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

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

TULARE COUNTY HEALTH AND HUMAN
SERVICES AGENCY,

Plaintiff and Respondent,

v.

AMANDA D.,

Defendant and Appellant.

F065771

(Super. Ct. Nos. JJV056920B)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Tulare County. Jennifer Conn Shirk, Judge.

Merrill Lee Toole, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Bales-Lange, County Counsel, John A. Rozum and Amy-Marie Costa, Deputy County Counsel, for Plaintiff and Respondent.

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

INTRODUCTION

Amanda D. (mother) appeals from the juvenile court's orders failing to find that the beneficial parent-child relationship exception to adoption is applicable to her case and terminating her parental rights to Madison D. (age four) pursuant to Welfare and Institutions Code section 366.26.¹ We reject mother's contentions and affirm the juvenile court's orders.

FACTS AND PROCEEDINGS

Early Proceedings

Mother had a long prior child welfare history with Madison's brother Levi, who was born in 2003. A dependency action involving Levi was initiated before he was six months old in 2003. Mother admitted allegations that she physically abused Levi and she eventually reunified with him. Referrals involving Levi were made again in 2006 based on deplorable conditions at home and an allegation that mother's boyfriend hit Levi. These referrals were closed.

A referral was made in 2007, after marks and bruises were found on Levi's legs and buttocks, but was closed because mother was outside the county and Levi had been under the care of a relative. A new referral was made for Levi in February 2009, on allegations of physical abuse and neglect. Levi suffered a long history of abuse in mother's custody.

On March 25, 2009, a petition was filed by the Tulare County Health and Human Services Agency (agency) pursuant to section 300 alleging that Levi, then six years old, had been physically abused by mother's boyfriend, A.P., who employed corporal punishment on Levi on many occasions. A.P. struck Levi on the head and made him stand in a corner for a long time to punish him. A.P.'s blows left Levi with a black eye. A.P. also called Levi derogatory names. Mother failed to protect Levi and A.P.'s

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

physical abuse of Levi placed Madison at substantial risk of serious physical harm. The juvenile court detained the children at the conclusion of a detention hearing on March 26, 2009.

A few days after the detention hearing, social workers met with mother, who claimed A.P. had left and she no longer had dealings with him. Nevertheless, A.P. attempted to send her text messages. Mother claimed that Levi suffered his black eye from a fight at school. Mother asserted that her home was not dirty and that she only had dirty clothes out of a hamper. The social workers had photographs that showed the filth in the residence was far more serious than dirty clothes on the floor.

On April 23, 2009, mother executed a waiver of rights document, waiving her right to a hearing and admitting the allegations in the petition. The court found all of the allegations in the petition to be true. The court ordered reunification services for mother. Mother was referred for a psychological evaluation. The psychologist who evaluated mother found that mother suffered from a depressive disorder and a borderline personality disorder with dependent personality traits. Mother exhibited suicidal ideation in 2007.

The psychologist noted that mother came from an unstable home and was the victim of physical and sexual abuse. Mother had learned to use violence to cope with uncomfortable emotions. When mother's relationships deteriorated, her sense of identity became jeopardized and she acted out with aggression and self-harming conduct. Mother had a past history of stress-related suicidal threats and paranoid ideation. The psychologist recommended mother receive individual therapy to target attachment issues related to her physical and emotional abuse and seek counseling services at local agencies. The psychologist believed mother should work on improving her impulse control, improving her social communications, building a sense of autonomy, enhancing her coping skills, and improving her self-esteem.

Prior to the six-month review hearing, mother reported that A.P. had moved out of town shortly before the birth of their child, A.P., Jr.² On October 29, 2009, the court ordered a transition plan rather than ordering the return of the children to mother because mother had not undergone conjoint counseling and had no unsupervised visits with the children. At a hearing on December 15, 2009, the court approved a transition plan formulated by the agency for the return of Levi and Madison back into mother's home. Mother was ordered to commence conjoint counseling with Levi. As of mid-March 2010, all four conjoint therapy sessions were conducted not with Levi and mother, but with Levi and a foster mother.

The children returned to mother's home on December 18, 2009. A social worker's status review report prepared in March 2010 noted that mother continued to need in-home services and was just beginning conjoint counseling with Levi. The social worker recommended another six months of family maintenance services to make the children's placement with mother successful.

By March 28, 2010, however, mother had Levi living with a relative because her residence was small. Mother was trying to obtain better housing. A representative from Court Appointed Special Advocates (CASA), observed that mother still became overwhelmed at times with supervising Levi, resorting to yelling at him. Mother called and asked CASA to discuss Levi's behavior with him. CASA declined and told mother she needed to handle those issues. CASA learned that during a family gathering, Levi spilled mother's beer. Mother responded by telling him that she was going to kick his "fucking face" for what he did. CASA visited mother's home and found it was becoming more and more cluttered and dirty with each visit. The last time CASA was allowed inside mother's home, it was cluttered, dirty, had dirty dishes and smelled of urine.

² Levi and A.P., Jr. are not subjects of this appeal.

