Filed 8/28/12 In re Brianna M. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re BRIANNA M., a Person Coming Under the Juvenile Court Law.	B238554 (Los Angeles County Super. Ct. No. CK37540)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ANN D. et al., Defendants and Appellants.	

APPEALS from an order of the Superior Court of Los Angeles County, Patricia Spear, Judge. Affirmed.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Appellant Ann D.

Eva E. Chick, under appointment by the Court of Appeal, for Defendant and Appellant Gabriel J.

Office of the County Counsel, John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

Ann D. (Mother) and Gabriel J. (Father) appeal the juvenile court's January 3, 2012 order terminating parental rights to their three-year-old daughter, Brianna M.[1] Mother and Father claim that the juvenile court erred by failing to apply the parental benefit exception set forth in section 366.26, subdivision (c)(1)(B)(i) of the Welfare and Institutions Code.[2] We disagree and affirm the juvenile court's order.

FACTUAL AND PROCEDURAL HISTORY

Mother and Father are the parents of Brianna (born Oct. 2008). On October 16, 2009, a Los Angeles County deputy sheriff responded to a child neglect call. When the deputy arrived at the location, a liquor store, he saw Father sitting on the ground with his back against the store. He had a 40-ounce beer in one hand and his other arm was around Brianna. Father was asleep and Brianna was found sitting next to him, barefoot, and crying. After waking Father, the deputy asked him where Brianna's shoes were. Father did not know. Father stood up. As the conversation continued, the deputy noticed that Father had bloodshot eyes, slurred his speech, and continuously staggered as he tried to

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1 Parents' challenge of the juvenile court's section 366.26 order is their second appeal in this juvenile dependency case. In their first appeal, parents contested the juvenile court's July 1, 2011 order denying their section 388 petitions seeking reinstatement of reunification services and unmonitored visitation. On March 28, 2012, this court affirmed the juvenile court's order as to the first appeal. (*In re Brianna M.* (Mar. 28, 2012, B234691) [nonpub. opn.].)

2 All further statutory references are to the Welfare & Institutions Code.

walk. After the deputy determined that Father was unfit to care for Brianna's safety, Father was arrested for child endangerment and being drunk in public.

Later that day, the deputy contacted Mother and advised her to report to the station. He also contacted the Los Angeles County Department of Children and Family Services (DCFS) to inform it that Brianna was in sheriff's custody. When Mother arrived at the station, the deputy detected a strong odor of alcohol on her breath. Shortly after Mother's arrival, a children's social worker (CSW) responded to the sheriff's station to investigate the referral. The deputy told the CSW that he did not "feel comfortable" releasing Brianna to Mother, explaining that Mother laughed after being told about Father's arrest.

The following day, Mother agreed to submit to an on-demand drug and alcohol test. Despite Mother's claim that she had not consumed any alcohol in the past few days, her test results came back positive for alcohol. Interviews with the maternal great grandfather confirmed that mother "definitely" had an alcohol problem and that she began drinking when she was a teenager. He also expressed his concerns about Father's alcohol abuse, noting that he had seen Father intoxicated on more than a few occasions.

Due to mother's positive alcohol test, her history with the dependency court,[3] and father's arrest, DCFS, on October 23, 2009, filed a dependency petition on behalf of 12-month-old Brianna pursuant to section 300, subdivision (b). The petition alleged the following: (1) Father has endangered the child by being under the influence while under his care; (2) Mother knew of Father's history of alcohol abuse and his consumption of alcohol on October 16, yet failed to take action to protect Brianna; (3) Mother has a 15-year history of substance abuse involving marijuana and alcohol and is a current abuser of alcohol, which renders her incapable of providing for Brianna with appropriate care; (4) Brianna's siblings received DCFS services due to Mother's substance abuse; and

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3 Mother has had an extensive history with the dependency court. She has failed to reunite with her five other children because of her history of illicit drug and alcohol abuse, including the use of marijuana and alcohol, which rendered Mother incapable of providing her children with regular care and supervision.

(5) Father has a history of substance abuse, is a current abuser of alcohol, and on October 16, Father cared for Brianna while under the influence of alcohol, placing Brianna at risk of harm. The day the petition was filed, the court ordered that Brianna remain detained and placed in foster care. It deemed Father to be Brianna's presumed father and ordered monitored visitation for the parents.

