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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re L.B. et al., Persons Coming Under the  
Juvenile Court Law.

2d Juv. No. B239319  
(Super. Ct. No. J1252373)  
(Super. Ct. No. J1252374)  
(Santa Barbara County)

SANTA BARBARA COUNTY CHILD  
PROTECTIVE SERVICES,

Plaintiff and Respondent,

v.

L.G.,

Defendant and Appellant.

L.G. appeals from a January 30, 2012 order terminating her parental rights to 11-year-old L.B. and freeing L.B. for adoption. (Welf. & Inst. Code, § 366.26.)<sup>1</sup> L.B.'s twin-brother, Li., lives in a different foster home and is not yet adoptable. Appellant claims that the court-appointed attorney for the minors had a conflict of interest. Appellant further argues that the trial court abused its discretion in denying her section 388 petition and that the parent-child/sibling relationship exceptions preclude L.B.'s adoption. (§§ 366.26, subd. (c)(1)(B)(i)&(v).) We affirm.

<sup>1</sup> All statutory references are to the Welfare & Institutions Code.

### *Facts and Procedural History*

In December 2007, Santa Barbara County Child Protective Services (CWS) filed a dependency petition alleging that appellant had failed to protect her seven-year-old twins, L.B. and Li., and that parental rights had been terminated with respect to an older sibling who was sexually abused.<sup>2</sup> (§ 300, subd. (b) & (j).) The petition stated that Li. experienced a near fatal asthma attack and that appellant repeatedly failed to follow through with Li.'s medical and dental treatment. Li. was asthmatic, suffered from a learning disability and developmental delays, and could not focus or settle down at school. The trial court sustained the petition and ordered family maintenance services.

On March 7, 2008, the trial court granted a petition to place L.B. and Li. in protective custody. (§ 324.) CWS reported that appellant spanked the children with a belt, that appellant had not maintained contact with CWS, and that appellant left the children without provision for support and failed to obtain prescribed antibiotics for Li.'s abscessed tooth. When appellant was interviewed, appellant called the case worker a "fucking bitch. You don't know anything. I am going to sue you pecker-woods . . . ." L.B. told the case worker that appellant spanks the twins with a belt and "hits hard with the belt."

The trial court placed the children in foster care and ordered reunification services and visitation. Appellant was ordered to undergo a mental assessment and comply with recommended treatment, attend parenting classes, not use physical discipline or physically abuse the children, and undergo a drug and alcohol assessment. During supervised visits, appellant told the children that their father was dead and "[i]t is the judge's fault, you have to leave, the judge said you can't come back home with me,

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<sup>2</sup> Appellant had a criminal history that included fraud to receive aid, corporal punishment to a spouse, being under the influence of a controlled substance, cashing a check with insufficient funds, and driving under the influence.

The children's alleged father, Carnel B., had an extensive criminal history for assault with a deadly weapon or force likely to produce great bodily harm, willful infliction of corporal injury to a spouse, probation and parole violations, being under the influence of drugs and driving while intoxicated.

you have to stay in a foster home." Li. was so upset that he threw himself on the ground crying and vomiting. When appellant tried to pick him up, Li. kicked and screamed.

At the six month review hearing, CWS reported that appellant had not completed parenting classes, had tested positive for cocaine and marijuana, and was not doing well without mental health medications. Appellant's visits were sporadic and when appellant did visit, she talked or text-messaged on her cell phone. Several visits were cancelled after appellant tested positive for drugs.

In a September 26, 2008 psychological evaluation, Doctor Robert Richey reported that appellant suffered from depression, substance abuse and anger issues, and was at substantial risk of physically punishing and neglecting the children. Doctor Richey recommended that appellant restart her psychotropic medication, attend psychotherapy and anger management groups, and submit to random alcohol and drug testing.

