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

In re CHRISTOPHER M., a Person
Coming Under the Juvenile Court Law.

STANISLAUS COUNTY
COMMUNITY SERVICES AGENCY,

Plaintiff and Respondent,

v.

MELODY M.,

Defendant and Appellant.

F067785

(Super. Ct. No. 516144)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Stanislaus County. Ann Q.
Ameral, Judge.

Valerie N. Lankford, under appointment by the Court of Appeal, for Defendant
and Appellant.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County
Counsel, for Plaintiff and Respondent.

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

Melody M. appeals from an order terminating her parental rights under Welfare and Institutions Code section 366.26¹ as to her three-year-old son, Christopher. Melody contends the juvenile court erred in declining to apply the exception to adoption contained in section 366.26, subdivision (c)(1)(B)(i), hereafter referred to as the “beneficial relationship” exception. We affirm.

PROCEDURAL AND FACTUAL SUMMARY

These dependency proceedings were initiated in July 2011 after the Stanislaus County Community Services Agency (agency) found then 15-month-old Christopher living with Melody and her girlfriend in a motel room where adults were smoking marijuana and methamphetamine. At the time, Melody was on probation, having been convicted of child cruelty related to Christopher’s seven-year-old half-brother, Joshua. Christopher’s father, Charles, was unable to take custody of Christopher.

The juvenile court exercised its dependency jurisdiction over Christopher and ordered reunification services for Melody and Charles. Melody’s case plan required her to participate in individual counseling, complete a parenting program and drug and alcohol assessment and submit to random drug testing. The juvenile court also ordered weekly two-hour visitation.

By September 2012, Melody completed drug treatment, was in an aftercare program and had been clean and sober for 104 days. In addition, she was having daylong visits with Christopher and participating in individual counseling and parenting classes. However, Melody was having difficulty retaining information and managing her emotions. Her counselor, Melissa Hale, suspected that Melody had a learning disorder and recommended that the agency refer her for a psychological evaluation.

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

Melody was evaluated by psychologist Philip Trompetter who determined she was mildly mentally retarded and suffered from a nonpsychotic mood disorder that was in remission. He recommended the agency refer her to Valley Mountain Regional Center (VMRC) to assess her capacity and recommend services for her.

In October 2012, following a contested 12-month review hearing, the juvenile court ordered the agency to refer Melody to VMRC for an assessment and gave the agency discretion to arrange overnight visits as long as Melody remained in a clean and sober living environment. The juvenile court terminated Charles's reunification services.²

Over the ensuing four months, Melody remained in the sober living facility and maintained her sobriety but was not actively engaged in recovery. In addition, she was given a referral for VMRC but did not make an appointment. She visited with Christopher on Fridays from 10:00 a.m. to 5:00 p.m. and their visits went well. Melody watched movies and played with him. There were reports, however, that Melody was not adequately feeding Christopher and attending to his health. According to the foster mother, on one occasion, Melody fed Christopher only a few goldfish crackers during a daylong visit, explaining that he was not hungry. The foster mother said he was very hungry when she picked him up. On another occasion, Melody took Christopher out in the rain even though he had an ear infection and a cough. There were also concerns about the way Melody treated Joshua during his overnight visitation with her. She was reportedly impatient and yelled at him, a marked difference from the way she parented Christopher.

² Charles appealed from the juvenile court's order terminating his reunification services (*In re Christopher M.* (June 11, 2013, F066122) [nonpub. opn.]) and we affirmed.

The agency opined that Melody made some progress in her services plan, but not enough to demonstrate that she could independently care for Christopher. In its report for the 18-month review hearing, it recommended the juvenile court terminate her reunification services.

In February 2013, following a contested 18-month review hearing, the juvenile court terminated Melody's reunification services and set a section 366.26 hearing. Melody challenged the setting of the section 366.26 hearing by writ petition which this court denied (*Melody M. v. Superior Court* (April 26, 2013, F0666663) [nonpub. opn.]).

