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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re A.W., a Person Coming Under the
Juvenile Court Law.

B237729
(Los Angeles County
Super. Ct. No. CK56354)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

M.C.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. D. Zeke Zeidler, Judge. Affirmed.

Kate M. Chandler, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Navid Nakhjavani, Deputy County Counsel, for Plaintiff and Respondent.

M.C. (mother) challenges a juvenile court order terminating parental rights to A.W.¹ (the minor, born Dec. 2008). She contends that the juvenile court erred in failing to apply the parental benefit exception. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).)² Because we find no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prior Dependency Cases

In 2002, mother signed a voluntary contract with the Department of Children and Family Services (DCFS) agreeing to participate in substance abuse counseling and drug testing. She signed another similar contract in 2003. In 2004, DCFS filed a section 300 petition on behalf of her two older children, D.P. and B.T. In 2005, those children were declared dependents; mother's family reunification services were terminated; and, mother's parental rights to those children were terminated. In 2007, they were adopted.

In 2008, DCFS filed a section 300 petition on behalf of mother's third child, M.W., again based upon mother's substance abuse issues. Eventually, M.W. was released to his father and the juvenile court terminated jurisdiction over M.W. with a family law order.

The Instant Section 300 Petition and Detention

On September 19, 2009, the family once again came to the attention of DCFS after it received a referral alleging general neglect, emotional abuse, and caretaker absence. At that time, mother had two children, R.W. (R.W., born Oct. 2006) and the minor, then eight months old. It was reported that in July 2009, mother and Andre J. (Andre) were arrested for selling drugs and were incarcerated. Andre's mother was caring for the two

¹ Because the minors in this case have unusual first names, we will refer to them using their first and last initials to protect their anonymity. (See Cal. Rules of Court, rule 8.401(a)(2).)

² All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

children, but the apartment was dirty and she was using drugs with other people in the home, in the children's presence.

When DCFS investigated the referral, the social worker learned that Andre's mother was not related to R.W. and did not know mother. After two months of caring for the children, she did not know R.W.'s name or the children's birth dates. She did not have medical or vaccination cards for the children and did not know their medical histories. She also had a long history of drug abuse and prior involvement with Child Protective Services in Kern County; in fact, in 1997, she lost custody of her son, Andre.

DCFS contacted Raymond³ W. (Mr. W.), R.W.'s father. He stated that he had not had contact with R.W. during the past year because of conflicts he had with mother. Mr. W. further reported that Andre and his mother were not related to any of the children and that the minor's father was named Anthony W. (Anthony).

On September 23, 2009, DCFS filed a section 300 petition on behalf of R.W. and the minor, alleging (1) that mother was incarcerated and failed to make an appropriate plan for the children's care, (2) mother's history with substance abuse, and (3) that the children's fathers failed to provide the children with the necessities of life.

At the detention hearing, the juvenile court found Anthony to be the minor's alleged father. It further found a prima facie case for detaining R.W. and the minor and that they were persons described by section 300, subdivisions (b), (g), and (j).

Information for the Court Officer

On November 6, 2009, the dependency investigator spoke with Andre, who confirmed that he was not the minor's biological father, but that he was acting as a stepfather prior to his incarceration. He told the investigator that he was not interested in pursuing paternity at that time and that mother would be able to provide information regarding the minor's biological father. DCFS conducted a due diligence search for Anthony but was unable to locate him.

³ The record and the parties' briefs inconsistently refer to R.W.'s father as "Raymond" and "Ronald."

Adjudication/Disposition Hearing

At the December 14, 2009, hearing, the juvenile court sustained the section 300 petition and declared the children dependents of the court. It then terminated jurisdiction over R.W. with a family law order, granting Mr. W. sole physical and legal custody. Regarding the minor, mother was provided with family reunification services, including parenting classes, drug rehabilitation with testing, and individual counseling to address her criminal history and drug use.