At a review hearing on April 23, 2010, the court did not order removal of the children but did order that the agency increase its services and monitoring of the case. Although mother subsequently finished in-home training services, she still had difficulty with Levi's behavior. Mother was bitten by Levi on one occasion. Also, mother did not appear to follow the training she received and followed her own parenting style. Mother also failed to participate with Levi in conjoint therapy.

On October 1, 2010, Levi was removed from mother's custody at an uncontested review hearing and a section 387 petition was subsequently filed. On October 5, 2010, the court ordered the detention of Levi and Madison. In late 2010 and early 2011, mother missed several visits with Levi and ended other visits with him 40 minutes to an hour early. Mother also cancelled three visits with Madison and a fourth visit due to illness. Mother only attended four sessions of individual counseling. The agency remained concerned with mother's ability to properly care for Madison.

On March 11, 2011, the juvenile court ordered a section 366.26 evaluation of Levi and set his case over for a section 366.26 hearing in August 2011. The court continued Madison as a dependent of the juvenile court. A report prepared by the agency recommended Madison's case be closed, although the report acknowledged that mother had received 53 months of services and continued to be resistant to therapy. A CASA report prepared in August 2011, however, indicated mother's residence was still "unusually messy with clothes strewn about." There was often the smell of urine and the kitchen was messy.

Mother reported that A.P., Jr. and Madison play to the point where they pull each other's hair out and bite each other. Mother was concerned about Madison's speech development. Mother completed in-home parenting classes. Mother attended 19 individual therapy sessions and missed 18 sessions. After almost two years in therapy, however, mother had not made any progress and failed to open up with her therapist about her own past abuse. At the review hearing on August 26, 2011, the juvenile court

retained jurisdiction over Madison and ordered that mother continue with individual counseling. The court ordered evaluation of Madison by the Central Valley Regional Center (CVRC) and that she be assessed for any speech or hearing impediments. The court further ordered that the behavior between siblings be addressed.

The evaluation by CVRC indicated that Madison had no qualifying developmental disabilities. CVRC ruled out mental impairment, cerebral palsy, epilepsy, or autism. The agency recommended in January 2012 that Levi's case proceed to a section 366.26 hearing and Madison's case be dismissed pending the outcome of a 10-day referral the agency had just received. Levi was living with relatives in another state who wished to proceed to adoption.

Section 387 Petition

On February 21, 2012, the agency filed a first amended petition pursuant to section 387 alleging that mother violated previous court orders by allowing A.P. back into her home. Further, A.P. became involved in a domestic dispute, throwing a remote control across the room. The remote hit Madison on her cheek causing a bruise. Mother resisted efforts by law enforcement to execute a protective custody warrant for Madison and A.P., Jr. After an altercation, Madison was taken into custody. A.P. had taken A.P., Jr. on an unsupervised visit in southern California. The agency contacted A.P. who agreed to surrender the child. Madison was in good health, but her clothes were dirty and her hair was matted. Madison also had a visible scar above one of her eyebrows and a rash on her cheek. Mother was arrested for resisting arrest.

On February 22, 2012, the juvenile court again detained Madison.³ Madison was placed in the home of a confidential foster family. The agency recommended a section 366.26 hearing be initiated for Madison because mother had received 60 months of services and there were no additional services available. Also, mother's reunification

³ Madison's younger brother A.P., Jr. was also detained.

services to Levi had been terminated. Although the agency received information in January 2012 that A.P. had lived with mother for the previous two years, mother continued to deny that she and her children resided with A.P. A.P. admitted to social workers that he lived with mother between February 2011 and October 2011.⁴ A.P. also admitted that he got into arguments with mother.

In an addendum report, the agency recommended that reunification services be denied for mother based on the prior termination of services to Levi, pursuant to section 361.5, subdivision (b)(10), and because mother had received 60 months of services and there were no additional services to offer to her, pursuant to section 361.5, subdivision (a)(1).

At the jurisdiction/disposition hearing on March 28, 2012, the agency submitted the matter based on the reports of its social workers and Levi and Madison's case files. Mother testified that she did not allow A.P. to live with her and that he resided with her until March 2009. A.P.'s father testified that A.P. lived with mother until he moved to the father's home in southern California in mid-November 2011.

The juvenile court found the allegations in the petition to be true, finding by a preponderance of the evidence that Madison was present when A.P. threw the remote control. The court noted that it was difficult to make a decision when the mother and A.P. have lied to several people at different times. The court found both A.P. and mother not to be credible.

⁴ A.P. was under a court order not to have contact with Madison. Although A.P. admitted that he lived with mother until October 2011, he inconsistently told social workers that he lived with mother until August 2011. In October 2011, mother sought a protective order against A.P. A.P. filed a response in November 2011 stating that he and mother had lived together for most of the preceding two years and he had recently moved to southern California.

At the disposition hearing, the court found that it could not imagine what other services could be offered to mother or what services would change the mother's views or behaviors. The court found that when mother was provided services in the past she only complied minimally and the children remained at risk while in mother's care.

