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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re ROBERT V. et al., Persons Coming
Under the Juvenile Court Law.

B241292
(Los Angeles County
Super. Ct. No. CK83608)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

ELAINE M.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County.

Daniel Zeke Zeidler, Judge. Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Elaine M. (mother) appeals from a juvenile court order terminating her parental rights to Robert V. (Robert, born Aug. 2001), Jazmine V.¹ (Jazmine, born Oct. 2003), and Emily V. (Emily, born May 2008). She contends that the juvenile court erred in refusing to apply the parental benefit exception (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i)).² We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Section 300 Petition and Detention

On August 13, 2010, the Department of Children and Family Services (DCFS) filed a section 300 petition on behalf of Gabriel C. (Gabriel, born June 1996),³ Robert, Jazmine, and Emily. The petition alleged that mother and Robert, Sr. (father), the father of the three younger children, had a 10-year history of domestic violence. The petition further alleged that mother used illicit drugs, including methamphetamine, amphetamine, and marijuana, abused prescription drugs and alcohol, and had mental and emotional problems. Father was alleged to have abused amphetamine, methamphetamine, and marijuana.

The family had a prior child welfare history with DCFS. There had been three referrals, one of which resulted in voluntary maintenance services. Mother had a 1994 arrest for possession of illegal drugs, which was dismissed. Father had been arrested on May 20, 2010, for a domestic violence incident with mother during which he hit her in the eye in a public setting.

On June 14, 2010, DCFS conducted a Team Decision Making (TDM) meeting, where it was decided that mother and father would be provided with more voluntary family maintenance services. However, on August 3, 2010, mother tested positive for

¹ In the appellate record, Jazmine's name is also spelled "Jasmine." We use the spelling on the section 300 petition.

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

³ Gabriel is not a party to this appeal.

amphetamine, methamphetamine, and marijuana.⁴ Three days later, father tested positive for amphetamine and methamphetamine. DCFS detained the children.

During her interview with the social worker, mother advised that she had been in an abusive relationship with father for seven years; she admitted that she also had used violence against him. She denied ever neglecting the children. She indicated that she took prescription medications due to a “meltdown” caused by the domestic violence and problems at work. She denied having a drinking problem and using methamphetamine, but she admitted using marijuana occasionally. She showed the social worker her “license” to use marijuana, and stated that she only used it when the children were not around.

Father admitted hitting mother in the eye during an argument. He admitted to years of domestic violence between them. He did not believe that mother was stable enough to care for the children. He stated that if mother got herself together, then she would be a good mother and that she was strongly bonded to the children.

Gabriel’s father reported that mother had problems with substance abuse. He believed that mother was a good mother when she was sober, but he wanted full custody of Gabriel and monitored visits for mother until she showed good progress in her sobriety.

The social worker then spoke to Robert. He reported that he stayed with his paternal grandparents and that he saw his mother a couple of days a month. He had lived with his paternal grandparents during the entire year he was in third grade; the year before, he had been living with his maternal great-grandparents.

Robert said that he did not see father hit mother in the eye in May 2010, but he reported seeing father hit mother before that date. He denied being physically abused and denied being exposed to illegal drug use.

⁴ At this time, mother, father, and the three children had been living at the paternal grandparents’ home. In August 2010, the paternal grandmother, Mary V. (Mary) reported that mother appeared to be under the influence of alcohol and/or drugs.

Mary informed the social worker that the children had been living with her and father. She said that mother had moved out two months prior, due to the domestic violence incident, and that mother had substance abuse issues.

At the detention hearing, all four children were ordered detained from mother and father. Gabriel was placed with his biological father; Robert, Jazmine, and Emily were placed with their paternal grandparents. Mother and father were allowed monitored visitation, at least once a week with Robert and Jazmine and twice a week with Emily.

Last Minute Information for the Court (September 15, 2010)

DCFS reported that mother had entered a residential drug treatment program, but then left it because she had to take care of her maternal great-grandmother.

September 15, 2010, Hearing

After extensive amendments, the section 300 petition was sustained. The matter was continued for a contested disposition hearing.

