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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re SOFIA S., A Person Coming Under
the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

Y.M.,

Defendant and Appellant.

G045879

(Super. Ct. No. DP019942)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Barbara H. Evans, Temporary Judge. (Pursuant to Cal. Const. art. VI, § 21.) Affirmed.

Marsha F. Levine, under appointment by the Court of Appeal, for Defendant and Appellant.

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

No appearance for the Minor.

Y.M. (aka Jenny) appeals from a judgment terminating her parental rights to her one-year-old daughter Sofia. She contends the juvenile court erred in failing to apply the so-called “benefit exception” to termination (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i)), but we disagree and affirm the judgment.

FACTS

Sofia’s father is Gustavo S. In January 2010, Jenny inflicted serious physical harm on one of Gustavo’s children from a previous relationship. Only four years old at the time, the child suffered permanent brain damage and partial paralysis as a result of Jenny’s actions. Consequently, when Sofia was born in June 2010, she was detained and placed with Gustavo’s parents. The juvenile court denied reunification services and set a hearing to decide on a permanent placement plan for Sofia.

Jenny challenged the denial of reunification services, but we denied her petition for writ relief. (*Y.M. v. Superior Court* (June 7, 2011, G044839) [nonpub. opn.])¹ The permanency hearing then went forward, and the court decided to terminate Jenny and Gustavo’s parental rights and free Sofia for adoption. Gustavo has not appealed that decision, but Jenny claims the court erred in failing to apply the benefit exception in her favor. For reasons that follow, we cannot agree.

Since she was five days old, Sofia has resided in the care of her paternal grandparents. They have tended to all of her needs and been identified as her prospective adoptive parents. As described in the social worker’s reports, there is a “warm physical and emotional connection” between Sofia and her grandparents. The child is healthy, content and well cared for, and is considered by the grandparents to be a delightful addition to their home.

¹ Since then, the parties have discovered Sofia’s name is spelled with an “f” and not a “p,” which explains why we referred to her as “Sophia” in our prior opinion.

Jenny has visited Sofia regularly. The visits occur three times a week in two hour intervals; Jenny has never requested visitation beyond that amount. The grandparents have monitored the visits and indicated they are open to continued visitation should they become the adoptive parents. Although the visits are pleasant and convivial, the social worker reported “the child does not exhibit distress at the end of the visits She is quickly distracted and soothed if she does show some reaction to the mother’s departure, a reaction which cannot be classified as anxiety or distress. There is no doubt that Sofia enjoys the time and attention she gets from her mother during visits and that the mother is appropriate and affectionate to the child in her time with her. However, there have been various examples in the visits the [social worker] has observed that have highlighted the child’s primary relationship is with her prospective adoptive mother, to whom she turns and whom she seeks when she is tired, fussy, or in need of consolation and soothing.”

At the permanency hearing, the social worker elaborated on the nature of the visits. She testified Jenny plays with Sofia, feeds her and changes her diaper. However, Sofia does not look to Jenny for feeding or diaper care. Reiterating her belief Sofia’s primary relationship is with her grandmother, the social worker opined it would not harm the child if her visits with Jenny were ended.

Jenny testified she brings food, clothing and diapers to the visits and also washes Sofia’s clothes. Sofia is happy to see her and they enjoy playing and spending time together. When asked if she has a bond with Sofia, Jenny said, “I’d like to say yes. . . . The minute I walk in, we just make eye contact, she smiles right away. I do my very best to make that bond or to have a bond with her.” Jenny said she has the grandmother distract Sofia when she leaves, so the child will not be sad. But parting is sad for Jenny. She said she loves Sofia very much and “every child should have the right to have her parents around.”

The court did not see it that way. While recognizing Jenny's visits with Sofia have been regular and amicable, the court stated, "It is easy to be a parent when you are a parent for two hours three times a week. It is easy to buy cute little baby clothes and to play with the baby and to feed her. The real test of a parent-child relationship is who is there 24 hours a day seven days a week to care for the child?"

"And in this case . . . those people have been the paternal grandmother and grandfather. They are the people with whom [Sofia] clearly has a parent-child relationship. The real detriment to [Sofia] would be to wrench her from the two people who have loved her and cared for her 24 hours a day since she was five days old, and that would be the paternal grandparents.

"I believe . . . [Sofia] is very fond of her parents just as she is fond of any kind visitor, just as she would be fond of a child care provider if, in fact, she were in daycare or child care. But we all know that children go to child care . . . and they go on to other phases of life, they go on to school, and these children are not permanently damaged or detrimentally harmed by no longer being with their babysitter, their nanny, their preschool teacher. And certainly the court does not believe that [Sofia] would be permanently damaged or suffer a detriment if she were adopted by her paternal grandparents, in addition to which of course the court believes that the parents would continue to have contact at least on the same basis that they have been having if [Sofia] is adopted by her grandparents, who clearly love her and clearly are committed to her. The detriment to remove [Sofia] from this environment would be beyond description"

Therefore, the court refused to apply the benefit exception. Finding Sofia to be highly adoptable, the court terminated Jenny and Gustavo's parental rights and freed the child for adoption.

DISCUSSION

In challenging the court's ruling, Jenny maintains the court overemphasized Sofia's relationship with her grandparents and failed to consider her own relationship

with the child. Jenny argues the potential harm from severing the parent-child relationship should be the only concern of the court, and “the effect of removing Sofia from the home of her grandparents was not a factor to be considered.” We disagree.

The benefit exception applies where the parent has “maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).) The relationship must promote “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.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

That is just what the court did in this case. On the one hand, it determined that Sofia has benefited greatly from the consistent loving, care and support of her grandparents and that it would harm her “beyond description” to remove her from their home. On the other hand, the court believed Jenny’s relationship to Sofia was akin to that of a friendly visitor or daycare provider, and it would not harm the child if the relationship were to be terminated. In comparing the strength and quality of the natural parent/child relationship to the likely benefits Sofia will continue to enjoy in the grandparents’ home, the court applied the correct legal standard in this case.

Jenny also argues the court erred in failing to find the benefit exception applicable, but again we disagree. The parent has the duty of proving the exception applies. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) He or she “must do more than demonstrate ‘frequent and loving contact[,]’ [citation] an emotional bond with the child, or that parent and child find their visits pleasant. [Citation.]” (*Id.* at p. 827.) Instead, “the parent must prove that 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.” (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1234.)

It is undisputed Jenny visits Sofia regularly, brings her food and clothing, and interacts with the child in an appropriate and caring manner. But as much as Sofia enjoys spending time with Jenny, she displays no signs of distress when the visits are over. She clearly looks to her grandparents as her parental figures, and there is no evidence she would suffer detriment if Jenny's parental rights were severed. That being the case, we cannot say the court erred in failing to apply the benefit exception to adoption. The court's decision to terminate Jenny's parental rights enjoys substantial evidentiary support and does not constitute an abuse of discretion by any means. (Compare *In re S.B.* (2008) 164 Cal.App.4th 289 [benefit exception applicable where the child displayed a strong attachment to the parent and a bonding study indicated the child could be harmed if the parent's rights were terminated]; *In re Amber M.* (2002) 103 Cal.App.4th 681 [same].)

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.