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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re A.R. et al., Persons Coming Under the Juvenile Court Law.	B282666 (Los Angeles County Super. Ct. No. CK73991)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ENRIQUE G. et al., Defendants and Appellants.	

APPEAL from orders of the Superior Court of Los Angeles County, Frank J. Menetrez, Judge. Affirmed.

Maryann M. Goode, under appointment by the Court of Appeal, for Defendant and Appellant Enrique G.

Emery El Habiby, under appointment by the Court of Appeal, for Defendant and Appellant Sara M.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Stephanie Jo Reagan, Principal Deputy County Counsel, for Plaintiff and Respondent.

Sara M. (mother) and Enrique G. (father) appeal from the findings and order terminating their parental rights under Welfare and Institutions Code section 366.26.[1] In separately filed briefs, mother and father contend the court's adoptability finding under section 366.26, subdivision (c)(1), was not supported by substantial evidence. Both parents further contend the court erred in finding inapplicable the parental relationship exception to termination of parental rights under section 366.26, subdivision (c)(1)(B)(i). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

To summarize the earlier proceedings of this dependency case, we quote a lengthy excerpt from an earlier unpublished opinion (*In re A.R.* (Jan. 25, 2017) B272231 [nonpub. opn.]): "[Mother and father] are the presumed

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

parents of sons A.R. (born December 2011), J.G. (born May 2013), and R.M. (born March 2014). The two older boys were detained in December 2013, and the youngest shortly after his birth. Jurisdiction over A.R. and J.G. under section 300, subdivision (b), was based on domestic violence by mother against father and father's failure to protect the children.[2] R.M. was declared a dependent under section 300, subdivision (j). The court ordered father to participate in reunification services, including Al-Anon, parenting classes, and domestic violence counseling. The court granted father monitored visits with all three boys, three times a week for three hours.

"In March 2014, the court ordered the Los Angeles County Department of Children and Family Services (Department) to inspect father's home for the children's possible placement. The Department reported that father attempted to convince the social worker that mother was not living in father's apartment, even though the social worker found mother's belongings in a closet and ultimately found mother lying on the floor in a bedroom, hidden from view. Mother claimed she had been resting and father explained mother was pregnant and had been hospitalized, and she was staying with him so he could care for her.

"Mother and father made substantive progress towards reunification over the summer of 2014. Visitation was

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[2] The court also sustained allegations based on mother's mental health problems and unresolved substance abuse history.

liberalized to unmonitored. Mother tested positive for alcohol on two urine tests in September 2014. For the first test, the lab and mother believed it was a false positive due to mother's diabetes. Mother later admitted to drinking two beers. Both mother and father agreed that mother would no longer live with father, so that father could regain custody of the three children. At the six-month hearing on September 25, 2014, the court placed the three boys with father, and gave the Department discretion to liberalize mother's visits to unmonitored and permit her to return to the family home.

"In January 2015, the Department detained the children from father's home and filed a supplemental petition under section 387. Mother had been making multiple unauthorized visits to father's home, and would become increasingly aggressive if father denied her access to the children. Father admitted to the social worker that while the children were in foster care, mother had continued to verbally and physically assault him, but that he had been afraid to report this information to the Department. Father obtained a temporary restraining order against mother in November 2014, but the Department was concerned he was continuing to allow mother into the home and was falsely denying that she was visiting. Mother was also missing therapy sessions. On January 5, 2015, the court entered a permanent restraining order against mother. The Department expressed concern that even though father had participated in classes, he had not learned how to protect himself and the children from mother. The court ordered the

children detained on January 28, 2015, and ordered monitored visitation for both parents three times a week for three hours. The court sustained the supplemental petition in April 2015. In October 2015, the court terminated reunification services for the parents and ordered the Department to initiate an adoptive home study and prepare a report under section 366.26.

"The Department's section 366.26 report from January 2016 noted that father was visiting the children for one hour a week, but the children did not appear bonded to him. He would bring them food and send them to play in the playground, but did not engage them in play or activities. The Department had not yet identified a prospective adoptive parent for any of the three children, but had identified adoption as the most appropriate permanent plan. A.R. and J.G.'s foster mother had given notice to the Department that she wanted the two boys removed, saying she was exhausted and could no longer care for them. A.R. (age four) was not speaking, instead using signs and expressions to communicate. He would defecate on himself and purposefully cough to the point of making himself vomit. J.G. (age two) exhibited signs of a child with fetal alcohol syndrome (FAS) or Down syndrome. A licensed social worker conducted a primary psychiatric assessment that identified some special needs and recommended further assessment to rule out autism for A.R. and FAS or Down syndrome for J.G. The report also noted that the Montebello school district was in the process of evaluating A.R.

"In late December 2015, a psychiatric social worker with the Los Angeles County Department of Mental Health (DMH) evaluated A.R. and J.G. The DMH report stated that A.R. displayed symptoms of trauma, such as tantrums, excessive fear, hypervigilance, and dissociative states such as 'freezing' and being unresponsive. A separate report for J.G. said he showed symptoms and behaviors involving dysregulation, including excessive tantrums and angry outbursts, difficulty following rules, and excessive clingy behaviors. The reports noted that foster mother reported A.R. engaged in maladaptive behaviors following visits with father, including defying rules in the home, tantruming, and defecating on himself. Foster mother also expressed concern that father lacked insight into J.G.'s specific needs.

"On January 22, 2016, all three children were placed with prospective adoptive parents, who 'appear to be able and willing to provide permanency for the children and meet the children's needs.'

"On January 27, 2016, the Department filed a petition under section 388 seeking to change the court's January 2015 visitation order from three times a week for three hours to one weekly one-hour visit in a therapeutic setting. The Department's petition explained the changed circumstances as follows: 'The children have been experiencing regression following visitation with the parents. The children were evaluated by [a county psychiatric social worker] who reported that [the] children's current behaviors and symtomology [*sic*] displayed following

each visit has impacted [the] children's ability to regulate behaviors.' Explaining why the requested change would be in the children's best interests, the Department stated the requested limitation 'would allow the children to adequately address their clinical needs with limited regressive symptoms that are currently experienced following visitation. The visits being conducted in a therapeutic setting would allow for the development of relations skills and assist parents in implementing appropriate bonding and attachment skills with direction of [a] trauma trained clinician.'"

In a January 29, 2016 last minute information report, the Department expressed concern that mother and father continued to have contact with one another even though there was a permanent restraining order in place. Following visitation with the parents, the children appeared to regress, with A.R. and J.G. having nightmares, tantrums, and difficulty regulating their behaviors. The Department also recommended transferring education rights to the foster parents, because it had been difficult for various service providers to contact the parents, whose consent was necessary before services could be provided to the children.

On February 11, 2016, mother and father filed separate petitions under section 388 seeking an order placing the children with father, or alternatively reinstating reunification services. The court denied father's petition but set mother's petition for a hearing.

An April 11, 2016 status review report noted that the children had continued to bond and build attachments with the prospective adoptive parents, the children's foster fathers, since their placement in the home on January 22, 2016. The children appeared comfortable, well bonded, and cared for by the foster fathers, who expressed a desire to adopt the children. A.R. had not met the eligibility criteria for an IEP. The foster fathers reported no behavioral concerns with the children. They reported mother and father brought clothes and toys to visits and were appropriate, although father frequently arrived late.

On April 11, 2016, the court granted the Department's section 388 petition to limit parents' visits to a therapeutic setting and denied mother's section 388 petition seeking placement with father. The court also appointed foster fathers as holders of the children's educational rights.

On April 29, 2016, the Department filed a report for the selection and implementation of a permanent plan under section 366.26. The Department reported that the foster fathers were interested in adopting, but would like to spend more time with the children before fully committing. The Department requested 120 days to allow the caregivers and the children to develop a parent-child bond and for time to complete an adoption home study. The court continued the matter to the fall of 2016.

The Department's September 2, 2016 last minute information report noted that a home study had been completed for foster fathers on September 4, 2015, and was

updated in January 2016 to reflect a move to a different foster services agency. The Department was still awaiting a child-specific addendum. A separate report with the same date summarized a social worker's interview of A.R., who reported he enjoys his visits with mother and father, but also felt his home was with his foster fathers, who take care of him and his brothers.

A status review report dated October 11, 2016, stated the children continued to thrive in the foster fathers' home. Mother and father continued weekly visitation, but the children appeared to regress during visits, at times trying to hit mother. Parents missed one visit in August and two visits in September. Both mother and father complained to social workers about issues with each other. A.R. no longer needed to continue play therapy, but his two younger siblings continued play therapy to address J.G.'s anxious mood and tearfulness and R.M.'s irritability and aggressiveness.

An October 24, 2016 last minute information report stated that the foster family agency had not yet approved the adoption home study and expressed concerns about unresolved medical and behavioral issues with the children. The agency and the foster fathers wanted the issues addressed to prevent a disruption in the adoptive placement, and the foster fathers stated they would not move forward with the adoption until the children were properly diagnosed, assessed for specialized rates, and treated. The Department acknowledged the children have pronounced

speech delays, behavioral issues, and developmental delays. It mailed the children's birth records for genetic testing to rule out genetic causes.

