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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Z.U., a Person Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

A.S. et al.,

Defendants and Appellants.

G045592

(Super. Ct. No. DP018979)

O P I N I O N

Appeal from a order of the Superior Court of Orange County, Cheryl L. Leininger, Judge. Affirmed.

Nicole Williams, under appointment by the Court of Appeal, for Defendant and Appellant A.S.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant G.U.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Aurelio Torre, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

* * *

Father A.S. and mother G.U. appeal from the juvenile court's order terminating their parental rights to their now 2-year-old daughter Z.U. (child) under Welfare and Institutions Code section 366.26. (All statutory references are to this code.) They contend the court erred in finding the benefit exception under section 366.26, subdivision (c)(1)(B)(i) did not apply. We disagree and affirm.

FACTS AND PROCEDURAL BACKGROUND

Due to mother's unresolved substance abuse issues and the fact her other children were dependents of the court, a hospital hold was placed on the child at birth in October 2009. Father was one of three named by mother as the child's possible biological father but his whereabouts were unknown at the time of detention.

For the next month, mother "had zero contact with the" child and did not inquire about her health and well-being. She began monitored visitation at some point thereafter and was reported to be appropriate.

A paternity test confirmed father was the child's biological father. Although he wanted mother and the child to live with him, mother told the social worker father was violent toward and stalked her, used methamphetamine daily, and collected state benefits for mental illness. Additionally he sent threatening text messages and commented about taking the child away and changing their identities.

Father began monitored visits with the child. He hugged and kissed the child, telling her he loved her. Although the child stopped crying after sitting on her father's lap for fifteen minutes, she began fidgeting, "appeared agitated and began to

cry.” She settled down after he gave her a bottle but began crying again when he tried to burp her. He changed her diaper, appearing comfortable while doing so, and paced the room with her in an unsuccessful attempt to console her. When the foster mother arrived, the child “easily went to her and stopped crying.” The foster mother explained the child had difficulty transitioning to new people. A second visit a few days later had to be terminated early because the child constantly “cried and screamed” except when drinking her bottle. The visitation monitor reported “father appeared to be very clumsy to handle the baby.”

The court sustained the dependency petition and ordered a psychological evaluation of father. Shortly thereafter mother missed two drug tests and tested positive three times for methamphetamines. She also appeared to be under the influence of drugs at one visit, speaking rapidly, “look[ing] frazzled,” acting nervously, and “pay[ing] little attention to the baby,” instead talking with the foster mother and social worker. Although she was usually 15 to 20 minutes late, mother “attended most of her visits,” during which she fed the child but did not change her diapers.

Father continued to visit the child and brought diapers, pajamas, and a toy. He changed her diapers, was affectionate, rocked her gently to console her, and fed and burped her. When the child cried or became fussy, he walked around the room with her patting her back, offered her toys, or gave her a bottle. She calmed down after finishing the bottle, on one occasion holding his fingers as she drank. Nevertheless, the foster mother reported the child “continues to have a difficult time during and after the visits with the father. [Father] attempts to calm and soothe the [child], but the [child] cries and seeks out the monitor for comfort during her visits.”

By mid-April 2010, mother, who had been living with father despite having obtained a restraining order, no longer lived with him. Although father remained affectionate and attentive to the child during visits, he “seemed distracted with thoughts and concerns regarding . . . mother” and had to be redirected to focus on the child.

At the dispositional hearing in May, the court officially removed the child from the parents' custody and granted them reunification services. Between May and November mother missed 18 of her twice weekly visits with the child, was late to most, and at times left early. During the visits she did attend, mother held the child, gave her a bottle, and sometimes checked the child's diapers, though she did not change them. Nor did she bring diapers or food to visits. The child seemed comfortable when mother held her.

Father left early from visits from May to July but thereafter stayed the entire time, although he was often late. He continued to be "very affectionate" with the child and complimented her. He played, read, and listened to music with her, and changed her diaper. He also continued to bring play-doh for the child despite having been told it was not age appropriate.

