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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re K.E., a Person Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

ERICA S.,

Defendant and Appellant.

G046520

(Super. Ct. No. DP019564)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Richard Y. Lee, Judge. Affirmed.

Lori A. Fields, 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.

* * *

Erica S. (mother) appeals from the termination of her parental rights over K.E. (now age four). Mother contends the court's termination of her parental rights was detrimental to K.E. under the statutory exception to adoption for a beneficial parental relationship. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).)¹ We affirm.

FACTS

In a March 22, 2010 petition, Orange County Social Services Agency (SSA) alleged, inter alia, mother and K.E.'s father failed to protect K.E. (then age two) when the parties became involved in a domestic altercation in the child's presence resulting in physical injury to mother and father's arrest for willful cruelty to a child and infliction of corporal injury to a spouse or cohabitant.² (§ 300, subd. (b).) The parents had histories of substance abuse and criminal arrests. Mother's prior drug use included heroin.

SSA initially left K.E. in mother's care. But at the detention hearing, the court detained K.E. and granted mother reunification services and liberal monitored

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

² K.E.'s father is not a party to this appeal. The petition also covered mother's daughter (K.E.'s half-sister), K.S., who is not a subject of this appeal. Our factual recitation therefore focuses on mother and K.E.

visitation. SSA placed K.E. with her maternal grandmother.³ Two of mother's other children (K.E.'s half-siblings) also resided with the grandmother; the grandmother was their legal guardian.

In late May 2010, mother was arrested and incarcerated for a robbery conviction, with an anticipated release date in late January.

At the June 22, 2010 jurisdiction/disposition hearing, mother pleaded nolo contendere to the amended petition. The court found the petition's allegations true. The court approved mother's case plan, which included drug testing, domestic violence and parenting counseling, and keeping SSA apprised of her current address. The court granted mother two visits per month, so long as she was incarcerated in Orange County.

The grandmother brought K.E. to the jail twice a month to visit mother. The grandmother described the visits as bonding. On August 16, 2010, however, mother was transferred to a different facility where she was unable to visit with K.E., but mother maintained regular contact with the child through telephone and mail.

As of December 3, 2010, K.E. remained in the grandmother's care and appeared "well adjusted and bonded to the grandmother and her [half-]siblings." The grandmother stated she loves K.E. and would like to adopt her if mother failed to reunify. Mother remained incarcerated and was ineligible to participate in any of her case plan objectives due to her short sentence.

On January 4, 2011, mother was released from prison and moved into the Phoenix House. While there, mother visited with K.E. only once because the Phoenix House program impeded her from leaving the premises.

Less than a month later, mother left the Phoenix House against the advice of her Phoenix House case managers. Mother's whereabouts were unknown. SSA suspended mother's visitation privileges until she contacted SSA.

³ In this opinion we refer to the maternal grandmother as the grandmother.

About a week later, mother reported she was staying at the Victory Outreach United Women in Ministry shelter because she needed a spiritual environment. The shelter required mother to undergo 30 days of seclusion, with no contact with the outside world, in order to get in touch with her faith. The shelter made an exception for mother to visit with K.E., but not to participate in her case plan objectives. The shelter did not offer parenting classes, counseling, drug testing, or AA meetings, “as it was purely a spiritual venue for their clients.” Mother had drug tested twice. The grandmother brought K.E. to the shelter twice to visit with mother.

On February 25, 2011, SSA recommended that the court terminate mother’s and father’s reunification services and schedule a section 366.26 hearing. SSA reported that it appeared mother had not made reunifying with K.E. her first priority. The Victory Outreach residential program lasted one year, was designed to prepare woman to serve within their church community, and did not let children live with their mothers or even have overnight visits. Mother’s decision to live there for at least one year would interfere with her ability to visit and spend time with K.E., thereby damaging the parent child bonding process. The choice also hampered mother’s ability to accomplish her case plan requirements. After eight months of reunification services, mother had visited with K.E. approximately six times and completed two drug tests. Thus, mother had demonstrated a lack of commitment to regain custody of K.E. The likelihood she could reunify by the next court hearing was very remote.

