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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re ANTHONY L. et al., Persons Coming
Under the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

DIANA H. et al.,

Defendants and Appellants.

G046455

(Super. Ct. Nos. DP019479,
DP019480)

OPINION

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

Linda Rehm, under appointment by the Court of Appeal, for Defendant and
Appellant Diana H.

Michelle L. Jarvis, under appointment by the Court of Appeal, for
Defendant and Appellant Marco L.

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

* * *

Diana H. (mother) and Marco L. (father) appeal from the juvenile court's judgment terminating their parental rights to Anthony and Damian L.¹ The parents contend there is insufficient evidence to support the court's finding the continuing benefit exception (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i); all statutory citations are to this code unless indicated) did not apply. Finding no basis to overturn the judgment, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

In February 2010, Damian L. (born September 2009) required emergency surgery for cranial and retinal hemorrhaging. According to hospital physicians, the injuries resulted from nonaccidental trauma, specifically “shaken baby syndrome.” Damian had previously received treatment for a swollen tongue, likely the result of force feeding. The injuries coincided with father becoming the children's primary caretaker. The parents had no explanation for the injuries.

The Orange County Social Services Agency (SSA) took Damian and his older brother Anthony L. (born May 2007) into protective custody and filed a petition alleging Damian had suffered serious physical harm inflicted nonaccidentally by his parents (§ 300, subd. (a)), the children had suffered or were at substantial risk of suffering serious physical harm or illness as a result of the parents' failure or inability to supervise

¹ Father joins in mother's argument and argues reversal of the judgment terminating his parental rights is required if the judgment as to mother is reversed. (Cal. Rules of Court, rule 8.200(a)(5); rule 5.725(a)(2) [court may not terminate the rights of only one parent absent exceptions not applicable here].)

or protect them (§ 300, subd. (b)), and a child under age five had suffered severe physical abuse by a parent (§ 300, subd. (e)).

In August 2010, the parents submitted on the issue of jurisdiction, and the juvenile court found the allegations of the petition to be true. In advance of the disposition hearing, mother reported she was no longer living with father and wanted him to prove he had nothing to do with the injuries. At the disposition hearing in January 2011, the court declared the children to be dependents of the juvenile court. The court denied reunification services for father under section 361.5, subdivision (b)(5) (child under five brought within the jurisdiction of the court under section 300, subdivision (e), because of abuse by that parent). The court ordered reunification services for mother, and allowed both parents weekly monitored visitation. SSA initially placed the children with relatives, but moved them to foster care in February 2011.

In late May 2011, SSA received a child abuse report (CAR) alleging mother and father lived together, and allowed their children to drink beer. SSA investigated but determined at that time the CAR was unfounded. Also in May, the foster parents withdrew for personal reasons, and SSA placed the children at Orangewood Children's Home.

As of June 2011, mother appeared to be actively participating in her case plan and SSA deemed her compliance "substantial." She attended child abuse and parenting classes, and participated in counseling, while working full time. Mother's therapist reported mother had "demonstrated excellent motivation, insight and commitment to change" She was "actively involved" with her children, maintaining "consistent contact . . . through visitation," making and attending medical and dental appointments, providing the caretakers with food and diapers, and enrolling Anthony in a soccer league. The social worker increased mother's visitation to 16 hours, half of it unsupervised. The caretaker characterized the visits as very positive. Mother claimed to have minimal contact with father. She reported she was not "100 percent sure" he caused

Damian's injuries, but "his behaviors and reactions since the injury" led her to "feel suspicious of him as the perpetrator." Father had not maintained contact with the social worker and had no recent visitation with the children.

In late June 2011, SSA placed the children with the current foster mother, who knew mother through work. On June 23, the social worker went to mother's residence unannounced. Mother denied contact with father, although she showed the worker some of his belongings, which she had packed away in boxes.

