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

In re F.R., JR., a Person Coming Under the
Juvenile Court Law.

TULARE COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

F.R., SR.,

Defendant and Appellant.

F065131

(Super. Ct. No. JJV058788C)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Tulare County. Charlotte A. Wittig, Commissioner.

Daniel G. Rooney, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Bales-Lang, County Counsel, John A. Rozum and Abel C. Martinez, Deputy County Counsel, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Kane, J., and Detjen, J.

INTRODUCTION

F.R., Sr., (father) appeals from the juvenile court's orders summarily denying his petition pursuant to Welfare and Institutions Code section 388,¹ finding that the beneficial parent-child relationship exception is inapplicable to his case, and terminating his parental rights to his son, F.R., Jr. (F.R.). We reject father's contentions and affirm the juvenile court's orders.

FACTS AND PROCEEDINGS

Background

On June 1, 2011, sheriff's deputies responded to a call that F.R., who was just over one-year old, had been battered by the mother. F.R. was rushed to Kaweah Delta District Hospital and the mother was arrested for child abuse. F.R. was placed in the custody of the Tulare County Health and Human Services Agency (agency). F.R. was given an x-ray, which revealed that he had a recently broken rib.

F.R. was possibly hit with a shoe and plastic hanger and suffered bruising to his thigh, both buttocks, his face, and jaw. He had a small abrasion to his inside lower lip and an abrasion on his upper back. F.R. did not cry and was not uneasy around strangers. F.R. appeared to be dirty and neglected. The mother was arrested for corporal injury to a child and assault with a deadly weapon. She admitted to use of methamphetamine two days prior to physically abusing F.R.

The social worker contacted father on June 2, 2011. Father was crying and worried because he wanted F.R. returned to his care. Father explained that he left F.R. with the mother and she was fine when he did so. Father said he kept F.R. 90 percent of the time, but could not provide an address where he intended to live with F.R. Father reported that he lived with the mother for three years and they used heroin together at the

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

beginning of their relationship. According to father, the mother stopped using heroin at three months of gestation. When F.R. was born, mother was on methadone and F.R. had to be weaned from it with Phenobarbital. Father suspected the mother was using methamphetamine for the prior month and a half. Father did not observe the mother hitting F.R.

Father was invited to attend a staffing meeting regarding F.R., but could not attend because his ride fell through. Father was invited to stay the night with F.R. in the hospital. Father lives in Tulare County with a relative. When the social worker went to the address father reported as his home, the address did not exist. Father did not answer his phone when the social worker attempted to confirm his home address.

A petition was filed on June 3, 2011, pursuant to section 300, alleging that the mother's physical abuse of F.R. placed him at substantial risk of serious physical harm and father's inability to adequately protect F.R. also placed F.R. at risk of serious physical harm. The petition also alleged that father was aware of the mother's substance abuse, used heroin with the mother, and failed to protect F.R.²

At the conclusion of a detention hearing on June 6, 2011, the juvenile court denied father's request for physical placement of F.R. and detained F.R. The court granted the agency discretion to further investigate father and his housing with the possibility of placing F.R. with father after consultation with F.R.'s counsel. Father was permitted supervised visits with F.R. Father's reunification plan included parenting classes and drug testing.

² The petition was amended three more times. Most of the changes were related to the mother. The second and third amended petitions, however, alleged that father was unable to protect F.R. from the mother's physical abuse, domestic violence and drug abuse, and knew or reasonably should have known that these behaviors placed F.R. at risk of physical harm and father failed to protect him. These petitions also alleged that father's substance abuse rendered him unable to provide F.R. with regular care.

A nurse working for the agency examined F.R. and found his language and motor skills to be delayed. F.R. was referred to the High Risk Infant Program and Central Valley Regional Services (CVRC) to be further assessed for these delays.

The social worker reported in a subsequent report filed on June 20, 2011, that father was aware of the mother's behavior for a month and a half prior to her assault of F.R. Despite his concerns, father left F.R. with the mother a few days out of each week. Father had angry outbursts with his social workers, one of which was placing F.R. in foster care. Father is age 57 and reported using heroin since age 16. Father was involved with the mother for three years and recently noticed her anger.

Despite knowledge that the mother used illegal drugs, father wanted mother to care for and have custody of F.R. Father did not take responsibility for his poor judgment or his own role in F.R.'s injuries. Father did not have a home in mid-June 2011 and was advised by the social worker that he would have to have secure housing prior to being considered for placement. Father was given a letter on June 16, 2011, explaining services and supervised visitation guidelines. Father was given referrals for substance abuse evaluation, random drug testing, and parenting classes. The agency recommended reunification services for father.

