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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re K.D., a Person Coming Under
the Juvenile Court Law.

B269482
c/w B276348
(Los Angeles County
Super. Ct. No. CK78328)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

MICHAEL E.,

Defendant and Appellant.

APPEALS from orders of the Los Angeles County Superior Court.
Julie Fox Blackshaw, Judge. Affirmed.

Jesse F. Rodriguez, under appointment by the Court of Appeal, for
Defendant and Appellant.

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

Andrea R. St. Julian, under appointment by the Court of Appeal, for
Minor, K.D.

In these consolidated appeals, defendant and appellant Michael E. (father) challenges the juvenile court's termination of his parental rights over his daughter K.D. (born Jan. 2010) and the denial of his request for blood or DNA testing to determine whether he is K.D.'s biological parent. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2012, police responded to a domestic violence call. Father had repeatedly hit the face and head of his girlfriend, who was holding their one-month-old son, threatened to kill her, poured a gallon of milk on them, and poured all of the baby's formula down the drain. During the fight, father hit the baby's face. Father did all of this in the presence of several children. Father would not let the police inside the home. When they forced their way in, father was holding then two-year-old K.D. and her four-year-old sister N.D. as human shields in front of him. Father screamed at the police, "Shoot me, shoot me, come on mother fuckers shoot me!" The girls were crying and their legs were shaking violently. The police had to forcibly remove the girls from father, who was arrested and remained incarcerated for the duration of this four-year case.¹ Father had a prior criminal history, including convictions for spousal abuse and a conviction for child cruelty in 2003. The whereabouts of the girls' mother were unknown and the girls were eventually placed with the maternal grandmother.

The juvenile court sustained the first amended petition filed by the Los Angeles County Department of Children and Family Services (the Department) on behalf of the girls under Welfare and Institution Code

¹ The mother of K.D. and N.D. is not a party to this appeal, having lost her parental rights to the girls. She physically abused N.D., causing a skull fracture. The family had more than 13 referrals before the incidents leading to the current case.

section 300, subdivision (b).² The amended petition was based on the above allegations, as well as allegations that father and his girlfriend had a history of domestic violence and engaged in violent altercations in the presence of the girls. The court ordered that reunification services be provided and that father complete domestic violence and anger management classes and participate in individual counseling. The court granted father monitored visits.

The girls were doing well in the maternal grandmother's home. She responded to their needs and they had formed a bond with her. Unfortunately, K.D. was diagnosed with type 1 diabetes, and N.D. was diagnosed with a cancerous brain tumor.

Throughout the case, the Department had trouble scheduling visits with father in custody for several reasons. The only public visitation days were Friday, Saturday and Sunday and other people scheduled visits with father on Fridays; father had several custody transfers, including to prisons in Kern County, Chino and San Diego; one prison refused a visit due to his child cruelty conviction; and the deteriorating health of K.D.'s sister eventually made visits with her impossible. The maternal grandmother refused to be the monitor for the visits in light of father's hostility and aggression towards her, but she did agree to accompany the girls in light of their medical conditions. During one visit, K.D. required an insulin shot, which the maternal grandmother administered. Father acted appropriately both during the in-person visits and monitored phone calls. He made silly faces at the girls, sang to them, went over their ABC's, and asked age-appropriate questions, and the girls appeared to enjoy interacting with him.

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

He consistently mailed the girls letters and pictures. Per the recommendation of the Department, the juvenile court continued reunification services in May 2013.

By November 2013, N.D. had passed away, and K.D. was receiving grief counseling. The Department recommended termination of reunification services. Father had been convicted of his crimes leading to this case, and it was unknown when he would be released from prison. Father was not in favor of the maternal grandmother adopting K.D. because he believed she would take K.D. away to an unknown location and he would never see her again.

On April 8, 2014, the juvenile court terminated father's reunification services and set the matter for a section 366.26 hearing, which did not take place for another two years, due to continuances, the assignment of a new social worker, the adoptive home study investigations, and the like.

In the meantime, K.D. had a short attention span when visiting with father or speaking to him on the phone, and was generally distracted, though she did seem happy to hear from him.

On September 23, 2015, in the Statement Regarding Parentage, father requested blood or DNA testing to determine if he was K.D.'s biological parent. His attorney explained that some members of the maternal grandmother's family did not believe father was K.D.'s biological father and his attorney argued that such testing would be in K.D.'s best interest in the event she might need a blood donation. K.D.'s attorney did not believe the testing would be in her best interest. The juvenile court denied the request, noting that father had already been found to be K.D.'s presumed father. Father filed an appeal from the order denying his request.

By the end of January 2016, the maternal grandmother's home study was complete and she was approved for adoption. The Department recommended termination of parental rights.

The section 366.26 hearing finally took place on June 7, 2016. The juvenile court stated that it did not believe father had met any exception to the termination of parental rights, and K.D.'s attorney agreed that father had failed to provide a sufficient offer of proof to warrant a contested hearing. Father spoke directly to the court, stating that the Department was hindering visits and destroying the bond between him and K.D. The court found that K.D. was adoptable and terminated parental rights. The maternal grandmother was designated as the prospective adoptive parent. Father filed an appeal from this ruling.