In early July 2011, the foster mother reported she believed father had been present during mother's visits with the children. Anthony reported "Tony" (father's nickname) had been at a visit, and he "pulls [Anthony's] ears and it hurts." The foster mother reported mother told her she concocted a story to the social worker about dating a new man so the social worker "would not suspect she was still with the father." Mother showed the foster mother pictures of the family at the zoo and identified father as "my husband" in the photos. Anthony reported "daddy hit my mommy" and he "hit Damian on the head." The foster mother reported mother yelled inappropriately at Anthony and expressed concern about mother's overreaction. Anthony acted out after visits with mother, and regressed with eating habits and toilet training. Mother told the foster mother she "was tired and overwhelmed," and wanted to spend more time with an older daughter, who was also not in her custody. Mother initially denied the allegations concerning contact with father, then claimed it was only "one time." Mother's therapist reported mother had been "dishonest in her therapy as well."

The social worker reduced mother's visitation to four hours, imposed a monitor, and recommended termination of reunification services. In August 2011, mother submitted on the social services reports and the juvenile court terminated reunification services. The court scheduled a section 366.26 hearing for December.

In the report prepared for the section 366.26 hearing, the social worker stated the children were cute, active and outgoing, and loving. Anthony loved "his little

brother [Damian] very much.” Based on their ages, characteristics, and attributes, Anthony and Damian were likely to be adopted. Anthony was very affectionate with his caretaker and “goes to her for comfort and attention.” Anthony told the social worker the current caretaker was “nice and a good mommy.” He liked visiting his mother, but stated she was “a bad mommy,” and “gets mad all the time.” According to the foster mother, the “children’s behaviors tend[ed] to regress when they come home from visits with” mother.

At the section 366.26 hearing,² four-year-old Anthony testified he called mother “mommy” and father “Tony” or Dad. He admitted he told mother he missed and loved her, but also testified he did not miss her, and called his foster mother “mommy.”

The foster mother testified she had monitored mother’s visits and did not see “bonding.” She characterized the relationship between mother and the children as distant and lacking affection.

Mother testified Anthony was two years old when SSA removed the children from her home. She had been a stay at home mom, “constantly took care of him,” and had “a nurturing, emotional bond with him . . .” After SSA removed the boys from her custody when Damian was three months of age, she continued to supply Damian with breast milk. Anthony’s behavior declined when the social worker reduced her visitation. She continued to care for and comfort the children as best she could with the limited visitation. She “talk[ed] to them a lot, hug[ged] them, show[ed] them a lot of attention.” She “read them books” and helped them to write letters and color. The boys fought for her attention, called her “mommy,” and “constantly ask[ed her] to hug them, give them a kiss or look at [them], look at what I’m doing, look, mommy. Look what

² Mother filed a section 388 request to modify the order terminating reunification services. The juvenile court denied the request after finding mother had not demonstrated a change of circumstances, or that a modification of the order would be in the children’s best interests. Mother does not appeal from that order.

I did for you.” Anthony “will always say, ‘I’ll see you. I’ll see you again, okay?’” Anthony ran up to her at the beginning of visits, gave her a hug and a kiss, and said “Hi, mommy” or sometimes “I love you mommy” or “I miss you.” When the social worker reduced her visitation, Anthony would sometimes cry at the end of visits and say he wanted to leave with her.

Damian was very affectionate with her and “clings to me a lot.” As they departed at the end of visits, the children would look back for her and she would blow them a kiss, and they would respond in kind and say “miss you” or “love you.” More recently, the end of visits had been less emotional. Mother admitted lying to the social worker about father’s contact with the children, but insisted she only permitted one visit with her and the children at the zoo when he gave her money and they took a family photograph. She and father were “not together.”

The juvenile court found the children were likely to be adopted. The court terminated parental rights, expressing concern over mother’s poor judgment, lack of insight, and inability to protect the children and provide a safe environment. The court remarked mother had not “been honest with the court [or SSA],” and it disbelieved mother’s testimony describing visits, siding with the independent monitor’s reports. The court found that while mother loved the children, and the children enjoyed visits with her, mother and the children did not have a strong or close emotional attachment, and the benefits of an adoptive home outweighed any incidental benefit in maintaining the natural parent relationship. The court remarked the evidence showed the children looked to the foster mother for support and comfort and recognized her as the parental figure.

