Filed 7/26/12 In re A.R. CA2/8

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| In re A.R., a Person Coming Under the Juvenile Court Law. | B236550 |
| LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>EDWIN R. et al.,<br><br>Defendants and Appellants. | (Los Angeles County Super. Ct. No. CK78877) |

APPEAL from an order of the Superior Court of Los Angeles County. Elizabeth Kim, Referee. Reversed.

Julie E. Braden, under appointment by the Court of Appeal, for Defendant and Appellant Edwin R.

Grace Clark, under appointment by the Court of Appeal, for Defendant and Appellant Griselda U.

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

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Griselda U. (mother) and Edwin R. (father) appeal from the October 4, 2011 order terminating their parental rights to their daughter, A.R., and selecting adoption as the permanent placement plan. Both parents contend the trial court erred in finding the Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i) exception to the preference for adoption did not apply.[1] We reverse.

## FACTUAL AND PROCEDURAL BACKGROUND

*A. Jurisdiction, Disposition and Status Review*

Mother and father were both 15 years old when A.R. was born in September 2008. For the first few months, mother and father lived with A.R. in maternal grandmother's home, but then father moved in with his own parents. A.R. came to the attention of the Department of Children and Family Services when she was 11 months old based on allegations that mother and her half siblings were being subjected to domestic violence by maternal grandparents. During the course of a DCFS Team Decision Making Meeting for the family on September 3, 2009, mother discussed other incidents involving A.R. Mother admitted that A.R. was a passenger when mother took maternal grandmother's car without permission, even though she did not have a driver's license and did not know how to drive. Mother also acknowledged that she and father had engaged in domestic violence in A.R.'s presence. In October 2009, the court sustained a section 300 petition (paragraph b-1 -- domestic violence; paragraph b-2 -- child endangerment). A.R. was placed with *paternal* grandparents on the condition that father not live with them.[2] In April 2010, DCFS reported that mother demonstrated "a very strong level of maturity." Mother visited with A.R. even when she had to ride three buses to reach the location of

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[1] All future undesignated statutory references are to the Welfare and Institutions Code.

[2] Mother had requested that A.R. be placed with paternal grandmother so that A.R. would not be exposed to the recurring domestic violence between the maternal grandparents.

the visits, which as the social worker acknowledged, reflected a level of dedication unusually seen even in older parents. Father was allowed to move back into paternal grandparents' home with A.R., and mother was given overnight visits.

By October 2010, mother was pregnant by father with a second child. Despite successful overnight visits, mother did not want A.R. returned to her custody because of abusiveness in the maternal grandparents' home. Finding mother and father in compliance with the case plan, the court placed A.R. with father under DCFS supervision, on the condition that father continue to live with paternal grandparents.

Mother gave birth to J.R. in January 2011. Around that time, mother discovered that father had one child by another woman and that he had another girlfriend who was eight months pregnant. On February 1, father pushed his pregnant girlfriend, causing her to fall. On March 31, when mother confronted father with her knowledge, father grabbed mother's cell phone and threatened to hit her. The next day, mother obtained a temporary restraining order against father. But at a TDM meeting on April 11, father denied any domestic violence and mother recanted her accusation. A.R. was detained from father that day and placed with mother in the home of maternal grandmother. DCFS filed a section 387 supplemental petition, which alleged that the previous home of father placement had not been effective in protecting A.R., and recommended modifying the disposition to home of mother.[3] Following a detention hearing on April 14, A.R. was placed with mother on the condition that mother continue to live with maternal grandmother. On April 18, the court reissued the TRO pending a May 9 Order to Show Cause re Permanent Restraining Order and cautioned mother that if she failed to enforce the TRO pending the OSC hearing, the court might detain both children.