Jurisdiction/Disposition Report

In its jurisdiction/disposition report, DCFS reported that the social worker had spoken to Gabriel. He advised her that he had first seen mother and father hitting each other when he was in third grade. He saw father beat up mother when she was pregnant with Jazmine. Mother would tell him to help her, but he stated that there was nothing he could do about the fighting except take the other children to his bedroom.

Regarding mother's drug use, Gabriel stated that mother took Paxil because she was bipolar and had "ADHD." When asked who took care of the children, he said that mother did, but he helped out. He reported that mother would tell Robert that he was just like father, which made Robert cry.

Robert was interviewed again. When asked what he liked about living with mother, he replied, "Nothing much My mom and dad always were fighting and I didn't like it. . . . They would use their fists and objects." Robert said that mother and father left big marks on each other's faces and bodies. He did not want to see mother and father because "They have to try to fix this."

Jazmine told the social worker that when mother and father fought, it made her cry. She wanted to stay with her paternal grandparents all the time.

Mary described an incident when mother went to her home and was high. She had asked the paternal grandparents for help. It was obvious that mother was under the influence because she was slurring her words, could not keep her head up, and was talking to herself like she was someone else. Mary confirmed that mother and father inflicted bruises and marks on each other.

Mother admitted that she began using amphetamine “[a] couple of years ago, once or twice when partying, not all the time. I snorted [methamphetamines] and [father] would smoke it.” Father reported more extensive methamphetamine use by both of them than mother reported.

DCFS recommended that the children be declared dependents of the juvenile court and that mother and father be given reunification services.

Interim Review Report and October 18, 2010, Hearing

DCFS reported that mother had missed a drug test on September 7, 2010, and had tested positive for methamphetamine on September 24, 2010.

DCFS recommended that the juvenile court terminate jurisdiction over Gabriel and order custody to his father, with monitored visits for mother.

On October 18, 2010, the juvenile court declared the children dependents of the court and removed them from mother and father’s custody. It further ordered monitored visits for mother and father as well as reunification services. Jurisdiction was terminated as to Gabriel, and Gabriel’s father was granted sole legal and physical custody of his son.

Status Review Report and Six-month Review Hearing

On April 11, 2011, DCFS reported that Robert, Jazmine, and Emily remained with their paternal grandparents and continued to do well in their care.

Mother was not in compliance with her case plan. She had been taking care of her critically ill grandmother, but was now residing with her maternal aunt. The aunt reported that mother had come home drunk on or around April 5, 2011. Mother had

tested positive for methamphetamines on January 12, 2011, and did not show up for the rest of her drug tests.

Mother's monitored visits with the children were sporadic. She had missed 12 visits since December 2010.⁵ During the visits, mother would whisper things to the children. On one occasions, she called Robert a "delinquent." There were times when Robert and Jazmine did not want to visit mother.

In conjunction with its report, DCFS provided the juvenile court with a mental health evaluation of mother dated June 23, 2010. The evaluator noted that mother exhibited depressive symptoms and used substance abuse as her coping mechanism. She believed that mother needed mental health treatment.

Robert was prescribed a low fat diet and glasses. Both he and Jazmine were receiving mental health services, but there were no other reported problems regarding any of the children. The children reported that they loved being with their paternal grandparents.

DCFS recommended further reunification services for mother and father.

During the six-month review hearing, county counsel informed mother and father that DCFS was now recommending that the juvenile court terminate reunification services. The juvenile court noted that there was no legal basis to extend services. The matter was set for a contested hearing.

Interim Review Report

In the interim, DCFS reported that mother had enrolled in Prototypes, a residential drug treatment program, and was actively participating in services. DCFS also reported that the children continued to do well in the care of their paternal grandparents. They stated that they wanted to live with their paternal grandparents and did not want to live with either mother or father. Robert and Jazmine did not want to visit mother at that time.

⁵ In April 2011, Mary informed the social worker that mother had been cancelling visits with the children, but she would sometimes make up the visits on Saturdays at Robert's basketball games.

The paternal grandparents were interested in adopting the children. However, Mary advised DCFS that the paternal grandfather had been arrested for driving under the influence and was awaiting a hearing on the charge. She reported that she would have the paternal grandfather move out and adopt as a single parent if necessary.

DCFS subsequently reported that mother had left the Prototypes program because she refused to follow the program's rules.