At an October 6, 2008 review hearing, the trial court ordered appellant to obtain gainful employment. maintain stable housing, attend an outpatient substance abuse treatment program with group and individual counseling, and submit to random alcohol/drug testing twice a week. On October 29, 2008, appellant was arrested for threatening and resisting an officer, driving under the influence, and driving with a suspended/revoked license. Appellant was so belligerent that the officer had to subdue her with a taser

At the April, 6, 2009 12-month review hearing, CWS recommended that services be terminated. Appellant was still unemployed, had dropped out of therapy and anger management counseling, and had tested positive for drugs and missed drug tests. Visitation was sporadic. Appellant failed to show for six visits, was late to five visits, cancelled four visits, and three visits were suspended after appellant tested positive for drugs.

The trial court found that appellant had made little progress and terminated reunification services. The court was concerned that appellant "fails to grasp the gravity of the mental health issues that she is dealing with and [appellant claims] . . . she needs

no medication and, apparently, need not participate or has chosen not to participate in therapy, counseling. " The court set the matter for a permanent placement hearing and ordered supervised visits subject to the condition that appellant test clean three consecutive times before a scheduled visit. Appellant filed a Notice of Intent to File Writ Petition which was dismissed as abandoned on July 7, 2009. (B216397.)

#### *Section 366.26 Hearing*

At the September 2009 366.26 hearing, CWS reported that L.B. was adoptable but Li. still suffered from behavioral and medical problems. The case worker opined that it was not in the children's best interest to separate the children because they were bonded. The trial court adopted the recommended findings and continued Li.'s and L.B.'s foster care.

In a post permanency review report, CWS reported that Li. was moved to a new foster home because of inappropriate touching of L.B. and a foster sister. L.B. was thriving in her foster home and wanted to be adopted. The trial court set the matter for a section 366.26 permanent placement hearing for L.B.

#### *Section 388/366.26 Hearing*

Appellant filed a section 388 petition to reinstate services which was heard at a combined section 388/366.26 hearing. CWS reported that the children exhibited negative behaviors after supervised visits with appellant. L.B. took out her anger on her foster sister and Li. would deliberately urinate on the carpet and destroy things.

In an addendum report, CWS reported that L.B. was adoptable and closely bonded to her foster parents who had cared for L.B. since October 2009. The case worker opined that L.B.'s need for permanency and stability outweighed her need to live with Li. who was seeing a psychologist to address addictive behaviors, lying and manipulation, and academic underachieving.

Appellant testified that she was unemployed and had just married her boyfriend (the same day as the section 388/366.26 hearing) who had two daughters, ages 16 and 17, living with them. Appellant said that she was willing to submit to random drug testing and attend AA meetings, and that she would like to take a parenting class again.

The trial court denied the section 388 petition on the ground there were no changed circumstances or showing that reinstating services was in the children's best interests. The court terminated parental rights as to L.B., finding that L.B.'s need for permanency outweighed any benefit of a continued relationship with appellant or Li.

### *Joint Representation of Children*

Appellant argues that Attorney Francene Kelly's representation of the children was a conflict of interest because L.B. and Li. had divergent interests in the outcome of the section 366.26 hearing. Appellant, however did not object and is precluded from raising the issue for the first time on appeal. (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558.) Appellant's reliance on *In re Elizabeth M.* (1991) 232 Cal.App.3d 553 is misplaced. There, the children filed their own appeal asserting that their attorney had a conflict of interest. (*Id.*, at p. 564.) L.B. and Li. are not parties to this appeal and have never claimed that their court-appointed attorney had a conflict of interest.

Waiver aside, there was no actual conflict of interest requiring the appointment of separate counsel for Li. (See *In re Celina R.* (2003) 31 Cal.4th 45, 57-58 [potential conflict of interest not enough]; *In re Barbara R.* (2006) 137 Cal.App.4th 941, 953-954.) The appointment of an attorney to jointly represent siblings is not a conflict of interest unless counsel seeks a course of action for one child with adverse consequences to the other. (*In re Barbara R.* (2006) 137 Cal.App.4th 941, 953.) California Rules of Court, rule 5.660 states: "(A) The court may appoint a single attorney to represent a group of siblings involved in the same dependency proceeding. [¶] , , , [¶] (C) The following circumstances, standing alone, do not necessarily demonstrate an actual conflict of interest or a reasonable likelihood that an actual conflict of interest will arise: [¶] . . . [¶] (iv) Some of the siblings appear more likely than others to be adoptable; or [¶] (v) The siblings may have different permanent plans."