Status Review Report

On June 1, 2010, DCFS reported that mother remained incarcerated and was not expected to be released from prison until February 2011. The social worker received a letter from mother that indicated that mother was aware of the programs that she needed to complete in order to reunify with the minor. Mother provided the social worker with certificates of completion from several programs that she had participated in during her incarceration, including a substance abuse 12-step recovery program and an anger management class. Mother was unable to enroll in individual counseling while incarcerated and many other programs that were offered, such as Narcotics Anonymous, Alcoholics Anonymous, and drug counseling, had been cancelled as a result of budget cuts.

In the meantime, the minor had been placed in the home of mother's cousin, Linda B. (Linda). The minor was doing well in Linda's home and appeared to be bonded with Linda. The minor had not visited mother because mother's facility was far and required quite a bit of travel time. Linda was attempting to schedule sibling visits with M.W. and R.W.

Last Minute Information for the Court

On July 15, 2010, the social worker reported that she had received a letter from mother, indicating that mother needed the social worker's signature in order to enroll in a mother-infant program in prison. The social worker spoke with the program's coordinator, who stated that mother had "jump[ed] the gun." He explained that mother needed to complete an application for the program and, once mother was deemed eligible

to participate, the program coordinator would be sending the social worker any documents that required a signature; those documents would not be coming from mother directly.

August 18, 2010, Contested Six-month Review Hearing

At the contested six-month review hearing, the juvenile court noted that DCFS was recommending that mother's reunification services be terminated. In support of its position, counsel for DCFS pointed out that mother's issues with drugs dated back to 2004, when a dependency petition was filed and mother failed to comply with services and was unable to reunify with her children. Currently, in 2010, mother was in prison on drug charges. The juvenile court found mother to be in compliance with her court-ordered services and ordered DCFS to provide mother with additional family reunification services. The matter was continued to November 18, 2010, for a 12-month review hearing.

November 18, 2010, 12-month Review Hearing

DCFS reported that the minor continued to reside in Linda's home. She was comfortable with her placement and attached to Linda. The social worker spoke with mother's counselor, who indicated that mother was due to be released on December 28, 2010, and would be entering a residential program. Although the social worker contacted the residential program, she was unable to obtain any information as a result of the program's client confidentiality procedure. Mother and the minor had not visited during mother's incarceration, however, Linda reported that mother would periodically call and inquire about the minor.

At the hearing, DCFS recommended that mother receive additional family reunification services. Again, the juvenile court found mother in compliance with her court-ordered services to the extent that she could be at her place of incarceration. DCFS was ordered to continue providing mother with reunification services. The matter was continued to March 23, 2011, for an 18-month review hearing.

March 23, 2011, 18-month Review Hearing

DCFS reported that mother had been released from prison in December 2010 and had entered Walden House. On February 2, 2011, mother reported that she was leaving Walden House. According to mother, she had inquired about another program and the staff at Walden House told her that it was disrespectful to inquire about another program and, therefore, had asked her to leave. Mother stated that she would be staying with a friend in Corona while she looked for another program. The social worker scheduled a face-to-face meeting with mother and provided mother with transportation funds, per mother's request. Mother, however, failed to show up for the meeting and stopped maintaining contact with DCFS altogether.

Later, the social worker spoke with Ms. Vega from Walden House. Ms. Vega informed the social worker that it was mother's decision to leave the program and that Walden House did not dismiss residents solely based on the resident's interest in another program. She indicated that the Walden House staff had been trying to work with mother the week before mother's departure in an attempt to convince her to complete the program. Ms. Vega reported that mother had expressed a desire to enter the sober living program but, in order to graduate to sober living, residents had to first successfully complete the "in house" program.

Linda reported that she had not heard from mother as well. She informed the social worker that she had contacted mother via Facebook and that mother had told her that she "wished to give the kids up for legal guardianship." (Italics omitted.)