On January 23, 3017, the Department reported that the foster fathers still had some concerns about the children's diagnoses or lack of information and had not made a definitive decision about moving forward with the adoption. The foster family agency social worker had informed the Department social worker that it was important to have proper evaluations and services in place for all three children, because failure to identify and initiate necessary services could lead to a failed adoption. The Department had disclosed all the information available, and was working on obtaining appropriate assessments and determining the best permanent plan for the children. A.R. was not qualified for D-rate, J.G. qualified for F-1 rate based on chromosomal abnormalities, and R.M. was temporarily qualified for F-1 rate based on his regional center services, but he was still being assessed to see if he qualified for F-1 rate independent of the regional center qualifier. The court directed the Department to interview the foster fathers and prepare another report addressing a number of issues, including the home study, genetic testing, and visitation.

On February 23, 2017, the Department reported that A.R.'s genetic testing results were received and reviewed on November 7, 2016, but "the child [R.M.]'s results were not available for the visit on this day." J.G. had an appointment scheduled for May 1, 2017. Mother and father's weekly

monitored visits continued, but mother appeared to pay more attention to A.R. during visits and would often leave 15-20 minutes before the end of her one-hour visits. On several occasions, father told the children they would be spanked if they misbehaved, and the social worker had to tell father these statements were inappropriate. After the Department contacted the foster fathers to explore any impediments to adoption, they decided to adopt the children regardless of whether the Department could obtain the F-1 rate for R.M. The lower rates for A.R. and R.M. were acceptable, and J.G. was already qualified for the higher F-1 rate.

An April 24, 2017 status review report stated the children appeared to be well-bonded to their caregivers, calling them "dad" and "daddy" and responding well to rules and structure in the home. Father continued to seek reunification with the children, and informed the social worker he did not believe the children were sick or delayed in any way. Father also said mother continued to harass him. He had not filed a restraining order and did not indicate he planned to move. The Department expressed concern about father's ability to meet the developmental and mental health needs of the children if they were to be returned to father. As recently as March 2017, visitation monitors continued to report that mother favored A.R. during visits, and father told children they would be spanked if they misbehaved.

Mother and father testified at the section 366.26 hearing, and the court admitted past Department reports into evidence. The court granted mother's request to have A.R. testify, and he testified he had visits with mother. After hearing argument from counsel, the court found the children were likely to be adopted and that the exception under section 366.26, subdivision (c)(1)(B)(i) was inapplicable. It then ordered parental rights terminated.

DISCUSSION

At a section 366.26 hearing, the juvenile court selects and implements a permanent plan for the dependent child. (*In re Celine R.* (2003) 31 Cal.4th 45, 52–53 (*Celine R.*); *In re Marilyn H.* (1993) 5 Cal.4th 295, 304.) "In order of preference the 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).)" (*Celine R., supra,* at p. 53.)

One exception to adoption is the parent-child relationship exception. (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395 (*Anthony B.*); *In re J.C.* (2014) 226

Cal.App.4th 503, 528.) This exception is set forth in section 366.26, subdivision (c)(1)(B)(i), which states: "[T]he court shall terminate parental rights unless either of the following applies: [¶] . . . [¶] (B) 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." The parent seeking application of this exception has the burden of proving his relationship with the child would outweigh the well-being gained in a permanent home with adoptive parents. (*Anthony B., supra*, at pp. 396–397; *In re G.B.* (2014) 227 Cal.App.4th 1147, 1165.)

Adoptability Findings

Mother and father contend there was insufficient evidence to support the trial court's determination under section 366.26, subdivision (c)(1) that the children were likely to be adopted. They point to evidence that might undermine a finding of adoptability, such as difficulties the Department faced in finding a long-term foster care placement for all three siblings, and once such a placement was found, the fact that the foster family agency and the children's caregivers requested additional information before making a decision about whether the caregivers were willing to adopt the children. We reject this argument

because the record as a whole demonstrates that the caregivers were willing to adopt the children, and there was no legal impediment to such an adoption.

Because the arguments made by mother and father closely parallel the analysis of our colleagues in the Sixth District in *In re I.W.* (2009) 180 Cal.App.4th 1517, we adopt that opinion's statement of the applicable law: "The 'clear and convincing' standard specified in section 366.26, subdivision (c)(1), is for the edification and guidance of the trial court and not a standard for appellate review. [Citations.] '"The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal."' [Citation.] Thus, on appeal from a judgment required to be based upon clear and convincing evidence, the clear and convincing test disappears and 'the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.' [Citation.]

"In making the determination of adoptability, the juvenile court 'must focus on the child, and whether the child's age, physical condition, and emotional state may make it difficult to find an adoptive family.' [Citation.] 'A child's young age, good physical and emotional health, intellectual growth and ability to develop interpersonal relationships are all attributes indicating adoptability.'

[Citation.] 'If the child is considered generally adoptable, we do not examine the suitability of the prospective adoptive home. [Citation.] However, where the child is deemed adoptable based solely on the fact that a particular family is willing to adopt him or her, the trial court must determine whether there is a legal impediment to adoption.' [Citation.]