Appellant argues that the children's relationship will be forever altered if L.B. is adopted. L.B. has lived with her foster parents for four years, is closely bonded to

them and calls them "Mom and Dad," and wants to be adopted. Because of Li.'s inappropriate touching of L.B., he was placed in a new foster home where he bonded to his foster parents and foster brothers. Although L.B. and Li. miss each other, they have adjusted to living apart and are doing well in their respective foster homes.

The fact that L.B. and Li. are on different adoption tracks does not establish a conflict of interest requiring the appointment of separate counsel. (Cal. Rules of Court, rule 5.660(c)(1)(C)(v); *In re Celine R.*, *supra*, 31 Cal.4th at pp. 55-57.) Elijah has lived in a different foster home for 18 months, is bonded to his foster parents who want to adopt, and is thriving.<sup>3</sup> Attorney Kelly argued that the children love each other and "have both indicated that they want to be adopted in their current foster homes. [¶] That is the real world options that are available to them, and they live in the real world, not an ideal world. [¶] . . . [W]hile there is a strong sibling bond[,] . . . it has been stated by both sets of foster parents, particularly by [L.B.]'s, that . . . visits between the siblings will be facilitated following adoption."

Appellant speculates that visits will stop if L.B. is adopted but a theoretical conflict of interest is not enough. (Cal. Rules of Court, rule 5.660, subd. (c)(1)(C)(iii) & (iv). Nothing in the record rises to the level of an actual conflict of interest requiring appointment of separate counsel for Li. (*Carroll v Superior Court* (2002) 101 Cal.App.4th 1423, 1429; *In re Candida S.* (1992) 7 Cal.App.4th 1240, 1253.)

Nor has appellant shown that it is reasonably probable that appellant would have obtained a more favorable result had the court appointed separate counsel for Li. (*In re Celine R.*, *supra*, 31 Cal.4th at pp. 60-62.) Based on the children's age, the fact they had been in foster care for four years and are bonded to their respective foster parents, and the statutory preference for adoption, there is no reasonable likelihood that the trial court would have reached a different result had separate counsel been appointed. Appellant argued vigorously that L.B.'s adoption would harm the sibling relationship. A

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<sup>3</sup> CWS reported that an adoptive home had been secured and requested that the trial court set an April 19, 2012 permanency planning hearing for Lijah's adoptive placement.

second voice advocating this position would, in all likelihood, not have changed the trial court's mind.

*Section 388 petition*

Equally without merit is the argument that the trial court abused its discretion in denying the section 388 petition. "After the termination of reunification services, the parents' interest in the care, custody, and companionship of her child are no longer paramount. Rather, at this point, 'the focus shifts to the needs of the child for permanency and stability [citation] . . . ." (*In re Stephanie M.* (1974) 7 Cal.4th 295, 317.)

Appellant made no showing of changed circumstances or that reinstatement of services was in the children's best interest. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) Little had changed after services were terminated in 2009. Appellant was unemployed, did not have suitable housing for the children, was not testing randomly for drugs/alcohol or attending AA meetings, had not completed an outpatient drug treatment or anger management program, and had little insight about her mental health problems. Appellant did not believe that she suffered from depression or anger issues or that she required psychotropic medication.

L.B. was closely bonded to her foster parents and doubted that she would feel safe living with appellant. Li. enjoyed his monthly visits with appellant but was bonded to his foster parents and foster brothers. Appellant claims that the visits were beneficial but the foster parents reported that the children's negative behaviors spiked before and after visits.

