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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re CHLOE J. et al., Persons Coming Under the Juvenile Court Law.	
TULARE COUNTY HEALTH & HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. PHILLIP J., Defendant and Appellant.	F066199 (Super. Ct. Nos. JJV064753A, JJV064753B) **OPINION**

THE COURT*

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

Neale B. Gold, under appointment by the Court of Appeal, Defendant and Appellant.

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

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

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Phillip J. (father) appeals from an order of the juvenile court terminating his parental rights to his children, Chloe and Phillip, Jr. Father contends that the juvenile court erred in terminating his parental rights because he maintained regular visitation with his children and they would benefit from continuing their relationship with him. We affirm.

STATEMENT OF THE CASE AND FACTS

Prior History

In 2005, father, who at the time had a lengthy arrest record (driving under the influence, unlawful sex with a minor, burglary and drug charges), was incarcerated when his child Alexis, born in 1998, was the subject of a dependency petition. Father was released in May of 2005; Alexis was placed with him in September 2005. Father was incarcerated more than once after 2005 on various charges. Alexis, a half-sibling to the children at issue here, is not included in this appeal.

Circumstances Leading to Chloe's Dependency

By 2009, father had another child, Chloe, born in November of that year. Chloe's mother was the subject of various referrals for abuse or neglect and did not have custody of her older child Jordan because of her abusive relationships, drug use and unstable housing.

Chloe came to the attention of the Tulare County Health and Human Services Agency (agency) in March of 2010, when she was four months old. A referral to the agency alleged that father had been arrested for domestic violence and that both mother and father used drugs. An agency investigation determined that father was incarcerated on various charges, including corporal injury to a spouse. Mother declined agency services and the referral was closed.

Section 300 Dependency Petition (Chloe)

Two months later, in May of 2010, the agency received another referral, again alleging that mother used drugs. During the investigation, both mother and father admitted to the use of methamphetamine and marijuana and the domestic violence that led to father's arrest in March of 2010. Mother tested positive for methamphetamine and marijuana and Chloe was removed. A section 300 petition was filed May 27, 2010. At the time, Chloe was six months old and father was still incarcerated.

Jurisdiction/Contested Disposition Hearing (Chloe) July 1, 2010

The petition was sustained and family reunification services ordered for mother and father. Upon his release, father was allowed twice a week supervised visits with Chloe. The court specifically found that mother was not an appropriate supervisor for father's visits.

In July of 2010, Chloe was placed with mother at her residential substance abuse program. Less than a month later, mother left the program, leaving Chloe behind. Chloe, now eight months old, was again detained.

Section 387 Petition and Detention/Jurisdiction/Disposition Hearings (Chloe) July 29, 2010; August 19, 2010; and September 1, 2010

On July 28, 2010, a section 387 petition was filed. Father remained incarcerated. The petition was sustained and family reunification services again ordered. Father was out of custody by August of 2010 and given twice a week supervised visits with Chloe.

Six-Month Review Report and Hearing (Chloe) January 11, 2011

By the time of the December 15, 2010, six-month review, Chloe had changed placements three times and was adjusting well to a fourth foster care placement. Chloe's foster mother reported no concerns as to her health and development.

Father continued to participate in services, including a domestic violence program and parenting education classes, substance abuse treatment, and random drug testing.

Father attended supervised visits with Chloe and she was happy to see him. Mother was not compliant with her services.

At the January 11, 2011, contested review hearing, the juvenile court ordered that family reunification services continue for both parents. Although the agency was granted discretion to lift supervision as to father's visits, it specifically found that father was not an appropriate supervisor for mother's visits. The court cautioned father that if mother did not comply with her services, he would have to make "a choice" between mother and Chloe.

Twelve-Month Review Report (Chloe)

In a report prepared in anticipation of the 12-month review hearing, the social worker noted that, by April of 2011, Chloe had bonded well with her foster parents and family. While she referred to her foster parents as "mommy" and "daddy," she also called father "daddy." Mother and father continued to visit Chloe weekly and Chloe recognized them and was happy to see them, but displayed no separation anxiety when the visits ended. An adoption assessment recommended a plan of adoption with Chloe's current caretakers if the parents did not reunify within the next six months.

Father was compliant with his case plan and demonstrated good progress. The agency recommended termination of mother's services and discretion to return Chloe to father under family maintenance after successful extended unsupervised visits. The social worker informed both father and mother that if Chloe were returned to father, mother had to move out of the house, which mother agreed to.

In May of 2011, father married mother, who was pregnant with their second child, due in July of 2011. Mother tested positive for methamphetamine more than once and was not compliant with her case plan.

