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

In re MICHELLE J., a Person Coming Under the
Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

MARIA D.,

Defendant and Appellant.

F069002

(Super. Ct. No. 10CEJ300104-1)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Fresno County. Brian M. Arax,
Judge.

Liana Serobian, under appointment by the Court of Appeal, for Defendant and
Appellant.

Daniel C. Cederborg, County Counsel, and Amy K. Cobb, Deputy County
Counsel, for Plaintiff and Respondent.

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

Appellant Maria D. (mother) appeals from the juvenile court's order terminating her parental rights under Welfare and Institutions Code section 366.26¹ as to her five-year-old daughter Michelle. Mother 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 April 2010 when the Fresno County Department of Social Services (department) received information that then 14-month-old Michelle was back in mother's custody. The reporting party was concerned for Michelle's safety because mother was involuntarily committed on a psychiatric hold the month before and Michelle's father, Luis, was supposed to obtain custody of her. The reporting party stated that mother was physically abusive, locked herself in a room with Michelle and refused to take her psychotropic medication.

A social worker spoke to mother's sister, Claudia, who stated that mother suffered a severe head injury in a car accident in 2004 and was "not all there." Claudia said mother was living with their parents and was physically and verbally abusive to them.

The social worker, accompanied by a police officer, located mother and Michelle at the maternal grandparents' home. The grandmother confirmed that mother hit her and pulled her hair and had threatened to kill her. Mother explained that she locked herself and Michelle in a room because she did not want to live in that home and that the "people" were mean and were not really her parents. She said she had given birth to 50 to 60 children, including the child of a police officer who had died in the line of duty.

The officer called for emergency medical services to transport mother to a psychiatric facility on an involuntary commitment and the social worker took Michelle into protective custody.

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

The juvenile court exercised its dependency jurisdiction and, in January 2011, ordered reunification services for mother and Luis. Mother's services plan required her to complete a mental health assessment and two psychological evaluations.

Mother received a year of reunification services. During that year, she regularly visited Michelle and was loving and attentive to her. Michelle called her "mom" and cried and did not want to leave her at the end of the visits. However, visitation remained supervised on the recommendation of mother's therapist, who reported that mother's thought process was "too unpredictable for her to be entrusted with the care of children."

Mother also participated in mental health counseling and was medication compliant. She completed two psychological evaluations conducted by Drs. Laura A. Geiger and Tamika London.

Dr. Geiger diagnosed mother with major depressive disorder with psychotic features in remission. Dr. Geiger believed mother could reduce the severity of her symptoms if she maintained a therapeutic level of medication. Dr. Geiger recommended the department refer mother for a neuropsychological evaluation.

Dr. London conducted the neuropsychological evaluation and diagnosed mother with cognitive and delusional disorders. The cognitive disorder was supported by mother's severely impaired executive functioning and mildly impaired memory capacity, which Dr. London believed were likely the result of the traumatic brain injury she suffered in 2004. The delusional disorder was supported by mother's "pervasive pattern of fixed delusions." Dr. London was particularly concerned about mother's "complete lack of insight, poor judgment, and lack of acknowledgement of her mental illness and cognitive limitations." Dr. London stated, "[Mother] does not understand the need for ongoing psychiatric treatment ... despite recommendations from multiple treatment providers. The results of this assessment strongly suggest that [mother's] lack of insight, poor judgment, cognitive limitations, and mental illness make her unpredictable to the

extent that it would be very difficult for her to provide adequate stable parenting on an independent basis for [Michelle] (without long term psychiatric treatment monitoring.)”

In December 2011, the juvenile court found it would be detrimental to Michelle to return her to mother’s custody. Consequently, the court terminated mother’s reunification services and set a section 366.26 hearing. The court had already terminated Luis’s reunification services at a prior hearing. Also in December 2011, the department placed Michelle with her maternal aunt, Claudia, who was willing to be Michelle’s legal guardian and supervise visits for mother and Michelle.

In its report for the section 366.26 hearing, the department recommended a permanent plan of legal guardianship for Michelle. The department reported that Michelle had a positive attachment to Claudia and a strong bond with mother. A plan of guardianship would provide Michelle the stability and safety she needed and maintain the positive bond she shared with mother.

