Filed 11/1/17 In re S.B. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re S.B., et al., Persons Coming Under the Juvenile Court Law.	B281861 (Los Angeles County Super. Ct. No. CK78455)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.B., et al., Defendants and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County, Lisa R. Jaskol, Judge. Conditionally affirmed and remanded with directions.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant J.B.

Johanna R. Shargel, under appointment by the Court of Appeal, for Defendant and Appellant M.G.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

J.B. (Father) and M.G. (Mother) appeal from an order terminating their parental rights to their daughters, S.B. and E.B., and their son, J.B., Jr. Mother contends the juvenile court erred in failing to apply the beneficial relationship exception set forth in Welfare and Institutions Code section 366.26, subd. (c)(i)(B)(1).[1] Father joins in Mother's position and also contends that the Department of Children and Family Services (DCFS) and the juvenile court failed to comply with the Indian Child Welfare Act (ICWA).

We conclude that Mother has failed to show that preserving her parental rights would promote the children's well-being to such an extent as to outweigh the benefit the children would gain in a permanent adoptive home. As for Father's ICWA claim, DCFS concedes the issue and agrees to a limited remand to allow the juvenile court to ensure compliance with the ICWA.

FACTUAL AND PROCEDURAL BACKGROUND

When the underlying dependency case was initiated in April 2013, S.B. was four years old, J.B. was two years old, and E.B. was one month old.[2] DCFS was already familiar with this family. In 2009, a dependency petition pertaining to S.B. was

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[1] Further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] A fourth child, Mat.G., born in August 2014, is not a subject of this appeal. Parental rights as to Mat.G. were terminated in December 2016. On September 27, 2017, Mother's appeal in case No. B279377 was dismissed as abandoned. Father is not Mat.G.'s biological father.

sustained due to Mother's use of methamphetamine and marijuana, and in 2011, the juvenile court terminated jurisdiction after Mother complied with her services.

On April 9, 2013, DCFS filed a petition alleging that a drug pipe and a taser gun were found in the home within reach of the children. The petition also alleged that the parents have a history of engaging in altercations, at times in S.B.'s presence; that S.B. was afraid of Father's violent conduct toward Mother; and that Mother failed to protect the children by allowing Father to reside in the home. Further, the petition alleged that Father has a history of illicit drug abuse, as well as a history of drug convictions. Lastly, the petition alleged that Mother has mental health and emotional problems and previously failed to take her psychotropic medication as prescribed.

At the detention hearing, the children were detained from Father and released to Mother on the condition that she reside in a domestic violence shelter, take her prescribed medication, participate in mental health services, and enforce a restraining order[3] against Father, which was to be issued by the court.

At the jurisdiction hearing held in May 2013, the juvenile court ordered the children remain released to Mother, with Mother to be provided with family maintenance services and Father to have monitored visitation. Two months later, however, the children were removed from Mother after DCFS learned that she was living in a motel with the children and had lied about living with the children's maternal grandmother, as the court had ordered. Another detention hearing was held, at which the children were ordered detained pursuant to section 385. The court ordered DCFS to provide both parents with reunification services, with Mother to

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[3] This restraining order was reissued a number of times through June 2013.

have monitored visits two or three times a week for a minimum of two to three hours each time.

As of August 2013, Mother was neither participating in services, maintaining contact with DCFS, nor visiting the children. She claimed she had no transportation, but failed to pick up her bus pass from DCFS. Between August and December 2013, Mother had 17 no-shows for drug tests and one positive test. She denied using drugs and told the social worker that the positive test result was for another person with the same name.

In November 2013, at a combined jurisdiction/disposition hearing, the children were declared dependents of the court. The court ordered DCFS to give both parents reunification services.

As of May 2014, S.B. was diagnosed with major depression and posttraumatic stress disorder (PTSD) and was prescribed medication and therapy. Mother's visits with the children continued to be sporadic. Between August 2013 and April 2014, Mother cancelled or did not show for more than 35 visits and when she did visit she was occasionally late. According to S.B.'s therapist, S.B.'s negative behaviors and depressed mood were largely triggered by Mother's inconsistent and missed visitations.

During 2014, Mother's random alcohol and drug tests were negative; she was participating and doing well in an outpatient drug treatment program, and was also attending individual counseling. She participated in an Evidence Code section 730 evaluation, which showed a long history of psychological problems, including a dysfunctional and violent relationship with her father. It was recommended that she continue in individual counseling and remain in drug treatment. Mother's visits with the children at this time were consistent and going well. The children were all healthy, except that S.B. continued to receive medication and counseling for depression. S.B. was later diagnosed with bipolar disorder.

In January 2015, Mother was arrested for shoplifting. That same month, the juvenile court terminated her reunification services. In September, the juvenile court terminated Father's services, advised the parents of their right to file a writ petition, and scheduled a permanency hearing under section 366.26.

During the first part of 2015, Mother visited the children frequently and consistently and it was reported that they "appear to love their mom, but it is a struggle for [her]." She was said to give all four children individual attention, but sometimes had trouble managing them all. Between July 2015 and February 2016, Mother failed to show for six drug tests. In October 2015, she was arrested for possession of narcotics, and in November 2015, for possession of unlawful paraphernalia.

As of January 2016, the children were placed in three separate foster homes. Mother was visiting the children three or four times a month, and had recently started having unmonitored visits at a McDonald's restaurant. She interacted appropriately with the children, though she was still struggling to manage all of them. Mother was not attending therapy, had missed three drug tests in October and November, was arrested on two warrants in November, and was convicted for driving with a suspended license. DCFS had concerns about Mother's ability to care for and supervise all four children, especially since two of them had behavioral problems. Mother was not under the care of a psychiatrist despite her diagnoses of psychosis and PTSD.

As of April 2016, Mother had not been visiting the children nor testing regularly. She maintained that she had medical issues and that the doctors could not figure out what was wrong. She also reported that she had a contagious disease and did not visit the children because she did not want them to catch it from her.

Between April and August 2016, Mother continued to be inconsistent with her visits. When she did attend visits, however, she combed S.B.'s hair and polished her nails, was attentive to the children's needs, and engaged with them. As of July 2016, all three children were in different homes, although E.B. had been placed in the same home as M.G. By September, S.B. was in the same home as J.B. and the family was interested in adopting both of them, while E.B.'s foster mother was interested in adopting E.B. and M.G. The two caregiver families had a preexisting relationship and were committed to continuing visits between the children and fostering the sibling relationships.

As of January 2017, S.B. was doing well and had not exhibited any major behavioral problems in her new home. She was no longer taking any psychotropic medication and she felt comfortable with her brother J.B. S.B. missed Mother, however, and said she wanted to return home to her.

Between August and mid-December 2016, Mother had one visit with S.B. and J.B., and had not visited E.B. at all, although she did telephone them twice a week to see how they were doing. On December 21, Mother visited with the children and brought them gifts, but did not see them again until February 23. During the February visit, Mother helped S.B. with her homework and played with the children, who were happy to see her.

In February 2017, Mother filed a section 388 petition,[4] alleging that she had enrolled in outpatient services with Latino Family Center, where she was attending parenting classes and participating in random drug testing at least once a week. She had had eight clean tests. Mother was asking the juvenile court to

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[4] Mother also filed section 388 petitions in January 2016 and December 2016; the former was withdrawn and the latter was summarily denied.

reinstate reunification services. She believed her request was "a better choice for the kids because [she has] remained in [her] children's lives even throughout this court case. [She has] bonded deeply with [her] children. [She] love[s] them very much. [She] want[s her] kids to come home and they want to go home with [her] too." The petition was summarily denied; the juvenile court found that the best interests of the children would not be promoted by the requested change.

The section 366.26 permanency hearing, which had been continued numerous times,[5] was eventually held on March 7, 2017. S.B., who was about to turn eight years old, testified in chambers. At first, S.B. said that she sees Mother as often as she would like to. A moment later, however, S.B. said she wished she could spend more time with Mother. She last saw Mother a week ago; they played together, they ate food together, and Mother helped her with her homework, although Mother normally does not do that. Mother asks S.B. about what she is doing in school, but does not ask her if she is healthy or if she is sick. S.B. calls Mother "mommy." At the beginning of a visit, she runs to see Mother and gives her a hug. At the end of the visits, S.B. feels sad because they do not get to leave together. She calls her foster parents "mommy" and "daddy." If S.B. could continue to have visits with Mother, she would want to do that. She would be sad if she were told she could never again see Mother. S.B. would be sad if she did not live with her foster parents "[b]ecause [she] love[s] them too." Mother gave her Christmas gifts which made her feel glad.

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[5] For example, the hearing initially scheduled for January 2016 was continued because DCFS was unable to identify adoptive families for the children.

Mother, who had arrived at court late, was permitted to testify over the objection of the deputy county counsel. She said she visits with the children at least two or three times a month. They talk about school, they play, and she tries to embrace them as much as she can. Mother knows "it is very emotionally hard for them right now, so [she] tr[ies] to give them that nurturing in the little time [she does] have with them." At times the children run to Mother at the start of a visit. At the end of the visits, the children cry, and "at that point in time it is best that [she] make them laugh." They say they do not want to leave. They tell Mother that they want to come home. They say they miss her, ask when they are going to come home, and hug her. Mother helps them with their school work as much as she possibly can. She talks to the foster parents about how the children are doing physically. Mother went to the hospital when S.B. broke her arm and needed surgery. At one time the visits were unmonitored, but they were changed to monitored. If she were allowed unmonitored visits, Mother would love to be able to assist the foster parents in their day-to-day responsibilities with the children.

In making its decision, the juvenile court said it knew that the parents love the children and that the children love their parents; the parents had not, however, proven that visitation was consistent or that they occupied a parental role in the children's lives. The juvenile court found by clear and convincing evidence that the children were adoptable and that the parents did not meet their burden to establish that the beneficial relationship exception applied. The juvenile court concluded that "the benefit to the . . . children[] derived from preserving parental rights . . . is not sufficiently compelling to outweigh the benefit achieved by the permanency of adoption." The juvenile court then proceeded to terminate parental rights.

Both parents filed timely notices of appeal, Father filed his on March 10, 2017 and Mother filed hers on April 10, 2017.

DISCUSSION

A. Beneficial Relationship Exception

Section 366.26, subdivision (c)(1), provides for the termination of parental rights if family reunification services have been terminated and the juvenile court finds by clear and convincing evidence that the child is likely to be adopted. Once reunification services have been terminated, " '[f]amily preservation ceases to be of overriding concern . . . the focus shifts from the parent's interest in reunification to the child's interest in permanency and stability. [Citation.]' " (*In re Richard C.* (1998) 68 Cal.App.4th 1191, 1195.) "Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573 (*Autumn H.*).)

When the juvenile court finds by clear and convincing evidence that the child is likely to be adopted, the court must terminate parental rights and order the child placed for adoption "unless it 'finds a compelling reason for determining that termination would be detrimental to the child due to one or more' of specified circumstances." (*In re Celine R.* (2003) 31 Cal.4th 45, 49.) The parent opposing termination has the burden of showing that termination would be detrimental to the minor under one of the specified statutory exceptions. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 949; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) The exception relevant here provides: "The 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).)

" '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.' [Citation.] Evidence of 'frequent and loving contact' is not sufficient to establish the existence of a beneficial parental relationship. [Citation.]" (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315-1316.) Moreover, the juvenile court must determine that the parent/child relationship "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 other words, 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." (*Autumn H., supra,* 27 Cal.App.4th at p. 575.) To overcome the benefits associated with a stable, adoptive family, the parent seeking to invoke the exception must prove that severing the relationship will cause not merely *some* harm, but *substantial* harm to the child. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853.) Similarly, "the 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, italics added.)