During her stay at Victory Outreach, the shelter authorized mother to leave the shelter’s premises to work on her family reunification plan. But on April 1, 2011, mother was ejected from the shelter for staying out overnight without authorization and for not abiding by the shelter’s rules and expectations. Mother told SSA that the shelter’s environment had been too restrictive; mother said she was not willing to sacrifice her independence. Mother hoped to find housing at a sober living home.

Mother attended parenting classes on March 11, 18, and 25 of 2011. She claimed to be attending personal empowerment classes, but when asked to provide verification, she retracted her statement and clarified she had not even enrolled. She had partially participated in a drug treatment program. She attended four group counseling sessions before missing some sessions and missing a drug test. She had not participated in the drug program or its drug testing since March 28, 2011. She missed drug tests through a different program on March 31, 2011 and April 4, 2011. Mother had attended some Narcotic Anonymous meetings. Although referred to individual therapy to address her past history of domestic violence and substance abuse — the primary reasons K.E. was removed from her care — mother did not take advantage of the referral (which SSA placed “on pause”) because mother complained she was overbooked with her other service objectives, and could not tackle another responsibility.

On April 14, 2011, SSA recommended again that reunification services be terminated for mother and father and a section 366.26 hearing be calendared. Mother had made little reunification progress. She spent the first six months of the reunification period incarcerated for a robbery she committed during the dependency proceedings, which reflected her poor judgment and lack of commitment to be in K.E.’s life. During the three months since mother’s release, she had fled one shelter and been ejected from another, thereby demonstrating an instability pattern. She had no source of income and had been unemployed even before K.E.’s removal from her custody.

On May 1, 2011, mother was discharged from a hospital where she had been treated for renal failure due to previously untreated Hepatitis C, which had damaged her kidneys and heart. She received dialysis, was bedridden, and felt very sick. She had decided to relinquish her parental rights. She did not want to participate in any reunification services. She continued to visit K.E. regularly. On May 3, 2011, mother began residing at a sober living home.

At the six-month review hearing on May 17, 2011, the court found mother had been provided or offered reasonable services but had made minimal reunification progress. The court terminated her reunification services and scheduled a section 366.26 permanency hearing for September 14, 2011.

In June and July of 2011, mother's whereabouts were unknown and she did not visit K.E. The grandmother suspected mother was using drugs during that time. In August mother reappeared and began visiting K.E. twice a week. The grandmother reported K.E. was bonded with mother, but their interactions were generally at a friendship level — they played together as though on a play date. During the visits, K.E. sought attention, parenting, and guidance from the grandmother.

In September 2011, SSA recommended that the section 366.26 hearing be continued so that an adoptive home study could be approved for the grandmother. The grandmother was currently unemployed but had a history of stable employment, including owning a hair salon; she was also a certified medical assistant. She lived in a five bedroom mobile home in a middle class neighborhood and was in good health. The grandmother and her husband wished to adopt K.E. because they loved her and wanted her to be raised with her siblings and family. K.E. was “young, precocious, personable, and cute,” with no known medical, developmental, or behavioral problems. The grandmother believed mother could continue to have supervised visitation, because the grandmother can recognize when mother is under the influence of drugs and can protect K.E. from mother if needed. The grandmother had terminated visits when she suspected mother was under the influence of drugs. Mother continued to be transient and was last reported to be residing at a relative's home. The court continued the section 366.26 hearing.

On October 27, 2011, mother filed a section 388 petition seeking the return of K.E. to her custody or the reinstatement of her reunification services and increased visitation. Mother stated her kidney failure illness was now well managed and she had a

stable residence and steady income through disability, had obtained her GED, and had reenrolled in drug treatment, counseling, personal empowerment, and parenting classes. The court denied the petition.

On November 16, 2011, SSA reported the grandmother no longer wished to adopt K.E. because the grandmother wanted mother to have a chance to change her circumstances and regain custody.

