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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re M.B., et al., Persons Coming Under the
Juvenile Court Law.

TULARE COUNTY HEALTH AND HUMAN
SERVICES AGENCY,

Plaintiff and Respondent,

v.

M.B.,

Defendant and Appellant.

F066367

(Super. Ct. No. J11-65562)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Hugo Loza, Commissioner.

Carol A. Koenig, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Michael B. (father) appeals from the order terminating his parental rights under Welfare and Institutions Code section 366.26.¹ Father contends the juvenile court abused its discretion when it denied his section 388 petition to return the children to his custody or reinstate reunification services due to changed circumstances. Father also contends the court erred in failing to apply the beneficial relationship exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)). We affirm.

FACTS

Father and Rebecca B. (mother) are the parents of Melody (born January 2008), Zachary (born December 2009), and Robert (born July 2011). The Tulare County Health and Human Services Agency (agency) initiated the current dependency proceedings in July 2011, after mother and Robert both tested positive for amphetamines at the time of Robert's birth. Shortly thereafter, all three children were placed together in a single foster home.

In August 2011, the juvenile court exercised jurisdiction over the children pursuant to section 300, subdivision (b), finding true allegations that mother's substance abuse issues, and father's failure to adequately protect the children from mother's substance abuse issues, caused Robert to suffer serious physical harm or illness, and placed his siblings, Melody and Zachary, at substantial risk of suffering physical harm or illness. The court granted the parents reunification services, and ordered supervised visits to occur twice a week.

A status review report filed in January 2012, reflected that the parents were visiting regularly but their interactions with the children were "limited." Mother held Robert throughout the visits and paid little attention to Melody and Zachary. Mother would not allow father to hold Robert unless Melody needed to use the restroom. During visits, father watched Melody and Zachary play in the playground. He also talked to

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

them and gave them snacks. Despite the parents' limited interaction with the children, the children appeared happy with the visits and, therefore, the agency concluded that family visitation continued to remain in the children's best interests.

In June 2012, the agency filed a status report for the 12-month review hearing, recommending that the juvenile court terminate the parents' reunification services and set a section 366.26 permanency planning hearing. According to the report, the parents were failing to comply with their case plans and they frequently missed visits with the children without first informing the agency or providing any explanation. At the time of the report, the parents had missed 19 out of 47 scheduled visits. When they did visit, they usually arrived late, allowing them less time with the children. Sometimes mother, without explanation, would stay in the restroom or in her car for 10 to 20 minutes prior to or during the visits.

The parents usually had a difficult time managing the children during visits. The children would cry, display tantrums, or repeatedly ask for the foster parents. Mother continued to hold Robert during visits and paid little or no attention to his brother and sister. The parents did not engage or supervise Melody and Zachary when they played in the playground. The parents rarely spoke to the children and displayed little interest in them.

At the 12-month review hearing in July 2012, father disputed the agency's report regarding his missed visits with the children, and testified he only missed three visits due to his work and car troubles. Father also testified the social worker cancelled many visits, citing the foster parents as the reason. Father denied arriving late to visits and testified he usually arrived as early as possible. Father also denied reports that he failed to interact with the children or show warmth or interest in them. According to father, he read books to the children, and brought toys, puzzles, and coloring books. He also gave the children piggy back rides and got down on the ground to play with them. Father

denied that he would engage in activities not involving the children, such as eating or being on his cell phone.

At the conclusion of the hearing, the juvenile court terminated reunification services and set a section 366.26 hearing. The court cited father's failure to maintain regular visitation as one of its reasons for terminating services. The court also reduced visits to once a month.

On October 25, 2012, the agency filed a report for the section 366.26 hearing, recommending that parental rights be terminated and the children be freed for adoption. The report reflected that the children had lived with their current caregivers, the prospective adoptive parents, since they were first placed with them in July 2011. The children's infant sister, Lacey, was also recently placed in the same home and the prospective adoptive parents wanted to adopt her as well.