On December 28, 2009, a mediation agreement for the section 300, subdivision (b) petition was submitted and an amended petition was sustained. Mother and Father admitted to the allegations of the amended petition. Brianna was removed from her parents' custody. The court ordered DCFS to provide family reunification services which included individual counseling, drug and alcohol counseling, parenting classes, and drug and alcohol testing.

Once family reunification services began, the parents clearly demonstrated their inability to follow through with the court-ordered case plan. During a June 8, 2010 scheduled home visit, the CSW found alcohol in Mother's refrigerator. Mother first told the CSW that the alcohol belonged to her neighbors but then later changed her story, and claimed that it belonged to her grandfather. A second CSW arrived at the home to discuss the matter and Mother again changed her story claiming that the alcohol belonged to a homeless man. On June 16, 2010, the CSW asked Father about the alcohol in the refrigerator and Father replied that it belonged to a cousin.

In August 2010, CSW conducted an unannounced visit at Mother's home and observed a liquor bottle on the table. Later that day, the CSW conducted an on-demand alcohol test after receiving an anonymous telephone call from someone who claimed to have seen Mother consume alcohol in the parking lot outside of an outpatient substance abuse clinic. The results for that test came back positive for alcohol. Father also tested positive for alcohol on four separate occasions. In September 2010, Mother tested positive for alcohol, provided a diluted test sample on September 13 and failed to appear for a random test in October 2010. The CSW reported that Mother was not attending her alcohol recovery program. When the CSW asked Mother the reason for her lack of

attendance, Mother claimed that she was incarcerated from August 5, 2010, to August 18, 2010.

On November 22, 2010, the juvenile court held a 12-month review hearing pursuant to section 366.21, subdivision (f). DCFS reported that the parents were attending their substance abuse program five days a week and participating in individual counseling; however, they still continued to consume alcohol. The parents denied having problems with alcohol despite repeatedly testing positive after various on-demand tests. DCFS recommended that the court terminate family reunification services. The court ruled that, "[i]n light of [the parent's] history there's no way this court could conclude there's a substantial probability reunification would occur by the 18-month date." It terminated family reunification services and calendared a section 366.26 hearing for March 21, 2011, and a review of permanent plan hearing for May 23, 2011.

On January 26, 2011, Mother filed a section 388 petition, seeking an order reinstating reunification services. Mother requested continued family reunification services, unmonitored visitation, and, in the event Brianna had to be placed in another home, that she be placed with a relative. On May 20, 2011, Father filed a separate section 388 petition, seeking Brianna's return to his custody or, in the alternative, continued reunification services with unmonitored visits.

The hearing on parents' section 388 petitions was held on July 1, 2011. The court found that the parents had failed to present any substantial evidence that reinstating reunification services would be in Brianna's best interest and denied their respective petitions. The court considered placing Brianna for adoption with a relative or her former foster mother. The parents identified relatives who they thought would be a better fit as adoptive parents; it was later determined that the relatives were not interested in adopting Brianna. DCFS strongly urged the court to grant custody to Brianna's current caretakers, who expressed a strong desire to adopt her. The court ultimately decided that Brianna would remain with her current caretakers and denied Mother's and Father's 388 petitions.

A section 366.26 hearing was held on January 3, 2012. The parents testified that they continued to visit Brianna twice a week and that Brianna showed clear signs of

attachment towards them. Mother confirmed that when Brianna saw Father during visits, she was always very excited, running to him, and calling out "daddy, daddy" with her arms outstretched. Mother also testified that she and Father brought food and clothing for Brianna when they visited. Mother said that Brianna would state at the end of a visit, "don't want to go bye-bye" and would cry. Briana never wanted to leave the visits with her parents and would say, "No, I don't want to go in the car." DCFS reported that the parents failed to transition from monitored to unmonitored visits. The parents argued that they satisfied the requirements set forth in the section 366.26, subdivision (c)(1)(B)(i) parental benefit exception to adoption because they maintained regular and positive contact with Brianna.

