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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re SOPHIA M., et al., Persons Coming Under the Juvenile Court Law.	B215776 (Los Angeles County Super. Ct. No. CK67743)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. AMANDA C., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Stanley Genser, Commissioner. Affirmed.

Anne E. Fragasso, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, James M. Owens, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for Minors.

* * * * * *

Amanda C. (mother) appeals from the juvenile court's order terminating her parental rights to three of her children, pursuant to Welfare and Institutions Code section 366.26.[1] Mother contends there was insufficient evidence to support the court's finding that the "beneficial relationship" exception to termination under section 366.26, subdivision (c)(1)(B)(i) did not apply. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2007, respondent Los Angeles County Department of Children and Family Services (department) filed a petition under section 300 on behalf of mother's twin girls Sophia M. and M. M. (who were then age 3) and her youngest son Ian M. (who was then age 20 months).[2] The amended petition alleged that mother and the children's father (who is not a party to this appeal) had a history of substance abuse and were periodic drug users of amphetamine and methamphetamine. Mother had a positive toxicology screen a few days before the petition was filed. The amended petition also alleged that in the prior month, mother and the children's father engaged in a mutually violent physical altercation. The children were detained and placed in foster care. At the detention hearing, the court ordered the department to provide the parents with family reunification services, including substance abuse and domestic violence counseling, and ordered the parents to have separate, monitored visits with the children at least twice a month.

At the adjudication/disposition hearing in June 2007, the court ordered mother to enroll in drug counseling and testing, parenting education, and individual counseling to address anger management and domestic violence. The department was given discretion to liberalize mother's monitored visits.

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise noted.

[2] Mother previously voluntarily relinquished three older children from a different father to the maternal grandmother in Texas, and no longer has contact with them.

In November 2007, the department reported that mother's counselors found her to be "noncompliant," though mother agreed to begin working on more consistent participation. Mother was regularly visiting the children twice a week, and the visits were going well. The foster mother reported that over the past six months the children's behavior had improved, they had become more accustomed to routines, and did not hit, bite or scratch one another nearly as often as they had been doing. They also appeared to be adjusting better to their placement and they cried less for mother. Mother's drug tests had been negative, with a few missed tests. The court found mother to be in partial compliance with her case plan and followed the department's recommendation that she be given another six months of reunification services.

In April 2008, the department reported that mother had reenrolled in her drug treatment program after being absent for more than a month, which meant that mother would have to participate for another full year. Mother had missed drug tests, and had tested positive for amphetamine and methamphetamine on April 7, 2008. Mother continued to have a strong relationship with the children's father and lied to the department about living with him. Mother admitted that he was still using drugs. Against the court's order, mother took the children to visit their father. The department recommended that mother's reunification services be terminated. At the hearing on April 28, 2008, the court terminated mother's reunification services and set the matter for a section 366.26 permanent plan hearing.

In August 2008, mother filed a section 388 petition, asking the court to reinstate her reunification services. The court denied the petition without a hearing. That same month, the department reported that a family who was related to the father and lived in San Diego, was interested in adopting all three children, and the department requested a continuance of the section 366.26 hearing. In October 2008, mother filed a second section 388 petition seeking return of the children to her custody or alternatively reinstatement of family reunification services. The court again denied the petition without a hearing.

In October 2008, the department reported that the children had been placed in the home of their prospective adoptive parents in San Diego on August 30, 2008. The court permitted mother to have monitored visits with the children up to six hours, so long as the visits took place in San Diego.

In January 2009, the department reported that the children were thriving with their prospective adoptive family. Their medical and dental checkups were up to date and the twins were regularly attending preschool. Although all three children had speech and language impairment, the twins were improving slightly in their speech therapy sessions at school and Ian was improving with help from his caregivers.