According to the report, supervised visits were occurring at a fast food restaurant. The parents were late to most of their scheduled visits. Father missed one of the visits, and mother missed two. With respect to father's missed visit, which was held at a different location than usual, the report noted that father called after the visit time and said he was lost. Additionally, the October visit had not been scheduled because the parents' contact numbers seemed to be disconnected. The social worker who supervised visits reported that the parents continued to have a difficult time interacting with and redirecting the children. Greetings were always distant with father; Melody gave hugs and kisses, but Zachary and Robert showed no response or interest. The children did not cry or have separation anxiety when visits ended and went readily to the prospective adoptive parents.

On November 5, 2012, father filed a section 388 petition for modification, requesting that the court return the children to him under family maintenance services, or reopen reunification services with increased visitation. In support of the petition, father asserted that, since the last court hearing, he had attended every visit and arrived on time.

The visits took place at a Burger King, which was generally a very noisy setting, which made it difficult to be heard and to hear everything the children were saying.

Father believed he interacted well with the children throughout visits. He brought the children lunch, snacks, toys, and educational books and set them up on the floor of the playground. He also read to and colored with the children. The children were very excited to see him at visits. The two oldest children ran to him, yelling, "That's my dad, that's my dad," and gave him hugs and kisses. They sat on his lap and told him what they had been doing recently. The oldest child frequently asked when they would be going home with father.

Father asserted the children were closely bonded to him and the bond between him and Melody was especially strong. Melody asked and talked about going home with father in front of the foster parents and the person supervising the visits. Father concluded he was "very proud of the way he has raised this children, especially the fact that they are polite and do not 'act out or raise a fuss' when the visit ends" and he felt "certain that [his] children would be happier and better off with him."

On November 30, 2012, the agency filed a response to father's section 388 petition. The response noted that, despite father's completion of some parenting classes prior to termination of his reunification services, he did not exhibit the parenting skills necessary to care for the children. His interactions with the children during visits continued to be limited. Although the visits were sometimes appropriate, for the most part, the visits did not benefit the children because father did not engage them or have the ability to direct their behaviors, and he was not attentive to their needs. The social worker who supervised the visits reported she never heard the older children asking or talking about going home with the parents. The social worker also reported that, while Melody seemed to know her parents, the younger children did not.

In addition, the agency reported there was a close bond between the children and their prospective adoptive parents, whom the children identified as their biological

parents and called “mommy and papa.” The agency noted the prospective adoptive parents had worked with the children on their behaviors and manners, and the progress the children had made due to this work was apparent during visits. The agency concluded that, due to the children’s young ages and father’s lack of parenting skills, it would be detrimental if the children were returned to his care and custody at that time.

On December 4, 2012, the juvenile court held an evidentiary hearing on father’s section 388 petition. Father’s mother, Melba R. (grandmother), testified on father’s behalf, disputing the agency’s characterization of father and the quality of his visits with the children. According to grandmother’s testimony, when she and father arrived at visits, the children would greet them with great excitement and happiness. Father responded by saying hello, picking them up, and hugging them. Afterwards, the children would “want to take turns climbing up on his lap and being in his arms and ... lay their little heads on his shoulder.” During visits, Melody asked when she would get to go home with father. When the foster parents came to pick them up, the children did not express the same kind of excitement they did upon seeing father. The children would just move to them like they knew it was the routine. Grandmother had heard Melody refer to the prospective adoptive parents as “the mommy” and “papa.” On the other hand, Melody always called father “Dad” or “Daddy” and called mother “Mama.”

After listening to this testimony and the arguments of counsel, the juvenile court denied father’s section 388 petition. While recognizing grandmother’s testimony reflected “a certain degree of bonding” between father and the children and “level of excitement” when they arrived at visits, the court found that father had failed to meet his burden of establishing it would be in the children’s best interests to grant the petition. The court further stated that under the “totality of the evidence and circumstances in this case that it would not be in the children’s best interests.”

After denying father’s section 388 petition, the juvenile court addressed the issue of permanency. The court found no exception to termination of parental rights applied,

as father had failed to meet his burden of establishing that severing the parental relationship would be detrimental to the children. In so finding, the court noted the children were “currently in a very stable placement” and had “been there for a significant period of time.” The court then adopted the agency’s recommendations and terminated parental rights.