Section 300 Petition (Phillip, Jr.)

Phillip Jr. was born four weeks premature in June of 2011. A section 300 dependency petition was filed and Phillip, Jr. was placed with father. Weekly supervised visits were ordered for mother; father was not to supervise the visits.

Contested 12-Month Review Hearing (Chloe) July 8, 2011

At the July 8, 2011, contested 12-month review hearing, mother testified that she and father were married, but that she had moved out of the house to live with her aunt. The juvenile court found that father had made substantial progress and family reunification services were continued for father while Chloe remained in foster care. Chloe was now 20 months old.

On July 28, 2011, the section 300 petition for Phillip Jr. was sustained. Father continued to do well, having completed parenting education and participating in a domestic violence program, substance abuse treatment and drug testing. Father had a good support system and agreed that the only contact mother would have with the children would be through the agency's instruction. Father was willing to separate from mother in order to have custody of Chloe and Phillip Jr.

Jurisdiction/Disposition Hearing (Phillip, Jr.) July 28, 2011

The juvenile court ordered that Phillip Jr. remain with father under family maintenance. No services were ordered for mother.

Mother's Section 388 Petition

On the eve of the 18-month review hearing, mother filed a section 388 petition requesting additional services. The juvenile court found no changed circumstances and denied the petition.

18-Month Review (Chloe) and Section 364 Review (Phillip Jr.) November 18, 2011

The report prepared in anticipation of the 18-month review hearing stated that father continued to participate in his case plan. He completed a substance abuse program, participated in co-dependency counseling, completed 44 out of the 52 required domestic

violence classes, consistently tested clean and earned unsupervised daytime visits with Chloe.

At the November 18, 2011, combined hearing, father asked the juvenile court to consider returning both children to him and terminating dependency. Father had received 18 months of services, during which he demonstrated growth and compliance with court ordered services. According to the social worker, he had provided excellent care for Phillip Jr., maintained regular visits with Chloe, and exhibited a "strong bond" with both children.

The juvenile court found father's progress substantial and ordered Chloe returned to him under family maintenance. By now Chloe was two years old and had been in out of home placement since she was six months old.

Family Maintenance Review Report and Hearing, May 4, 2012

The report in anticipation of the May 4, 2012, status review hearing stated that father was doing well. He lived in a motel room with the children, had food and operating utilities, and he worked full-time while his adult sister cared for the children. Father received cash assistance, food stamps and Medi-Cal for the children, who appeared healthy and well cared for. Father told the social worker he accepted responsibility for his past actions and was now focused on his children and did not plan to reunify with mother.

The agency recommended that father be granted sole legal and physical custody of the children and that dependency be terminated. But the juvenile court disagreed and continued the children as dependents and father on family maintenance.

On May 3, 2012, the day before the scheduled review hearing, father, mother and both children registered at a local motel. On May 9, 2012, five days after the hearing, father was arrested on burglary charges and incarcerated after officers found him hiding in a commercial building near the motel. Three days later, the children were located in a car with mother, who, although she admitted to using methamphetamines earlier that day,

was driving. Mother was arrested for possession of an illegal substance. The children were again detained.

Section 387 Detention Petition and Hearing, May 21, 2012

On May 17, 2012, a section 387 petition was filed. At the time, father was again incarcerated.

The petition stated that father had allowed mother to have contact with the children in violation of court orders. Neither mother nor father advised the agency of either of their arrests or that the children were not in father's custody.

Father denied facilitating contact between mother and the children and denied residing with her, but ultimately admitted to leaving the children in mother's care because he had no one else to care for them while he worked.

The agency recommended no further services for father and that a section 366.26 hearing be set.

Contested Section 387 Jurisdiction/Disposition Hearing, June 21, 2012

On June 21, 2012, a contested section 387 hearing was held. Father was incarcerated and not present, but counsel made an offer of proof that father would testify that on May 7, 2012, the day father was arrested, he left the children with a babysitter named Jamie.

The juvenile court sustained the section 387 petition and denied father further services. A section 366.26 hearing was set. Father was allowed every other week supervised visits with the children, if allowed by the custody facility. Once released, he was allowed twice a week supervised visits.

Father was informed of and served notice of his right to seek writ review. No writ petition was filed.

Section 366.26 Termination Hearing, October 31, 2012

A report prepared in anticipation of the October 12, 2012, section 366.26 hearing stated that, because father was incarcerated in a facility that did not permit contact visits,

Chloe and Phillip Jr. had not seen their father for six months. The children were placed with their maternal great aunt who had cared for them off and on since birth and was willing to pursue adoption. The children had a strong bond with the maternal aunt and she provided them a nourishing and healthy environment. This was Chloe's tenth placement and Phillip Jr.'s fourth. The adoption assessment found the children, who were young and in good health, to be adoptable. Termination of parental rights was recommended.