The following month, the department filed a section 388 petition asking the court to reduce mother's visits to two hours on the grounds that the longer visits were causing disturbances in the children's behavior and disruption in their placement, and that they had begun crying, hitting and having nightmares after the visits. The information attached to the petition, as related by the caregivers, stated that Sophia in particular had trouble adjusting after the visits, that she made herself vomit, did poorly in school and was argumentative and moody. Prior to one visit, Ian appeared nervous and kept asking if his prospective adoptive father would pick him up after the visit. M. and Ian made clear that they did not want to live with mother, but wanted to stay with their new "mommy and daddy." The prospective adoptive parents tried several times without success to contact mother by telephone, and did not tell the children they were calling because the children stopped asking for mother. During one visit at the end of January 2009, the children did not seem interested in seeing mother, and at the end of the visit they ran to their prospective adoptive father and did not say goodbye to mother. That night Ian cried in his sleep, and the twins tossed and turned. Sophia later stated that she wanted to live with mother, but when asked about this, she told her prospective adoptive mother that mother had bought her a dog and that she wanted to be with her dog. Mother also disappointed the children by promising to bring them things, such as gifts, without following through, and told them that their prospective adoptive father was a bad person. The court set the petition for hearing on March 24, 2009, the same date scheduled for the

contested section 366.26 hearing. A week later, mother filed a third section 388 petition, again asking for return of the children or alternatively for reinstatement of reunification services. The court set the petition for the same hearing date.

In a last minute information for the court, the department reported that the children's father, who had been deported to Mexico on criminal charges, had returned to this country illegally and was living with mother. Although mother denied knowing that the father was back in the country, paternal relatives reported that father was living with mother and that they had seen them together, mother's landlord stated that a man regularly visited mother, and during an unannounced home visit by the department, a man clearly fitting the father's description was seen outside. The department also reported that mother's attendance and participation in her drug treatment program had been "extremely sporadic at best since the beginning of 2009." In a separate report, the department stated that the children's caregivers continued to provide them with a safe and stable home, that the children were very happy and well cared for, and that adoption remained the case plan goal.

At the combined contested sections 388 and 366.26 hearings which began on March 24, 2009, the social worker testified that mother's attendance at the drug treatment program had been sporadic in December and January, but that mother had consistently visited the children. Another witness who ran Narcotics Anonymous (NA) meetings testified that since April 2008 mother had regularly attended two NA meetings a week. A counselor at mother's drug treatment program testified that mother was required to attend the program five days a week and that her attendance in November, December and January had been sporadic, but that it was improving.

The matter was then continued a month to April 24, 2009. In the meantime, mother's former friend, roommate and visitation monitor contacted the social worker and stated that mother "parties all the time, goes out and drinks," that mother had been living with the children's father, but was now living on the streets and was not stable enough to care for the children. The same witness later testified in court that the statements she

made to the social worker were true, that she personally observed mother drinking, and that she was told that mother was still using drugs and living on the streets.

Mother testified that her children were happy to see her during the visits and that they were bonded with her. Her attendance at the drug treatment center was sporadic because she was depressed and was having trouble with her medication being adjusted. She did not have any visits with the children in December and January due to the lack of a monitor. Mother also testified that she was attending NA meetings usually once a day, she talked to her sponsor daily and was on step 6 of the 12-step program. Mother denied that she was partying and drinking.

Following oral argument by counsel, the court denied mother's section 388 petition on the grounds that she had not demonstrated a substantial change in circumstances. The court found credible the testimony of mother's former friend that mother was drinking and still using drugs. Regarding the section 366.26 hearing, the court found the children were adoptable, and that "in light of mother's failure to make progress in her sobriety and stability, and to deal with her mental health issues, and the fact that her visits have never gone to unmonitored, and the fact that visits have been problematic, as detailed in all of the various reports," mother had not met her burden of demonstrating that terminating her parental rights would be detrimental to the children's best interests. The court terminated mother's parental rights, noting that mother had been dishonest in reporting whether the children's father was in the country and having contact with her, and that mother was not "a significantly credible witness." This appeal followed.

DISCUSSION

Mother contends the juvenile court erred in failing to apply the "beneficial relationship" exception to termination of parental rights under section 366.26, subdivision (c)(1)(B)(i) (formerly subdivision (c)(1)(A)). We disagree.