"'A prospective adoptive parent's . . . interest in adopting is evidence that the child's age, physical condition, mental state, and other matters relating to the child are not likely to discourage others from adopting the child.' [Citation.]

"In other words, '[w]hile, generally, the present existence or nonexistence of prospective adoptive parents is, in itself, not determinative, it is a factor in determining whether the child is adoptable.' [Citation.] As one court has explained, 'in some cases a minor who ordinarily might be considered unadoptable [because of] age, poor physical health, physical disability, or emotional instability is nonetheless likely to be adopted because a prospective adoptive family has been identified as willing to adopt the child.' [Citation.]

"Conceivably, there could be some legal impediment to adoption by a prospective adoptive parent that, in turn, might preclude reliance on this parent's interest as a basis for an adoptability finding. [Citation.] Or, there could be facts that contraindicate adoptability notwithstanding the parent's interest. Here, however, mother [and father] failed to develop any issue along these lines. Had [they] done so,

the juvenile court would have had the benefit of [their] viewpoint and might have found differently. Absent such an impediment or evidence, it follows that the foster parents' interest in adopting [the children] is sufficient to support the juvenile court's finding of general adoptability." (*In re I.W., supra*, 180 Cal.App.4th at pp. 1525–1527.)

By the time the court conducted the section 366.26 hearing on April 24, 2017, the children had lived with their foster fathers for over a year, and the foster fathers were committed to adopting them. There was evidence J.G. and R.M. suffered from developmental delays and behavioral issues, but the evidence also shows that the foster fathers were aware of the boys' challenges and were fully engaged in obtaining appropriate evaluations and services. They had an approved home study, and there was no legal impediment to adoption. Given the foster parents' deep engagement in obtaining services for the children and their commitment to adopt, there was substantial evidence to support the court's finding that the children were likely to be adopted.

Parental Relationship Exception

Mother and father contend the dependency court erred when it found the parental relationship exception under section 366.26, subdivision (c)(1)(B)(i) inapplicable, and they seek reversal of the order terminating parental rights. We find no error.

We assess whether the court's order on the parental relationship exception is supported by substantial evidence. (*In re G.B.*, *supra*, 227 Cal.App.4th at p. 1166.)[3] If supported by substantial evidence, the finding here must be upheld, even though substantial evidence may also exist that would support a contrary result and the dependency court might have reached a different conclusion had it determined the

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[3] "[S]ome courts have applied different standards of review. (*In re K.P.* [(2012)] 203 Cal.App.4th [614,] 621–622 [question of whether beneficial parental relationship exists is reviewed for substantial evidence, whereas question of whether relationship provides compelling reason for applying exception is reviewed for abuse of discretion]; *In re C.B.* (2010) 190 Cal.App.4th 102, 122–123 [abuse of discretion standard governs review, but 'pure' factual findings reviewed for substantial evidence]; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [(*Jasmine D.*)] [applying abuse of discretion standard].) On the record before us, we would affirm under either of these standards. (E.g., *Jasmine D.*, at p. 1351 [practical differences between substantial evidence and abuse of discretion standards are minor].)" (*In re G.B.*, *supra*, 227 Cal.App.4th at p. 1166, fn. 7.)

facts and weighed credibility differently. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

In determining whether the parental relationship exception applies, the court considers "'"[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs." [Citation.]' [Citation.]" (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643; accord, *In re Breanna S.* (2017) 8 Cal.App.5th 636, 646 (*Breanna S.*).) "A showing the child derives some benefit from the relationship is not a sufficient ground to depart from the statutory preference for adoption." (*Breanna S., supra*, at p. 646.) Furthermore, evidence of frequent and loving contact is not enough to establish a beneficial parental relationship. (*Ibid.*) "The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment between child and parent." (*In re C.F.* (2011) 193 Cal.App.4th 549, 555.) The parent must also establish "the child would suffer detriment if his or her relationship with the parent were terminated." (*Ibid.*)

Here, neither mother nor father had a relationship with the children that would promote their well-being "'to such a degree as to outweigh the well-being the child[ren] would gain in a permanent home with new, adoptive parents.'" (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534; accord, *Jasmine D.*, *supra*, 78 Cal.App.4th at pp. 1347–1350.) Even during the permitted one-hour weekly visits in

a therapeutic setting, mother would favor A.R. over the other children, and father repeatedly needed to be reminded not to threaten to spank the children. There was simply no evidence mother or father were acting in the role of a parent during the visits. The court did not err in finding the exception under section 366.26, subdivision (c)(1)(B)(i) inapplicable.

DISPOSITION

The court's order terminating parental rights under section 366.26 is affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

RAPHAEL, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.