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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re J.O., A Person Coming Under the
Juvenile Court Law.

B267275

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. DK04728)

Plaintiff and Respondent,

v.

P.O.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Amy M. Pellman, Judge. Affirmed.

M. Elizabeth Handy, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, Interim County Counsel, Dawyn R. Harrison, Assistant County Counsel and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

P.O. (mother) appeals from the dependency court's order terminating her parental rights to her son, J.O. Specifically, mother contends the court erred in failing to find the parental bonding exception to termination applied. We conclude the trial court did not err and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

J.O. was detained and ultimately declared dependent due to continued domestic violence between mother and J.O.'s father, C.V. (father). While father was the primary aggressor in the domestic violence, mother was unable to protect J.O. Indeed, a review of the record reveals that mother could have retained custody of J.O. if she had moved into a domestic violence shelter, but mother was unable to leave father.¹

J.O. was born in September 2011. Although he was not detained until April 2014, a significant incident of domestic violence occurred in June 2013. At that time, father attempted to hit mother when she was holding J.O. Mother moved out of the way to avoid the punch, and father hit J.O. instead. Father then punched mother four times on the forehead.²

In March 2014, father struck mother while J.O. was crying on the bed nearby. Father was arrested. DCFS became involved. Because Mother told the social worker that she would not let father back in the home if he was released from custody, the social worker allowed J.O. to remain with mother. One month later, the social worker made an unannounced visit and discovered that, not only had father moved back into the home, mother and father were at that moment having a loud altercation in front of the child.

¹ It is troubling to see a mother/child relationship terminated when the mother was a victim of domestic violence who, by all accounts, did not herself present a risk of harm to the child. We set forth the facts in some detail in order to demonstrate that J.O. would likely have been returned to mother's custody if she had taken steps suggested by the Department of Children and Family Services (DCFS) that might have protected J.O. from further domestic abuse.

² A referral was made to DCFS, but the parents moved away to avoid DCFS involvement.

DCFS believed it was necessary to put J.O. in protective custody, and, with police assistance, J.O. was detained in foster care. A petition was filed to declare J.O. dependent.

On April 28, 2014, the dependency court issued a temporary restraining order keeping father away from mother until the adjudication hearing. The dependency court detained J.O., and indicated that DCFS could seek to release J.O. to mother if she entered a domestic violence shelter. Mother was granted monitored visitation of at least four times per week for at least two hours.

Although mother told DCFS that she had decided to enter a domestic violence shelter that would accept her and J.O., she never did. As late as May 22, 2014, mother told the social worker she was planning to move into the shelter as soon as possible. Five days later, she informed the social worker that, instead, she wanted to work things out with father.

At the adjudication hearing on June 5, 2014, mother pleaded no contest to the petition. The court declared J.O. dependent under Welfare and Institutions Code section 300, subdivision (a), due to the history of domestic violence and mother's inability to protect J.O.³ Reunification services were ordered for both parents. Mother was ordered to complete parenting, a domestic violence program, and individual counseling. J.O. was to remain in foster care but DCFS was authorized to release him to mother if she moved into a domestic violence shelter. Mother declined extension of the temporary restraining order. Mother was again granted monitored visitation four times per week for two hours per visit.

What mother and father had not told the court was that they were living together and, on the very morning of the adjudication hearing, there had been another domestic violence incident, which had resulted in father's arrest and a domestic violence restraining order.

³ Unless otherwise indicated, all statutory references are to the Welfare and Institutions Code.

While the record is not clear on the precise dates that mother lived with father, it appeared that the couple was trapped in a cycle of abuse: mother and father would fight; mother would leave and live with her mother; father would try to get mother back; and mother would eventually move back with father.