Mother remained inconsistent with her visitation. By early 2011, she was missing half the visits, was usually late, and sometimes left early. At the end of visits, mother "appear[ed] to get tired and lose[] interest in the child. She [was] not attentive and stop[p]ed interacting with the child," then asked to leave early. On one occasion she left 45 minutes early to see a movie with her boyfriend.

Father maintained his visitation but almost fed the child expired milk he had brought to a visit and attempted to put diaper rash cream on her face. He also showed poor judgment in allowing the child to play with his ring and place a diaper bag around her neck.

In March 2011, the court terminated both parents' reunification services and set a section 366.26 hearing. From March to July, mother missed the majority of her visits and was late or left early for the ones she attended. Mother was appropriate during the visits and the child seemed to respond well to and was comfortable around her, often engaging her to play. Nevertheless, mother did "not take a parental role during the visits," "interact much with the child," or "focus all her attention [on] the child," instead

being “easily distracted by others” and “often seem[ing] more interested in . . . talk[ing] to the caregiver” The caregiver had “to prompt the mother to change the child’s diaper and . . . clothes when needed.” Other than a few toys on two occasions, mother brought nothing to the visits.

Father was also “consistently late” for visits. He often took breaks to check on his dog in his car and talked to other parents about their dependency cases, requiring the visitation monitor to redirect him to focus on his visit. By July, the child was unwilling to go with father at the beginning of visits and cried. Father frequently left the child with the monitor while he took ““drinking breaks,”” but it was unknown if he drank from the drinking fountain in the lobby or if he went to his car. Yet he continued to show affection, playing, reading, and singing to the child, feeding her, telling her he loved her, and changing her diaper.

At the section 366.26 hearing, the parties stipulated father had maintained regular and consistent visitation with the child. As the sole witness at the hearing, father testified he did the “ABC’s” and counted with the child, using her snacks, and explained how she liked to pretend to cook for him. They would talk and look at the birds and cars outside and played ball, though she had trouble with her hand-eye coordination. Father tried to bring snacks but was not always allowed to do so. He brought toys and changed the child’s diapers.

Although he acknowledged the child would cry when he first started visiting, father stated that after the first two visits “she was very, very happy to see [him]” and looked forward seeing him. She hugged him and did not want him to leave. When he put her in the car, the child would be upset and it was “hard for her to leave.” Father believed it would be “traumatic” for the child if visitation stopped and “the cancellation or removal of [him] from her life . . . will hurt her terribly” because “[i]t would be another denial of her rights to live her life as it is right now” He “consider[ed] himself] to be a father figure for the visits” and tried to be involved in the child’s life.

The court found the child was specifically and generally adoptable and that, although the parents had a bond with her, she did not have “the same connection as the parents have to her,” as evidenced by the child’s reluctance to go to father at the beginning of recent visits. The child had been in the same foster home since she was 29 days old. Mother’s visits were sporadic, but father maintained regular and consistent visitation, which had gone well for the most part despite some “minor issues.” The court concluded the parent-child relationship did not outweigh the benefits of adoption and terminated parental rights.

DISCUSSION

Parents contends the court erred in terminating their parental rights because they satisfied the benefit exception of section 366.26, subdivision (c)(1)(B)(i) by showing they maintained regular visitation and contact with the child and that the child would benefit from continuing a continued relationship. The contention lacks merit.

Once the court determines under section 366.26 a child is likely to be adopted, it “shall terminate parental rights” (§ 366.26, subd. (c)(1)) and order the child placed for adoption unless it “finds a compelling reason for determining that termination would be detrimental to the child” because of one of the statutory exceptions (§ 366.26, subd. (c)(1)(B)). One exception is where a “parent[] ha[s] maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) The parent has the burden of proving both factors and that they “occupie[d] a ‘parental role’ in the child’s life. [Citations.]” (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826-827.)