In April 2012, at the section 366.26 hearing, the juvenile court selected legal guardianship as the permanent plan for Michelle and issued a letter of guardianship for Claudia. The court also ordered that visitation remain supervised.

In September 2012, mother’s attorney filed a section 388 petition² asking the juvenile court to modify its visitation order to allow unsupervised visits and liberal visits at Claudia’s discretion. In support of the request, mother’s attorney stated that mother had made significant progress in therapy, was no longer delusional, and that mother was in the fifth week of a 15-week parenting class.

In late September 2012, at the post permanency plan review hearing (§ 366.3), the juvenile court granted mother’s section 388 petition. The following month, the juvenile court terminated dependency jurisdiction and retained jurisdiction over Michelle as a ward of the guardianship. (Cal. Rules of Court, rule 5.740(a)(3).)

² All further petition references are to 388 petitions.

Mother enjoyed weekly unsupervised visits with Michelle at Claudia's house and the visits initially went well. Mother was attending parenting classes, seeing a therapist and taking her medication. Mother agreed to be more responsible and assume more of a parenting role and Claudia allowed mother to occasionally sleep over at Claudia's house. According to Claudia, mother did not take initiative in parenting Michelle, but mother played with Michelle and Michelle enjoyed visiting mother and spending time with her. Eventually, Claudia allowed mother an overnight visit with Michelle at mother's house. However, by April 2013, it was apparent to Claudia that mother had quit taking her medication and was regressing. Mother was confrontational and aggressive. She flew into screaming rages in front of Michelle and threatened to hurt Claudia because she believed Claudia was taking Michelle away from her. Mother also made inappropriate and bizarre statements in Michelle's presence. Claudia discontinued unsupervised and overnight visits and reverted to supervised visitation.

In June 2013, Claudia filed a petition asking the juvenile court to grant her discretion to supervise visitation. Before Claudia's petition was heard, two more petitions were filed in Michelle's case. In July 2013, Claudia filed a petition asking the juvenile court to set a section 366.26 hearing and allow her to adopt Michelle. In September 2013, mother's attorney filed a petition asking the juvenile court to set aside the guardianship and remove Michelle from Claudia's custody.

The juvenile court reinstated its dependency jurisdiction and set a contested hearing on the petitions in September 2013. In its report for the hearing, the department recommended the juvenile court grant Claudia's petitions.

By this time, the relationship between mother and Claudia had completely deteriorated. The department informed the juvenile court of an incident in August 2013 in which mother contacted the police late at night and reported that she was talking to Michelle on the telephone when Claudia got upset and yelled at Michelle. Michelle cried as if she was being hurt and mother wanted the police to check on her. The police went

to Claudia's residence and determined Michelle was fine. Claudia showed them her guardianship documents and they left.

According to Claudia, Michelle cried because mother told her to ask Claudia if they could visit the next day at McDonalds and Claudia said they could not. The police arrived at Claudia's home at 11 p.m. and said mother accused her of kidnapping Michelle. Mother was with the police and was told to leave because she was causing a scene. Michelle was asleep and unaware of the situation.

The department also informed the juvenile court of another incident in August 2013, when mother went to Michelle's school and told the school assistant director she was granted unsupervised visitation and would soon have custody of Michelle. Mother also stated that Claudia was committing fraud by using Michelle to collect money and was trying to get Michelle tested for autism so she could collect her Social Security Disability. The assistant director told mother she could not see Michelle without a court order.

In September 2013, the juvenile court conducted a contested hearing on the petitions. Social worker Enrique Madrano testified that Michelle was attached to mother and liked to visit her. She called her "momma" and Claudia "tia" meaning "aunt" in Spanish. He said mother appeared to be calmer. However, he did not believe Michelle should be placed with mother and agreed that the case should proceed to a section 366.26 hearing.

Mother testified she quit taking her medication because she was "fine" without it. She only experienced anxiety and depression when people triggered them. She started taking medication again in July 2013, and was willing to continue taking it. She also said she was in therapy.