On October 22, 2014, during one of father's monitored visits with J.O., father threatened to shoot mother, everyone else, and himself. A police report was filed. Mother informed DCFS that she moved back in with her mother after this threat. Nonetheless, mother still refused the advice of the social worker and mother's domestic violence instructor to move into a shelter. On December 10, 2014, father was arrested in connection with this incident. The criminal matter was adjudicated on December 19, 2014. Father was sentenced to 200 days in jail; he was expected to be released in June 2015.⁴

A review hearing was held in the dependency matter on January 13, 2015. During the reunification period prior to this hearing, although mother had missed some visits with J.O., she mostly visited regularly and consistently. Her behavior at visits was appropriate and her demeanor affectionate. It is undisputed that J.O. enjoyed their visits. However, mother had not completed the required 24 sessions of her domestic violence program (having done only 17); she had enrolled in parenting classing, but had not returned since her enrollment date. Mother was found to be in partial compliance with the case plan, while father was not in compliance at all. The court found mother had not made significant progress in resolving the problems that led to J.O.'s removal, and had not demonstrated the capacity and ability to complete the treatment plan. With no substantial probability of returning J.O. to parental custody within the next six months, reunification services were terminated. Mother did not seek appellate review. (Cal. Rules of Court, rule 8.452.)

Mother's visitation continued on an agreed-upon schedule of three visits per week. Her visits with J.O. were consistent and enjoyable.

⁴ Mother obtained a 10-year restraining order against father on December 19, 2014. She nonetheless visited father in jail six times in December 2014 and January 2015.

By May 5, 2015, a prospective adoptive mother (PAM) was identified for J.O. J.O. met with the PAM for a three-hour visit at a park. The visit went well; J.O. seemed comfortable with the PAM. In contrast, at J.O.'s then-"most recent visit" with mother, he showed a lack of interest in interacting with mother, and hit her when he did not get his way.

At a hearing on May 12, 2015, DCFS sought another 60 days in which to facilitate J.O.'s placement with the PAM. The court continued the hearing on selection of a permanent plan in order to allow J.O. to bond with the PAM. Mother's visits were reduced to twice per week. Mother agreed instead to visit once per week for two hours.

J.O. had a weekend overnight visit with the PAM shortly after the hearing. The visit was a success, and J.O. was placed in the PAM's home thereafter. J.O. was affectionate toward the PAM; he called her "mommy" and PAM's mother "grandma." The PAM, for her part, was affectionate and nurturing toward J.O. In their short time together, the PAM established a parent-child relationship with J.O.; in addition to being loving, she also set boundaries and provided guidance for J.O. In contrast, J.O.'s former foster mother, who had monitored some of mother's visits, observed that mother did not set boundaries or act as a parent.

After mother's visits had been reduced to once per week, she missed her first visit because she got lost. She attended three visits in June. J.O. was excited to see her at the visits; but, in contrast to their earlier visits, he no longer called her "mommy." He also released aggression and showed anxiety by smashing his car toys. Mother was a no show for the fourth June visit.

DCFS's report for the July 14, 2015 hearing indicated that J.O. – then almost four years old – feels "comfortable, secure, and content" in the PAM's home. He has adjusted to the PAM's way of living and routine. Significantly, he has not asked about his mother.

At the July 14, 2015 hearing, mother briefly testified in order to establish the strength of her relationship with J.O. She testified that she had "a special bond" with J.O. She explained that, at visits, she would read to him and they would sing songs, play, and eat. She acknowledged that, since his detention from her custody, it has been J.O.'s

foster mother or the PAM who puts him to bed, feeds him most of his meals, comforts him when he is hurt or sad, and does most of the reading to him. She also admitted that, after the first six months out of her custody, J.O. became accustomed to her leaving at the end of visits.

By the time of the hearing, father had been released from custody. There was some suggestion in the record that he was going to be deported. However, he was present at the hearing. He did not testify.

The court found that mother obviously loved J.O., but concluded she had not attained a parental relationship with him while he was out of her custody. The court concluded that mother had not shown the existence of a beneficial relationship with J.O. that outweighed the permanency of adoption. The court found J.O. was adoptable. The parental rights of both parents were terminated. Mother filed a timely notice of appeal.

DISCUSSION

1. *The Parental Bonding Exception to Termination of Parental Rights*

Mother contends she established the parental bond exception between her and J.O. that precluded the termination of parental rights. We review the applicable law. A juvenile court at a section 366.26 hearing must select a permanent plan for the child. (§ 366.26, subd. (b).) Adoption is the permanent plan preferred by the Legislature for dependent children who are likely to be adopted if parental rights are terminated. If the dependency court finds that a child should not be returned to his or her parent and is likely to be adopted, it must select adoption as the permanent plan unless it finds a “compelling” reason for determining that termination of parental rights would be detrimental to the child under one of several specified exceptions. (§ 366.26, subd. (c)(1)(B).)