After reviewing the CSW's reports reflecting her observations during visits, the juvenile court told the parents it was impressed with the persistence and consistency of their visits with Brianna. However, upon a careful review of the totality of the circumstances, including the parents' individual progress, the court concluded that Brianna was generally and specifically adoptable and the parents had not met their burden of proving that the detriment caused by severing their relationship with Brianna outweighed the benefit she would receive from the permanency of adoption. The court terminated Mother's and Father's parental rights.

On January 3, 2012, the parents filed timely notices of appeal.

DISCUSSION

The parents contend the juvenile court erred when it terminated their parental rights to Brianna because they met the burden of proving the applicability of the parental benefit exception set forth in section 366.26. They argue that substantial evidence does not support the juvenile court's order to terminate parental rights. We disagree.

In cases pertaining to custody determinations, we generally apply the substantial evidence test when the sufficiency of the evidence is at issue on appeal. (*In re. I.W.* (2009) 180 Cal.App.4th 1517, 1527.) Under this test, we are bound by the established

rules of appellate review that all factual matters are viewed in the light most favorable to the prevailing party and in support of the judgment. (*Ibid.)*

Initially, we observe that neither parent takes issue with the juvenile court's determination that Briana is adoptable. Thus, "[a]doption must be selected as the permanent plan for [Brianna] and parental rights terminated unless the court finds 'a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) 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).) '[T]he burden is on the party seeking to establish the existence of one of the section 366.26, subdivision (c)(1) exceptions to produce that evidence.' [Citation.]" (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.)

In order to satisfy the requirements of the beneficial parent-child relationship, the parents had the burden of establishing that their relationship with Brianna "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.) In that regard, the parents had to "do more than demonstrate 'frequent and loving contact[,]' [citation] an emotional bond with the child, or that parent and child find their visits pleasant. [Citation.] Instead, the parent must show that he or she occupies a 'parental role' in the child's life. [Citations.]" (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) Here, neither parent met that burden.

The only evidence Mother and Father cite in support of their claim that they have a beneficial relationship with Brianna relates to their visits with the child. Mother asserts Brianna is bonded to her and "clearly feels safe in her Mother's care." Father notes that Brianna continues "to display a strong attachment to [him]." She is "unhappy when visits ended and did not want to go back to her foster home." They contend their interaction with Brianna is parental in nature because when visiting they bring her diapers and homemade food, brush her hair and clean her ears, encourage her to play nicely with other children, and remain consistently attentive to her safety.

On the other side of the ledger, Brianna has a bonded and stable relationship with her current caregivers, who are prospective adoptive parents. Now three and a half, she has lived with her present family for more than half of her life. Brianna refers to the caregivers as her parents and their son as her brother. Mother attempts to denigrate the caregivers and the home they have provided for Brianna. First, on balance, the evidence establishes that the child is happy, healthy, and thriving in her current home. Second, whatever shortcomings Mother believes the caregivers may have in no way demonstrates that her relationship with Brianna is a beneficial one.

In the final analysis, Mother and Father do not have a parental role in Brianna's life. They enjoy visits with her and do their best to provide for her during those times. However, it is Brianna's caregivers who give her a stable and loving home.

The cases the parents cite in support of their position are distinguishable. The parents in those cases were the children's primary caregivers for substantial periods of time. (*In re S.B.* (2008) 164 Cal.App.4th 289, 298 [father was child's primary caregiver for three years]; *In re Amber M.* (2002) 103 Cal.App.4th 681, 684 [the oldest child was almost five when child welfare filed petition].) In contrast, Brianna lived with her parents for one year. In *In re Amber M.*, a psychologist conducted a bonding study and concluded that "'[i]t could be detrimental'" to sever the parental relationship (103 Cal.App.4th at p. 689), and in *In re S.B.*, the doctor who conducted a bonding study described the bond between the father and child as "'fairly strong'" or "'moderate'" (164 Cal.App.4th at p. 295). Here, there was no bonding study. In *In re S.B.*, the father "complied with 'every aspect' of his case plan." (164 Cal.App.4th at p. 298.) As we have discussed, in the present case, neither parent adequately addressed his or her alcohol problem.

The juvenile court properly concluded that any harm caused by the termination of the parents' relationship with Brianna was outweighed by the benefit adoption would provide.

DISPOSITON

The juvenile court's order terminating Mother's and Father's parental rights is affirmed.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.