Mother further testified she called the police because she thought Claudia was hurting Michelle. She said Michelle told her that Claudia hit her and she had seen Claudia hurt Michelle. She saw Claudia smack Michelle, throw her on the ground, pull

her hair and tell her what to do and say. Mother suspected Claudia even told Michelle to pretend she was sleeping when the police checked on her.

Claudia testified and denied hitting Michelle and pulling her hair. She denied using any corporal punishment with Michelle. She said the department had not investigated her for physical abuse but investigated an allegation of sexual abuse made by mother. Michelle was questioned about the sexual abuse and the department determined that the allegation was unfounded.

At the conclusion of the hearing, the juvenile court denied mother's petition to set aside the guardianship and granted Claudia's petitions to reinstate supervised visitation and set a section 366.26 hearing.

In its report for the section 366.26 hearing, the department recommended the juvenile court approve a permanent plan of adoption for Michelle. The department reported that Michelle had a significant parent-child relationship with Claudia but not with mother. Michelle enjoyed visiting mother but did not look to her to care for her, meet her needs, or keep her safe. The department also reported that Claudia was not considering an open adoption because of mother's mental health issues.

The department also provided a letter from Michelle's therapist who stated Michelle had been in therapy since January 2014 to address her anger, oppositional behavior and anxiety. She said Claudia obviously cared about Michelle's emotional health and Michelle was strongly connected to her. She said she had not met mother but Claudia reported that Michelle acted out directly before and after visits with her. The therapist supported terminating visitation between mother and Michelle since there was no clear and obtainable plan for reunification and visitation could exacerbate Michelle's symptoms.

In February 2014, the juvenile court conducted a contested section 366.26 hearing. Michelle was present with her attorney and the juvenile court and mother's attorney questioned her to determine if she was competent to testify. After questioning Michelle,

the juvenile court did not feel comfortable taking a stipulation as to her competency and Michelle's attorney objected to her testifying, stating she did not believe Michelle understood the difference between the truth and a lie. Nevertheless, the juvenile court allowed limited questioning by mother's attorney and stated it could accord her testimony some weight. Mother's attorney elicited from Michelle that Michelle missed her mother and liked to visit her. She wanted to stay with "Tia" and after being asked twice if she wanted to live with her mother she stated, "I don't know."

Mother testified that she regularly visited Michelle throughout the reunification period and after. When Michelle was with Claudia, mother visited her often. She fed Michelle, bathed her, played with her, read to her, and spent the night at Claudia's. Other times, Michelle spent the night with her at her house. However, her visitation had been reduced to once weekly for an hour under supervision. During their visits, they played and mother read to Michelle. She said Michelle told her she wanted to live with her when she found a home. At that time, mother was homeless. However, she said she was thinking of joining a program through which she would be provided an apartment.

At the conclusion of the hearing, the juvenile court terminated mother's parental rights. It did so after finding that Michelle was adoptable and the beneficial relationship exception to adoption did not apply.

This appeal ensued.

DISCUSSION

Mother contends the juvenile court erred when it determined the beneficial relationship exception, under section 366.26, subdivision (c)(1)(B)(i), did not apply to her circumstances. We disagree.

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573 (*Autumn H.*) Thus, 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 detrimental. (§ 366.26,

subd. (b); *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1344.) A parent seeking to prevent the adoption of his or her child must show that termination of parental rights would be detrimental to the child under one of the statutory exceptions. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) The statutory exception at issue here--the beneficial relationship exception set forth in section 366.26, subdivision (c)(1)(B)(i)--requires the parent to show that he or she maintained regular visitation and contact with the child, and the child would benefit from continuing the relationship.

Section 366.26, subdivision (c)(1)(B)(i) (the statute) provides as relevant here:

“(c)(1) If the [juvenile] court determines, ... by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption[] ... unless ...[] [¶] ... [¶] (B) [t]he court finds a compelling reason for determining that termination would be detrimental to the child [because] ...[] [¶] (i) [t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

In this case, it is undisputed mother maintained regular visitation and contact with Michelle throughout the reunification period and beyond. The question then becomes whether Michelle derived such benefit from her relationship with mother that terminating the relationship would be detrimental to Michelle.

