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

In re LILY T. et al., Persons Coming Under
the Juvenile Court Law.

TULARE COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

BRANDON T.,

Defendant and Appellant.

F065269

(Super. Ct. Nos. JVV65054A,
JVV65054B, JVV65054C)

OPINION

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B.R.,

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THE COURT*

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

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

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

Marsha F. Levine, under appointment by the Court of Appeal, for B.R., Defendant
and Appellant.

Kathleen Bales-Lang, County Counsel, John A. Rozum and Jason G. Chu, Deputy
County Counsel, for Plaintiff and Respondent.

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INTRODUCTION

B.R. (mother) and Brandon T. (father) appeal from the juvenile court's orders finding the beneficial parent-child relationship exception to adoption is inapplicable to their case, challenging a visitation order by the juvenile court, and terminating the parental rights of both parents as to Lily T., Molly T., and L.T. pursuant to Welfare and Institutions Code section 366.26.¹ We reject parents' contentions and affirm the juvenile court's orders.²

FACTS AND PROCEEDINGS

Background

On January 13, 2012, a petition was filed pursuant to section 300 alleging that four-year-old Lily T., three-year-old Molly T., and nine-month-old L.T. were left without provision for support because father was incarcerated and mother had just been arrested on felony and misdemeanor warrants. On January 19, 2012, an amended petition was filed adding allegations that mother and father failed to protect their children and were unable to provide regular care for the children due to mother and father's extensive

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

² Father filed briefs joining mother's arguments on appeal. On November 20, 2012, mother's and father's appeals were consolidated by order of this court.

substance abuse histories, which placed the children at risk of harm and caused a detrimental home environment. The amended petition further alleged that mother's willful or negligent failure to provide adequate medical care placed the children at risk of suffering serious physical harm and illness.

The jurisdiction/disposition report prepared by the Tulare County Health and Human Services Agency (agency) sought denial of reunification services for both parents pursuant to section 361.5, subdivision (b)(13) because both parents had histories of extensive, abusive and chronic use of drugs or alcohol and resisted prior court-ordered treatment. In January 2005, a relative went to mother's home and reported there was drug activity in the home. Mother had a baby³ and stated she had "given the baby" to an adult female cousin. The baby was seen in a bedroom in what appeared to be a "cage." The cousin had attached a baby gate to the top of the baby's crib so he could not get out. The baby was malnourished at the time and the home was filthy. Mother did not want to be part of the baby's life.

Mother had a lengthy arrest history for drug offenses dating back to 2004. Mother pled guilty and was placed on recovery court probation for a misdemeanor drug charge filed in February 2004. In May 2004, however, mother entered a guilty plea to a felony drug offense and was placed on probation in drug court for five years. Mother continued to be arrested for new drug related offenses between 2004 and 2012. Father also had a long history of drug offenses and forgery arrests and convictions dating back to 2007.

The agency reported that on January 11, 2012, social workers received an emergency response referral that mother was being arrested and there was no adult to care for the children. Father was incarcerated in the county jail on drug charges. Social worker Angelita Saenz found mother's home to have a very strong cigarette odor. The

³ This child is not a party to this proceeding.

home was moderately clean except for the bedroom where the children's clothes were located. The bedroom was messy with clothes that were dirty, smelly, and thrown everywhere. The bed was not visible. Although the children were appropriately dressed, their clothes were dirty and had a strong odor. The children gave mother a kiss, said goodbye to her, but showed no emotion upon leaving her. Lily and Molly complained that they were hungry.

A paternal aunt said the parents have a long history of drug use and have had many issues raising the children. Mother admitted that in January 2012 she was smoking methamphetamine in a back bedroom while the children were in the living room watching television and eating lunch. Mother admitted she had been ordered to complete drug court and failed to do so in the past. Mother had not had any contact with an older son, T.M., in over two years and believed T.M.'s father had been granted sole custody of him.

Mother told the social worker that she first started using methamphetamine when she was 13 years old. Mother had never successfully completed a drug court program. Mother stated L.T. was her only "sober baby," meaning she did not use methamphetamine while pregnant with him. The agency concluded that it was not in the children's best interests to offer either parent reunification services due to their extensive histories of controlled substance abuse.

The foster parent caring for Lily and Molly discovered that they both had head lice. Lily reported to her caregiver that mother smokes and drinks a lot, something Lily described as "awful, awful, awful." Molly looked up to Lily for all of her needs. Lily and Molly did not ask about their parents for the first few weeks after becoming dependents. Lily became upset upon learning that her little brother would be coming to live with them because she explained that she always had to take care of him when she lived with her parents.

The jurisdiction hearing was held on February 9, 2012. Father waived his right to a hearing and submitted the matter on the agency's report. Mother maintained the children were dirty because she was arrested in the evening before they had their daily bath. The court found the allegations in the petition to be true.