II

DISCUSSION

Mother contends the juvenile court erred in terminating her parental rights. She argues there is insufficient evidence to support the court's finding the continuing benefit exception (§ 366.26, subd. (c)(1)(B)(i)) did not apply. We disagree.

Section 366.26 provides that after reunification efforts have failed and the court finds the child is likely to be adopted, “the court shall terminate parental rights” (§ 366.26, subd. (c)(1)), unless specified circumstances exist. One exception is where “[t]he court finds a compelling reason for determining that termination would be detrimental” because “[t]he 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).) “[T]he burden is on the party seeking to establish the existence of one of the section 366.26, subdivision (c)(1) exceptions to produce that evidence.” (*In re Megan S.* (2002) 104 Cal.App.4th 247, 252.)

The statutory exception requires the child “benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) The benefit exception “does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348 (*Jasmine D.*)) To the contrary, once the mandated period for reunification has passed the parent bears the burden of proving that termination of parental rights will be detrimental to the child. (*Id.* at p. 1350.) After reunification efforts end, the Legislature's preferred permanent plan calls for termination of parental rights and subsequent adoption. (*In re Jose V.* (1996) 50 Cal.App.4th 1792, 1799; *In re Cody W.* (1994) 31 Cal.App.4th 221, 227–231.) “Adoption is the Legislature's first

choice because it gives the child the best chance at . . . commitment from a responsible caretaker. [Citations.]” (*Jasmine D.*, at p. 1348.) Thus, the benefit prong of section 366.26, subdivision (c)(1)(B)(i), is satisfied only if “the relationship 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.) “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.” (*Ibid.*) The court’s balancing of competing considerations must be performed on a case-by-case basis, taking into account variables such as the child’s age, “the portion of the child’s life spent in the parent’s custody, the “positive” or “negative” effect of interaction between parent and child, and the child’s particular needs. [Citation.] . . .” (*Jasmine D.*, at pp. 1349–1350; *Autumn H.*, at pp. 575–576.)

We will not disturb the juvenile court’s balancing of interests unless the order is not supported by substantial evidence (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 425), or the court abused its discretion (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351; see *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314 [substantial evidence standard of review applies to existence of a beneficial parental or sibling relationship; abuse of discretion standard applies to whether existence of relationship constitutes a compelling reason for determining that termination would be detrimental]; see *In re C.B.* (2010) 190 Cal.App.4th 102, 123) [“the trial court’s findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious”].)

Mother states she actively participated in her case plan, including counseling sessions, child abuse prevention classes, parenting classes, and a personal empowerment program. She visited as much as she was allowed, 16 hours a week without supervision as of early July 2011, and never missed a visit. She argues she actively parented her children during the time she spent with them, assisted with medical and dental appointments, provided the caretakers with diapers, food, and other items as needed, and helped find new caretakers when placements fell through. She enrolled Anthony in a soccer league, and attended his practices and games. Mother focuses on the period February to May 2011, when the social worker characterized mother's visits as "very positive" based on reports from the former caretaker who stated the children responded well to the mother and they cried when she left. "Damian is said to get over it quickly, but Anthony will remain upset for a while. The mother also displayed empathy to the children's needs, as she would sit and talk to them before leaving as Anthony would become really upset, cry, and throw tantrums when the mother would have to leave." Mother testified she never had behavioral problems with Anthony until her visits were reduced to four hours of monitored visitation. She claimed Anthony and Damian would cling to her and cry.

Mother minimizes the substantial evidence of detriment in continuing the parental relationship, however. In July 2011, the social worker discovered mother had been lying about her relationship with father. She was not "dating a new guy" and "moving on to a new relationship." As late as November 2011, the foster mother reported seeing mother and father together at a store. Father furtively ducked into mother's van when Anthony spotted him. In light of the jurisdictional and dispositional findings, mother's relationship with father, who was denied reunification services and

eschewed authorized monitored visits with the boys, posed a grave risk to their physical and emotional well-being. Significantly, at the section 366.26 hearing, mother testified she still did not know whether father caused Damian's injury. As noted by SSA's lawyer, notwithstanding mother's participation in "all those programs [mother] still allowed unauthorized contact with father."