That same day, father sat next to mother outside the courtroom. A court officer observed father take mother's cell phone and pinch her. Mother did not report this

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**3** Paragraph s-1 of the supplemental petition alleged that on February 1, 2011, father pushed his eight month pregnant girlfriend, causing her to fall; paragraph s-2 alleged that father and mother engaged in a violent altercation during which father grabbed mother's cell phone and threatened to hit mother.

incident to the social worker. When later questioned, mother admitted the event occurred and further admitted that she lied when she denied the March 31 incident because she was afraid of father. A.R. and J.R. were detained from mother and placed in an adoptive foster home.

DCFS's Ex Parte Application to modify the placement order (§ 385) was set for a noticed hearing. According to the DCFS report for that hearing, the social worker was troubled that mother continued to "minimize the seriousness [of the domestic violence perpetrated by father] and has changed her story various times and has further failed to enforce a temporary restraining order . . . ." Mother was willing to retake domestic violence and parent education programs and to participate in individual counseling, but she did not want to move into a domestic violence shelter, which would require her to change to a continuation high school. Meanwhile, father enrolled in services even though he denied committing any domestic violence. But the social worker did not believe father had learned anything from the programs he had already completed. Because the parents had received over 18 months of services without reunifying with A.R., DCFS recommended terminating reunification services and setting the matter for a section 366.26 permanency planning hearing (.26 hearing).

Following a hearing, the juvenile court found the previous disposition had not been effective to protect A.R. The court sustained paragraph s-2 of the section 387 petition which alleged father engaged in a violent altercation with mother on March 31. Adoption was identified as the permanent placement plan, the prior home of parent order was terminated and the matter continued to September 20 for a .26 hearing.

*B. Mother's Section 388 Petition*

On August 3, mother filed a section 388 petition seeking to have A.R. placed with her so long as she lived in maternal grandmother's home or, alternatively, placed with maternal grandmother. As changed circumstances, mother alleged she had complied with the court ordered treatment plan, had come to understand the harm caused to A.R. by exposure to domestic violence and had not had any contact with father. In opposition,

DCFS argued that, although mother's visits were going well and mother was in full compliance with the court orders, mother continued to minimize the seriousness of the domestic violence perpetrated by father. In particular, DCFS referred to a comment by mother's therapist to the social worker, the gist of which was that although mother regularly attended her therapy sessions, she had not told the therapist the details of the domestic violence, or how serious it was, which could be construed as either minimizing or denying. Mother's intake questionnaire suggested she was minimizing.

At the hearing, mother testified that she regretted lying about the March 31 incident. Through therapy mother had learned that domestic violence can escalate from just a little push. What she once thought of as a game she had come to recognize as domestic violence. Mother had no contact with father and no plans to renew contact in the future. In response to questions from the trial court, mother testified that she did not need the protection of a restraining order because she could protect herself by staying away from father; if father would not leave her alone, she would call the police and contact her attorney about getting a restraining order.

The court denied mother's petition, observing that mother had at best established only changing circumstances – that she was beginning to address the issue of domestic violence – not changed circumstances, and mother had not shown that A.R.'s best interests would be served by returning her to mother. The .26 hearing was continued to October 4.

*C. The .26 Hearing*

There was no testimony at the .26 hearing two weeks later. According to the DCFS report, A.R. was doing well with her foster parents, whom she called "mom" and "mommy." The foster parents had an approved home study and wanted to adopt both A.R. and her brother, although reunification services were still ongoing for J.R. Father missed two scheduled visits in May 2011, and had not arranged any other visits. But mother visited regularly several hours a week and A.R. called her "mommy." Mother also participated in all court ordered services while remaining a full time high school

student and playing team soccer. The foster care social worker stated that A.R. recognized mother and was bonded to her. As the social worker put it, mother appeared to "genuinely care for her children, demonstrating a loving and caring demeanor during visits, tending to the children's needs, . . . hugging, kissing and playing with both, asking [A.R.] questions about her day or week and taking her to the restroom, etc. [A.R.] recognizes [mother] as her mother and both appear to be bonded to one another." The social worker observed that mother had demonstrated a dedication to visiting her children that "is seldom seen by many older parents." There was no contention that mother had ever failed to provide for A.R.'s needs. DCFS recommended terminating parental rights.