His two appeals have been consolidated. Father asks us to first address his appeal from the order terminating his parental rights.

DISCUSSION

I. Termination of Parental Rights

Under section 366.26, subdivision (c)(1), if the court finds by clear and convincing evidence that it is likely the dependent child will be adopted, "the court shall terminate parental rights and order the child placed for adoption." An exception exists when "[t]he court finds a compelling reason for determining that termination would be detrimental to the child" because "[t]he 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).)

It is well established that a parent bears the burden of proving that termination would be detrimental to the child under section 366.26, subdivision (c)(1)(B)(i). (Cal. Rules of Court, rule 5.725(d)(4); *In re*

Jasmine D. (2000) 78 Cal.App.4th 1339, 1350; *In re Derek W.* (1999) 73 Cal.App.4th 823, 826–827; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343–1344.) This is not an easy burden to meet. “Because 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.*, *supra*, at p. 1350.)

Reviewing courts have been applying a mixed standard of review to an appellate challenge to a juvenile court ruling rejecting a claim that an adoption exception applies. In *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315 (*Bailey J.*), the appellate court applied the substantial evidence test to the factual determination of the *existence* of a beneficial relationship, and applied the abuse of discretion standard to the “quintessentially” discretionary decision of “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.” (See also *In re K.P.* (2012) 203 Cal.App.4th 614, 622 [“We find the *Bailey J.* approach persuasive and apply its composite standard of review here”].)

With respect to the first prong, there is no dispute that father maintained regular contact with K.D. while incarcerated. The record shows that he consistently called and mailed letters to her. Father complains that the lack of any regular visitation was due to factors beyond his control as an inmate and that he took all the steps he could to facilitate visitation while incarcerated. It is true that father consistently tried to arrange visits by contacting the social workers, the court, and the jail and prison authorities. It is also true that there is no “go to prison, lose your child” rule in California. (*In re Brittany S.* (1993) 17 Cal.App.4th 1399, 1402.) Of course,

father's incarceration throughout this four-year case was due to his own heinous actions that put K.D. in serious harm's way, and at least one visit was canceled by the prison because father had a prior conviction for child cruelty.

But even assuming father met his burden on the first prong, he cannot meet his burden on the second prong of showing that termination of parental rights would be so detrimental to K.D.'s well being that her adoption should be derailed. (*In re Jasmine D.*, *supra*, at p. 1350.) In order to establish the second prong of the test, the relationship must promote 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 order to overcome the legislative preference for adoption, the parent must demonstrate that severing his or her parental rights would deprive the child "of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

There is no dispute that there have been positive interactions between father and K.D. But a child's positive reaction to visits is not sufficient to establish the beneficial child/parent relationship exception to termination of parental rights. (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1166.) "A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent. [Citation.] A child who has been adjudged a dependent of the juvenile court should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree, but that does not meet the child's need for a parent. [Citation.]" (*In re*

Angel B., *supra*, 97 Cal.App.4th at p. 466; *In re Noah G.* (2016) 247 Cal.App.4th 1292, 1300 [parent must occupy a parental role]; *In re C.F.* (2011) 193 Cal.App.4th 549, 555.)

Father did not occupy a parental role in K.D.'s life; her maternal grandmother has occupied this role. The last time father had custody of K.D. was when she was two years old and he beat up his girlfriend in front of her and then held K.D. as a human shield in an attempt to prevent his arrest, terrifying her. By the time of the section 366.26 hearing, K.D. had spent the last four years of her life living with and being cared for by the maternal grandmother, with whom she was bonded.

Moreover, even the existence of a parental role is not enough to invoke the parent/child beneficial relationship without a showing that terminating the relationship would be detrimental. (*In re C.F.*, *supra*, 193 Cal.App.4th at p. 555.) Such a showing could not be made here. There was no evidence that K.D. experienced any difficulty in separating from father at the end of the visits, that she asked about him when they were not visiting, or that she wanted more frequent contact with him.

In sum, father cannot demonstrate there is a compelling reason to determine that termination of parental rights would be detrimental to K.D. After four years in the dependency system, she was entitled to a safe and permanent adoptive home. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.) The juvenile court's decision to terminate parental rights and allow her to be adopted was long overdue.

II. Denial of Request for Genetic Testing

After father filed his appeal from the juvenile court's denial of his request for blood or DNA testing, the Department took no position and did not file a responsive brief. K.D.'s attorney filed a responsive brief stating she

was also not taking a position, but she nonetheless asserted that our affirmance of the termination of parental rights would moot father's challenge. Father disagrees, arguing that knowing if he is her biological father "may benefit her in the future in the event she ever needed a donation of blood or even an organ."

We agree the issue is now moot. In any event, there was no abuse of discretion by the juvenile court in denying father's request. The court had already found father to be K.D.'s presumed father, the highest parental status he could achieve under dependency law. (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801.) The argument that K.D. might someday need a blood or organ donation is pure speculation; and there is nothing to stop father from having himself tested in such an event. Even K.D.'s attorney did not think such testing would be in the minor's best interest.

DISPOSITION

The orders terminating father's parental rights and denying his request for genetic testing are affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT