Filed 2/3/17 In re Brianna B. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re BRIANNA B. et al., Persons Coming Under the Juvenile Court Law.	B270634
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MALITA W., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK78028)

APPEAL from an order of the Superior Court of Los Angeles County, Teresa Sullivan, Judge. Affirmed.

Christopher R. Booth, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Stephen D. Watson, Deputy County Counsel, for Plaintiff and Respondent.

This is an appeal by the mother in a dependency case from the trial court's order terminating her parental rights and its concomitant order rejecting her claim that the "benefit exception" should apply. (Welf. and Inst. Code, §§ 388 & 366.26, subd. (c)(1)(B)(i).)[1] We find no error in the trial court's rulings and affirm.

FACTUAL AND PROCEDURAL SUMMARY

The two children in this case are Brianna B., now ten years old, and her sister, Tiffany G., who is now seven years old. Each is a special needs child suffering from developmental disability.[2] Mother herself had been a dependent child, a regional center client since she was a child and did not have a stable living situation. She had been in several placements before becoming emancipated at age 21, in 2006. She left her most recent placement in June 2014 and was living at a home not certified by the Regional Center.

Dependency jurisdiction in this case began in Riverside County. In December 2012 the child welfare agency in that county found that mother had left her children with Laura C.

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[1] All code citations are to the Welfare and Institutions Code.

[2] Each child is by a different father, and neither father is a party in this appeal.

Laura C. is variously described in the briefing as a "family friend" and as a "paternal aunt." Mother and the girls had been living with Laura C. for several years when, in December 2012, she left them there and returned to Los Angeles. Laura C. informed the Riverside County child welfare agency that each girl was a special needs child, and that mother could not care for them because mother was unstable. Mother acknowledges on appeal that she had "abandoned the girls with L.C." (Laura C.) and had told the Riverside agency that she was unable to properly care for the girls, but had left them with "my food stamp card and plenty of clothes." She lacked stable housing and was unable to meet the children's needs. In January 2013, the Riverside agency filed a section 300 dependency petition. The juvenile court detained the children from parental custody, set the case for adjudication, and placed them with Laura C.

The adjudication occurred in February 2013 when the Riverside court declared the children dependents of the court, ordered them suitably placed (with Laura C.) and allowed mother a weekly monitored visit. Later the case was transferred to Los Angeles County, the county of mother's residence, where she lived in an adult care home certified by the regional center in that county. The weekly, then bi-weekly, monitored visitations were for an hour and were held at a mall halfway between Perris, where Laura C. lived, and Los Angeles. The Department of Children and Family Services (DCFS), the Los Angeles County agency administering dependency cases, reported that the children were thriving with Laura C., that each had unique needs which were being met, and that she loved the children and was willing to raise them as her own daughters. She pointed out that

she had been caring for Brianna since that child was three years old, and for Tiffany since birth.

The visitations were problematic. Mother had completed parenting classes, had remained clean and sober, and was participating in counseling. There were 10 monitored visits between April and July 2013, and 15 in roughly the first half of 2014, but only one between July and November of that year, and mother cancelled six visits between October 2014 and January 2015. Laura C. reported difficulty with the girls' behavior after visits. On one occasion, in October 2013, mother gave Tiffany a cell phone, although Laura C. previously had warned her not to do so because of problems when the phone had to be returned. On this occasion mother had a difficult time retrieving the phone and when she finally took it, Tiffany screamed until Laura C. intervened. Laura C. thought mother had used "excessive force" in taking the phone.

Brianna was diagnosed with intellectual disability manifested by problems with speech, communication, memory and cognitive ability. She required 24-hour supervision. She often threw tantrums at home and school, and if left unsupervised she would smear feces. Tiffany also was diagnosed with intellectual disability, had speech and language problems, and suffered from chronic asthma.

These problems were reported at the six-month review hearing, held in November 2013. At the 12-month hearing, in May 2014, it was reported that mother continued to be in compliance with her case plan, but that returning the children to her care would create a substantial risk of detriment to the children since the conditions that led to dependency jurisdiction still existed. By then mother had been in several placements but

had left the most recent placement and currently was living in a home not certified by the regional center and not receiving any services, with a caregiver with little knowledge about how to assist her. She had terminated the placement she had had through the Community Joint Venture Family Home Agency. DCFS advised that it believed mother's decision to do so demonstrated an overall inability to make reasonable decisions and that she was vulnerable without ongoing services and support from the regional center.

At the 18-month review hearing, held in July 2014, the court made a finding that the children should not be returned to mother and that there was no substantial probability that they could be returned within the next six months. It terminated parental services and set the case for a section 366.26 hearing.

At that hearing, conducted in November 2014, DCFS reported that the children had bonded with Laura C. The department also reported that mother had visited the girls only once since July 24, 2014 and that their behavior changed every time they saw mother, creating problems for Laura C. According to Laura C., Tiffany had told her that mother said she was going to "get them back" and they did not have to listen to Laura C. Shortly after this hearing the court identified adoption as the permanent plan for the girls.

Later reports stated that the girls had developed a "good and loving relationship" with Laura C.; the adoption home study had been approved in August 2015. Mother filed a section 388 petition asking that the children be returned to her custody or, alternatively, for reunification services. She reported that she had maintained employment, received parental training, and worked with a behavior person and her home health care

provider and was able to provide a home for the girls. She stated that she had continued to visit the girls on Saturdays, without missing a visit, and that the visits had gone well.

A DCFS report filed shortly after that concluded that, throughout the case, the mother's visits had been sporadic in frequency and poor in quality. She had visited with the girls on August 9 and 29, 2015 but did not engage them, sitting and watching people walk around the restaurant where the visits took place.

The report said that DCFS continued to be concerned about mother's willingness and ability to visit and bond with the children. It expressed concern over "mother's lack of knowledge and/or interest in the children's extracurricular activities [and] provision of medical and regional center services/development" as well as her ability to maintain a stable and suitable placement since she had a history of unstable placements, six since 2012, and had been with her current caretaker for only five months.

The trial court addressed the section 388 petition at a hearing in December, 2015. Mother testified that she was living with a care provider furnished through a special needs agency, that she was working part-time, and receiving services from a regional center. This included parenting training one or two times a week, for two-hour sessions. She was visiting the children every other week for two hours a visit. She also reported that the girls were happy, would run to her and address her as "mother," and would hug her when the visits ended. She knew Tiffany was supposed to take medication for temper tantrums but did not know what the medication was or its dosage, and had not spoken to the physician who prescribed it. She had not attended

any of Brianna's occupational therapy sessions, and had not called the regional center to ask about the children.

The court denied mother's section 388 petition. At the section 366.26 hearing, in February 2016, counsel for the children joined DCFS in asking the court to terminate parental rights. Mother's counsel asked the court to apply the exception for cases where the child would benefit from continuing the parental relationship. (§ 366.26, subds. (c)(1)(b)(i).) The court denied that motion, terminated parental rights, and designated Laura C. as the prospective adoptive parent for the girls. Mother appealed.

DISCUSSION

The principal issue in this case is application of the "benefit exception." The basic statute, section 366.26, provides in subdivision (c)(1) that if the trial court determines by clear and convincing evidence that it is likely the child will be adopted, it shall terminate parental rights. As often is the case with basic statutes, there are several exceptions. The one argued here provides that if the trial court "finds a compelling reason for determining that termination would be detrimental to the child" for one of the specified circumstances, it may forego termination of parental rights 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).)

For more than twenty years the leading case on application of this exception has been *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*): "We find no reported cases addressing the standard a court must use in determining if a parent/child relationship should continue under the section 366.26, subdivision (c)(1)(A) exception. A finding no exceptional

circumstance exists is customarily challenged on the sufficiency of the evidence. [Citations.] We therefore treat the question as one of first impression."

In *Autumn H.* the court found the exception did not apply because the relationship between the parent, the child's father, and the child "was one of friends, not of parent and child. Autumn had been a dependent for three-quarters of her young life and needed a stable, permanent home. The court properly concluded no exceptional situation existed to forego adoption." (27 Cal.App.4th at p. 576.)

The existence of a frequent and loving contact between parent and child is not necessarily sufficient to establish the "benefit from a continuing relationship" required by the statutory exception. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418–1420.) "No matter how loving and frequent their contact with the girls, appellants had not occupied a parental role in relation to them at any time during their lives." (*Id.* at pp. 1418–1420.) As *Autumn H.* explains, the exception applies only where the court finds that regular visits and contact have led to a "significant positive, emotional attachment from child to parent." *Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) And as the Supreme Court put it in an earlier decision, "[t]he parent's interest in having an opportunity to reunify with the child is balanced against the child's need for a stable, permanent home." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

"To sum up, when the court has not returned an adoptable child to the parent's custody and has terminated reunification services, adoption becomes the presumptive permanent plan and parental rights should ordinarily be terminated at the section 366.26 hearing. The parent has the burden of proving that

termination would be detrimental to the child under section 366.26, subdivision (c)(1)(A). [Citations.] The juvenile court may reject the parent's claim simply by finding that the relationship maintained during visitation does not benefit the child significantly enough to outweigh the strong preference for adoption. The court must make a more substantial and affirmative finding if it decides to apply the exception and preserve parental rights. It must 'state its reasons in writing or on the record,' and those reasons must be 'compelling.' (§ 366.26, subd. (c)(1).) Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

Mother begins her argument on appeal with the argument that the circumstance that both she and her daughters are developmentally delayed makes it "entirely unfair" for DCFS and the court to "view their mother-daughter relationships through the same lens as non-delayed persons." She concludes with the observation that "[t]he notion that adoption is not just more permanent than guardianship, but also always appropriate and desirable, is fiction, and forcing these girls' square peg into the *Autumn H.* round hole is what" courts have cautioned against, citing *In re S.B.* (2008) 164 Cal.App.4th 289. The facts in *In re S.B.* are different. In that case, the child had been cared for by appellant father for most of her life, had a strong attachment to him, wanted the relationship to continue, and because the father-daughter bond was strong, there was a potential of harm to the child if she were to lose that relationship. (*Id.* at p. 296–

301.) The fact that both parent and child suffer from developmental disabilities does not warrant a conclusion that different principles apply. If anything, it cautions that particular care is needed in decision making when parent or child, and especially both, suffer from that condition. The guiding rules are the same: given the showing necessary to warrant the presumption in favor of adoption, including the conclusion in this case that mother is not in a position to care for the girls, is it in the best interest of the children that adoption go forward?

The law entrusts that decision to the trial judge, subject to appellate review where legal error is shown. The general test on appeal for resolution of factual disputes and conclusions that may properly be drawn from them, is the substantial evidence rule. That rule was applied in *Autumn H.* and many other cases. *In re Jasmine D.* suggested a more deferential standard: abuse of discretion. (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)

In this case we reach the same result under either standard. Mother herself experienced a difficult childhood, and she has made efforts under difficult circumstances to demonstrate that the parental relationship should remain intact. But we are satisfied that the trial court applied correct legal principles and reached a proper result.

DISPOSITION

The order terminating parental rights is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.