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

In re V.H., a Person Coming Under the Juvenile
Court Law.

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

L.P.,

Defendant and Appellant.

F067212

(Super. Ct. No. 10CEJ300242-1)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Brian Arax,
Judge.

Maureen L. Keaney, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kevin Briggs, County Counsel and William G. Smith, Deputy County Counsel,
for Plaintiff and Respondent.

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

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L.P. (mother) appeals from the order terminating her parental rights (Welf. & Inst. Code, § 366.26)¹ to the minor V.H. (born Sept. 2009). Mother contends the juvenile court erred in failing to apply the beneficial relationship exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The minor came to the attention of the Fresno County Department of Social Services (department) in November 2010, after her eight-week-old sister was admitted to the hospital with severe injuries consistent with nonaccidental trauma and Shaken Baby Syndrome. The minor was examined and found to have multiple bone fractures at different stages of healing, as a result of which she was removed from her parents' custody. Two days later, the minor's sister was declared brain dead and died after being taken off life support. Father eventually admitted to dropping, shaking, and throwing the baby against a wall, and was arrested on charges of murder and child abuse. Mother claimed she had no idea how the girls sustained their injuries and expressed some disbelief after being told father had admitted to shaking the baby.

In September 2011, the department filed a second amended petition alleging the minor was subject to juvenile court dependency jurisdiction pursuant to section 300, subdivisions (a), (b), (e) and (f), based on both the acts and omissions of each parent. At the conclusion of the jurisdictional hearing in March 2012, the court found all the allegations in the second amended petition to be true.

The disposition report filed in June 2012, indicated that mother visited consistently and regularly with the minor. During the two-hour supervised visits, which occurred twice a week, mother was observed to be appropriate, loving, and nurturing. The minor appeared to be attached to mother and her maternal family. However, visiting staff

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

reported that mother “has difficulty reinforcing structure at times, especially saying ‘No’” It was further reported that “[the minor] at times hits her mother and staff redirects [mother] to not let [the minor] hit her.” The disposition report also noted the minor had developed a positive attachment to her current care providers, and was able to separate herself from mother at the end of visits.

At the dispositional hearing in June 2012, the juvenile court denied mother reunification services pursuant to section 361.5, subdivision (b)(4), (5), and (6). The court then set a section 366.26 hearing to select and implement a permanent plan for the minor and reduced mother’s visits with the minor to once a month.

In January 2013, the department filed a section 366.26 report in which the social worker, Lois McKenzie, recommended that mother’s paternal rights be terminated as to the minor and the child freed for adoption. McKenzie noted that the minor had been living with her prospective adoptive parents since November 10, 2010. The prospective adoptive parents were a mother and adult daughter, who resided in the same home and shared the responsibility of caring for the minor. They had cared and raised the minor as their own and loved her very much. The minor had developed a strong bond with her prospective adoptive parents and their family, and called one of her caregivers “mama.” The minor appeared to be healthy, happy, and well adjusted in her placement with them.

McKenzie reported that she had the opportunity to observe a supervised visit between mother and the minor on January 23, 2013. In McKenzie’s view, the visit was “playtime” for the minor, and mother’s relationship with the minor was that of “a good friend of the family with whom the minor has a very close connection.” McKenzie noted that mother was responsive when the minor indicated she wanted to go to the bathroom and brush her teeth. Mother also brought a toy cash register to the visit, and showed the minor how to play with it, an activity the minor appeared to enjoy. However, there were also challenges during the visit. For example, mother allowed the minor to eat candy before dinner and take toys with her to the dining table, which resulted in the minor

barely touching her dinner. McKenzie further noted that when mother played with the minor, she appeared to try to appease the minor by giving in to her when the minor got mad at her.

In completing the adoption assessment, McKenzie reported that she looked at four specific areas (structure, nurturing, challenge, and engagement) to assess the strength or relative bonds between the minor, her mother and her caretakers. McKenzie indicated that both mother and the prospective adoptive parents demonstrated the ability to nurture, challenge, and engage the minor. However, mother was unable to provide structure by exercising her authority when the minor required discipline. During visits, visitation staff frequently corrected the minor and instructed mother “to show positive reinforcement so that [the minor] can respect the mother’s authority and follow the rules [mother] sets for her.” On the other hand, the prospective adoptive parents had demonstrated a strong ability to provide structure for the minor. They set regular routines and took on the role of parents or adults when they were in the minor’s presence. The minor looked to them for help and guidance.

