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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re M.C., a Person Coming Under the
Juvenile Court Law.

B241778
(Los Angeles County
Super. Ct. No. CK 59211)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

S.M.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Terry Truong, Juvenile Court Referee. Affirmed.

William Hook, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Peter Ferrera, Deputy County Counsel, for Plaintiff and Respondent.

* * * * *

S.M. (father) appeals from the juvenile court's order terminating his parental rights to his daughter, M.C.¹ He contends the court erred in finding that the beneficial parental relationship exception (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i)) to the preference for adoption did not apply.² We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

M.C. was born in January 2005. M.C. has previously been a dependent of the juvenile court from May 2005 to June 2007 because of sustained allegations of substance abuse by mother. During that case, M.C. resided with maternal grandmother until November 2006, at which time mother completed court-ordered services and M.C. was placed in mother's home. Father received family reunification services during the case, but the court terminated them in January 2007 because father failed to comply with court-ordered parenting classes. The court permitted father monitored visits during this time. When the court terminated jurisdiction in June 2007, it granted mother full physical custody.

1. Petition and Disposition

M.C. came to the attention of the Los Angeles County Department of Children and Family Services (DCFS) again on May 4, 2009, when a referral alleged that mother did not have appropriate housing and would leave M.C. with maternal grandmother for several weeks. The investigation revealed that mother was also living in a home with an unprotected swimming pool six or seven feet away from mother's and M.C.'s bedroom. DCFS received another referral on May 29, 2009, alleging that mother and her boyfriend had physical altercations in front of M.C. and also general neglect by mother.

While DCFS was investigating the family, mother and M.C. were in a car accident on June 30, 2009. Mother was driving while intoxicated and without a license, and M.C.

¹ The court also terminated mother's parental rights. Mother is not a party to this appeal.

² All future undesignated statutory references are to the Welfare and Institutions Code.

was not in a car seat but had on a seat belt. Mother flipped the car several times. She took M.C. and walked to their hotel after the accident, instead of obtaining medical care for M.C. That same day, M.C. was detained from mother and placed with maternal grandmother.

Father was incarcerated during this time and had been since his arrest in September 2008. He was convicted of a felony in May 2009. The court sentenced him to two years in state prison. Mother reported to DCFS that father had not been in M.C.'s life since she was born. Mother did not know where father was located. Both mother and maternal grandmother reported that father had never provided M.C. with any necessities of life, even when he was not incarcerated.

DCFS filed a petition under section 300, subdivisions (b) and (g), in July 2009. The petition alleged that M.C. was at risk based on the car accident, mother's substance abuse, mother's failure to plan for M.C.'s ongoing care and supervision, and father's failure to provide for M.C. For DCFS's combined jurisdiction and disposition report of July 2009, the investigator interviewed father at county jail. Father reported that he had not seen M.C. since September 2008, approximately a week prior to his incarceration. He wanted to write to M.C. and receive family reunification services. He stated that he loved her and missed her.

The court adjudicated the portion of the petition relating to mother on July 29, 2009, and continued the portion relating to father so that he could be transported to court from jail. It amended and sustained the allegations relating to the car accident and mother's history of substance abuse. The court ordered M.C. to remain placed with maternal grandmother and ordered family reunification services for mother.

The court adjudicated the portion of the petition relating to father on September 28, 2009. It sustained the allegation under section 300, subdivision (g) that father failed to provide M.C. with the necessities of life. The court ordered family reunification services for an incarcerated parent, parenting classes, and monitored visits for father.

2. Six-month Review

At the time of mother's six-month review report, father was still incarcerated and DCFS had tried but was unable to contact his counselor. M.C. had not had any in-person visits with father, but she received letters and pictures from him, and she was excited to show the social worker the pictures that father drew for her. At the time of father's six-month review report, father's counselor reported that he would be released sometime in 2010. While father was on a waiting list for a job program, the prison at which he was incarcerated did not offer any family programs. DCFS thought that father obviously had a relationship with M.C., and noted she referred to him as "daddy."

Maternal grandmother reported that she did not believe M.C. even noticed a change in her circumstances because M.C. had been living with maternal grandmother for almost her entire life. M.C. was very comfortable in maternal grandmother's home and referred to her two cousins, who also lived there, as sisters. Maternal grandmother wrote to father about M.C., and he had told maternal grandmother in a response letter that he would be released in "a couple of months."

The court found that father had "kept in touch with" M.C. and made "some progress" in resolving the issues that led to her removal. It continued family reunification services and ordered DCFS to provide him with referrals for online classes while he was incarcerated.