Mother had two visits with the minor in January 2011. Although the social worker had arranged for two additional visits, mother had left Walden House and did not contact DCFS. Mother contacted Linda in March 2011 to schedule a visit, but Linda did not hear from mother again.

Mother had called the DCFS social worker in March and explained that she had not been in contact with DCFS because her friend's telephone did not work. She reported that she was present for M.W. and R.W.'s hearing. The social worker informed mother that, according to the juvenile court's minute orders, mother was not present at that

hearing. Mother responded that the case was heard very early. She also told the social worker that she was thinking about giving her children's respective caretakers guardianship over her children. Mother agreed to submit to a drug test and represented that she would be in court for the next hearing.

DCFS noted that mother had an extensive history and none of her children were in her custody. She previously had given birth to prenatally substance exposed children and two other children had been ordered home-of-parent father. DCFS had great concerns about mother's ability to address and rectify the issues that had brought her family to the dependency court's attention. Mother previously had failed to comply with court-ordered services. DCFS also indicated that mother had a pattern of starting programs but not following through with them to completion. Mother had been unable to bond and appropriately engage the minor and had not taken advantage of visitation. DCFS assessed that it was in the minor's best interest for the juvenile court to terminate mother's family reunification services.

Per mother's request, the matter was set for a contested section 366.22 hearing.

Last Minute Information for the Court

On May 2, 2011, DCFS reported that mother had submitted to two drug tests in March and that the results were negative. Mother had missed a drug test appointment on April 4, 2011. She tested positive for cocaine on April 19, 2011. DCFS further reported that mother had enrolled in the Matrix Intensive Outpatient Program, but had stopped attending counseling sessions. She had attended one group session, but failed to return for subsequent meetings. Because she had been absent for more than three weeks, mother was removed from the program. Mother stated that she did not want to return to the program because she was looking for a job and wanted to find another program that she could attend in the mornings. She denied using drugs and indicated that she wanted to talk to her attorney about her positive drug test and request a hair follicle test. DCFS again recommended that mother's family reunification services be terminated.

May 24, 2011, Contested Section 366.22 Hearing

At the hearing on May 24, 2011, the juvenile court heard testimony from mother. It entertained oral argument and then terminated mother's family reunification services with the minor.

September 22, 2011, Section 366.26 Report

According to Linda, mother was visiting the minor on the weekends for three hours. Linda stated that when mother was unable to go to Linda's house for a visit, Linda would take the minor to mother's home. Linda did not report any problems during the visits. Although she was willing to adopt, she preferred legal guardianship because she did not want the minor to be taken from her family. Linda did not want to sever any connections with mother and was willing to allow postfinalization visits. Linda had enrolled the minor in a good childcare program and had already made plans for her to attend Head Start when she turned three years old.

DCFS noted that the minor's placement in Linda's home afforded the minor the ability to maintain contact with extended family members, as well as her siblings and mother. The minor deserved a family that was committed to her, and her physical and emotional needs were being met by Linda. Given that the minor had been living with Linda since she was 11 months old (for 21 months), adoption was the most viable option as the permanent plan.

Last Minute Information

In November 2011, DCFS indicated that Linda remained supportive of mother and hoped that mother would regain custody of the minor. She was, however, willing to adopt the minor. The minor's primary attachment was to Linda and the minor had adjusted well in Linda's care. Linda's home previously had been approved pursuant to the Adoption and Safe Families Act, but had been resubmitted and approval was pending.

November 7, 2011, Contested Section 366.26 Hearing

Mother testified first. She stated that she had been visiting the minor five or six times a week for at least three to four hours per visit. During those visits, the minor greeted mother by saying “Hi, mama” and hugging her. Then, mother would cook and they would eat dinner together, watch television, color, and play. Mother also would give the minor a bath and comb her hair. And, mother would help the minor learn the alphabet and numbers. At the end of the visits, the minor was “okay” and would say “Bye, mama.”⁴

Mother stated that she had been paroled in December 2010, but her visits with the minor did not become frequent until March or April 2011. Mother testified that from July 2009 (when she was incarcerated) through December 2010 (when she was paroled), she did not see the minor.

Linda testified next. She stated that she would take the minor to mother’s house almost every school day, from approximately 4:00 p.m. to 7:00 p.m. On weekends, they talked on the telephone and made plans. She might take the minor to mother by 11:00 a.m. and stay until 4:00 p.m. or maybe even as late as 6:00 p.m. Mother visited as often as she could, unless she was in class.

The juvenile court asked Linda why she was taking the minor to mother’s house so often, when mother needed to complete a drug treatment program and could have spent that time participating in services in order to regain custody of the minor. Linda replied: “At that particular time, when she was in the program, the social worker was taking her to see the mom.”

Linda said that the visits went well. When Linda and the minor would show up, the minor referred to mother as “mommy.” Linda also stated that she would call mother and invite her to the minor’s doctor appointments and to pick the minor up from school. Mother had helped potty-train the minor.

⁴ According to mother, the minor called mother “mama” and called Linda “mommy.”

Linda also stated that the minor had recently begun to bring mother up when she was away from her and asked when she was going to see mother again.

After hearing oral argument, the juvenile court noted that although mother had maintained regular and consistent contact with the minor during the past few months and mother's interactions were "in the nature of a parental role," it did not find that maintaining the parent-child relationship outweighed the benefits of adoption. Mother had not progressed past monitored visits with the minor, had other children coming in and out of the dependency system, and "the benefits of permanence in adoption clearly outweigh the ongoing instability of not knowing when the mother is or isn't going to be in a condition to have maintained regular visits, to have her act together, and the mother still has not made any progress in stability in relationship to reunifying with any of her children."

Thus, the juvenile court terminated mother's parental rights over the minor.

Appeal

Mother's timely appeal ensued.

DISCUSSION

I. Standard of review

"For years California courts have diverged in their view about the applicable standard of review for an appellate challenge to a juvenile court ruling rejecting a claim that an adoption exception applies. Most courts have applied the substantial evidence standard of review to this determination [citations], although at least one court has concluded that it is properly reviewed for an abuse of discretion [citation]. Recently, the Sixth District has cogently expressed the view that the review of an adoption exception incorporates both the substantial evidence and the abuse of discretion standards of review. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314–1315 (*Bailey J.*)). The *Bailey J.* court observed that the juvenile court's decision whether an adoption exception applies involves two component determinations: a factual and a discretionary one. The first determination—most commonly whether a beneficial parental or sibling relationship exists . . . is, because of its factual nature, properly reviewed for substantial evidence.

[Citation.] The second determination in the exception analysis is whether the existence of that relationship or other specified statutory circumstance constitutes ‘a compelling reason for determining that termination would be detrimental to the child.’ [Citations.] This “quintessentially” discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption,’ is appropriately reviewed under the deferential abuse of discretion standard. [Citation.]” (*In re K.P.* (2012) 203 Cal.App.4th 614, 621–622.) Like the courts in *Bailey J.* and *In re K.P.*, we apply the composite standard of review here.

II. *Relevant law*

At the section 366.26 hearing, the juvenile court’s task is to select and implement a permanent plan for the dependent child. When there is no probability of reunification with a parent, adoption is the preferred permanent plan. (§ 366.26, subd. (b)(1); *In re Marina S.* (2005) 132 Cal.App.4th 158, 164.) If the juvenile court finds by clear and convincing evidence that a child is likely to be adopted, the juvenile court must terminate parental rights, unless one of several statutory exceptions applies. (§ 366.26, subd. (c)(1); *In re Marina S.*, *supra*, at p. 164.)