The section 366.26 hearing was conducted on several dates between February and April 2013, and concluded on April 5, 2013. Mother called McKenzie to testify, and the social worker’s testimony indicated that visits between mother and the minor were generally positive. The minor, who continued to call mother mom, appeared to be happy and comfortable. There was a mutual exchange of affection. Mother met the minor’s physical needs and engaged her in age-appropriate play and teaching activities. And the minor reportedly told mother she wanted to go home with her on October 29, 2012.

However, the visitation narratives reflected that mother was not always able to address the minor’s behaviors and occasionally had to be redirected by visitation staff on how to handle situations. McKenzie opined that mother and the minor did not have a parent-child relationship, explaining the minor had been away from mother for a major part of her life, and it seemed the minor viewed mother simply as “a nice friend visiting

her.” McKenzie did not think it was necessarily significant that the minor called mother mom. The minor also referred to her prospective adoptive parents as mom, and sometimes referred to her grandparents as mom or mama.

McKenzie did not think that the minor had a substantial positive emotional attachment to mother. The minor’s behaviors when she was removed from mother’s custody indicated a “toxic relationship” existed when the minor was in mother’s care. McKenzie explained the minor had been severely abused, and came in exhibiting chronic behavioral issues such as digging through trash, hitting, biting, and severe temper tantrums. Overall, the minor’s behaviors had improved since being placed with her prospective adoptive parents. However, the minor had not fully recovered. Her primary need at that time was to be adopted. The minor needed safety and stability, which she had with her current care providers.

According to McKenzie, mother handled the minor’s behavioral problems by giving in to her. Although the minor recognized and seemed happy to see mother at visits, she never had any issues about leaving mother at the end of visits. When asked about her home, the minor referred to her current care providers’ home as her home.

Mother also called Oweida Doxey to testify. Doxey testified she supervised visits between mother and the minor between August 30 and October 10, 2011. During the two-hour visits, mother set structure for the minor. She always came prepared with more than one activity and kept the minor occupied throughout each visit. Mother’s style of discipline was redirecting, which was good for toddlers. Mother was pretty firm with redirecting. If the minor resisted, mother would move her right to the activity she wanted the child to move on to.

Doxey believed mother occupied a parental role during her visits with the minor. Mother was nurturing, affectionate, and able to challenge the minor with age-appropriate activities. The minor seemed comfortable during visits, never asking when the visits were going to end. When the grandparents would attend visits, the minor would be

happy to see them, but she did not show a preference to them over mother. Doxey never heard the minor refer to anyone but mother as mom during the visits. The minor appeared to be bonded to mother. If the minor needed anything, she would always go to mother and would not go to a visitation monitor like some children did.

Based on what Doxey observed, she believed the minor would benefit from seeing mother. Doxey explained the minor and mother spent a lot of time together, and mother was very present in the minor's life. According to Doxey, the amount of time mother visited with the minor each week was "phenomenal."

Doxey acknowledged that the minor seemed excited when her foster parents came to pick her up.

Mother testified regarding the positive quality of her visits with the minor, describing how she would meet the minor's needs and keep her engaged with various activities during visits. Mother felt she and the minor had a strong bond. The minor was always happy during visits and reciprocated affection with mother. The only time mother saw the minor crying was on her birthday when mother and the maternal family were leaving.

Mother thought it would be good for the minor for their relationship to continue, explaining:

"I've been told that she throws a lot of tantrums and she's—she hits herself. She scratches herself. Stuff like that and I feel like maybe I could help her out with that. Maybe she does it because—I don't know. She might want me at the time or she might need me so I feel like I can help her out with that because at the visits she's never done anything like that. She's never thrown a tantrum. She's usually really happy when we're at visits so that's why maybe I feel like I can help her out with that so she can not harm herself. Maybe she needs to cope with everything she's going through. Maybe it's hard to not see us as much because we're all so close. When I say all I mean me and her and my family members."