I. Section 366.26 and Standard of Review.

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." A finding that the court has continued to remove the child from the custody of the parent and has terminated reunification services "shall constitute a sufficient basis for termination of parental rights" unless the 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(e)(3); *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 traditionally applied a substantial evidence test to a juvenile court's finding of whether an exception to termination of parental rights under section 366.26 has been established. (See *In re Autumn H*. (1994) 27 Cal.App.4th 567, 576.) "The judgment will be upheld if it is supported by substantial evidence, even though substantial evidence to the contrary also exists and the trial court might have reached a different result had it believed other evidence." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) Some courts have concluded that abuse of discretion is the appropriate standard of review, but noted that the practical differences between the two standards are not significant. (See *In re Jasmine D., supra,* 78 Cal.App.4th at p. 1351.) "'[E]valuating the factual basis for an exercise of discretion is similar to analyzing the

sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only "'if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did.'. . ."'" (*Ibid*.)

II. Mother Did Not Establish the Beneficial Relationship Exception Applied.

There is no dispute that mother maintained regular and consistent visits with the children. Thus, the real question here is whether mother met her burden of proving that the children would benefit from continuing their relationship with her. (§ 366.26, subd. (c)(1)(B)(i).)

The "benefit from continuing the [parent/child] relationship" exception in section 366.26, subd. (c)(1)(B)(i) has been defined to mean that "the relationship 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.*, *supra*, 27 Cal.App.4th at p. 575.) "In other words, 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. 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." (*Ibid*.)

"The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child's particular needs." (*In re Angel B*. (2002) 97 Cal.App.4th 454, 467, fn. omitted; *In re Helen W*. (2007) 150 Cal.App.4th 71, 81.)

The department concedes that when the children were initially detained, they had a bond with mother. But by the time of the section 366.26 hearing, when they had been out of mother's custody for two years, the bond had significantly weakened. After living with their foster mother for approximately six months, the children appeared to adjust to

their placement and cried less for mother. Then, while living with their prospective adoptive parents, who were committed to adopting them, the children began showing little interest in visiting mother and would leave the visits without saying goodbye to her. The evidence showed they had trouble readjusting to their routines after the visits, and Ian cried in his sleep after one visit. Mother also disappointed the children by promising to bring them things without following through. M. and Ian repeatedly made clear that they wanted to live with their new "mommy and daddy" and not with mother. Though Sophia stated that she wanted to live with mother, her statement appears to be rooted in the fact that she wanted to spend time with mother's dog. The evidence also showed that the children were thriving in the home of their prospective adoptive parents, who were meeting all of their medical, educational and developmental needs.

Mother's argument that the children "knew her to be their mother, had spent their early years in her care, developed a strong attachment for her and wanted visits with her," does not assist her. Even assuming the latter part of her argument was true, which the evidence contradicts, frequent and loving contact between a parent and child is not sufficient by itself to establish that the exception applies. (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534.) Interaction between a 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.) "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." (*In re Angel B.*, *supra,* 97 Cal.App.4th at p. 466.) At most, by the time of the section 366.26 hearing, mother appeared to occupy the role of a friendly visitor in the children's lives. "[F]or the exception to apply, the emotional attachment between the child and parent must be that of parent and child rather than one of being a friendly visitor or friendly nonparent relative, such as an aunt." (*In re Angel B.*, *supra,* at p. 468;

see also *In re Jasmine D., supra,* 78 Cal.App.4th at p. 1350 [“We do agree . . . that a *parental* relationship is necessary for the exception to apply, not merely a friendly or familiar one”].)

We are satisfied the evidence supports the court’s finding that the children would not be greatly harmed if their relationship with mother was severed. To the contrary, if mother’s parental rights were not terminated, the children would be denied a permanent, stable, adoptive family with each other, “something that the Legislature *has* determined to be detrimental, as shown by its ranking of adoption as more desirable than long-term foster care or legal guardianship, and its streamlining of the dependency system to promote the prompt adoption of infants whose parents have failed to reunify with older siblings.” (*In re Angel B., supra*, 97 Cal.App.4th at p. 468.)

Based on the record here, we conclude that this is not the extraordinary case where the Legislature’s preference for adoption should have been overcome by the exception to termination of parental rights provided in section 366.26, subdivision (c)(1)(B)(i).

DISPOSITION

The order terminating mother’s parental rights is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