A beneficial parent-child 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.* (1994) 27 Cal.App.4th

567, 575.) A parent must establish more than merely some benefit to the child by continuing the parent-child relationship, as “[i]nteraction between natural parent and child will always confer some incidental benefit to the child.” (*Ibid.*)

When determining whether a parent-child relationship confers more than incidental benefit to a child, courts have noted that such a “relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.]” (*In re S.B.* (2008) 164 Cal.App.4th 289, 297.) The exception does not require “proof that the child has a ‘primary attachment’ to a parent or that the noncustodial parent has maintained day-to-day contact with the child. [Citations.]” (*Id.* at p. 300.) Nevertheless, a “parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits. [Citation.] . . . [T]he parent must prove he or she occupies a parental role in the child’s life, resulting in a significant, positive emotional attachment of the child to the parent. [Citations.]” (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.) To overcome the benefits associated with a stable, adoptive family, the parent seeking to continue a relationship with the child must prove that severing the relationship will cause not merely some harm, but great harm to the child. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853.) If supported by substantial evidence, we will not disturb the court’s determination that a beneficial relationship does not exist. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 576.)

Here, neither parent has identified any evidence the child would suffer detriment from the termination of their parental rights. Mother’s citation of evidence she bonded with the child at birth, held and fed the child, changed her when prompted, and that the child was comfortable around her, often engaging her to play demonstrates the relationship between them was nothing more than that of a friendly visitor. The facts mother had to be prompted to change the child’s diaper even after reunification services were terminated and was more interested in talking to the caregiver rather than focusing

on the child also support a determination she did not “occup[y] a ‘parental role’ in the child’s life. [Citations.]” (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 826.)

Father references evidence he was affectionate, attentive, and appropriately concerned for the child’s well-being; played with, read to, and listened to music with the child; changed her diapers; plus made consistent efforts to console her whenever she cried, to which the child responded well by calming down at feedings, no longer crying consistently throughout visits or having reported problems at home after visits with father, not crying at all on two visits, and on one occasion holding father’s finger while drinking her bottle. He also cites his testimony at the section 366.26 hearing, which he claims was “uncontroverted” because no one else testified, in which he presented “very detailed and specific information that only a person in a parental role could provide”; described his attempts to engage the child in talk and teach her numbers and the alphabet, as well as how the child responded to him; and his belief he was a “‘father figure’” to the child and that it would be “traumatic” for her if visits were discontinued. At most, father has shown a bond may have existed between him and the child and that some visits may have become more pleasant.

None of the evidence cited by the parents demonstrated their relationship with the child outweighed the benefits of adoption or that the parent-child relationship was so significant that its termination would cause the child any detriment. To the contrary, neither parent progressed beyond monitored visitation. (*In re Jeremy S.* (2001) 89 Cal.App.4th 514, 523, disapproved of on another ground in *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414 [showing required for benefit exception “difficult to make . . . where . . . parents have . . . [not] advanced beyond supervised visitation”].) The child was almost two years old at the time of the section 366.26 hearing and had been living with the same foster parent who now wanted to adopt her since she was less than a month old. At the end of visits, the child went easily to the foster mother and

stopped crying. Moreover, towards the later stages of the case, the child did not want to go with father at the beginning of visits and cried.

Father's testimony he believed the child would be traumatized if he no longer visited does not alter our analysis as "[w]e review the evidence in the light most favorable to the trial court's determinations, resolve all evidentiary conflicts in favor of the prevailing party, and indulge in all reasonable inferences to uphold the trial court's findings. [Citation.] We do not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts. [Citation.]" (*In re H.G.* (2006) 146 Cal.App.4th 1, 12-13.)

To the extent the child derived some benefit from the relationship with her parents, the quality and strength of that relationship did not outweigh the benefits of adoption. That plus the child's need for a permanent, stable home support the court's finding the beneficial parent-child relationship to adoption did not apply. "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. [Citation.]" (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

We reject parents' contention the court should have ordered legal guardianship rather than terminating their parental rights. "Adoption, where possible, is the permanent plan preferred by the Legislature." [Citation.] If the court finds that a child may not be returned to his or her parent and is likely to be adopted, it must select adoption as the permanent plan unless it finds that termination of parental rights would be detrimental to the child [Citations.]" (*In re Derek W., supra*, 73 Cal.App.4th at p. 826.) Where, as here, adoption is possible and detriment to the child has not been shown, legal guardianship is not an option. (*In re Jose C.* (2010) 188 Cal.App.4th 147, 158.)

DISPOSITION

The order is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

FYBEL, J.