At the contested section 366.26 hearing, father was present with counsel. He testified that he had been incarcerated for the past six months and not able to visit the children. According to father, he would be released in three days and wanted to continue his relationship with the children.

The juvenile court took judicial notice of the "entire" case file and found that Chloe and Phillip Jr. were adoptable. It found that father did not meet his burden of establishing that the parent-child benefit exception to termination of parental rights applied. The juvenile court terminated father's parental rights.

DISCUSSION

Father contends that substantial evidence supported a finding that he shared a strong and beneficial bond with his children, pursuant to the section 366.26, subdivision (c)(1)(B)(i) statutory exception to termination of his parental rights. We disagree.

Applicable Law

Once reunification services are terminated, a parent's interest in the care, custody, and companionship of his or her child is no longer paramount. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Rather, the focus shifts to the child's need for permanency and stability. (*Ibid.*) When a court has not returned an adoptable child to the parent's custody and has terminated reunification services, adoption becomes the presumptive permanent plan. (See *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) We note that father does not challenge the juvenile court's finding that Chloe and Phillip, Jr. were

adoptable. Considering its findings of adoptability, the juvenile court had to terminate parental rights unless it found one of the statutory exceptions to the preference for adoption applied. (§ 366.26, subd. (c)(1)(B)(i)-(vi).)

The statutory exception urged by father provides that once a child is found to be adoptable, parental rights must be terminated unless the court finds that termination would be detrimental to the child because "[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).) We note that it is the parent's burden to prove the exception. (Evid. Code, § 500; *In re Erik P.* (2002) 104 Cal.App.4th 395, 401.)

The parent-child relationship exception occurs when a significant parent-child relationship is found to exist. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 574.) The juvenile court must then engage in a balancing test, juxtaposing the quality of the relationship and the detriment involved in terminating it against the potential benefit of an adoptive family. (*In re Cliffton B.* (2000) 81 Cal.App.4th 415, 424-425; see also *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154-1156.)

Interaction between the natural parent and the child will always confer some incidental benefit to the child. (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575.) But a showing that the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent is not sufficient where that relationship does not meet the child's need for a parent. (*In re Jasmine D., supra,* 78 Cal.App.4th at pp. 1348, 1350.) A parent's failure to progress beyond monitored visitation with a child and to fulfill a "meaningful and significant parental role" justifies an order terminating parental rights. (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1109.) "It would make no sense to forgo adoption in order to preserve parental rights in the absence of a real parental relationship." (*In re Jasmine D., supra,* at p. 1350.)

The factors to be considered when looking for whether a relationship is important and beneficial are "(1) the age of the child, (2) the portion of the child's life spent in the

parent's custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child's particular needs." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467, fn. omitted.) "[F]or the exception to apply, the emotional attachment between the child and parent must be that of parent and child rather than one of being a friendly visitor or friendly nonparent relative, such as an aunt." (*Id.* at p. 468.)

Standard of Review

Because there is some confusion by the parties about the appropriate standard of review, we set it out in detail here. On appeal after a court has rejected a parent's effort to establish the exception, two different standards of review apply. (See *In re K.P.* (2012) 203 Cal.App.4th 614, 621-622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.) Since the parent must first show the existence of a beneficial parental relationship, which is a factual issue, we uphold a court's express or implied finding that there is no beneficial relationship if supported by substantial evidence. (*In re K.P.*, *supra*, at p. 621; *In re Bailey J.*, *supra*, at p. 1314.) More specifically, a challenge to a court's failure to find a beneficial relationship amounts to a contention that the "undisputed facts lead to only one conclusion." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1529.) Thus, unless the undisputed facts establish the existence of a beneficial parental relationship, a substantial evidence challenge to this component of the juvenile court's determination cannot succeed. (*In re Bailey J.*, *supra*, at p. 1314.)

The second requirement for the exception is that the beneficial parental relationship constitute a "compelling reason for determining that termination would be detrimental …." (§ 366.26, subd. (c)(1)(B); *In re K.P.*, *supra*, 203 Cal.App.4th at p. 622.) Although grounded in the facts, the court's determination of this issue is a "'quintessentially' discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption. [Citation.] Because this component of the juvenile court's decision is

discretionary, the abuse of discretion standard of review applies." (*In re Bailey J., supra,* 189 Cal.App.4th at p. 1315; see also *In re K.P., supra,* at p. 622.)