DISCUSSION

I. Denial of section 388 petition

Father contends the juvenile court abused its discretion in denying his section 388 petition because he met his burden of showing changed circumstances and “demonstrated that reunification would be in the children’s best interests, particularly Melody’s, by the bond that they had, by their mutual affection, and her desire to be returned to his custody.” We disagree.

Section 388 provides that any parent may request the juvenile court to “change, modify, or set aside” any previously made order on “grounds of change of circumstance or new evidence.” The moving party has the burden of showing, by a preponderance of the evidence, both that there are changed circumstances and that these differences “make a change of placement in the best interests of the child.” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*))

The juvenile court has broad discretion in ruling on these issues. As the Supreme Court explained in *Stephanie M.*, *supra*, the “court’s ruling should not be disturbed on appeal unless an abuse of discretion is clearly established. [Citations.] ... [W]hen a court has made a custody determination in a dependency proceeding, “a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].” [Citations.] ... “The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably

be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.’ [Citations.]” (*Stephanie M., supra*, 7 Cal.4th at pp. 318–319.)

Even assuming father demonstrated a change of circumstances, he was required to prove that returning the children to his care or reinstating reunification services would be in their best interests. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526 (*Kimberly F.*.) In determining whether father met his burden in this regard, we look to the following factors: “(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of the problem; (2) the strength of the relative bonds between the dependent children to both parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been.” (*Id.* at p. 532, italics added.)

Applying the *Kimberly F.* factors here, we are unconvinced that the record shows an abuse of judicial discretion. First, the reason for the children’s dependency in this case was quite serious. Father minimizes his role by asserting he “was not the cause of the initial dependency” and “did not know about the mother’s substance abuse.” This issue was litigated and resolved against father at the jurisdictional hearing. As the juvenile court then concluded, “[t]here is clearly evidence that he knew or should have known that the mother was using controlled substances.” The record thus contradicts father’s suggestion that mother’s conduct alone led to the children’s dependency.

Concerning the bonding issue, there was evidence the children expressed affection towards father and were excited to see him. And Melody, being the oldest child, may have exhibited a stronger attachment to father than her younger siblings. However, there was also evidence all three children had a strong bond with the prospective adoptive parents, as well as evidence the younger children did not know and expressed indifference towards father during visits. While grandmother testified Melody would ask or talk about going home with father, the social worker who supervised visits reported she never heard Melody make such statements. Although the venue for visits was

allegedly noisy, which is offered as a reason the social worker may not have heard Melody's statements, father specifically asserted in his section 388 petition that Melody made the statements in front of the person supervising the visits, thus implying she was in a position to hear them. We believe the juvenile court could reasonably infer from the evidence that grandmother and father were exaggerating the bond between father and the children, and the court could properly find application of this *Kimberly F.* factor favored the bond between the children and their prospective adoptive parents. We also find no support in the record for father's assertion that the court inappropriately "compared homes, lifestyles, and abilities rather than attachments" in assessing the relatives bonds between the children to both father and the foster parents.

Finally, there is evidence in the record contradicting father's assertion on appeal that he overcame the problems which led to the dependency, including by completing parenting classes and attending a drug-exposed infant class. The agency specifically reported that, despite father's completion of these programs, he still did not exhibit the parenting skills needed to care for the children. Although he sometimes interacted appropriately with the children, he remained largely disengaged and inattentive to the children's needs during visits. The agency's assessment finds support in the supervised visitation feedback forms contained in the record, which reflect only slight improvements in father's interactions with the children in his last two visits.

For all these reasons, we are compelled to conclude the juvenile court did not abuse its discretion in determining father failed to meet his burden of showing that the modifications sought would serve the children's best interests.

II. Failure to apply the beneficial relationship exception

Father also contends the juvenile court erred by failing to apply the beneficial relationship exception to termination of his parental rights to the children. Disputing the agency's reports to the contrary, father asserts he regularly visited the children and missed only a few visits. He also claims he occupied a parental role towards the children,

and they shared an affectionate, positive, and beneficial relationship. Father's arguments are unpersuasive.

