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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re NATHANIEL P. et al.,
Persons Coming Under the Juvenile
Court Law.

B294938
(Los Angeles County
Super. Ct. No. DK17004)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

JENNIE P.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles
County, Steff R. Padilla, Commissioner. Affirmed.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal,
for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine Miles, Assistant
County Counsel, and Kimberly Roura, Deputy County Counsel, for
Plaintiff and Respondent.

Jennie P. (mother) appeals from an order terminating parental rights to her children, Nathaniel P. and K.P. She contends the beneficial parental relationship exception to terminating parental rights applies in her case. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).)¹ Mother failed to raise the exception in the lower court, forfeiting the contention on appeal. Even considering the issue on the merits, we find that mother's lengthy criminal history, substance abuse, and abandonment of the children provides substantial evidence the exception does not apply. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Mother's Altercation Involving K.P. (June 2014)

Nathaniel P. (born July 2012) and his half-sister K.P. (born February 2014) came to the attention of the Orange County Social Services Agency (SSA) in June 2014 after the police responded to a domestic disturbance call at their home. It was reported that mother swung K.P.'s car seat at her live-in boyfriend while the child remained in the car seat. Mother then stole the boyfriend's car and drove away. The police reported mother engaged in ongoing domestic violence and admitted to using methamphetamine in the home.

The SSA filed a section 300 petition. The operative first amended petition (FAP) alleged that the children were at risk under section 300, subdivision (b), based on mother's failure or inability to supervise and

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

provide the children with regular care. The Orange County Superior Court sustained the FAP and ordered the children removed from mother's custody with monitored visitation and family reunification services for mother. Between July and October, mother visited the children once, cancelled two visits, and failed to confirm three visits.

Mother's Arrest and Incarceration (October 2014–August 2015)

In October 2014, mother was arrested and subsequently incarcerated with a release date of September 2015.² During that time, mother visited with the children once per week through a glass partition. Following the visits, Nathaniel had tantrums and engaged in self-harm and aggression toward K.P. He appeared confused about separation and was fearful his caregivers would abandon him.

Mother Enters Substance Abuse Program and Takes Custody of the Children (August 2015–January 2016)

In August 2015, mother was released from prison and entered a residential substance abuse program. From the date of her release until she transitioned to a new substance abuse program in November, mother visited the children three times. Mother also contacted the children by phone on a regular basis. After the calls, Nathaniel “act[ed] up,” ignoring direction and hitting K.P.

² Mother has been arrested and/or convicted for battery on a spouse, vehicle theft, grand theft auto, and being under the influence of a controlled substance.

The court continued reunification services and permitted overnight visits with mother in November. The children began a 60-day trial visit with mother, who required assistance from the program parenting staff. At the 18-month review hearing in January 2016, the court released the children to mother with family maintenance services.

Mother Abandons the Children and Substance Abuse Program (April–December 2016)

In April 2016, mother abandoned the inpatient substance abuse program and requested the children be returned to foster care. Both children screamed as mother left them at the program. The children were removed from their initial placement after abandonment because they consistently engaged in destructive, “uncontrollable” misbehavior.

After living with a friend for one month, mother re-enrolled in a residential substance abuse program. The court sustained a section 387 petition filed by the Los Angeles County Department of Children and Family Services (DCFS),³ re-detaining the children, ordering monitored visitation, and transferring the case to Los Angeles County.

The children’s regressive behaviors continued. Nathaniel re-enacted scenes of domestic violence he observed in mother’s home. K.P. had trouble sleeping alone, requiring the caregivers to sleep in the same room but in different beds.

³ Section 387, subdivision (a) requires a supplemental petition to be filed before the court can issue an order “changing or modifying a previous order by removing a child from the physical custody of a parent.”

In December 2016, mother moved from the inpatient drug abuse program to a transitional shelter and began consistent weekly visitation with the children. One month later, the court authorized unmonitored visitation and continued reunification services.

Mother Abandons Second Drug Abuse Program and Transitional Shelter (April–October 2017)

At the time she enrolled in an outpatient alcohol and drug program in April 2017, mother was drinking alcohol and smoking marijuana. In May, she abandoned the program and tested positive for methamphetamine and marijuana. In light of such cyclically dysfunctional behavior, DCFS filed a section 385 application to restrict visitation, which the court granted in June 2017.

In October 2017, mother abandoned the transitional shelter to live with her boyfriend, but left him one month later due to physical abuse. Since abandoning the transitional shelter, mother had not visited the children, taken any scheduled drug tests, or participated in any recovery or support programs.