Mother, father and the children argued for application of the section 366.26, subdivision (c)(1)(B)(i) beneficial relationship exception to the preference for adoption. The children's counsel related that the foster care social worker had called counsel to tell her how well mother's monitored visits were going. Counsel for the children was concerned that A.R. and her brother were on different tracks as a result of which parental rights might be terminated for A.R. but her brother would later be reunified.[4]

Father argued that application of the exception was established by two DCFS reports from 2010, when A.R. was placed with father while he lived with paternal grandparents. According to those reports, father was actively involved in caring for A.R. and when paternal grandmother became ill, father took over A.R.'s daily care. Father acknowledged that A.R. was detained in April 2011 as a result of father's domestic

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[4] Father contends that counsel's comment made it clear that A.R. and J.R. had a conflict of interest which required the trial court to appoint separate counsel for each child and that failure to do so requires reversal. Father is incorrect. In *In re T.C.* (2010) 191 Cal.App.4th 1387, 1391, the court recently explained, "For an actual conflict to arise at the permanency planning stage, there must be a showing that the siblings have different interests that would require their attorney to advocate a course of action for one child which has adverse consequences to the other. Standing alone, the fact that siblings have different permanent plans does not necessarily demonstrate an actual conflict of interest." Here, the children's counsel was not advocating a course of conduct for A.R. that would have adverse consequences to J.R., or vice versa. On the contrary, she was arguing in favor of the beneficial relationship exception for A.R. so that she would not have a different permanent plan than J.R. Accordingly, there was no conflict of interest.

violence, and since then he had only monitored visits with her and had not completed any additional court ordered programs. DCFS countered that any bond father had established with A.R. when she was living with him had been diminished by the six months since A.R. had been in foster care and father had not maintained regular contact.

Mother argued that she visited A.R. regularly throughout the dependency, participated in all court ordered services, and the .26 report established a parental bond between mother and A.R. In addition, mother introduced a letter dated September 15, 2011, from the foster care worker who had been monitoring mother's visits with A.R. and her brother for the previous two months. In the letter, the social worker described the positive bond between mother and A.R. DCFS acknowledged that mother "appeared to step up within the last six months," but maintained it was too little, too late.

The trial court terminated parental rights and selected adoption as the permanent placement plan. It found in light of A.R.'s age, the percentage of her life she lived with her parents, father's inconsistent visitation over the last six months and "the positive and negative aspects of interaction between the parent[s] and the child," the security provided by a permanent adoptive home outweighed the benefits of a continued relationship with mother and father. The court also summarily denied father's section 388 petition, observing that father had described "changing circumstances" not "changed circumstances."

Mother and father timely appealed from the order terminating their parental rights.

## DISCUSSION

### *A. Standard of Review*

Most appellate courts apply a substantial evidence standard of review to the trial 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 (*Jasmine D., supra*, at p. 1351), and under either standard, we would reverse.

*B. Termination of Mother's Parental Rights Was an Abuse of Discretion*

Implicit in the court's statement at the .26 hearing that the benefits of a permanent adoptive home outweighed the benefits of a continued relationship with the parents, is a finding that there exists some benefit in the parent-child relationship. We at least make that assumption for purposes of appeal. We thus turn to whether the trial court abused its discretion in finding that the relationship was not so beneficial that termination of parental rights would be detrimental to A.R. Mother contends the section 366.26, subdivision (c)(1)(B)(i) exception applies as to her. We agree.

If reunification does not occur within the statutorily prescribed period, the court must terminate reunification services and set the matter for a .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 .26 hearing, the court has four choices. In order of preference, those choices are: "(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).) Whenever the court finds 'that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption.' (§ 366.26, subd. (c)(1).) . . . '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.]" (*Celine R.* at p. 53.)