Mother's election to continue a secretive relationship with father called into question any allegedly positive aspects of the mother-child relationship reported by mother and the previous caretaker. Anthony reported father had hit mother, painfully pulled on his ear, and struck Damian in the head. Anthony stated he wanted to kill his father. Anthony returned from visits tending to "act out more, has bad habits, he will talk back, say 'I hate you.'" He regressed with toilet training and feeding himself. The foster mother reported mother yelled inappropriately at Anthony and she expressed concern "about the mother's reaction to the child." Mother also complained the children were "out of hand and hard to control," she was "tired and overwhelmed," and it was the foster mother's "responsibility to care for the children," as mother was "doing the [foster mother] a favor by taking the children off her hands for" the weekend hours.

The foster mother testified when she monitored visits, mother did not "interact with the kids [¶] . . . [¶] She would talk to them, play with them, but there was never that connection, that bonding." She characterized the relationship as "distant" and saw no kissing, hugging, or other signs of affection. At the end of one visit in late July "Anthony was watching television and . . . did not look up to say [goodbye] to his mother" During a visit in August, mother attempted to hug Anthony and he "pretty much wanted her to let go," and he "continued to play with toys and watch a movie." Damian "did not want [mother] to hold him or be near him." During a

November 2011 visit, Anthony hit mother and said repeatedly, “I don’t like you, I want my other mommy.” The children went “home easily and they do not cry to stay with [her].” The monitor also noted mother did not follow through with discipline when the children misbehaved during visits. The foster mother testified Anthony had bathroom “accidents” the day after a visit with mom.

Mother’s reliance on *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*) is misplaced. There, the juvenile court found father had maintained consistent and appropriate visitation with his daughter throughout the dependency proceedings and they shared an emotionally significant relationship. (*Id.* at p. 298.) The father had been S.B.’s primary caretaker for three years and, when she was removed from his custody, the father complied with every aspect of his case plan. (*Ibid.*) The record showed that “S.B. loved her father, wanted their relationship to continue and derived some measure of benefit from his visits.” (*Id.* at pp. 300–301.) An expert who had conducted a bonding study of father and daughter testified that, due to their “fairly strong” bond, “there was a potential for harm to S.B. were she to lose the parent-child relationship.” (*Id.* at pp. 295–296.) The appellate court concluded that “[b]ased on this record, the only reasonable inference is that S.B. would be greatly harmed by the loss of her significant, positive relationship with [the father]. [Citation.]” (*Id.* at p. 301; see also *In re Amber M.* (2002) 103 Cal.App.4th 681, 689–691 [termination of parental rights reversed where experts opined children had a primary beneficial relationship with parent that clearly outweighed benefit of adoption]; *In re Scott B.* (2010) 188 Cal.App.4th 452 [court found compelling reason to reverse order terminating parental rights where nine-year-old child had consistent weekly visits with mother, and court appointed special advocate that found

disrupting the close mother-daughter relationship would prove detrimental to an emotionally vulnerable child who repeatedly insisted on living with her mother].)

Here, there was no testimony from a psychological expert or other disinterested person suggesting termination of parental rights would be detrimental. As stated in *In re Jason J.* (2009) 175 Cal.App.4th 922, the same appellate court that decided *S.B.*, “The *S.B.* opinion must be viewed in light of its particular facts. It does not, of course, stand for the proposition that a termination order is subject to reversal whenever there is ‘some measure of benefit’ in continued contact between parent and child.” (*Jason J.*, at p. 937.)

Mother’s ongoing relationship with father was detrimental to the children, and ample evidence contradicted mother’s testimony she enjoyed a strong emotional bond with Anthony and Damian. On the other hand, the boys now looked to the foster mother for support and comfort, and recognized her as a parental figure. Accordingly, substantial evidence supports the juvenile court’s finding the children would not benefit from continuing their relationship with mother.

III

DISPOSITION

The judgment terminating parental rights is affirmed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.