Mother's Second Arrest and Incarceration (February–December 2018)

Mother was arrested on February 8, 2018, for evading police and taking a vehicle without the owner's consent. The court terminated reunification services and set the matter for a section 366.26 hearing.

While incarcerated, mother was either prohibited from telephone contact with the children or had difficulty reaching them. In June,

mother began consistent phone contact with the children. Both children acted defiantly after the calls.

Permanency Planning (May–December 2018)

The children were finally placed with their prospective adoptive parents, M.H. and L.H., in May 2018. Prior to that time, the children had been placed in 11 different placements. M.H. and L.H. soon formed a healthy bond with the children, and the children’s behavior began to stabilize. The children stated that they wished to live with M.H. and L.H. “forever,” and they referred to them as “mom and dad.”

Mother’s last monitored visit with the children took place in December 2018 after she was released from prison. Nathaniel shook his head “no” to mother’s questions and did not allow her to take a picture of him. Midway through the visit, K.P. laid underneath a table and stated, “I want Mommy, I want [L.H].”

Section 388 and 366.26 Proceedings⁴

The court called the matter for a concurrent section 388/366.26 hearing on December 20, 2018. In support of her section 388 petitions seeking reunification services, mother testified she visited the children “on a consistent basis.” She claimed that the children had “an established bond” with her and called her “mother.” After considering

⁴ Mother filed two section 388 petitions in April and September 2018 to reinstate reunification services. The section 388 petitions are not at issue in this appeal.

mother's argument, the court denied the petitions, stating it would not "risk a stable environment for an unstable environment."

Rather than testify at the section 366.26 hearing, mother rested her argument on the grounds she alleged and testified to at the section 388 hearing. The court found the children were adoptable by clear and convincing evidence. It also found it would be detrimental to return the children to mother's care, custody, and control and "no exception to adoption" applied to either child. Mother timely appealed.

DISCUSSION

Mother contends the juvenile court erred in failing to apply the beneficial parental relationship exception to adoption. DCFS contends alternatively that mother forfeited the issue on appeal by failing to raise it at the section 366.26 hearing, and that the evidence does not support the exception. We agree mother forfeited the issue, but find the exception inapplicable in any event.

"The Legislature has declared that California has an interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.) Once the juvenile court terminates reunification services and determines a child is adoptable, it "must order adoption and its necessary consequence, termination of parental rights, unless one of the specified" exceptions stated in section 366.26, subdivision (c)(1) "provides a compelling reason for finding that termination of parental rights would be detrimental to the child." (*In re Celine R.* (2003) 31

Cal.4th 45, 53; *In re Breanna S.* (2017) 8 Cal.App.5th 636, 645 (*Breanna S.*.)

One statutory exception—the beneficial parental relationship exception—applies if the “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 336.26, subd. (c)(1)(B)(i).) The parent bears the burden of establishing the existence of the exception, which applies in only “extraordinary” cases. (*In re Zeth S.* (2003) 31 Cal.4th 396, 412, fn. 9; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

Consonant with the applicable burden of proof, a parent’s failure to raise an exception by objection or appropriate motion in the juvenile court renders any argument forfeited, and the parent may not raise the exception for the first time on appeal. (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558; see also *In re Erik P.* (2002) 104 Cal.App.4th 395, 403 [parent forfeited sibling exception because he failed to raise it at section 366.26 hearing].)

At no point in the juvenile court did mother ask the trial court to apply the beneficial parental exception to termination of her parental rights. At the section 366.26 hearing, mother referred to the evidence and arguments supporting her section 388 petition, including testimony she maintained consistent visitation and had forged a bond with the children. Though these concepts are relevant to the beneficial parental relationship exception, mother did not ask the court to apply the exception. Without appropriate objection or motion, mother has forfeited the issue.

Even were we to consider mother's claim, we would find that the exception does not apply.

The court considers two prongs when determining whether a parent has met his or her burden to establish the beneficial parental relationship exception. The first prong examines how consistently a parent has maintained visitation with the child. (*In re Grace P.* (2017) 8 Cal.App.5th 605, 612.) “[T]he second prong involves a qualitative, more nuanced analysis, and cannot be assessed by merely looking at whether an event, i.e. visitation, occurred. Rather, the second prong requires a parent to prove that the bond between the parent and child is sufficiently strong that the child would suffer detriment from its termination.” (*Id.* at p. 613.) In doing so, courts consider “[t]he age of the child, 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.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 (*Autumn H.*).