The exception to termination found in subdivision (c)(1)(B)(i) of section 366.26 provides that detriment may be found if “[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).) There are two prongs to this exception: regular visitation

and the child's benefit from continuing the relationship. The regular visitation prong requires consistent visitation throughout the child's detention. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1254.)

In order to prove the child would benefit from continuing the relationship, a particular type of relationship must be proven. “[T]he 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.) The type of parent-child relationship that triggers the exception is a relationship that “ ‘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 Brandon C.* (1999) 71 Cal.App.4th 1530, 1534; accord *In re Jasmine D.* at pp. 1349-1350.) The exception applies 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.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) “[L]oving and frequent” contact with the child is insufficient to trigger the exception; the parent must occupy a parental role in relation to the child. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) The exception “ ‘ ‘applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.’ ’ ” (*In re Melvin A., supra*, 82 Cal.App.4th at p. 1254.) “The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child’s life spent in the parent’s custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child’s particular needs.” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467, fn. omitted.)

2. *Standard of Review*

There is some dispute about the standard of review that applies to an appellate challenge to a juvenile court ruling rejecting a claim that the parental bonding exception applies. In *In re Jasmine D.*, *supra*, 78 Cal.App.4th at page 1351, the court

acknowledged that most courts had applied the substantial evidence standard of review to this determination. However, the court concluded that the abuse of discretion standard was “a better fit” because the juvenile court was obligated to make “a quintessentially discretionary determination.” (*Ibid.*)

Other courts have concluded both standards apply. As the determination of whether a beneficial parental relationship exists may be more properly characterized as a factual one, substantial evidence review applies. But there is also a second, discretionary determination – whether that relationship is a compelling reason for finding detriment to the child. This determination should be reviewed for abuse of discretion. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) We use the combined standard of review.

3. *Mother Did Not Establish the Exception*

We first consider mother’s factual challenge: Did the undisputed facts establish the existence of a beneficial parental relationship? We conclude substantial evidence supports the trial court’s conclusion that there was no such relationship.

The appellate record contains detailed visitation logs for the period between J.O.’s detention at the end of April 2014 and mid-November 2014. To be sure, those visitation logs show that J.O. was frequently excited to see mother; often ran to her, calling, “Mommy! Mommy!”; and, on one occasion, had a tantrum because he did not want her to leave. The logs also show that mother sometimes used educational toys with J.O. and taught him about the things they saw together. J.O. was comfortable with mother, and twice fell asleep in her arms.

However, we are not concerned with the state of the parent-child relationship just in November 2014, but more so in July 2015, at the time of the termination hearing. By this time, mother acknowledged that J.O. no longer had trouble with her leaving at the end of visits and no longer called her “Mommy.” Mother’s visits had been reduced to once per week, and she missed two of the first five of those visits. At the visits mother attended, J.O. showed anxiety by smashing his toys. The former foster mother observed mother did not act in a parental role at visits.

We turn to the four factors identified in *Angel B.*, *supra*, 97 Cal.App.4th at page 467, to be considered: (1) the age of the child; (2) the portion of the child's life spent in the parent's custody; (3) the positive or negative effect of the interaction between the parent and the child; and (4) the child's particular needs. By the time of the July 2015 hearing, J.O. was nearly four years old. He had been taken from his parents' custody more than a year earlier. While he had spent his first two and one-half years with mother, he had spent the last one-third of his life out of her custody – a long time for a toddler. While his interactions with mother were generally positive, his most recent experience was less so – with J.O. no longer calling her “Mommy” and mother not acting in a parental role. J.O. has no identifiable special needs, but he, like all children, needs permanency and parental guidance. Mother has not established that she satisfies these needs. The dependency court did not err in concluding that, although mother clearly loves J.O., she has not established a beneficial parental relationship.

Even if mother had established such a relationship, the court did not abuse its discretion in concluding the relationship was not a compelling reason to withhold termination of parental rights. All of the evidence indicated that J.O. is a resilient child who easily bonded to the PAM. He was becoming a member of the PAM's family, turned to her for comfort, and did not ask about his mother – even after her visits had been significantly reduced. On this record, the court did not err in concluding that severing the natural parent-child relationship would not deprive J.O. of a substantial, positive emotional attachment such that he would be greatly harmed.

DISPOSITION

The order terminating mother's parental rights is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.