforts have failed.’ [Citation.] At this stage of the dependency proceedings, ‘it becomes inimical to the interests of the minor to heavily burden efforts to place the child in a permanent alternative home.’ [Citation.] The statutory exceptions merely permit the court, in *exceptional circumstances* [citation], to choose an option other than the norm, which remains adoption.” (*Ibid.*)

In this case, mother argued that the sibling-relationship statutory exception applied. (§ 366.26, subd. (c)(1)(B)(v).) To avoid termination of parental rights under this 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]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.” (*Ibid.*) In deciding whether the exception applies, “[t]he court must balance the beneficial interest of the child in maintaining the sibling relationship, which might leave the child in a tenuous guardianship or foster home placement, against the sense of security and

belonging adoption and a new home would confer.” (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 951.) It was mother’s burden to prove that the sibling relationship applied in this case. (See *id.* at p. 949.)

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.* (2010) 190 Cal.App.4th 102, 123.)

Here, mother acknowledges that D.S. III did not express deep sadness or pain in losing his siblings and, further, there is no realistic option for D.S. III to spend the rest of his childhood in the same home as his siblings. She also acknowledges that D.S. III wanted to be adopted and appeared to be thriving in his new home. Nonetheless, she contends that the evidence “supports a strong attachment developing between [D.S. III] and his sister [C.S.], who were less than two years apart, and many day-to-day shared experiences for [D.S. III] and all three [of] his siblings during a very meaningful period for a child forming life-long supportive family figures—his first five years of life.” Mother does not, however, refer to any evidence in the record to support her assertions regarding D.S. III’s relationship with C.S. Mother also criticizes the “expert” evidence of a social worker who determined that adoption was in D.S. III’s best interest, but mother did not present any evidence, expert or otherwise, to establish that severing the sibling relationship would be detrimental to D.S. III. While she asserts that the preservation of family ties is critical to healthy growth, mother points to no evidence in the record to support the proposition that, in this particular case, the sibling relationship was critical to D.S. III’s healthy growth.

“Moreover, even if a sibling relationship exists that is so strong that its severance would cause the child detriment, the court then weighs the benefit to the child of continuing the sibling relationship against the benefit to the child adoption would provide.” (*In re L.Y.L., supra*, 101 Cal.App.4th at pp. 952-953.) In this case, the juvenile

court determined that the benefits to D.S. III of adoption outweighed the benefit of continuing the sibling relationship. The court expressed hope that D.S. III could continue his relationship with his siblings, but reached its determination assuming that D.S. III would not continue visiting his sisters.

On the record before us, we conclude that the juvenile court reasonably could determine that D.S. III's continued relationship with his sisters did not outweigh the benefit of a permanent home with his prospective adoptive parents. Stated differently, we cannot say that the record compels a finding that D.S. III's relationship with his sisters outweighs the benefits of adoption. (See *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528 [where appellant had 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"].)

DISPOSITION

The juvenile court order is affirmed.