At the disposition hearing on March 2, 2012, father testified that he was released from jail on February 11, 2012, and he had had two visits with the children since his release. Father was not yet in drug treatment but was taking drug tests. Mother's counsel argued that although mother had a long history of drug abuse, she never "flat out refused to do anything." Counsel explained that mother was a drug addict and needed treatment in order to reunify with the children. Father's counsel joined in this request.

The court denied reunification services to the parents pursuant to section 361.5, subdivision (b)(13). Mother's counsel requested Lily and Molly be granted visitations with mother at the jail "through the glass." Counsel contended the girls were old enough to not be traumatized by such visits. The court ordered contact visits with the mother every other week to be supervised by the agency. If the visits could not be contact visits, the court found it would be detrimental to the children to visit their mother "through the glass." Father was granted visitation once a week.

The matter was set for a section 366.26 hearing on June 22, 2012. The parents were informed of and served notice of their right to seek writ review of the juvenile court's ruling.

Section 366.26 Hearing

The agency prepared a report for the section 366.26 hearing. The children had supervised visits with father once a week for two hours. A paternal aunt also visited the children. Because mother was incarcerated in a unit of the jail that did not permit contact visits, the children did not visit mother as of June 2012. The maternal grandmother visited the children twice, leaving one visit 20 minutes early.

Mother was originally in a jail unit that permitted contact visits. The social worker wrote mother to inform her of her right to visitation. Mother wrote back to the social worker that she would like to visit the children. In the process of scheduling a visit, however, mother got into trouble in jail and was transferred to a unit where contact visits were not allowed. Mother had not visited the children since their detention.

The prospective adoptive parents stated their desire to adopt the children. Given their young ages and good health, the children were considered adoptable. The prospective adoptive parents were close to the children and had been involved with the children since their placement. The prospective adoptive parents were committed to a plan of adoption. The agency recommended termination of parental rights with a permanent plan of adoption.

The section 366.26 hearing was conducted on June 29, 2012. Father called his sister, Heather T. (aunt), as a witness. The aunt testified that father had 19 visits with the children since his release from incarceration on February 11, 2012. The aunt stated all three children loved their father. Lily and Molly sometimes cried when they left father and asked to go home with him. Father's visitations were always supervised.

The aunt believed the children loved father and had a strong bond with him. The aunt also thought the children had a loving relationship with mother. The children told the aunt that they loved their mother. The aunt described their bond with mother as strong.

Father testified that he had between 25 to 30 hours of visitation with the children after his release from custody. Lily always came up to him, hugged him, and called him dad. Molly was always excited to see father. L.T. made eye contact with father and called him dad. Father explained that Lily seemed to understand some of what was happening with the visitation schedule and had recently become upset when leaving father.

Father had a very good visit with Lily the day before the hearing. Father loved his children. He acknowledged he had been incarcerated until recently and felt his bond to them was stronger now.

The juvenile court found the parents loved the children. The court found, however, that the parents failed to meet their burden of establishing that the parent-child benefit exception to termination of parental rights was applicable to this case and the children would gain in a permanent home with the new, prospective adoptive parents. The court found it was likely the children would be adopted and terminated the parents' parental rights.

DISCUSSION

The parents contend the juvenile court's restriction of the children's visitation with mother in jail to face-to-face contact deprived mother from availing herself of the beneficial parent-child relationship exception to termination of her parental rights. The parents further contend that mother's trial counsel was ineffective because he improperly filed an appeal rather than a writ petition and she could not seek writ review of the juvenile court's visitation order.⁴ Mother argues this issue has not been waived.

The agency argues that mother waived her right to appeal the visitation order by not filing a timely writ petition. The agency further argues that mother's contention fails on its merits. We agree with the agency's contentions and affirm the juvenile court's orders.

⁴ Mother filed a request that we take judicial notice of her trial counsel's notice of appeal, our order deeming that notice an intent to file an extraordinary writ petition, and our order dismissing the writ petition as abandoned. On September 7, 2012, we issued an order granting appellate counsel's request for judicial notice.

Forfeiture

The parents argue that mother's trial counsel was ineffective because he filed a notice of appeal from the juvenile court's orders after the disposition hearing rather than a writ petition.⁵ Mother's trial counsel filed a notice of appeal from the juvenile court's disposition rulings on March 2, 2012.

On March 21, 2012, this court filed an order notifying mother and her counsel that the juvenile court's orders were not subject to direct appeal, but could be reviewed by way of a petition for extraordinary writ. Our order treated the notice of appeal as a notice of intent to file an extraordinary writ pursuant to California Rules of Court, rule 8.450. We directed the Tulare County Superior Court clerk to prepare, certify, and serve the record of the proceedings pursuant to the rules of court. Finally, we gave this notice: "Trial counsel for B.R. or B.R. in propria persona shall be responsible for filing any petition for extraordinary writ." Mother and her trial counsel were served with this order. On April 9, 2012, after receiving nothing from B.R. or her counsel, we dismissed the writ proceeding as abandoned.