While the statute does not describe the “benefit” the child must receive from the relationship, appellate courts have provided some guidance. First, the “benefit” is more than “some measure of benefit from maintaining parental contact.” (*In re C.F.* (2011) 193 Cal.App.4th 549, 559 (*C.F.*.) As one court pointed out, “Interaction between natural parent and child will always confer some incidental benefit to the child” but incidental benefit is not what the statute envisioned. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Rather the “benefit” intended is “a substantial, positive emotional attachment” (*ibid.*) that “results from the adult’s attention to the child’s needs for physical care, nourishment, comfort, affection and stimulation. [Citation] The relationship arises from day-to-day interaction, companionship and shared experiences.” (*Ibid.*)

Further, the “benefit” the child derives from the substantial and positive emotional attachment to the parent must be so strong and must meet the child’s needs so completely that it outweighs the benefit the child would derive from the stability and permanency that an adoptive parent could provide. Thus, the juvenile court must assess these competing benefits in deciding whether the beneficial exception exists.

The Court of Appeal, Fourth Appellate District, Division One, described the considerations the juvenile court must balance in *Autumn H.* The court stated:

“[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.” (*Autumn H., supra*, 27 Cal.App.4th at p. 575.)

On appeal from an order terminating parental rights, we determine whether the juvenile court abused its discretion in ruling that adoption would not be detrimental to the child. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) 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.) We conclude in this case the juvenile court properly exercised its discretion.

According to the record, mother maintained a loving and affectionate relationship with Michelle. She did so through substantial contact, which included regular daily visitation and occasional overnight visits. During that time, mother fed and bathed Michelle, read to her and played with her. As a result, Michelle was strongly attached to mother and enjoyed their time together.

However, there is no evidence that mother stood in a parental role for Michelle or that Michelle looked to mother to meet her physical and emotional needs. In fact, to the

extent Michelle's testimony can be given weight, it strongly suggests Michelle did not consider mother a parental figure. Michelle clearly expressed her desire to live with Claudia but did not know if she wanted to live with mother.

Thus, since mother did not fulfill a parental role, the juvenile court could reasonably conclude that it would not be detrimental to Michelle to sever the relationship and that Michelle stood to benefit more from the security Claudia could provide as her adoptive mother.

Mother contends that facts similar to hers have resulted in reversal, citing *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*) in which the appellate court concluded the juvenile court erred in not applying the beneficial relationship exception and reversed its order terminating parental rights. (*Id.* at pp. 292-293.) *S.B.*, however, has been misconstrued according to the appellate court that authored it and is "confined to its extraordinary facts." (*C.F., supra*, 193 Cal.App.4th at p. 558.)

In *S.B.*, appellant (father) maintained regular, consistent and appropriate visits with his daughter, was her primary caregiver for three years, complied with "every aspect" of his case plan and after a year apart, his daughter continued to display a strong attachment to him. (*S.B., supra*, 164 Cal.App.4th p. 298.) In reversing, the *S.B.* court stated: "The record shows S.B. loved her father, wanted their relationship to continue and derived *some measure of benefit* from his visits. Based on this record, the only reasonable inference is that S.B. would be greatly harmed by the loss of her significant, positive relationship with [her father]." (*Id.* at pp. 300-301; italics added.)

The "some measure of benefit" language in *S.B.* has been cited in appellate cases to describe all that was required to establish the parent-child beneficial relationship exception. (*C.F., supra*, 193 Cal.App.4th at p. 558.) The same appellate court, however, emphasized that *S.B.* does not stand for such a proposition. It also stated it had not found any case, published or unpublished, that had reversed an order terminating parental rights based on its opinion in *S.B.* (*C.F., supra*, at p. 558.)

Mother's case is readily distinguishable from *S.B.* Mother did *not* fully comply with her case plan and, unlike the father in *S.B.*, has an untreated mental illness that places her child at risk of harm. More fundamentally, as we stated above, incidental benefit from parental contact is an insufficient basis to support the beneficial relationship exception.

We conclude the juvenile court did not abuse its discretion in determining that adoption would not be detrimental to Michelle and affirm its order terminating mother's parental rights.

DISPOSITION

The order terminating mother's parental rights is affirmed.