By June 2013, Christopher had been in the care of Mr. and Mrs. C. for a year and developed a close family bond with them. The C.'s had no other children and wanted to adopt Christopher. Prior to being placed with the C.'s, Christopher had been in six other placements, including two other concurrent homes and a relative placement. Christopher was removed from these placements for reasons other than his suitability with one exception. Just prior to being placed with the C.'s, Christopher was placed in a concurrent home for several weeks. However, the caregiver reported that Christopher was not adjusting well. He cried, threw fits and had a hard time taking a bath. He also kept the caregiver's other son awake, not allowing him to take naps. Once placed with the C.'s Christopher adjusted well. The agency felt certain the C.'s would adopt him if given the opportunity.

The agency reported that Melody attended five of the six visits scheduled for her from February to May 2013. She did not show up for a visit in March 2013 and did not call. The visits usually went well. Christopher was happy to see Melody and Melody interacted appropriately with him. However, the agency believed Christopher viewed Melody more as a "play buddy" than a parent. He did not cry at the end of visits and happily went with his caregivers. The agency recommended the juvenile court terminate

Melody and Charles's parental rights and select a permanent plan of adoption for Christopher.

In July 2013, Melody appeared with her attorney at the section 366.26 hearing and made an offer of proof that she visited Christopher, visits went well, Christopher asked about his brother, she had a parental relationship with Christopher, and severing her parental rights would not be in Christopher's best interests. Charles also appeared and made an offer of proof that he loved Christopher, but believed that adoption was in his best interest and supported the agency's recommendation. The juvenile court accepted both offers of proof and no further evidence was offered. Melody's attorney, however, objected to the termination of Melody's parental rights, stating Melody believed her relationship with Christopher was such that it would be more detrimental than beneficial to him to sever their relationship. She asked the court not to terminate her parental rights.

The juvenile court terminated Melody and Charles's parental rights and ordered adoption as the permanent plan. The court did so after finding neither Melody nor Charles met their burden of showing it would be detrimental to Christopher to sever their parental rights. This appeal ensued.³

DISCUSSION

Melody contends the juvenile court erred by failing to apply the beneficial relationship exception to termination of her parental rights to Christopher. She contends she maintained a parent/child relationship with Christopher through visitation and that the juvenile court could infer from the strength of their bond that Christopher would be harmed if their relationship was severed.

Once a dependency case reaches the permanency planning stage, the statutory presumption is that termination is in an adoptable child's best interests and, therefore, not

³ Charles did not appeal.

detrimental. (§ 366.26, subd. (b); *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1344 (*Lorenzo C.*)) It is the parent's burden to show that termination would be detrimental under one of the statutory exceptions. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) The beneficial relationship exception in section 366.26, subdivision (c)(1)(B)(i), involves a two-part test: did the parent maintain regular visitation and contact with the child, and would the child benefit from continuing the relationship.

The Court of Appeal, Fourth Appellate District, Division One interpreted the beneficial relationship exception in *In re Autumn H.* (1994) 27 Cal.App.4th 567 (*Autumn H.*) to mean "the [parent/child relationship 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 other words, the 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." (*Id.* at p. 575.)

When a juvenile court rejects a detriment claim and terminates parental rights, the appellate issue is whether the juvenile court abused its discretion in so doing. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 (*Jasmine D.*)) The decision is not reviewed, as Melody argues, for substantial evidence that termination would be detrimental.

To conclude there was an abuse of discretion, the proof offered must be uncontradicted and unimpeached so that discretion could only be exercised in one way, compelling a finding in favor of the appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) Based

on our review of the record, we conclude the juvenile court properly exercised its discretion in rejecting Melody's argument.

There is no dispute Melody maintained regular contact with Christopher and thus satisfied the first part of the two-part test. Melody failed, however, to show that Christopher would benefit from continuing his relationship with her. While the record reflects that Melody and Christopher had pleasant visits and loving contact, she did not establish it would be detrimental to Christopher to sever their relationship.

Melody argues the duration and quality of her time with Christopher evidences the benefit he derives from their relationship. She points out that they spent many long visits together during which they engaged in normal parent/child activities and that Christopher was happy to see her and was affectionate with her. Such evidence she contends shows that Christopher would suffer emotional harm if her parental rights were terminated.