At the conclusion of the section 366.26 hearing, the court specifically found the beneficial relationship exception to termination had not been established. In arriving at

this finding, the court provided a detailed explanation. Among other things, the court expressed that it was troubled by mother's continued failure to recognize that the minor's negative behaviors were a product of child abuse:

“This attribution of the child's tantrum behaviors to the care of the care providers rather than from the abuse implies the lack of benefit to continuing the relationship. Her lack of insight into this incredible harm that each child suffered and the danger to these children or this child now that is left to continuing that relationship.”

The court found the minor to be generally and specifically adoptable and terminated parental rights.

DISCUSSION

Mother contends the juvenile court erred in terminating her parental rights due to the existence of a beneficial parent-child relationship within the meaning of section 366.26, subdivision (c)(1)(B)(i). We disagree.

“At a section 366.26 hearing, the court may select one of three alternative permanency plans for the dependent child—adoption, guardianship or long-term foster care. [Citation.] If the child is adoptable, there is a strong preference for adoption over alternative permanency plans. [Citations.]” (*In re Michael G.* (2012) 203 Cal.App.4th 580, 588-589.) Once the court determines a child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental under one of the exceptions listed in section 366.26, subdivision (c)(1)(B). (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809, citing *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.)

One such exception applies when the court finds a compelling reason for determining that termination would be detrimental to the child because the 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).) This exception applies only when the relationship with a natural parent 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.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*)) A parent's "frequent and loving contact" with the child was not enough to sustain a finding that the exception would apply, when the parents "had not occupied a parental role in relation to them at any time during their lives." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.)

To establish that the parents have occupied a parental role, it is not necessary for a parent to show day-to-day contact and interaction. (*In re S.B.* (2008) 164 Cal.App.4th 289, 299; *In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) As the court observed in *In re S.B.*, *supra*, "[i]f that were the standard, the rule would swallow the exception." (*In re S.B.*, at p. 299.) Instead, the court determines whether the parent has maintained a parental relationship, or an emotionally significant relationship, with the child, through consistent contact and visitation. (*Id.* at pp. 298, 300-301.)

Thus, "[t]o overcome the preference for adoption and avoid termination of the natural parent's rights, the parent must show 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." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466 (*Angel B.*), citing *In re Lorenzo C.*, *supra*, 54 Cal.App.4th at p. 1342.) "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." (*Angel B.*, at p. 467, fn. omitted; see also *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315 (*Bailey J.*))

As to the first two factors, they do not support mother's argument. The minor was only 13 months old when she was removed from mother's custody in November 2010. By the time of the section 366.26 hearing in the early months of 2013, the minor had

spent the majority of her young life in out-of-home placement with her prospective adoptive parents.

Regarding the third factor, the record shows that mother did visit regularly, and the minor appeared to have a bond with her. However, there is nothing in the record to show that the bond was of a nature that would compel a conclusion that termination of parental rights would be detrimental to the minor. The visits described in the reports reflect that mother often had difficulty providing structure and redirecting the child's negative behaviors, resulting in frequent intervention by visitation staff. In the social worker's opinion, mother would give in to the minor and act more as a friend than a parent. On the other hand, the minor was positively attached to her prospective adoptive parents, who demonstrated they were capable of providing structure and assuming a parental role with the minor.

As to the fourth factor, there was no evidence the minor had any needs that can be met only by mother. (*In re Helen W.* (2007) 150 Cal.App.4th 71, 81.) At the section 366.26 hearing, mother suggested she could help the minor with tantrums and other negative behaviors the minor reportedly exhibited outside the visitation setting. However, as the juvenile court observed, mother's apparent lack of insight and failure to recognize the minor's behaviors were a product of the severe physical abuse she and her deceased sister suffered when they were in mother's custody, was evidence that continuing a relationship with mother would not be beneficial to the minor.

Therefore, despite the fact the minor appeared to have a bond with mother, it was not such a substantial emotional attachment that the child would be greatly harmed if it were terminated. The juvenile court did not err in finding the beneficial relationship exception to termination was inapplicable in this case.²

² We are aware of the split of authority concerning the standard of review in this context. (See *Bailey J.*, *supra*, 1314-1315 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

DISPOSITION

The order terminating parental rights is affirmed.

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.’ ... ”” (*Id.* at p. 1351.)