The mother pled guilty to charges of child endangerment and corporal injury of a child for her assault on F.R. and was sentenced to prison for 13 years. The agency learned that father had a lengthy criminal record, including convictions for possessing and using illegal narcotics, and for assault. In May 2011, father was arrested for violating his probation for failure to complete volunteer hours.

At the jurisdiction/disposition hearing, the juvenile court found all of the allegations against the mother to be true. The court found the allegation that father failed to protect F.R. to be true, but not the substance abuse allegation. The court ordered reunification services for father, but suspended visits with F.R. until father had two consecutive clean drug tests. The court advised father that if he failed to reunify with

F.R., the permanent plan would be adoption for F.R. The court further advised father he had until January 30, 2012, to reunify with F.R. and that father's failure to reunify with F.R. could lead to termination of his parental rights.

Father was referred on June 20, 2011, to an outpatient treatment program. Between July 28, 2011, and August 28, 2011, father had six drug tests. On two occasions father tested positive for opiates. Father failed to show for three tests and was unable to provide a sample for two other tests. Father was discharged from the outpatient treatment program on August 16, 2011. Father had failed to attend four individual and four group appointments. Father admitted to his social worker that he was using drugs and alcohol.

Father enrolled at Family Services in Visalia on July 18, 2011, for classes on anger management and non-violence strategies. Father was dismissed from the program on November 7, 2011, for missing class a third time. Father began a parenting education program on September 7, 2011. He participated in eight of twelve sessions. Father informed the program that he was checking into an inpatient recovery program. Father planned to complete classes by the end of December 2011.

Father was given two supervised visits a week with F.R. On July 20, 2011, the juvenile court ordered that visits be suspended until father submitted two consecutive, clean drug tests. On October 6, 2011, father was referred to inpatient services at the Pine Recovery Center. Father told his social worker that he attended anger management classes during his inpatient treatment. Father had three positive drug tests and one failure to show between September 11, 2011, and October 27, 2011. Between November 10, 2011, and December 6, 2011, father had four negative drug tests. Father completed the inpatient program on December 3, 2011.

Father had his first visit with F.R. on November 28, 2011, after two consecutive negative drug tests. The social worker described father's conduct to be appropriate. Father and F.R. played, laughed, and hugged each other. F.R. was doing well in his placement with foster parents. F.R.'s vocabulary was increasing and he gained a

substantial amount of weight. F.R.'s destructive behaviors such as hysterical crying and banging his head against the wall were decreasing. F.R. asked for his foster mother during visits with father, but was adjusting to visits with father and becoming more comfortable with each visit.

Father told his social worker that he thought he needed an additional six months of services to appropriately care for his son. Father was trying to find resources that would allow him to provide stable housing for F.R. Although father was doing well with his case plan, he was afraid to be out on the streets because so many of his friends use drugs and alcohol. Because of father's inexperience in dealing with his addiction and that supervised visits had only begun since late November 2011, the agency believed it was not in F.R.'s best interest to reunify with father. The social worker noted that it was too early to ascertain whether father's lifestyle change would be permanent.

Court Appointed Special Advocates of Tulare County filed a report on December 11, 2011. Father had recently resumed twice weekly visits with F.R. The long suspension of visits between father and F.R. caused F.R. difficulties in their relationship. F.R. would try to leave the room and get back to his foster mother. F.R.'s teacher at the childcare center reported that F.R. was somewhat emotional for two days after his first visit with father. The situation improved after the second visit and F.R. was much more engaged with father and the visit went well.

The agency filed an addendum report on January 4, 2012. On December 12, 2011, father tested positive for the presence of opiates in his blood. Father was spending much of his time volunteering at the inpatient recovery center and had shown a real change in his attitude. The father had shown his social worker that he was committed to recovery and to reunifying with F.R. The agency sought an additional six months of services for father.

On January 13, 2012, however, the agency changed its recommendation regarding father because father failed to drug test on January 6, 2012. Father was also terminated

from his aftercare program on January 11, 2012. The social worker concluded that father was taking the dependency action lightly and was not committed to making the changes necessary to reunify with F.R. The agency recommended termination of reunification services to father. At the conclusion of a review hearing on January 31, 2012, the court followed the agency's recommendation and ordered the termination of reunification services to father.

Section 366.26 Hearing

On May 15, 2012, the agency filed its section 366.26 report recommending that father's parental rights be terminated and F.R.'s plan to be adoption. Father had two visits a week with F.R. in late November and early December of 2011. Father was affectionate with F.R. and the visits went well.

F.R. is likely to be adopted by his foster parents, who are committed to adopting him. The prospective adoptive parents are in their late 20's, have been married for five years, and have their own biological child who is two years old. Both prospective adoptive parents graduated from high school and attended college. One is working on a master's degree and plans to obtain a Ph.D. The prospective adoptive parents have been caring for F.R. since June 3, 2011, and stated they are committed to adopting him.

