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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re O.A. et al., Persons Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

O.A. et al.,

Defendants and Appellants.

G052431

(Super. Ct. Nos. DP023998,
DP023999, DP025567)

O P I N I O N

Appeal from postjudgment orders of the Superior Court of Orange County,
Gary Bischoff, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

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

Sharon S. Rollo, under appointment by the Court of Appeal, for Defendant and Appellant O.A.

Leon J. Page, County Counsel, Karen L. Christensen and Debbie Torrez, Deputy County Counsel, for Plaintiff and Respondent.

* * *

N.A. (mother) and O.A. (father) appeal from the termination of their parental rights over O.A. (now age three) and H.A. (now age two). Mother contends the court's termination of her parental rights was detrimental to O.A. and H.A. (the boys) under the statutory exception to adoption for a beneficial parental relationship. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).)¹ Father joins in mother's appeal and contends that if mother's parental rights are reinstated, his parental rights should be restored as well. We affirm the court's termination of the parents' parental rights over O.A., H.A., and A.A.²

FACTS AND PROCEDURAL HISTORY

We refer to our prior unpublished opinion (*N.A. v. Superior Court of Orange County* (July 21, 2015, G051893)), in which we detailed the facts and procedural history in this case leading up to the juvenile court's April 30, 2015 rescheduling of a section 366.26 hearing (.26 hearing). In brief, the boys were detained on July 15, 2013, when H.A. tested positive for methamphetamine at birth. The boys were subsequently

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

² The parents do not challenge the court's termination of their parental rights over one-year-old A.A.

declared court dependents and placed with relatives. About a year later, mother tested positive four times for methamphetamine, but adamantly denied drug use and claimed the test results were false positives. The court set a .26 hearing. The parties then stipulated to provide mother one last chance at reunification, conditioned on mother testing negative for drugs. When mother again tested positive for methamphetamine, the court reset the .26 hearing for August 5, 2015. Mother petitioned for a writ of mandate, claiming the juvenile court deprived her of due process when it declined to proceed with a review hearing or listen to her testimony, which (according to an offer of proof) would have amounted to her denying she actually ingested drugs. We denied her petition.

In an August 5, 2015 report, Orange County Social Services Agency (SSA) recommended that the parents' parental rights be terminated. Social worker Dorothy Perez concluded the children were adoptable and that termination of the parents' parental rights would not be detrimental to them. The boys' caregivers (Juan and Virginia) had cared for the boys for two years, with the exception of a three-month period when they were placed with mother. The caregivers loved the boys and wished to adopt them. The boys were thriving in their home.

Perez's report summarized the parents' complete visitation history with the boys.³ In July 2013, the parents were authorized two 4-hour monitored visits a week. By January 2014, mother's visits had increased to 14 hours per week and SSA had liberalized them to unsupervised.⁴ But in February, mother was arrested for driving under the influence of alcohol and for driving with a suspended license. Between January and April, the parents missed 11 visits with the boys. (One was due to a

³ We focus primarily on mother's visitation history since father's claim to reinstatement of his parental rights depends upon the success of mother's appeal.

⁴ All dates refer to 2014 unless otherwise stated.

neighborhood street closure.) Nonetheless, in April, mother was granted overnight visits. In April and May, she attended 11 visits but missed seven others.

On June 5, the court placed the boys in mother's care on a trial visit. In July, the court granted mother custody of the boys under a family maintenance program.

In September, the court detained the boys due to mother's drug abuse. She had tested positive for drugs four times in the last two months, had tampered twice with her alcohol measurement bracelet, and continued to deny any substance use and to claim the test results were false positives. The boys were again placed with Juan and Virginia. The court ordered two-hour monitored visits twice a week for mother.

Between November 2014 and February 2015, mother missed five out of 19 possible visits. In March 2015, the parents were authorized six supervised hours per week. Also in March, mother tested positive twice for methamphetamine. Between March and June of 2015, mother missed four visits.

In August 2015, mother filed a section 388 petition requesting return of the boys or additional family reunification services. The court denied the petition.

At the .26 hearing in August 2015, social worker Perez testified the boys were generally and specifically adoptable, and that their caregivers were committed to adopting them. Perez testified "mother has been, again, consistently visiting," but also testified mother had missed some visits. Perez believed it would not be detrimental to the children if the court terminated parental rights. She explained the boys need a stable and nurturing home, and that mother has taken no responsibility for her positive drug patch test results.

Virginia testified she believed the boys would benefit from continuing their relationship with mother, but also testified the boys did not get upset when mother missed a visit.

Mother testified that during her visits with the boys, she cooked for them, fed them, changed their clothing, and played with them. Whenever she visited them, O.A. would run to her with open arms; he would cling to her at the end of a visit.

The court found by clear and convincing evidence that the children were adoptable and likely to be adopted. At the outset, the court noted father had clearly failed to establish that the parental benefit exception applied to him.

As to mother, the court found she had not regularly visited the boys, since she had missed “upwards of 24” visits with them, which equaled about one missed visit per month. The court commented that a child cannot benefit from a relationship when a parent does not visit regularly and consistently.