On January 24, 2012, mother filed a section 388 petition similar to her previous one, with the exception that mother had finished her parenting classes. The court denied the petition.

At the section 366.26 hearing, the grandmother, the social worker, and mother testified. The court ordered mother's and father's parental rights terminated and that K.E. be placed for adoption.

DISCUSSION

Substantial Evidence Supports the Court's Finding the Section 366.26, Subdivision (c)(1)(B)(i) Beneficial Relationship Exception Did Not Apply

Mother contends she satisfied all required elements of the section 366.26, subdivision (c)(1)(B)(i) exception and demonstrated that termination of her parental rights would be detrimental to K.E. She argues insufficient evidence supports the court's finding to the contrary.

The court stated its written findings in an 11-page order. As to the regular visitation prong of the section 366.26, subdivision (c)(1)(B)(i) exception, the court concluded that, before August 2011, mother failed to maintain consistent and regular visitation. Indeed, mother had admitted in her testimony that there were times when she did not regularly or consistently visit K.E. due to mother's substance abuse problems. As to the second prong of the section 366.26, subdivision (c)(1)(B)(i) exception, which

balances the benefits of maintaining the parental relationship against the benefits of adoption, the court found mother's testimony was *not* credible, while the grandmother and the social worker were credible. The court found the bond between mother and K.E. to be "more akin to that of a relative, such as an aunt, than that of a parent. The court does not read additional significance to the fact that [K.E.], age three, asked to see the mother or enjoyed her visits with the mother, as children often want to see relatives that they have a positive relationship with, as well as friends."

Under section 366.26, subdivision (c)(1), if the court determines the child is likely to be adopted, the court must terminate parental rights and order the child placed for adoption unless one of six specified exceptions applies. "[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.)

Section 366.26, subdivision (c)(1)(B)(i) establishes the beneficial relationship exception. (*In re Amber M.* (2002) 103 Cal.App.4th 681, 689 (*Amber M.*)). Under that exception, termination of parental rights would be detrimental to the child if the parent has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (*Ibid.*) The parent must establish that both prongs of the exception have been met. (Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2011 ed.) § 2.171[5][b], p. 2-461.) As to the first prong, the parent must show he or she has "maintained regular visitation and contact with the child" (§ 366.26, subd. (c)(1)(B)(i).) As to the second prong, the parent must establish that "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 (*Autumn H.*)). A court must "balance[] 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.” (*Ibid.*)

On review, applying the substantial evidence test, we “accept the evidence most favorable to the order as true and discard the unfavorable evidence” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 53.) We give “the prevailing party the benefit of every reasonable inference and [resolve] all conflicts in support of the order.” (*Autumn H., supra*, 27 Cal.App.4th at p. 576.) ““Evidence sufficient to support the court’s finding “must be ‘reasonable in nature, credible, and of solid value; it must actually be “substantial” proof of the essentials which the law requires in a particular case.’”” (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 705.)

We turn to the second prong of the beneficial relationship exception, which requires the court to balance the strength and quality of the natural parent/child relationship against the security and the sense of belonging provided by an adoptive family. (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) Mother contends she demonstrated that continuing her “very close and loving relationship” with K.E. would benefit the child more than any added security she might receive from living with the grandmother under a plan of adoption. She argues the court expressly found the testimony of the grandmother and the social worker to be credible and that such testimony showed K.E. missed mother, asked to see her between visits, called her on the phone to find out when she was coming over, and often did not understand why she could not go home with mother when visits ended.

“Here, as in many dependency cases, the case posed evidentiary conflicts. And, as is common in many dependency cases, this case obligated the juvenile court to make highly subjective evaluations about competing, not necessarily conflicting, evidence.” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) Contrary to the applicable

standard of proof, mother focuses on the evidence favorable to her. We focus on the same testimony as mother, but view it in context and fairly.

