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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re C.G. et al., Persons Coming Under
the Juvenile Court Law.

LOS ANGELES COUNTY DEPARTMENT
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

K.G.,

Defendant and Appellant.

B233819

(Los Angeles County
Super. Ct. No. CK76930)

APPEAL from an order of the Superior Court of Los Angeles County,
Donna Levin, Juvenile Court Referee. Affirmed.

Janette Freeman Cochran, under appointment by the Court of Appeal,
Defendant and Appellant.

Tarkian & Associates and Arezoo Pichvai for Plaintiff and Respondent.

K.G. (father) appeals an order terminating his parental rights with respect to C.G. and I.G. Father contends the juvenile court abused its discretion and denied father due process in refusing father's request for a contested permanency planning hearing. We reject this contention and affirm the order terminating parental rights.

FACTS AND PROCEDURAL BACKGROUND

1. Detention of C.G.

The family came to the attention of the Department of Children and Family Services (the Department) in October of 2008 based on a referral indicating C.G. was born prematurely weighing 1 pound and was medically fragile. C.G. had extensive medical conditions including atrial septal defect, persistent pulmonary hypertension, strabismus and retinopathy of prematurity. Mother had bipolar and schizoaffective disorders, suffered mild mental retardation and was a client of the Regional Center. Father, who also was a Regional Center client, resided in a facility for males with mental health issues. A psychological evaluation of father, conducted in August of 2008, indicated father had a history of defiant and impulsive behavior, becomes frustrated easily, destroys property and uses inappropriate language. The report concluded father was mildly delayed and had borderline daily living skills.

On December 2, 2008, mother and father agreed to participate in a voluntary case plan pursuant to which C.G. was placed in a facility for medically fragile children.

In April of 2009, the Department filed a dependency petition with respect to C.G. The detention report indicated mother and father had a history of domestic violence. The direct service professional at father's residence facility told the social worker mother and father "really had it out a few times." In one incident, father slapped mother twice. Mother told the social worker father slapped her in the face "one or two years ago" and pushed her on one occasion while she was pregnant. Father stated that, on one occasion about a year earlier, he struck mother on the arm but did not cause a bruise.

Mother visited C.G. two or three times. Father visited once, did not attend C.G.'s medical appointments and believed parenting classes were pointless. Father had a history of arrests and mother and father themselves had been dependents of the juvenile court. In May of 2009, father told a social worker he had been smoking marijuana since the age of 13 years. Father agreed to complete an on-demand drug test but failed to appear.

On June 9, 2009, the juvenile court sustained a dependency petition and declared C.G. a dependent child within the meaning of Welfare and Institutions Code section 300, subdivision (b).¹ The juvenile court granted mother and father monitored visitation, ordered mother and father to participate in parenting education for medically fragile children, and directed mother and father to enroll in individual counseling to address case issues including domestic violence and anger management.

2. Detention of I.G.

In June of 2009, I.G. was born prematurely. He was in the neonatal intensive care unit for the first six weeks of his life with respiratory distress syndrome. He was small for his age and he had retinopathy of prematurity. Upon his release from the hospital, I.G. was placed with Ms. B. and Ms. C.

3. The reunification period.

In August of 2009, the Department reported father had left his group home. On September 2, 2009, father was arrested for possession of narcotics. A week later he was convicted of a misdemeanor and was sentenced to two days in jail. At a visit on September 22, 2009, the monitor smelled marijuana on father.

On October 13, 2009, the juvenile court sustained a dependency petition filed with respect to I.G.

¹ As sustained, the petition alleged mother's mental and emotional problems render mother unable to provide regular care and supervision; mother and father have a history of domestic violence and physical altercations; and, father failed to attend C.G.'s medical appointments and neither parent had enrolled in parenting class, resulting in their inability to care for the child.

Subsequent unspecified statutory references are to the Welfare and Institutions Code.

A social report filed December 8, 2009, indicated father was arrested on October 13, 2009, for possession of a controlled substance and was released ten days later. The report indicated mother often slept during visits with I.G. and had to be reminded how to hold I.G.'s bottle during feeding. Father had not complied with court orders and visited I.G. inconsistently.

Social reports filed January 28, 2010, indicated mother and father fail to respond appropriately to I.G.'s health situations during visits. At three separate visits, I.G. vomited and began to choke because he had been fed incorrectly but mother and father did not attend to him until they were prompted. Mother and father repeatedly have been shown how to feed I.G. but they continue to do so incorrectly.

A review report filed March 22, 2010, indicated that during a visit on February 22, 2010, father was admonished not to shake I.G. forcefully. Mother and father began yelling at each other while father held I.G. When I.G. began to choke, mother's parent partner was forced to intervene. Mother's parent partner indicated "she was very fearful of the parents during this incident" As a result of this incident, mother and father no longer were permitted to visit at the same time.

The Department recommended no further family reunification services be provided, noting the parents lacked the ability to care for the children, both parents had failed to comply with orders for domestic violence counseling, and father has failed to drug test.

On March 24, 2010, the juvenile court granted mother and father additional family reunification services and directed father to participate in parenting classes and attend individual counseling. The juvenile court also ordered father to complete four weekly random drug tests and to participate in a full drug rehabilitation program if he missed a test or tested positive.

A review report filed June 14, 2010, indicated that on March 25, 2010, father enrolled in a drug abuse program. The program manager indicated father participated two or three times but he "was high and could not comprehend anything that was going

on around him.” The program referred father to parenting classes but father failed to enroll.

On May 26, 2010, father was arrested for grand theft. He subsequently was convicted and was sentenced to state prison for 16 months.