At the termination hearing on June 6, 2012, father argued that the parental relationship exception should be applied to this case. The court had no doubt that father loved F.R., but did not find that the benefits of continuing the parent-child relationship outweighed the benefits that permanent placement with the foster parents, who were willing to give F.R. a permanent home, would provide. The court terminated father's parental rights.

DISCUSSION

Father argues that because of the close relationship he had with his child, the parental benefit exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)) should have been applied in this case because terminating his parental rights would be

detrimental to the child. Father maintains he was involved with F.R., had recovered from his addiction, forged a bond with F.R., and that the juvenile court abused its discretion in failing to apply the beneficial parent-child relationship exception.

Appellate courts have interpreted the phrase “benefit from continuing the relationship” to refer to a parent-child relationship that promotes the wellbeing of the child to such an extent as to outweigh the benefits the child would gain in a permanent home with adoptive parents. Courts balance the strength and quality of the natural parent-child relationship against the security and sense of belonging the new family would provide. If severing the natural parent-child relationship would deprive the child of a substantial, positive emotional attachment so that the child would be greatly harmed, only then is the preference for adoption overcome and the parents’ rights are not terminated. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953-954 (*L.Y.L.*); *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

To meet the burden of proof for this exception, the parent must show more than frequent and loving contact or pleasant visits. (*L.Y.L.*, *supra*, 101 Cal.App.4th at pp. 953-954.) The relationship arises from day-to-day interaction, companionship, and shared experiences. The parent must show he or she occupies a parental role in the child’s life that results in a significant, positive emotional attachment from child to parent. (*Id.* at p. 954.) We review the juvenile court’s findings concerning the parental benefit exception under the deferential abuse of discretion standard. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 (*Jasmine D.*))

Where the issue on appeal turns on a failure of proof, the question for a reviewing court is whether the evidence compels a finding in favor of the appellant as a matter of law. 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. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528 (*I.W.*))

We review the record in the light most favorable to the judgment. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) When a court rejects a detriment claim and terminates parental rights, the appellate issue is whether the juvenile court abused its discretion in so doing. (*Jasmine D., supra*, 78 Cal.App.4th at p. 1351.) To conclude there was an abuse of discretion, the proof offered must be uncontradicted and unimpeached so that discretion could be exercised in only one way, compelling a finding in the appellant's favor as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; *I.W., supra*, 180 Cal.App.4th at p. 1528.)

Father claims he made a compelling showing that he cared for F.R. most of the first year of F.R.'s life, F.R. loved father, and father played a "vital role" in F.R.'s life even though he was not F.R.'s primary caretaker. In father's view, his maintenance of a true parent-child relationship with F.R. warranted a finding that termination would be detrimental. Father relies on his reading of *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*) and *In re Amber M.* (2002) 103 Cal.App.4th 681 (*Amber M.*) to support his claim. We are neither factually nor legally persuaded by father's argument.

Neither *S.B.*, nor *Amber M.*, stand for the proposition that a parent's effort to reunify, coupled with regular, pleasant, and affectionate visits, compels a finding that termination would be detrimental to the child. The appellate court, in both cases, did mention the parent's effort as evidence of his or her devotion to the children. (*S.B., supra*, 164 Cal.App.4th at p. 300; *Amber M., supra*, 103 Cal.App.4th at p. 690.) The parent's effort and devotion, however, was not the linchpin to either decision. Notably, in both cases, there was uncontroverted third-party evidence, including expert opinion, of a strong attachment between the parent and the children and the potential for harm to the children. (*S.B., supra*, 164 Cal.App.4th at pp. 295-296; *Amber M., supra*, 103 Cal.App.4th at pp. 689-690.) In this case, father presented no such evidence.

As the juvenile court observed, there is little doubt father loves his child. The parent-child relationship, however, must arise from day-to-day interaction,

companionship, and shared experiences. The parent must show he or she occupies a parental role in the child's life that results in a significant, positive emotional attachment from child to parent.

Although father asserts that he was involved in the first year of F.R.'s life, father's drug addiction dominated his relationship, or absence of a relationship, with F.R. throughout the second half of 2011 and first half of 2012. Father succeeded in remaining drug free for only limited periods of time and had sporadic, inconsistent contact with F.R. for most of the year F.R. was a dependant.

Father failed to demonstrate at the section 366.26 hearing that he occupied a true parental role with F.R. that resulted in a significant, positive emotional attachment of F.R. to him. Father failed to show that the juvenile court abused its discretion in rejecting the application of the parental benefit exception to his case. The juvenile court did not err in failing to apply the parental benefit exception to this case or in terminating father's parental rights.

DISPOSITION

The court's orders denying father's motion to apply the parent-benefit exception and terminating his parental rights pursuant to Welfare and Institutions Code section 366.26 are affirmed.