Melody likens her case to *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*) in which the Court of Appeal, Fourth Appellate District, Division One concluded the juvenile court erred in finding the beneficial relationship exception did not apply and terminating a father's parental rights. (*Id.* at p. 301.) In *S.B.*, a three year old was removed from the custody of her father who had been her primary caregiver. The father fully complied with his case plan and regularly visited S.B. three days a week. When the visits ended, S.B. became upset and wanted to leave with her father. The juvenile court terminated the father's reunification services at the 12-month review hearing because health problems impeded him from caring for S.B. full time. At the section 366.26 hearing, the juvenile court terminated his parental rights. (*S.B.*, *supra*, 164 Cal.App.4th at pp. 293-296.)

The court in *S.B.* acknowledged as it did in *Autumn H.* that the relationship envisioned by the beneficial relationship exception generally "arises from day-to-day interaction, companionship and shared experiences, and may be continued or developed by consistent and regular visitation after the child has been removed from parental

custody. [Citation.]” (*S.B.*, *supra*, 164 Cal.App.4th at p. 299; italics omitted.) However, the *S.B.* court stated that it did not “narrowly define or specifically identify the type of relationship necessary to establish the exception” in *Autumn H.* Nor did the *S.B.* court believe it was reasonable to make the parent prove the child had a “primary attachment” to the parent or that the parent and child maintained day-to-day contact. The exception may apply, the court stated, if the child has a “substantial, positive emotional attachment” to the parent. (*S.B.*, *supra*, at p. 299.)

Applying those principles, the *S.B.* court concluded that a beneficial relationship exception existed because the father had been the child’s primary caregiver for three years and then immediately complied with “every aspect” of his case plan after her removal. In addition, the child continued to display a strong attachment to her father. She initiated physical contact with him, running into his arms to be picked up, nestled up to his neck, whispered and joked with him and told him that she loved and missed him. The court concluded the child “derived comfort, affection, love, stimulation and guidance from her continued relationship” with her father. (*S.B.*, *supra*, 164 Cal.App.4th at pp. 298-300.) The same, however, cannot be said in this case.

Melody only had custody of Christopher for 15 months. In addition, Christopher did not display the depth of emotional attachment to Melody that *S.B.* displayed to her father. On the contrary, Christopher easily separated from Melody. Further, unlike *S.B.*’s father, Melody did not fully comply with her case plan. Anticipating that argument, Melody argues she demonstrated her devotion in other ways — such as consistent visitation and overcoming her drug use. Be that as it may, it does not alter the fact that Christopher did not evidence a “substantial, positive emotional attachment” to Melody.

Melody also cites but distinguishes another beneficial relationship case out of the Court of Appeal, Fourth Appellate District, Division One, *In re C.F.* (2011) 193

Cal.App.4th 549 (*C.F.*), in which the appellate court affirmed the juvenile court's termination of a mother's parental rights. (*Id.* at p. 552.) *C.F.* involved three children ranging in age between three and seven years who were removed because of the mother's drug use. The mother was unable to maintain sobriety and the children were placed with their maternal aunt who wanted to adopt them. (*Id.* at pp. 552-553.) Two of the children said they would be sad if they could no longer visit their mother, but all of the children looked to their aunt to meet all their emotional and physical needs. (*Id.* at pp. 556-557.)

In affirming, the court in *C.F.* concluded the mother failed to meet her burden of showing the termination of her parental rights would cause her children detriment. (*C.F.*, *supra*, 193 Cal.App.4th at p. 558.) The court stated: "While [the mother] and the children had pleasant visits, and her daughter was sometimes sad to see them end, there is no bonding study or other evidence that shows [the mother] occupied a parental role in their lives, that they would suffer any actual detriment on the termination of parental rights, or that the benefits of continuing the parental relationship outweighed the benefits of permanent placement with family members who are ready to give them a permanent home." (*Id.* at p. 557.)

Melody distinguishes her case by pointing out that unlike the mother in *C.F.*, she attained sobriety and she "did really well with Christopher and he went to her willingly." She ignores, however, the complete absence of any evidence that Christopher would suffer actual detriment if her parental rights were terminated.

We find no abuse of discretion in the juvenile court's failure to find the beneficial relationship exception applicable in this case and affirm its order terminating parental rights.

DISPOSITION

The order terminating Melody's parental rights is affirmed.