The evidence supports the finding that reinstatement of services was not in L.B.'s or Li.'s best interests and would undermine the permanency and stability of an adoptive placement that L.B. so badly needs. A section 388 "petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.]" (*In re Casey D., supra*, 70 Cal.App.,4th at p. 47.)

### *Parent-Child/Sibling Beneficial Relationship*

Appellant contends that the beneficial parent-child and sibling relationship exceptions preclude L.B.'s adoption. (§ 366.26, subd. (c)(1)(B)(i) & (v).) "Because a parent's claim to . . . an exception [to termination of parental rights] is evaluated in light of the Legislature's preference for adoption, it is only in exceptional circumstances that a court will chose a permanent plan other than adoption. [Citation.]" (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.)

To establish the beneficial parent-child relationship exception, appellant had to prove that termination of parental rights would be detrimental to L.B. because appellant maintained regular visitation and contact, and L.B. would benefit from continuing the relationship. (§ 366.2, subd. (c)(1)(B)(i).) The court considers facts such as (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 the interaction between the parent and the child, and (4) the child's particular needs. (*In re Helen W.*, (2007) 150 Cal.App.4th 71, 81.)

Sporadic visitation is not enough. (*In re C.F.* (2011) 193 Cal.App.4th 549, 554.) Appellant failed to maintain regular visitation and contact with L.B.

To satisfy the second prong, the parent must show that "severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed. [Citations.] 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.]" (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

During the four years that L.B. was in foster care, appellant did not progress beyond supervised visitation. L.B. questioned whether appellant could be a good mom because she suffered from drinking, boyfriend, and anger issues. L.B. did not want to see appellant more often than once a month and displayed negative behaviors before and after the visits.



L.B. is closely bonded to her foster parents and wants to be adopted by them. It is uncontroverted that the foster parents are committed to providing L.B. a safe and nurturing home. The trial court reasonably concluded that the benefits of maintaining the parent-child relationship do not outweigh L.B.'s needs for a stable and permanent home.

With respect to the sibling relationship exception, L.B. and Li. have lived apart for 18 months and are thriving. The sibling relationship exception "focuses exclusively on the benefits and burdens to the adoptive child [i.e., L.B.], not the other siblings [Li.]) (*In re Celine R.*, *supra*, 31 Cal.4th at p. 54.) The ultimate question is whether adoption would be detrimental to L.B., not someone else. (*Id.*, at p. 55.)

L.B. was happy to see Li. once a month but thought weekly visits would be too much. Li. had engaged in sexually inappropriate conduct which resulted in a new foster home placement. In November 2011, L.B. reported that Li. kept pushing up against her, making her feel uncomfortable. L.B.'s foster parents did not believe they could protect L.B. or their foster daughter and gave CWS notice that L.B. would have to be moved to a new foster home if Li. returned. It would cause L.B. to lose the only family she has known and bonded with for the last four years. In the words of the CWS caseworker, L.B. had been in foster care "going on four years now" and deserves to "live a life outside of a fishbowl."

A trial court must balance the benefit of maintaining the sibling relationship against the benefit the child would derive from being adopted. Here, the trial court struck the balance in favor of adoption. It did not error. "Reflecting the Legislature's preference for adoption when possible, the 'sibling relationship exception contains strong language creating a heavy burden for the party opposing adoption. It only applies when the juvenile court determines that there is a "compelling reason" for concluding that the termination of parental rights would be "detrimental" to the child due to "substantial interference" with a sibling relationship.' [Citation.]" (*In re Celine R.*, *supra*, 31 Cal.4th at p. 61.)

Appellant's remaining arguments have been considered and merit no further discussion.

The judgment is affirmed

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Arthur A. Garcia, Judge  
Superior Court County of Santa Barbara

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Marissa A. Coffey, under appointment by the Court of Appeal, for  
Appellant.

Dennis A. Marshall, County Counsel. County of Santa Barbara; Maria  
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