The court set the matter for a section 366.26 hearing and advised mother that her parental rights could be terminated and her child placed for adoption. The court denied mother reunification services as to Madison. The court ordered weekly visitation. Mother was served with and notified of her right to file a petition for writ review of the court's orders.

Section 366.26 Proceedings

On June 1, 2012, there was a section 366.26 hearing for Levi. The court found the sibling relationship and parent benefit exceptions to termination of parental rights did not apply. The court terminated mother's parental rights as to Levi.

The agency prepared a section 366.26 report for Madison in July 2012, recommending a permanent plan of adoption and termination of mother's parental rights. Madison was placed with relative caretakers who sought to adopt her. Mother had been permitted weekly visits with Madison for a minimum of one hour. The caregiver initially supervised the visits until mother showed up with her boyfriend at two visits even though the caregiver informed mother that she was not supposed to bring her boyfriend to the visits.

The agency supervised subsequent visits with mother and Madison. Madison and A.P., Jr. were excited to see mother and ran over to hug her. The children were also excited to see their caregiver and ran over to hug her as well. Mother's only contact with Madison came through court-ordered visits. Given Madison's age, general good health and mental status, the social worker found it likely that she would be adopted. Also, the current caregivers were clear in their desire to adopt her. The social worker stated that Madison was thriving under the care of the current caregivers and it would be in her best interest to be adopted by them.

Mother testified at the August 22, 2012 section 366.26 hearing that she visited Madison once a week for an hour. Mother explained that Madison always gave her a big hug and they would play with dolls or a Curious George memory game. Mother stated that Madison was always affectionate with her. Mother only missed one visit due to illness and a few others when she was in custody. Mother stated that she loves Madison with all of her heart. Mother's counsel asked the court to apply the parent benefit exception to Madison.

The juvenile court found mother failed to meet her burden of showing that the parent benefit exception to termination of parental rights applied. The court found terminating mother's parental rights would be in Madison's best interests. The court found by clear and convincing evidence that it was likely Madison would be adopted and terminated mother's parental rights. Madison's permanent plan is for adoption.

DISCUSSION

Mother argues that because of the close relationship she had with Madison, 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 her parental rights would be detrimental to Madison. Mother also argues the plan that maintains Madison's best interests is legal guardianship. We disagree.

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.*); *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.⁵ (*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

⁵ To the extent that mother's argument can be inferred to mean that we apply a substantial evidence standard of review, rather than an abuse of discretion standard of review when the juvenile court finds the parental benefit exception to adoption inapplicable, we reject it. Although we do not apply the substantial evidence standard of review to the juvenile court's rejection of the parent-child benefit exception, we note that there is substantial evidence in the record to support the juvenile court's 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.)

Mother argues that she loves Madison, Madison knows her as “mommy,” and mother was the one who cared for Madison most of her life. In mother's view, maintenance of a true parent-child relationship with Madison warranted a finding that termination would be detrimental. Mother relies on her reading of *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*) to support her claim. Another case similar to *S.B.* is *In re Amber M.* (2002) 103 Cal.App.4th 681 (*Amber M.*). We are neither factually nor legally persuaded by mother'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, mother presented no such evidence. Mother exposed Madison to A.P., who had a long history of physically and emotionally abusing Madison's older brother, Levi. Furthermore, Madison was beginning to show signs of physical injury. A.P. admitted throwing a remote control that hit Madison in the head. Madison also had a scar above her eyebrow. Mother and A.P. lied to authorities about the fact that A.P. continued to live with mother long after the court had ordered that he have no contact with Madison. At times, mother would keep her residence clean, but would later let it become dirty and messy. The last time Madison was detained, she was dirty and her hair was matted. In conducting herself in this way, mother was not being a consistent or nurturing parent to Madison.

We do not quarrel with mother's assertion that she loves Madison. 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. We agree with respondent that mother failed to demonstrate evidence at the hearing that Madison would benefit from maintaining a relationship with her.

Although mother asserts that she was involved with Madison's life, her insistence of staying in an abusive relationship for an extended period of time shows that mother was incapable of prioritizing Madison's need for security and protection. Mother also failed to apply most of what she had learned in 60 months of services. Mother's attendance in individual therapy was inconsistent and she failed to show any insight into her own behavior as a result of therapy.

Mother failed to demonstrate at the section 366.26 hearing that she occupied a true parental role with Madison that resulted in a significant, positive, emotional attachment of Madison to mother. Mother did not show that the juvenile court abused its discretion in rejecting the application of the parental benefit exception to this case.

We also reject mother's contention that the juvenile court erred in failing to consider legal guardianship as an option in mother's case. We agree with respondent that mother attempts on appeal to turn the statutory preference for legal adoption on its head by arguing that the juvenile court should have chosen legal guardianship as Madison's permanent plan.

DISPOSITION

The court's orders denying mother's motion to apply the parent-benefit exception, choosing adoption as the child's permanent plan, and terminating mother's parental rights pursuant to Welfare and Institutions Code section 366.26 are affirmed.