A parent does not meet his or her burden by showing the existence of a “friendly and loving relationship,” an “emotional bond” with the child, or pleasant, even frequent, visits. (*In re J.C.* (2014) 226 Cal.App.4th 503, 529; *In re K.P.* (2012) 203 Cal.App.4th 614, 621; *In re C.F.* (2011) 193 Cal.App.4th 549, 555.) Nor is a showing the child “derives some benefit from the relationship” sufficient to depart from the statutory preference for adoption. (*Breanna S., supra*, 8 Cal.App.5th at p. 646.)

In reviewing challenges to a court’s refusal to find a statutory exception to adoption, we employ the substantial evidence or abuse of discretion standards of review, depending on the nature of the challenge.⁵ “In the dependency context, both standards call for a high degree of appellate court deference.” (*In re J.S.* (2017) 10 Cal.App.5th 1071, 1080.)

For factual determinations such as consistent visitation or whether a parental relationship exists, we apply a substantial evidence standard of review. (*In re K.P., supra*, 203 Cal.App.4th at p. 622.) “Under this test, “we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment ‘In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing.*’ [Citation.] All conflicts, therefore, must be resolved in favor of the respondent.” [Citation.]” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.)

⁵ Courts of appeal have applied different standards of review when determining whether an exception to adoption applies. Some have applied the substantial evidence standard, others the abuse of discretion standard or combination of both, and others a standard requiring evidence that compels a finding in favor of the parent as a matter of law. (See *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947 [substantial evidence]; *In re Jasmine D., supra*, 78 Cal.App.4th at p. 1351 [abuse of discretion]; *In re Collin E.* (2018) 25 Cal.App.5th 647, 663 [combination]; *Breanna S., supra*, 8 Cal.App.5th at p. 647 [matter of law].) The Supreme Court has granted review to determine what standard of review applies in this context. (*In re Caden C.* (2019) 34 Cal.App.5th 87, 106, review granted July 24, 2019, S255839.) On the record before us, we would affirm under all of these standards.

The evidence here shows that mother has engaged in a cycle of consistent visitation followed by abandoning the children. When mother was first incarcerated, she consistently visited with the children and regained custody after she was released. She then abandoned the children and had limited visitation for nine months. Following a subsequent period of consistent visitation, mother had little to no visitation or contact with the children between May 2017 and the section 366.26 hearing in December 2018. Such sporadic contact does not constitute regular visitation within the meaning of section 366.26, subdivision (c)(1)(B)(i). (See *In re Anthony B.* (2015) 239 Cal.App.4th 389, 396 [prior periods of visitation may be consistent, but parent's three in-person visits in five months preceding section 366.26 hearing did not establish consistent visitation].)

Nor has mother demonstrated she occupies a parental role in either child's life. The issue here is not whether there is an emotional bond between mother and the children, but whether severing the relationships with mother would deprive either child of a stable, substantial and positive emotional attachment. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

The record does not support a finding that mother forged a stable or positive attachment with the children. (*In re Collin E.*, *supra*, 25 Cal.App.5th at p. 662.) Throughout the dependency period, mother abandoned the children, engaged in criminal conduct leading to multiple arrests and incarcerations, and associated with a physically abusive partner. She also struggled with substance abuse. (Compare *In re Noah G.* (2016) 247 Cal.App.4th 1292, 1302–1303 [parental rights

properly terminated due to parent's failure to attend substance abuse programs, missed drug tests, and positive tests for marijuana and methamphetamine] and *In re S.B.* (2008) 164 Cal.App.4th 289, 298–301 [parental rights improperly terminated; father consistently complied with case plan and maintained sobriety].)

The children's interactions with mother placed their well-being at risk. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) Following visits and phone calls with mother, Nathaniel engaged in self-harm and aggression toward K.P. The children's "uncontrollable" misbehavior led to their removal from an initial placement after mother abandoned them. Nathaniel engaged in persistent self-harm and aggression, while K.P. appeared reluctant to engage with mother at the last monitored visit. The record does not substantiate a positive, emotional attachment between mother and the children.

The children were finally placed in a stable home environment with their prospective adoptive parents, M.H. and L.H., who soon formed a healthy bond with the children. The children refer to M.H. and L.H. as their parents, and the children have frequently expressed a desire to live with M.H. and L.H. "forever."

Under the circumstances, mother has not proven she has a bond sufficient to overcome the stability the children have finally found in their current placement. The beneficial parental relationship exception does not apply. (§ 366.26, subd. (c)(1)(B)(i); *Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

DISPOSITION

The order terminating parental rights is affirmed.

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WILLHITE, Acting P. J.

We concur:

COLLINS, J.

CURREY, J.