The purpose of a section 366.26 hearing is to select and implement a permanent plan for the dependent child. (*In re S.B.* (2009) 46 Cal.4th 529, 532.) The Legislature's preferred permanent plan is adoption. (*In re D.M.* (2012) 205 Cal.App.4th 283, 290.) "At a section 366.26 hearing, the court must terminate parental rights and free the child for adoption if [1] it determines by clear and convincing evidence the child is adoptable within a reasonable time, and [2] the parents have not shown that termination of parental rights would be detrimental to the child under any of the statutory exceptions to adoption found in section 366.26, subdivision (c)(1)(B)(i) through (vi). (§ 366.26, subd. (c)(1).)" (*In re D.M., supra*, 205 Cal.App.4th at p. 290.) In this case, father does not dispute that the children are adoptable; he contends the beneficial relationship exception applies. (§ 366.26, subd. (c)(1)(B)(i).)

To avoid termination of parental rights under the beneficial relationship 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]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).) It is the parent's burden to prove the exception applies. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 574 (*Autumn H.*.)

The Court of Appeal in *Autumn H.* defined a beneficial parent/child relationship as 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." (*Id.* at p. 575.) "[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly

harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid.*)

A parent must show more than frequent and loving contact or pleasant visits for the exception to apply. (*In re C.F.* (2011) 193 Cal.App.4th 549, 555; *In re C.B.* (2010) 190 Cal.App.4th 102, 126; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527 (*I.W.*)) "The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment between child and parent. [Citations.] Further, to establish the section 366.26, subdivision (c)(1)(B)(i) exception the parent must show the child would suffer detriment if his or her relationship with the parent were terminated." (*In re C.F.*, *supra*, at p. 555.)

There is a split of authority concerning the standard of review in this context. (See *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314–1315 (*Bailey J.*) and *In re K.P.* (2012) 203 Cal.App.4th 614, 621–622 [hybrid combination of substantial evidence and abuse of discretion standards; applying substantial evidence test to determination of the existence of a beneficial sibling relationship and the abuse of discretion test to issue of whether that relationship constitutes a compelling reason for determining that termination would be detrimental to the child]; *Autumn H.*, *supra*, 27 Cal.App.4th at p. 576 [substantial evidence test—"On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order"]; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 (*Jasmine D.*) [abuse of discretion test].)

Our conclusion in this case would be the same under any of these tests because the practical differences between the standards are "not significant," as they all give deference to the juvenile court's judgment. (See *Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.) "[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling.... Broad deference must be

shown to the trial judge. The reviewing court should interfere only “‘if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court’s action, no judge could reasonably have made the order that he [or she] did.’ ... ”” (*Ibid.*)

Moreover, a substantial evidence challenge to the juvenile court’s failure to find a beneficial relationship cannot succeed unless the undisputed facts establish the existence of a beneficial parental relationship, since such a challenge amounts to a contention that the “undisputed facts lead to only one conclusion.” (*I.W.*, *supra*, 180 Cal.App.4th at p. 1529; *Bailey J.*, *supra*, 189 Cal.App.4th at p. 1314.)

The record contains evidence that father did not maintain regular visitation and contact with the children throughout the dependency proceedings. However, even assuming he did, he failed to meet his burden of proving the children would benefit from continuing their relationship with him. Father did not show the relationship promoted the children’s well-being to such a degree that it outweighed the well-being they would gain in a permanent home with the new adoptive parents. As already discussed, although father presented some evidence that the children enjoyed visiting with him and shared a bond with him, there was also evidence to the contrary. For example, the supervised visitation form for the last scheduled visit in November 2012, states that when father went to greet the children, Melody was the only one that recognized him and greeted him with a hug and a smile. There was also evidence the children had no difficulty separating from their parents at the end of visits and went readily to their prospective adoptive parents, with whom they shared a close bond.

On this record, the juvenile court could reasonably find the children’s need for permanence outweighed the benefits they would derive from a continued relationship with father. It also could find that severing the children’s relationship with father would not deprive them of a substantial, positive emotional attachment that would greatly harm them. Accordingly, the court did not err by failing to apply the beneficial relationship exception to the termination of father’s parental rights.

DISPOSITION

The order terminating parental rights is affirmed.

WE CONCUR:

HILL, P. J.

CORNELL, J.

FRANSON, J.