The court stated that, furthermore, even if it had found otherwise on visitation and therefore had to address the exception’s second prong, mother had failed to show that her relationship with the boys outweighed the benefit they would receive from a permanent and stable adoptive home. Mother’s visits were still monitored because mother could not maintain sufficient sobriety. She continued to deny every relapse, thereby revealing a total lack of insight and an inability to address her drug problem. The court was also concerned that O.A., who seemed traumatized at the end of each visit with mother, could not fully integrate into his prospective adoptive family under these conditions.

Accordingly, the court found the parental benefit exception was inapplicable and that termination of parental rights was in the children’s best interest.

DISCUSSION

Mother contends the court erred by finding she did not regularly visit the children.

“At a .26 hearing, the court may order one of three alternative plans: (1) adoption (necessitating the termination of parental rights); (2) guardianship; or (3) long-term foster care. [Citation.] If the child is adoptable, there is a strong preference for adoption over the other alternatives. [Citation.] Once the court determines the child is adoptable (as [the boys] indisputably [were]), a parent seeking a less restrictive plan has the burden of showing that the termination of parental rights would be detrimental under one of the exceptions listed in section 366.26, subdivision (c)(1)(B).” (*In re J.C.* (2014) 226 Cal.App.4th 503, 528.)

The beneficial parental relationship exception applies when (1) the parents have “maintained regular visitation and contact with the child,” *and* (2) “the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) Both prongs must be satisfied for the exception to apply. (*Ibid*; *In re Amanda D.* (1997) 55 Cal.App.4th 813, 821 [“The statute requires a parent to show there has been regular contact *and* ‘the minor would benefit from continuing the relationship’”].)

Here, the court found that neither prong of the beneficial parental relationship exception had been met. As to the first prong, the court found mother failed to establish she maintained regular visitation and contact with the children.

The regular visitation and contact element of the exception “is somewhat self-explanatory.” (Seiser & Kumli, *Cal. Juvenile Courts Practice and Procedure* (2015) *Permanency Planning Procedures*, § 2.171[5][b][ii][A], p. 2-571.) It does not require the parent to have “‘maintained day-to-day contact.’” (*In re C.B.* (2010) 190 Cal.App.4th 102, 124.) But it does require the parent to have “maintained *regular* visitation and contact with the child” (§ 366.26, subd. (c)(1)(B)(i), italics added.) In other words, the parent must have visited *and* contacted the child as a “steady . . . practice, or occurrence” recurring at “uniform intervals.” (Webster’s 3d. *New Internat. Dict.* (2002) p. 1913 [definition of “regular”].) Stated another way, the visitation and contact must be

consistent. (Webster’s 3d. New Internat. Dict. (2002) p. 484 [“consistent” defined as “marked by . . . regularity, or steady continuity throughout”].)

We apply a variation of the substantial evidence standard of review to the court’s finding mother failed to establish she maintained regular visitation and contact with the boys. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) Because mother bore the burden of proof at trial on this issue, “the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant’s evidence was (1) ‘uncontradicted and unimpeached’ and (2) ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.’” (*Ibid.*)

Here, substantial evidence supports the court’s finding on the visitation prong. The court noted that Perez’s testimony that mother had been, “again, consistently visiting,” may have compared mother’s recent visitation to her prior visitation history. The court chose to look at mother’s entire visitation history because the purpose of the visitation prong is to determine the likelihood that “the parent will be there for the child to enjoy that relationship . . . on a consistent and regular basis” The court concluded that, “overall, upwards of 24 missed visits amounting to something close to a missed visit per month is hardly what the court considers to be regular visitation.

By mother’s own calculation, she missed 31 out of 164 possible visits. Those missed visits constitute almost 20 percent of mother’s allotted visits. Mother offered various excuses for the missed visits, including transportation problems. Yet, as the court noted, SSA had provided the parents with bus passes.

Mother failed to take advantage of the many chances she was given to reunify with her children. Shortly after her visitation was liberalized to unsupervised, she was arrested for driving under the influence of alcohol and for driving with a suspended license. Several months later, she was granted overnight visits, but missed almost two-thirds of her allotted visits in the next two months. Nonetheless, the court granted mother

custody of the boys under a family maintenance program, but three months later, the court again detained the boys due to mother's drug abuse and tampering with her alcohol bracelet.

Because mother failed to meet her burden of proof to show she regularly visited and contacted the boys, we do not address the second prong of the beneficial relationship exception, which requires the court to determine whether the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i).)⁵

DISPOSITION

The postjudgment orders are affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.

⁵ In *In re Bailey J.* (2010) 189 Cal.App.4th 1308, the Sixth District Court of Appeal held that — when a reviewing court concludes that substantial evidence supports a juvenile court's finding that a parent has established the existence of a beneficial relationship (*id.* at p. 1314) — the reviewing court must then exercise its discretion in deciding whether “that relationship constitutes a ‘*compelling reason*’ for determining that termination would be detrimental” (*id.* at p. 1315.) Mother urges us to disagree with *In re Bailey J.* We need not address the issue since substantial evidence supports the juvenile court's finding she failed to establish she regularly visited the boys.