3. 12-month Review

For the 12-month review report, DCFS reported that M.C. continued to do well in maternal grandmother's home. Father's counselor reported that father was set to be released from prison on July 7, 2010. The review hearing was set for July 27, 2010. Father had no access to parenting classes while incarcerated and no access to the Internet. He had continued to make monthly contact with M.C. via letters. She was reportedly aware of him and "excited to meet him." DCFS mailed a contact letter to father on June 11, 2010, asking about his plans to visit M.C. once he was released from prison. At the time of the report, he had not responded to the letter. DCFS noted that both mother

and father had not complied with the case plan, though maternal grandmother had and was eager to adopt M.C.

Father was released from custody and appeared at the scheduled 12-month review hearing. DCFS recommended terminating family reunification services for both parents. Father requested that the court set the matter for a contested hearing.

4. Contested Review Hearing

In preparation for the contested hearing, DCFS filed a supplemental report. DCFS reported that it mailed father several parenting and individual counseling referrals on July 30, 2010. On August 5, 2010, he verified that he had received them but had not yet enrolled in any programs. Father had a monitored visit with M.C. on July 19, 2010, that was described as positive and loving. On July 31, 2010, father attended M.C.'s baptism. Mother attended with her boyfriend. Father got upset and became intoxicated to the point that he could not stand upright. He was angry that mother had come with her boyfriend and caused a scene in front of M.C. Mother and her boyfriend left the baptism to avoid further confrontation with father. The social worker asked father about the scene. He stated that nothing had happened and he did not want to talk about it. As of August 6, 2010, father had not contacted M.C.

At the contested hearing, the court found that father had contacted and visited with M.C. since his release and had just enrolled in a parenting class. He had also demonstrated the capacity and ability to complete the objectives of the case plan. The court thus ordered that family reunification services for father continue to the 18-month date. The court also ordered that he participate in on-demand testing, in light of the incident at M.C.'s baptism. The court terminated family reunification services for mother.

5. 18-month Review

In advance of the 18-month review hearing, DCFS reported that father's visits were infrequent. Father had set weekly Saturday visits with M.C. for a minimum of two hours after the last hearing, but he had not been consistent in that visiting schedule. In November 2010, he did not visit with M.C. at all, though he did call her on Thanksgiving.

On average, he had seen M.C. eight times between the last hearing in August 2010 and the current report (January 2011). Maternal grandmother reported that M.C. was happy whenever she did get to visit with father.

Since August 2010, he had four negative drug tests and one “no show.” Father did not return the social worker’s calls when she tried to contact him regarding the infrequency of his visits and his missed drug test. Father had also not responded to the contact letters DCFS had mailed to him asking him to stay in contact. He eventually contacted DCFS on December 27, 2010. He was supposed to drug test that day, but the toxicology site would no longer permit him to use his parole identification and he did not have a valid California identification card. He was unsure when he would be able to apply for an identification card. DCFS made father a DCFS identification card to drug test when he came to the DCFS office in January 2011. It also provided him with a bus pass to commute throughout Los Angeles county.

Father had completed a parenting a class, but he had not participated in M.C.’s therapy sessions and had no explanation for why that was the case. M.C. expressed to her therapist that she did not want to live with father and she cried when discussing the possibility. M.C. had exhibited depressive symptoms when she started therapy, and while the symptoms had decreased after some sessions, she continued to show sadness and anxiety when discussing the possibility of reunifying with father. The therapist believed her symptoms were linked to father’s inconsistency in visits and calls. M.C. indicated that she enjoyed spending time with father and mother but prefers to live with maternal grandmother. Maternal grandmother reported that she wanted to adopt M.C.

DCFS felt that father had not made a diligent effort to spend more time with M.C. and form a solid father-child bond. It noted that father had been released from custody for more than five months at that point but had only visited M.C. for approximately 15 hours total since his release. DCFS recommended that maternal grandmother adopt M.C., noting that maternal grandmother had cared for her since birth, and maternal grandmother’s home was the only home with which M.C. was familiar.

DCFS compiled another report in February 2011. The social worker reported that, when she had spoken with father on January 14, 2011, he did not remember the last time he had visited with M.C. He thought he might have seen her a few days before Christmas and a few days before New Year's Day. Father did visit M.C. once in December 2010, and he visited her once in January 2011. On January 27, he arrived at the DCFS office smelling of alcohol. He thought there was a therapy session with M.C., but it was actually scheduled for February 3, 2011. Father told the therapist that he was under the influence of alcohol, but he thought it better to attend the session that way than not at all. Father and M.C. had a conjoint therapy session soon after. The therapist reported that M.C. was laughing and smiling during her session with father until maternal grandmother asked to take her to the restroom. They were in the restroom for a long time, and when M.C. returned to the session, she had "shut down" and no longer wanted to participate. The therapist asked whether maternal grandmother had told her to no longer participate, and M.C. said, "yes." The therapist felt that maternal grandmother was trying to sabotage father so that M.C. remained in her care.

Maternal grandmother reported that she still wanted to adopt M.C. and she wanted an open adoption in which M.C. would still have contact with mother and father.

At the February 15, 2011 hearing, DCFS recommended that father continue to receive family reunification services. The court agreed and so ordered. It admonished father that he was not to drink alcohol 24 hours prior to any visits with M.C. and admonished maternal grandmother that she was not to do anything to sabotage father's visits with M.C.

6. 24-month Review

In preparation for the 24-month review hearing, DCFS reported that father's visits and telephone contacts had been inconsistent. After the last hearing, maternal grandmother and father agreed to visits every Sunday for four hours. Father missed two visits in April 2011, three visits in May 2011, and two visits in June 2011. Father said he missed some visits because he had been dealing with the death of a friend and was depressed, and he missed one visit because of bad weather. DCFS informed him that he

was entitled to nine hours of visiting per week. Father said he could not do nine hours because he did not have someone to serve as a monitor. He said that he would have family members live scan so that they could be approved as monitors, but he did not follow through with this. Only one family member contacted DCFS to sign the monitor agreement form, but that person cancelled his appointment with DCFS at the last minute. In late June, maternal grandmother reported that father no longer had a cell phone and had not called M.C. in the last few weeks. M.C. did enjoy the visits she got to have with father.

Maternal grandmother continued to want an open adoption. DCFS recommended that the court terminate family reunification services for father and set a hearing regarding adoption. At the July 2011 review hearing, the court set the matter for a contested hearing at father's request.

7. Contested Review Hearing

In preparation for the September 2011 contested hearing, DCFS reported that when it spoke to father on July 25, 2011, he had not seen M.C. since June because he was working construction with his stepfather to buy M.C. a new bed. He had not been calling her because he no longer had a cell phone. Father was asked to drug test August 22, 2011, and reported that he could not because the facility would not accept his parole identification. Father told DCFS that there was a reason why he would not apply for a California identification, but he would not say what that was. Father stated that he would come to the DCFS office to get another photo identification on August 29, but he did not show up and never called to reschedule.

The court continued the contested review hearing on September 14, 2011, so that father could have unmonitored visits and overnight visits and DCFS could issue a supplemental report. As of October 11, 2011, none of the family members with whom father lived had live scanned, as was necessary for M.C. to have overnight visits. He reported that his brother and sister-in-law refused to live scan, and he was waiting to see whether the family members would move out of the home. If they did not, he said he might move in with other family members, but he did not have a time frame for this

possible move. He had not spoken with or seen M.C. since his September visits on September 18 and 25, 2011.

Father attended one conjoint therapy session with M.C. on August 29, 2011, and then missed all subsequent sessions. Her therapist left a voicemail for him after the third missed session, but he did not return her call.

At the contested review hearing on October 19, 2011, father indicated that he was willing to move forward with DCFS's recommendation to terminate reunification services because he had spoken with maternal grandmother, and she was willing to have legal guardianship over M.C. as opposed to an adoption. M.C.'s counsel joined in DCFS's recommendation and stated that while M.C. loved father, counsel was concerned that his visits and conjoint therapy had been inconsistent. The court terminated family reunification services for father and set the matter for a permanency planning hearing under section 366.26.

8. Section 366.26 Hearing

In preparation for the section 366.26 hearing, DCFS identified adoption by maternal grandmother as the permanent plan for M.C. M.C. told DCFS that she wanted to stay with maternal grandmother. On March 12, 2012, DCFS gave notice that mother had voluntarily relinquished her parental rights and designated maternal grandmother as M.C.'s adoptive parent. The adoption home study was completed and maternal grandmother's home was approved.

At the May 25, 2012 hearing, father was present in custody. M.C.'s counsel stated for the record that M.C. had a "real attachment" to mother and father, and counsel would prefer legal guardianship over adoption, but she understood there was "no legal basis for that," and she also understood that maternal grandmother was adamant about adoption. Father objected to the termination of parental rights.

The court found by clear and convincing evidence that M.C. was adoptable and that it would be detrimental to return her to her parents. It further found no exception to adoption applied. It therefore terminated mother's and father's parental rights and appointed maternal grandmother the prospective adoptive parent.

Father filed a timely notice of appeal.

DISCUSSION

Father contends that the juvenile court erred in finding that the beneficial relationship exception to the termination of parental rights did not apply. We disagree and find no error.