To satisfy the parent-child exception to termination of parental rights in section 366.26, subdivision (c)(1)(B)(i), a parent must prove he or she has “maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i); see *In re Derek W.* (1999) 73 Cal.App.4th 823, 826 [“parent has the burden to show that the statutory exception applies”].) The “benefit” prong of the exception requires the parent to prove his or her relationship with the child “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 [“the court balances 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”].) No matter how loving and frequent the contact, and notwithstanding the existence of an “emotional bond” with the child, “the

parents must show that they occupy ‘a parental role’ in the child’s life.” (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418–1419.) The relationship that gives rise to this exception to the statutory preference for adoption “characteristically aris[es] from day-to-day interaction, companionship and shared experiences. Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.)

Moreover, “[b]ecause 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.)

A court may consider the relationship between a parent and a child in the context of a dependency setting, e.g., amount of visitation permitted, whether the parent was ever the child’s primary caretaker. (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1537–1538.) But the overriding concern is whether the benefit gained by continuing the relationship between the biological parent and the child outweighs the benefit conferred by adoption. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1155–1156; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

III. Analysis

The juvenile court did not err in refusing to apply the parental-benefit exception and in terminating mother’s parental rights. Although mother may have maintained regular and consistent contact with the minor, she had not done so for very long; only in September 2011, two months before the section 366.26 hearing, was the juvenile court advised that mother was visiting the minor with any regularity.⁵ And, notably, mother’s visitation had never progressed past monitored.

⁵ For this reason, mother’s reliance upon *In re Brandon C.*, *supra*, 71 Cal.App.4th 1530 and *In re S.B.* (2008) 164 Cal.App.4th 289 is misplaced. In those cases, the appealing parents visited their children consistently for the entire lengthy period of the dependency case. (*In re Brandon C.*, *supra*, at p. 1536; *In re S.B.*, *supra*, at p. 298.)

Moreover, mother has not demonstrated how the minor would benefit from continuing the relationship; in other words, mother did not meet her burden in showing that the termination of parental rights would be detrimental to the minor.⁶ (§ 366.26, subd. (c)(1)(B)(i); *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.) There is no evidence that the minor had a strong bond with mother. The minor had spent the majority of her life outside of mother's custody and with little contact with mother. In fact, mother testified at the section 366.26 hearing that at the end of their visits, the minor was "okay" and would simply say "'Bye, mama.'" There is no evidence that the minor had difficulty separating from mother, threw tantrums as a result of having to say goodbye, sought mother for comfort, or exhibited any difficulty in Linda's home. And, we cannot ignore the evidence that Linda, not mother, would often initiate the visits by calling mother and asking her if she wanted to visit or attend a doctor's appointment or pick the minor up from school. Under these circumstances, the juvenile court did not err in determining that the security and sense of belonging that the minor would gain by residing in a permanent home outweighed the natural parent-child relationship. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

Mother claims that the juvenile court did not take into account whether the parent-child relationship would be beneficial to the minor. We disagree. The appellate record confirms that the juvenile court did consider the continuing relationship between mother and the minor and ultimately concluded that the benefit of the parent-child relationship did not outweigh the benefit of adoption.

Finally, we are not persuaded by mother's contention that legal guardianship was a better option for the minor than adoption. As mother concedes in her appellate brief, adoption is the preferred permanent plan for a dependent child. (*In re Heather B.* (1992) 9 Cal.App.4th 535, 546.) That is particularly true in this case given the fact that Linda made clear that she would allow mother continued contact with the minor postadoption.

⁶ It follows that *In re Amber M.* (2002) 103 Cal.App.4th 681 is distinguishable. In that case, a psychologist, various therapists, and a social worker testified that there was a beneficial parental relationship between the mother and her children. (*Id.* at p. 690.)

And, once a child is deemed adoptable, the juvenile court need not consider less permanent options. (*San Diego County Dept. of Social Services v. Superior Court* (1996) 13 Cal.4th 882, 885.)

DISPOSITION

The juvenile court's order is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