While the Legislature has expressed a strong preference for adoption, adoption is not the appropriate plan in every case. (§ 366.26, subds. (b)(1) & (c)(1).) An exception exists when, as in this case, the child has a strong bond with the parent and severing that bond would be detrimental to the child. (See § 366.26, subd. (c)(1)(B)(i); see *In re S.B., supra,* 164 Cal.App.4th at p. 299 ["The exception [to the preference for adoption] may apply if the child has a 'substantial positive emotional attachment' to the parent."].) The

beneficial parental relationship exception applies when " '[t]he court finds a compelling reason for determining that termination would be detrimental to the child' (§ 366.26, subd. (c)(1)(B)) 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).)' " (*In re K.P.* (2012) 203 Cal.App.4th 614, 621.) "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.' [Citations.] 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.' [Citation.] 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.' [Citation.]" (*Id.* at p. 621.) A showing that the child would derive some benefit from continuing a relationship with the parent through visitation is not enough to derail an adoption. (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1348.) The exception is not "a mechanism for the parent to escape the consequences of having failed to reunify." (*Ibid*.)

The parents bear the burden of showing that termination of parental rights would be detrimental to the child. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) In *In re S.B.* (2008) 164 Cal.App.4th, 289, 301, the reviewing court found that the only reasonable inference from the record, which included a bonding study, was that the child would be greatly harmed by the loss of the parental relationship. By contrast, in *In re C.B.* (2010) 190 Cal.App.4th 102, 125, where there was no bonding study or other expert

evidence of detriment, the court concluded that the undisputed fact that the children loved the mother was insufficient to establish the exception.

Here, the undisputed evidence is that A.R had a substantial positive emotional attachment to mother. Mother exhibited extraordinary efforts to reunify with A.R. and was thwarted only by father's conduct. Mother, herself a dependent child, was in full compliance with her case plan. She attended parenting and domestic violence classes, in addition to individual therapy. Mother did this while attending high school and participating in after school sports. DCFS initially recommended placing A.R. in mother's care, stating that A.R. was stable with mother, and mother completed all her services. That recommendation changed only after father threatened mother when she confronted him about his two children born by other women. Then mother failed to report to the social worker that father sat next to mother in court and pinched her notwithstanding a restraining order, and when confronted with these facts mother did not characterize father's conduct as domestic violence.

Mother's parental rights cannot be terminated based on father's conduct toward her and his violation of the restraining order. Mother and father have no ongoing relationship and even assuming mother minimized father's abusive conduct, there was no evidence that such minimization ever placed A.R. at risk of harm. Under these circumstances, the trial court erred in finding the section 366.26, subdivision(c)(1)(B)(i) exception to the preference for adoption did not exist. We therefore reverse the order terminating parental rights and remand to the trial court for further proceedings.[5]

We make one additional observation. On October 11, 2011, the date of the .26 hearing in this case, A.R. and J.R. were at different stages of the dependency process:

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[5] Although we find no abuse of discretion in the trial court's assessment of the beneficial relationship exception as to father, reversal of the juvenile court order terminating mother's parental rights must also result in a reversal of the order terminating father's parental rights. (*In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1168, fn. 7; Cal. Rules of Court, rule 5.725(a)(2) & (g) ["The purpose of termination of parental rights is to free the dependent child for adoption. Therefore, the court must not terminate the rights of only one parent" except under circumstances not present here].)

reunification services had been terminated as to A.R., but J.R. had been a dependent child for less than six months and reunification services were still ongoing as to him. (See § 361.5, subd. (a)(1)(B) [for child under three years of age at time of removal, no less than six months but no more than 12 months of reunification services].) J.R. is now 18 months old and it has been more than 12 months since he was declared a dependent child. The trial court may find it appropriate to hold future hearings for the two children at the same time.

**DISPOSITION**

The order terminating parental rights is reversed.

RUBIN, Acting P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.