If reunification of parent and child does not occur within the statutorily prescribed period, a juvenile court must terminate reunification services and set the matter for a section 366.26 hearing to select and implement a permanent placement plan. (§ 366.21, subd. (g); *In re Celine R.* (2003) 31 Cal.4th 45, 52.) At the hearing, the court has four choices. They are, in order of preference: “(1) terminate parental rights and order that the child be placed for adoption (the choice the court made here); (2) identify adoption as the permanent placement goal and require efforts to locate an appropriate adoptive family; (3) appoint a legal guardian; or (4) order long-term foster care. (§ 366.26, subd. (b).) . . . [Citation.] . . . [Citation.] . . . ‘Adoption is the Legislature’s first choice because it gives the child the best chance at [a full] emotional commitment from a responsible caretaker.’ [Citation.]” (*In re Celine R.*, *supra*, at p. 53.) Under section 366.26, subdivision (c)(1), the court must terminate parental rights if it finds by clear and convincing evidence it is likely the child will be adopted.

While the Legislature has expressed a strong preference for adoption, the court will not terminate parental rights and proceed to adoption if it determines that doing so would be detrimental to the child based on one of several statutory exceptions. (§ 366.26, subd. (c)(1)(B).) The party challenging termination of parental rights bears the burden of proving that one or more of the statutory exceptions applies. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.)

An exception exists when the child has a strong relationship with the parent and severing that bond would be detrimental to the child. (See § 366.26, subd. (c)(1)(B)(i); *In re S.B.* (2008) 164 Cal.App.4th 289, 299.) To establish the beneficial parent-child relationship exception, the parent must prove termination of parental rights would be detrimental to the child because (1) the parent maintained regular visitation and contact,

and (2) the child would benefit from continuing her relationship with the parent. (§ 366.26, subd. (c)(1)(B)(i); *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449-450.)

The “benefit” prong of the exception requires a parent to prove that 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.) “Because a parent’s claim to . . . an exception [to termination of parental rights] is evaluated in light of the Legislature’s preference for adoption, it is only in exceptional circumstances that a court will choose a permanent plan other than adoption. [Citation.]” (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.) “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.’ [Citations.] 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 K.P.* (2012) 203 Cal.App.4th 614, 621.) “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, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*In re Autumn H.*, *supra*, at p. 575.)

Most appellate courts apply a substantial evidence standard of review to the juvenile court’s determination of whether a section 366.26 statutory exception applies. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) Some courts have applied the abuse of discretion standard of review. (See, e.g., *In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1512.) The practical differences between the two standards are not significant (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351), and under either standard, we find no error here.

Father argues that he met the first prong of the exception because he frequently and consistently visited and contacted M.C., and he saw her regularly before she was detained. The record does not support this argument. Mother indicated that father had

not been a part of M.C.'s life since she was born, and both mother and maternal grandmother said that father had never provided M.C. with the necessities of life. He did not see her at all during almost 12 months of her dependency because he was in custody, although he did write her letters. Even after he was released, however, father's visitation was sporadic at best. Some months he did not see her at all. Some months he saw her only once, and occasionally he saw her two or three times a month. Even the visits he had did not appear to be long, though. DCFS estimated that in the five months following his release from custody, he had visited with M.C. for only 15 hours – an average of three hours per month. His telephone contact was inconsistent as well, apparently because he did not have access to a cell phone at times. He never progressed to longer monitored visits because he could not secure an appropriate monitor, and he did not progress to unmonitored or overnight visits because he could not secure a living situation in which his housemates would live clean, and he did not demonstrate any urgency in trying to change these circumstances. He also repeatedly missed conjoint therapy sessions with M.C. and did not return the therapist's calls to explain why he missed them or reschedule them. At one point, M.C. was experiencing depressive symptoms that her therapist opined were linked to father's inconsistency in visits and calls. This record of contact cannot be characterized as frequent or regular.

The fact that father has not met the first prong of the beneficial relationship exception is enough alone to affirm the court's order. But he also fails to show that M.C. would benefit from continuing the relationship with him under the second prong. His evidence is that he was in M.C.'s life for three years before he was incarcerated, she was always excited to receive his letters and drawings, she was always happy to see him, their visits were positive, and she referred to him as "daddy." First, there was no evidence that father was involved in M.C.'s life before he was incarcerated. Again, mother said that he had not been part of M.C.'s life, and maternal grandmother had cared for M.C. since birth, essentially. Second, while the limited contacts father did have with M.C. were reportedly positive and happy interactions, "[i]nteraction between natural parent and child will always confer some incidental benefit to the child." (*In re Autumn H.*, *supra*,

27 Cal.App.4th at p. 575.) Father must show much more – that he has a significant bond with M.C. and occupies a parental role in her life. This he does not do. His evidence is simply not sufficient to establish that this is an exceptional case in which termination of parental rights would be detrimental to M.C., or that maintaining her relationship with father outweighs the well-being she would gain from a permanent home with the person who has been her primary caregiver since birth.

DISPOSITION

The order terminating father's parental rights is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.