Contested Review Hearing (June 6, 2011)

At the hearing, mother testified that she left Prototypes because she was not getting visits with her children as it was too far for Mary to transport them for visits. Mother planned on enrolling in another program in El Monte. She also indicated that she was "back and forth with places to live right now." She was attending a 12-step program and was on the second step, but she did not have a sponsor. She also was participating in a 10-week parenting class, but she could finish sooner.

The juvenile court terminated reunification services for mother and father and set the matter for a section 366.26 hearing.

Section 366.26 Report

On October 3, 2011, DCFS reported that Robert and Jazmine were overweight, but they did not exhibit any signs of developmental delays; they both continued to attend counseling. The three children were doing well in the paternal grandparents' home.

Mother had been scheduled for twice weekly visits with the children, but she routinely cancelled because of transportation problems or other obligations. She was able to make up some of the missed visits at Robert's Saturday baseball games. The children hesitated to visit mother and Mary had to convince them to go.

The paternal grandfather had moved out of the house and the children continued to be cared for by Mary. An adoptive home study remained pending, but DCFS did not believe that there would be any impediment to Mary adopting the children.

Second Section 366.26 Report

On February 6, 2012, DCFS reported that Robert and Jazmine were performing at, or above, grade level, although the school reported that Robert would benefit from after-school tutoring. Mary consistently ensured that the children received appropriate care.

DCFS further indicated that mother had a history of consistent visits when a hearing was approaching, but, as of June 2011, she routinely cancelled visits. Robert and Jazmine informed Mary that they did not want to visit mother; Mary had to convince them to see her. Mary stated that Robert and Jazmine did not enjoy the visits with mother and were constantly asking what time the visit was going to end. On the other hand, the children enjoyed their visits with father and were always asking when the next visit would occur.

DCFS reported that the adoptive home study had been submitted to the supervising adoption worker for review. Mary was willing and capable of providing the children with a stable, caring, and permanent home, and was strongly committed to adopting the children. She was willing to continue mother's visits after the adoption was finalized, but she expressed doubt that mother would maintain consistent with visits.

The children advised DCFS that they felt safe with Mary and did not want to live anywhere else.

DCFS subsequently informed the juvenile court that the adoptive home study had been approved.

Last Minute Information for the Court

On May 21, 2012, DCFS advised the juvenile court that father had stolen \$800 from Mary and that she was pursuing criminal charges against him. Mother informed the social worker that she had been attending visits with the children, had completed a substance abuse recovery program, and had completed her court-ordered case plan. She intended to file a section 388 petition.

Contested Section 366.26 Hearing

At the March 21, 2012, hearing, the juvenile court read and considered the entire court file and received into evidence various written reports from DCFS. Then, mother submitted her prepared statement for the court.

Mother advised the juvenile court that she was starting to realize her self-worth through her new program at New Directions treatment program. She had spent an hour every Monday and Thursday with Emily. She claimed that Robert told her that he wanted her to attend his sporting events, but her requests for the schedule were ignored. She did not understand why the children now indicated that they did not want to visit her, but she believed that they were torn and confused. She asked the children to forgive her. She claimed to have accepted full responsibility for her poor choices in the past, and said that the choices she had made were no longer issues in their lives. The letter was accepted into evidence, in part.

Mother then submitted proof that she had completed a three-month outpatient drug treatment program and four parenting classes.

Robert, who was now 10 years old, testified next. He understood that if Mary adopted him, she would legally take care of him and make decisions for him. Mother's attorney asked: "Did they tell you that your mom who is sitting next to me would no longer be your mom legally?" Robert replied affirmatively and said that it would be "okay" if mother was no longer his legal mother.

Robert then said that he had not wanted to visit mother lately because he had "stuff" to do after school, such as sports and homework; that was the only reason he did not want to see her. He said that if the visits were scheduled for another time, he would like to go—but only once a week. He wanted to see mother just to say "hi." But, if the decision were up to Mary whether he saw mother, that would be alright with him.

Robert wanted mother to attend his sporting events. Mother blurted out, "Thank you, baby." The juvenile court noted that mother needed to get control of her emotions. If she did not do so, Robert would have to testify in chambers or mother would have to go outside.