The grandmother testified she was willing and able to adopt K.E. if parental rights were terminated. The grandmother loved K.E. and her step-siblings “just as if they were my children.” When K.E. asked the grandmother if the grandmother planned to adopt her, the grandmother said, “Yeah, okay,” and K.E. replied, “Okay.” In contrast, the grandmother described the relationship between mother and K.E. as friends and also as mother and daughter. When asked to describe in what ways they were like mother and daughter, the grandmother reported that when mother asks, “Do you love me very much?”, K.E. replies, “I love you, I love you.” Yet, when mother was not present, K.E. did not ask for mother “to help her with things.” When mother was sick and had to miss visits with K.E., “it didn’t affect” the child. At the end of a visit with mother, sometimes K.E. was content and sometimes not, “like a child.” K.E. was usually excited to show her books and toys to mother, but the child was also excited to show such items to the grandmother, since K.E. is “a very happy child.” Asked whether mother is a good mother with K.E., the grandmother said: “I can’t answer that because I’m not gonna say that, because it could be that in the future she could be a good mother, it could be.” The grandmother intended to maintain the relationship between mother and K.E. because “she is her mother, she is her mom.”

The social worker testified mother’s relationship with K.E. was like a friendship because the grandmother reported that the child comes to the grandmother “for any kind of parental guidance, rule setting, permission, et cetera[, and that the child’s interactions with mother] are mostly just hanging out, like friends.” The social worker also believed K.E. would benefit from continued visitation with mother because “mother has been part of the child’s life, that what the child knows to be in her dynamic, so it would be detrimental to take her away from that dynamic.” The social worker believed that if K.E. had no interaction with mother, she might “potentially” suffer emotional

harm. Mother and K.E. were bonded “in that they communicate with each other [and] seem to be comfortable around each other.”

But to “meet the burden of proving the section 366.26, subdivision (c)(1)(B)(i) exception the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits — the parent must show that he or she occupies a parental role in the life of the child.” (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1527.) “While friendships are important, a child needs at least one parent. Where a biological parent . . . is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent.” (*In re Jasmin D.* (2000) 78 Cal.App.4th 1339, 1350.) *Autumn H.* requires a balancing between the benefits to the child derived from securely placing her in an adoptive home as opposed to continuing a parental relationship. K.E. has bonded with the grandmother and calls her “mama.” At three years old, she was able to say she wanted to be adopted by her grandmother, meaning she wished to remain in the grandmother’s care. She said she loves her grandmother very much. K.E. had thrived in the grandmother’s care. Even mother acknowledges that K.E. “shares a very strong, loving bond with [the grandmother] and is happy in [the grandmother’s] home.”

Mother relies on *In re S.B.* (2008) 164 Cal.App.4th 289 and *Amber M.*, *supra*, 103 Cal.App.4th 681, but those cases do not assist her cause. In *Amber M.*, the mother “was devoted to [her children] and did virtually all that was asked of her to regain custody.” (*Amber M.*, at p. 690.) Similarly, the father in *S.B.* “complied with ‘every aspect’ of his case plan.” Here, mother failed to demonstrate that she had consistently made reunification with K.E. a priority in her life. She complained she was being asked to do too much to reunify, even though she was unemployed and had no time conflicts resulting from a job.

Mother points out K.E. lived with mother for the first two years of her life and that legal guardianship and long term foster care are alternatives to adoption as a

permanent plan. Pursuant to legislative mandate, the clear preference at this stage of the dependency proceedings is for adoption. “The Legislature has decreed . . . that guardianship is not in the best interests of children who cannot be returned to their parents. These children can be afforded the best possible opportunity to get on with the task of growing up by placing them in the most permanent and secure alternative that can be afforded them.” (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419.)

Because mother failed to meet her burden of proof to show K.E. would benefit more from the continuation of mother’s parental rights than from the grandmother’s adoption of the child, we do not address the first prong of the beneficial relationship exception, i.e., the regular visitation and contact requirement.

DISPOSITION

The postjudgment order is affirmed.

IKOLA, J.

WE CONCUR:

O’LEARY, P. J.

RYLAARSDAM, J.