Mother argues we should not treat her challenge to the trial court's custody order as abandoned because her counsel was ineffective for filing the wrong document and, because mother was incarcerated, there was no assurance that she received our order and notice of March 21, 2012. Mother's argument ignores the fact that she was informed of,

⁵ The standards for a showing of ineffective assistance of trial counsel in dependency proceedings are the same as in criminal cases. First, there must be a showing that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Second, the parent must show prejudice, which is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case. (*In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1711.)

and served with written notice of, her right to file a writ proceeding at the conclusion of the disposition hearing.

We reject mother's contention that there was no assurance that she received our order and notice of March 21, 2012. The agency notes that mother was served with notice in open court at the conclusion of the disposition hearing of her right to file an extraordinary writ petition. The agency also accurately points out that proof of service, absent proof to the contrary, is evidence that the party received notice of the order. The filing of a proof of service creates a rebuttable presumption that the service was proper. (Code Civ. Proc., § 1013; *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1205; *Conservatorship of Wyatt* (1987) 195 Cal.App.3d 391, 396-397.) Mother failed to present any evidence that would rebut the presumption that she received proper service.

The burden is on the parent in a dependency case, not the parent's trial counsel, to pursue his or her appellate rights. (*In re Cathina W.* (1998) 68 Cal.App.4th 716, 724.) Mother had had more than a month after the disposition hearing, and more than two weeks after our March 21, 2012 order, to file a petition for extraordinary writ and failed to do so. Under section 366.26, subdivision (l), the failure of a parent to pursue an issue that can be raised by extraordinary writ after a juvenile court's rulings constitutes a waiver of that issue on appeal from the section 366.26 orders of the juvenile court. This court has interpreted the Welfare and Institutions Code as requiring parents to avail themselves of the writ procedures available to them at the conclusion of proceedings that occur prior to section 366.26 termination hearings. The failure of a parent to do so results in a waiver of any such issue on an appeal from the section 366.26 proceedings. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150-1156 [applying waiver on appeal with contentions by the parent very similar to those in the instant appeal].)

We further reject mother's contention that her trial counsel was ineffective for failing to pursue an extraordinary writ petition. Although counsel filed the incorrect

notice of appeal form, this technical error was effectively corrected when this court treated the notice of appeal instead as a notice of intent to file a writ petition. The parents are, in effect, asking this court to treat her and her counsel's inaction thereafter as proof that counsel's representation fell below professional norms. We refuse that invitation. Counsel could well have determined that mother did not have a viable claim concerning the juvenile court's visitation order. Also, we cannot tell on this record whether mother herself abandoned writ review by our court. We therefore find that the parents have failed to demonstrate how they were prejudiced by the mother's failure to pursue extraordinary writ review.

Juvenile Courts' Visitation Order

Assuming arguendo that this issue has not been forfeited for appellate review, we further reject the merits of the parents' claim that the juvenile court's visitation order was erroneous, and because of the court's order, mother did not have a proper opportunity to establish the beneficial parent-child relationship exception (§ 366.26, subd. (c)(1)(B)(i)).

Adoption, where possible, is the permanent plan preferred by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573 (*Autumn H.*)) For the beneficial relationship exception to apply, the parent must show first that he or she maintained regular visitation and contact with the children and must then show that the children would benefit from continuing the relationship. (*Id.* at p. 574.)

Appellate courts have interpreted the phrase "benefit from continuing the relationship" to refer to a parent-child relationship that promotes the well-being 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.*); *Autumn H., supra*, 27 Cal.App.4th at p. 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.*))

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; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

Mother had a long history of drug abuse and failed attempts at rehabilitation. Mother stated L.T. was her only "sober baby." The oldest daughter, Lily, lamented that mother smoked and drank too much, describing it as "awful, awful, awful." Lily and Molly displayed little emotional reaction when they were taken by the agency from their mother. Molly looked to Lily for all of her needs. Lily was upset that their brother was coming to live with them because she had always taken care of him. Clearly, the parents were not statutorily entitled to reunification services.

The parties concur that mother had no contact with the children during her incarceration. The parents argue, however, the court erred in not permitting contact with the children in jail "through the glass." Given the very young ages of the children at the

time the dependency was initiated, the trial court did not abuse its discretion in denying mother's request for visitation "through the glass."

The juvenile court permitted face-to-face contact between mother and the children. There is evidence that mother apparently did something while incarcerated to lose her privilege for face-to-face visitation and thereby limiting her possible contact. We are skeptical concerning mother's assumption that "through the glass" visitation would have been of a sufficiently high quality to bring her within the parent-child benefit exception to termination of parental rights. The uncontroverted fact is mother did not have contact with her children as a direct result of her own prolonged and sustained substance abuse. We find the juvenile court did not abuse its discretion in limiting any potential visits between mother and the children to face-to-face contacts.⁶

DISPOSITION

The orders of the juvenile court are affirmed.

⁶ Citing *In re J.N.* (2006) 138 Cal.App.3d 450, the parents argue that if we find the juvenile court abused its discretion as to either parent, the termination of parental rights to both must be reversed. Given our holding, we do not reach this contention.