For instance, when a parent has had custody of the children and visited consistently when he did not have custody, and had an established parental bond recognized by the agency worker's, substantial evidence supports the first prong of the application of the statutory exception. (*In re K.P., supra,* 203 Cal.App.4th 614, 622.) The determination then becomes whether under the facts of the case, there is a compelling reason for the court to order a plan other than adoption, and whether the court abused its discretion in failing to do so. (*Id.* at pp. 622-623.) In simplest terms, the establishment of the beneficial parental bond exception depends upon a parent having kept significant contact through visitations with his child, and the child having developed such a beneficial bond that it would be detrimental to sever it. The benefit from continuing with the parent would outweigh any benefit to the child derived from his or her adoption. (§ 366.26, subd. (c)(1)(B)(i); *In re Autumn H., supra,* 27 Cal.App.4th 567, 575.)

Father argues he established both prongs of the parental relationship exception, and that the record in this case is supportive that his children would best benefit from a continued relationship with him.

Analysis

We conclude that father's sporadic contact with his children failed to satisfy even the initial prong of the beneficial parent-child relationship exception to termination of his parental rights. It is undisputed that father had not visited or contacted the children for about six months prior to the section 366.26 hearing. But father argues that he was unable to visit his children during the months preceding the hearing because the facility where he was detained would not allow it; that he was going to be released three days after the hearing and could resume his relationship with his children; and that his children

had lived with him for a significant period prior to his arrest (and the children's most recent removal and detention).

We note that, although father's latest incarceration did not allow contact visits with his children, there is nothing in the record to suggest that he otherwise tried to maintain contact with the children during that time period. Six months is a significant portion of both Chloe and Phillip, Jr.'s lives. The record does indicate that father attended scheduled visits with the children when he was not incarcerated and that the visits went well.

As for having custody of the children, the record shows that Chloe had been in father's custody for only about 10 months, less than a third of her life. Prior to the filing of the original section 300 petition, Chloe had lived with father for about four months (from birth to father's incarceration March of 2010). She then lived with mother for two months, in foster care for about 18 months, and again with father for about six months, before she was again detained. Phillip, Jr. lived with father for about the first 11 months of his life, before he was detained.

Even if we were to find that father maintained regular visitation with the children, satisfying the second prong requires the parent to prove that "severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed. [Citations.] A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Angel B., supra,* 97 Cal.App.4th at p. 466.) Evidence that a parent has maintained "'frequent and loving contact' is not sufficient to establish the existence of a beneficial parental relationship." (*In re Bailey J., supra,* 189 Cal.App.4th at pp. 1315-1316.)

"To trigger the application of the parental relationship exception, the parent must show the parent-child relationship is sufficiently strong that the child would suffer

detriment from its termination." (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449.) A beneficial relationship is one that "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." (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575.) The existence of this relationship is determined by "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs …." (*Id.* at p. 576.)

Here, we note that the children, still very young at the time of the termination hearing, spent a good deal of time being shuffled back and forth between parents and out of home placements due to father and mother's behavior. By the time of the termination hearing, there is no evidence in the record that the children would suffer detriment if the parent child relationship was severed. Instead, both children were placed with a relative who had known them from birth and was committed to adoption. The children were assessed to have a strong bond with the prospective adoptive parent, who consistently met the children's needs and continued to put those needs "as a top priority in her life." The prospective adoptive parent also had the help and support of her adult daughter and son-in-law, "who are both very active in the children's lives."

Father claims that a beneficial relationship existed, pointing to the social worker's statement which stated, "point blank, that termination of parental rights would be detrimental to Chloe because of her regular and beneficial contact with her father." But this assessment was taken from an adoptions consultation staffing report done in May of 2011, almost a year and a half before the termination hearing. By the time of the termination hearing, the agency argued that the beneficial relationship exception did not apply, citing the case history and the repeated attempts to place the children with father, the services provided, and the repeated failures on father's part to protect the children by keeping mother from them and his inability to keep from participating in behavior leading to arrest and incarceration.

We find that there is substantial evidence to support the juvenile court's findings that Chloe and Phillip, Jr. would not suffer detriment from termination of the parent-child relationship, and that maintaining the relationship would not promote their well-being "to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Amber M.* (2002) 103 Cal.App.4th 681, 689.) Although father has demonstrated that he cares for his children and has an affectionate relationship with them, because he continues to subject them to mother and because he cannot himself refrain from criminal behavior, he has not demonstrated an ability to provide the children, over the long-term, with a stable, safe and loving home environment. Accordingly, the juvenile court properly found there was no beneficial parental relationship sufficient to overcome the statutory preference for adoption.

DISPOSITION

The order terminating parental rights is affirmed.