A status review report filed September 22, 2010, with respect to I.G. indicated the child had been referred to the Regional Center and a neurologist for developmental problems. The child also had undergone multiple studies and evaluations to determine the cause of his respiratory distress. The report noted father had not visited I.G. since March of 2010. Ms. B. and Ms. C. have provided for all of I.G.’s physical, medical and psychological needs, ensure the child attends his medical and Regional Center appointments, and have expressed an interest in adoption.

A review report filed with respect to C.G. on November 18, 2010, indicated mother continued to lack the ability to parent the child and mother’s home was not appropriate for the child as numerous extended family members with significant mental health problems reside in the home.

On November 18, 2010, juvenile court terminated family reunification services and set a permanency planning hearing as to both children.

4. Reports submitted in advance of the permanency planning hearing.

A social report prepared for C.G.’s permanency planning hearing indicated that on January 12, 2011, C.G. was placed with I.G.’s caretakers, Ms. B. and Ms. C. Ms. B. and Ms. C. had completed medical training, were pleased the children were together, were committed to providing permanency for both children through adoption and they had an approved home study. Ms. B. and Ms. C. both are early childhood educators with years of experience working with children.

On March 17, 2011, mother filed a section 388 petition seeking reinstatement of family reunification services, unmonitored visitation and housing assistance.

A review report filed May 19, 2011, indicated father was released from prison in January of 2011 but had not visited either child. Social workers made an unannounced visit to mother’s home on the morning of May 4, 2011, and found father present but not

mother. Father stated he resides with his grandmother. However, father's grandmother denied that father lives with her.

A review report filed May 19, 2011 with respect to C.G. indicated the child had adapted well to her new placement and had developed a close bond to Ms. B. and Ms. C. and I.G. Mother admitted she and father remained in a relationship and claimed their most recent incident of domestic violence was a "little altercation" about two weeks ago. The report indicated mother and father had not attended parent education or individual counseling to address case issues.

5. The juvenile court denies father's request for a contested permanency planning hearing and thereafter terminates parental rights.

On May 19, 2011, the juvenile court set a hearing on mother's section 388 petition and granted mother's request for a contested permanency planning hearing. When father's counsel asked to join in the request for a contested hearing, the juvenile court responded it had no information that indicated "father could meet the burden of [section] 366.26, so I will not set it on behalf of the father" The juvenile court noted that, if mother prevailed on her contest, father's parental rights could not be terminated. Thus, mother's contest "will affect both parents."

The juvenile court conducted the contested hearing on May 26, 2011. At the conclusion of the hearing, the juvenile court noted the children are "delicate and have physical conditions, and are also developmentally delayed. They need specialized care that the mother has never been able to be trained to give." The juvenile court denied mother's section 388 petition, finding mother had not shown a change of circumstances or that granting her further family reunification services was in the best interest of the children.

The juvenile court thereafter terminated parental rights, noting the parents had never assumed a parental role with respect to the children and father failed to visit regularly.

DISCUSSION

Father contends the juvenile court abused its discretion and denied father due process in refusing father's request for a contested permanency planning hearing. Father concedes that, under *In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1121-1122, and *In re Earl L.* (2004) 121 Cal.App.4th 1050, 1053, a juvenile court may require an offer of proof before setting a contested hearing with respect to an issue as to which the parent has the burden of proof. Those cases involved application of the beneficial parental relationship exception (*Tamika T.*) and the sibling relationship exception (*In re Earl L.*) to the requirement that parental rights be terminated at a permanency planning hearing if the juvenile court finds the child is likely to be adopted. (See *In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368; § 366.26, subd. (c)(1).)

Father argues these cases do not apply because the Department had the burden of proof, citing *In re Thomas R.* (2006) 145 Cal.App.4th 726, 732. Father claims the juvenile court's ruling prevented father from presenting evidence, cross-examining witnesses or testing the sufficiency of the Department's evidence, thereby violating father's rights.

Father's reliance on *In re Thomas R.* is misplaced. In that case, the parents appealed an order terminating their parental rights claiming they were denied the opportunity to cross-examine the witnesses who testified their children were adoptable. *In re Thomas R.* held a parent has a due process right to test the sufficiency of the evidence offered by a social service agency on the issue of adoptability, noting the agency bears the burden of proof on that point. (*In re Thomas R.*, *supra*, 145 Cal.App.4th at p. 729, citing *In re Brian P.* (2002) 99 Cal.App.4th 616, 623.)

Here, neither parent argued the children were not likely to be adopted. Given that Ms. B. and Ms. C. repeatedly had expressed their desire to adopt both children and provide them a permanent home, it was clear the children were likely to be adopted. Thus, the only issue the juvenile court confronted at the permanency planning hearing in this case was whether either parent could forestall termination of parental rights under the beneficial parental relationship exception.

The beneficial parental relationship exception arises when: “The 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 applying the exception, the juvenile 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.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

The parent has the burden of showing both regular visitation and contact and benefit to the child in maintaining the parent-child relationship. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

Because father bore the burden of proof on the beneficial parental relationship exception, the juvenile court committed no error in requiring father to make an offer of proof before the juvenile court set a contested hearing with respect to father. (*In re Tamika T., supra*, 97 Cal.App.4th at pp. 1121-1122.)

On the record presented, father could not have proved application of the beneficial parental relationship exception. The juvenile court conducted a contested hearing with respect to mother, who participated in the case plan but failed to prove application of the exception. Father, who did not participate in the case plan, would not have fared better than mother. Indeed, father failed to visit the children regularly before he was incarcerated and he did not visit at all after his release from custody in January of 2011. He persistently used drugs during the reunification period and he failed to address his domestic violence issues. Thus, there was no possibility father would have been able to demonstrate the children would benefit from continuing the parental relationship to such an extent as to overcome preference for adoption. Consequently, the juvenile court committed no error in denying father’s request for a contested permanency planning hearing.

DISPOSITION

The order terminating parental rights is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.