Our review of a juvenile court decision refusing to apply an exception to terminating parental rights is twofold. (See *In re Bailey J.*, *supra*, 189 Cal.App.4th at pp. 1314-1315; *In re K.P.* (2012) 203 Cal.App.4th 614, 621-622.) "When the juvenile court finds the parent has not maintained regular visitation or established the existence of the requisite beneficial relationship, our review is limited to determining whether the

evidence compels a finding in favor of the parent on this issue as a matter of law. [Citation.]" (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 647.) "When the juvenile court concludes the benefit to the child derived from preserving parental rights is not sufficiently compelling to outweigh the benefit achieved by the permanency of adoption, we review that determination for abuse of discretion. [Citations.]" (*Ibid.*)

Applying this standard here, we conclude that the juvenile court's decision was not error. To support the first prong of the statute, i.e., maintaining regular visitation and contact with the children, Mother contends her visits were "frequent and regular for most of the proceedings," but that she was ill during the last six months and could not make the visits. The record does not support her position. In February 2016, she told the social worker that she had some medical issues and that her doctor had been unable to determine the cause, but that she was telephoning the children regularly. Thereafter, she did not see the children between August and December. When she finally visited with them on December 21, they were happy to see Mother and to receive their Christmas presents, but they did not see her again until February 23, 2017.

In short, Mother's visitation during the six-month period prior to the March 7 permanency hearing was far from frequent or regular; it was virtually nonexistent. Sporadic and inconsistent visitation is insufficient to satisfy the first prong of the beneficial relationship exception. (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) Although the statute does not specify "recent" visitation and contact, we think the term is implicit and that the relationship must be a current one. Indeed, without a *current* relationship, there is no relationship to be preserved. We therefore conclude that Mother's failure to maintain regular visitation with the children,

without more, was a sufficient basis for not applying the exception to termination of parental rights.

The juvenile court's ruling was proper, however, even if Mother's visitation is deemed regular. With respect to her position that she was bonded to the children, Mother points to a statement made by the social worker early in the proceedings that the children "appear to be connected to the mother," and that "mother expressed loving her children." Mother also points to a statement made two years later that "the children appear to love their mom." Lastly, she contends the children were happy to see her during visits, that they were sad when the visits ended, and that S.B. wished she could spend more time with Mother and wanted to go home with her. As the juvenile court observed, there is no question that the children love their parents and the parents love their children. That is not sufficient, however, to satisfy Mother's burden to establish that the beneficial relationship exception applied. Although there was evidence that a parental bond existed between Mother and S.B., Mother's lack of consistency in visitation together with her unresolved drug problem support the juvenile court's conclusion that, on balance, the benefit of permanency through adoption outweighed any benefit the children might derive from continuing the parent-child relationship. Thus, the juvenile court did not abuse its discretion when it concluded that "the benefit to the . . . children[] derived from preserving parental rights . . . is not sufficiently compelling to outweigh the benefit achieved by the permanency of adoption."

B. ICWA Noncompliance

Father contends that DCFS and the juvenile court failed to ensure compliance with the ICWA so as to determine whether the children have Indian ancestry. DCFS concedes that it did

not comply with the ICWA notice provisions and does not oppose a limited remand to rectify the error. (See *In re Francisco W.* (2006) 139 Cal.App.4th 695, 703-704.) We agree and therefore conditionally affirm the order terminating Mother's and Father's parental rights and remand the matter with directions to the juvenile court to ensure full compliance with the ICWA.

DISPOSITION

The order terminating parental rights is conditionally affirmed and the matter is remanded to the juvenile court with directions to ensure full compliance with the ICWA, including an inquiry into Father's possible Sioux heritage. If, after proper notice and inquiry, a determination is made that the children are Indian children, the juvenile court is to vacate the order terminating parental rights in order to conduct new proceedings consistent with the procedural and substantive requirements of the ICWA. If the inquiry produces no evidence that the minors are or may be Indian children, or if there is no intervention or assertion of jurisdiction by any tribe after proper notice, then the order terminating parental rights is affirmed unconditionally.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.