Testimony resumed, and Robert was asked to describe his relationship with mother. He stated that he did not really see mother a lot, but that he cared about her. He also said that he thought about mother.

When asked if Mary ever talked to him about visiting mother, Robert testified that she told him that he did not have to visit mother if he did not want to do so.

Mother testified next. She said that in December, she was having weekly visits with Robert and Jazmine, and that they were mending their relationship and doing homework together. She further stated that after Christmas,⁶ the visits stopped and she thought it was because of all the extra-curricular activities, such as Homework Club.

Mother said that she had tried to reschedule missed visits, but Mary was always too busy. She described the last visit as going very well. They did homework together. She brought them movies and Christmas presents. She expressed her love to them, but believed that they were a little hesitant to return that love because they were so used to the paternal side of the family. Mother claimed that Mary ignored her when she tried to get the schedule for Robert's baseball games.

Mother believed that it would be detrimental for the children to no longer see her because they would be "den[ied] . . . their mother's love."

The juvenile court then heard oral argument. Mother's attorney argued, in part, that Mary undermined the children's relationship with mother. Thus, she requested legal guardianship in lieu of termination of parental rights.

After entertaining oral argument, the juvenile court found that although mother had maintained regular contact with the children, at least up until December 2011, the relationship between mother and the children did not outweigh the benefits of adoption. Parental rights were terminated.

Mother's timely appeal ensued.

⁶ Mother later testified that the last time she saw Robert and Jazmine was on December 22, 2011.

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 Appellate 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. Preliminarily, we note that, mother's claim notwithstanding, the juvenile court did not conclude that mother had visited her children consistently throughout these proceedings. Rather, it found that mother only had visited consistently until December 2011.

To the extent mother contends that her visitation was not consistent because Mary interfered with her visitation rights, we are not convinced. There is ample evidence that mother, not Mary, cancelled her visits.

Comparing the instant dependency case to a private adoption, mother claims that Mary was an agent of DCFS, which has a special responsibility as *parens patriae* to the children not to interfere with visitation. Thus, according to mother, Mary was obligated not to interfere with her visitation. We reject this complicated and unfounded theory.⁷ As set forth above, there is sufficient evidence that mother chose not to visit her children. Moreover, if mother believed that she was wrongfully denied her right to visit, she had an obligation to bring it to the juvenile court's attention so that it could have been corrected; she should not have waited until the time of the contested section 366.26 hearing to complain about this issue. (*In re Christina L.* (1992) 3 Cal.App.4th 404, 416.)

⁷ As DCFS points out, there is no legal authority to support mother's novel proposition that DCFS is in the position of *parens patriae* to dependent children. The cases that address the issue at all speak to the juvenile court's special responsibility to the child as *parens patriae*, not the child welfare agency. (See, e.g., *In re Greg F.* (2012) 55 Cal.4th 393, 417.) Similarly, mother offers no legal authority to support her theory that a foster parent or relative caregiver has any sort of principal/agent relationship with a child protective agency. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768; *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545–546.)

Next, mother seems to argue that DCFS is equitably estopped from arguing that the beneficial-parent exception does not apply because DCFS and/or Mary prevented mother from visiting with her children. As mother notes, estoppel applies only if the party to be stopped has engaged in blameworthy or inequitable conduct. (*City of Hollister v. Monterey Ins. Co.* (2008) 165 Cal.App.4th 455, 488.) Mother does not identify any blameworthy conduct by Mary. The scheduled activities that may have interfered with mother's visits met the children's specific needs, including the Homework Club and sports activities.

Finally, mother claims that Robert's alleged desire to maintain a relationship with her prevented the juvenile court from terminating parental rights to all three children. Mother overstates Robert's testimony. While Robert testified that he wanted continued contact with mother, he only wanted to see her once a week and just to say hi. But, he also stated that he did not have a problem with Mary deciding whether or not the visits would occur. And, Mary represented that she was willing to continue visits between mother and the children after parental rights were terminated. Last, perhaps most importantly, Robert testified that he would be okay with mother no longer being his legal mother. Taken together, this evidence does not provide any basis to reverse the juvenile court's order.

DISPOSITION

The juvenile court's order is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