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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re ANGEL A. et al., Persons Coming
Under the Juvenile Court Law.

B237583
(Los Angeles County
Super. Ct. No. CK14131)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

GILBERT A.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County.
Marilyn Mackel, Juvenile Court Referee. Affirmed.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant
and Appellant.

Office of County Counsel, John F. Krattli, Acting County Counsel, James M.
Owens, Assistant County Counsel, Jacklyn K. Louie, Deputy County Counsel, for
Plaintiff and Respondent.

Gilbert A. (Father) appeals the dependency court's order terminating his parental rights. Since we find that substantial evidence supported the dependency court's finding that the "beneficial relationship exception" to termination of parental rights did not apply, we affirm.

FACTS

This matter came to the attention of the Department of Children and Family Services (DCFS) in November 2008. Angel and Zachariah A., ages 10 and six at the time, had come to school filthy and hungry. They were living homeless with their mother, Shelly T. (Mother). Mother had a history of drug abuse, arrests, and child dependency issues. In the mid-1990's, two of her older children were declared dependents of the dependency court, and Mother failed to reunify with both of them.

Father did not live with Mother. He took care of the boys on weekends, and they stayed with Mother on weekdays. Father admitted that he had caused the boys to be late to school on Mondays because he lived far from the school and had transportation difficulties. Like Mother, Father had an extensive criminal history and drug abuse problems.

At the initial hearing in December 2008, the dependency court ordered DCFS to offer Mother reunification services. The children were released to Father, who was given the option of monitoring Mother's visits.

The February 2009 jurisdiction/disposition report noted that Father had been arrested twice in November 2008 for drug-related offenses. Father was on probation and was participating in a six-month out-patient substance abuse and methadone treatment program. He was awaiting placement in a residential drug rehabilitation program as a condition of his probation. Father told the social worker that he was happy caring for his sons, but was worried about their possible out-of-home placement while he would be receiving in-patient treatment.

In March 2009, Father contacted DCFS to inform the social worker that he had entered a two-week detoxification program, to be followed by a six-month residential substance abuse program. Father had left the children in the care of his cousin, G.P., who

was also the children's godmother. The children were enrolled in school, and G.P. told DCFS that she was happy to help the children and would take care of them as long as she could.

In April 2009, G.P. called DCFS and told the social worker that she required assistance caring for the children. The children needed food, clothing, shoes, backpacks, and counseling. The social worker reported that Father had failed to provide the children with the necessities of life and failed to make appropriate and adequate arrangements when he was admitted to the residential treatment facility.

On April 22, 2009, at a hearing on an amended section 300¹ petition, the dependency court ordered the children detained from Father but allowed him to have unmonitored visits so long as he tested negative for drugs. At a continued hearing the next day, the court sustained the amended petition. The court declared the children dependent, removed them from custody of their parents, and ordered them placed with G.P. Father was ordered to attend parenting and individual counseling and to submit to random drug testing.

As of September 2009, the children remained placed with G.P. and were doing well at home and school. However, G.P. was losing her home due to financial troubles and could no longer care for the children. Father had remained active in the children's lives and had taken them to the beach, parks, and for haircuts. He was in compliance with his court orders and had been seeking employment. Mother had failed to maintain contact with the children or the social worker and had missed numerous drug tests.

At the section 366.21, subdivision (e) hearing, the dependency court ordered reunification services terminated for Mother due to her lack of compliance with the case plan. Reunification services for Father were to continue. Once Father was able to find a place to live, DCFS was to assess the home and allow Father to have overnight visits if appropriate.

¹ Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

By March 2010, the children had been placed in a foster home. They were doing well at home and at school and were receiving counseling. Father had still been unable to find adequate housing. He had completed his drug program but had not been drug testing at the facility referred by DCFS. Father said that he did not have time to drug test at the facility, but that he drug tested randomly at the men's shelter where he resided. DCFS contacted the director of the shelter, who stated that Father had been taking random drug tests. Father's behavior, however, had changed. He had stopped visiting the children consistently and rarely called them, talking only for a few minutes when he did. The children were confused by the change in their Father.

At the section 366.21, subdivision (f) hearing, Father was found to be in compliance with the case plan and family reunification services were ordered continued. The dependency court admonished Father to visit the children more frequently.

A September 2010 status review report noted that the children continued to do well in their foster home and at school. Father still refused to drug test at the DCFS-referred facility. He claimed that he was working 14 hours a day seven days a week and did not have time. Father maintained that he was testing at the shelter, but the test results did not show any tests for alcohol. Furthermore, the results appeared to be altered, and some did not have dates.

Father had made better efforts to see the children. However, he would occasionally take the children for six to eight hours and bring them back unfed. He also showed up for some visits with alcohol on his breath. During one visit to the beach with the foster family, Father disappeared after about 10 minutes. After he was gone for two hours, the children became distraught, and the foster father went to look for him. Father was found sitting at a bar, albeit with no drink in front of him.

The September 2010 report further stated that a social worker had visited the shelter where Father claimed to be living. An employee informed the social worker that Father had left the shelter six weeks to two months prior, and that Father informed the shelter he was going to live in a sober living home. The employee was unable to explain how Father had drug tested at the shelter if he was not living there. Father became irate

when the social worker confronted him with this information. He admitted that he had no job and was struggling with money. He also admitted that he had been taking the children to a friend's home to stay, even though the residents of the home had not submitted to criminal background checks. Despite these problems, the children stated that, although they liked their foster family, they still preferred to be with Father.

The section 366.22 hearing was held on September 22, 2010. Father's attorney stated that carbon copies had been made of Father's drug test results, which caused the reproductions to look altered. The court clarified that Father had only been ordered to test for drugs, not alcohol. Father was asked if he had participated in a fatherhood group, and when Father responded that he had only gone to one session, the court ordered him to start attending group sessions immediately.

An October 2010 DCFS report stated that Father had not been in compliance with court orders. Father had refused to drug test at a DCFS-referred location. As a result, the social worker called the company listed on Father's drug test reports to verify their authenticity. She was informed that the company only sent kits and paperwork to customers and had no control over how the kits were used. Moreover, the entity that was supposedly conducting Father's tests, Fresh Start Ministry, was not listed as a customer. When the social worker explained the situation to Father, he finally agreed to change testing locations. He then missed his next test. Furthermore, he failed to enroll in a fatherhood group. DCFS recommended that Father's reunification services be terminated.

At a contested 366.22 hearing in November 2010, Father testified that he now had a room where the children could stay if they were returned to his care, and that he would be able to provide for their needs. He stated that he had previously drug tested once a week, more often than DCFS required, and the most recent test was the first one he had missed.

After Father testified, and after hearing argument, the court noted how Father had already received more than 18 months of reunification services. The court stated that it had no doubt Father loved and cared for the children and visited them regularly, but his

problems with drug testing, especially his refusals to test at facilities approved by DCFS, were troubling. The court was also concerned that Father had only recently started attending a fatherhood group. Consequently, the court ordered reunification services for Father terminated and set a section 366.26 hearing.

In January 2011, DCFS filed a section 388 petition requesting that the dependency court change Father's visits from unmonitored to monitored. The petition was based on a statement from Angel that Father would take him and Zachariah to the home of Father's friend, where Father would drink with friends and then transport the children back to their foster housing. Furthermore, Father missed five drug tests from October through December 2010, and when he did test in December 2010 he tested positive for alcohol and hydrocodone. The cutoff level for hydrocodone was 300, and Father's level was 1660. Upon receiving the application, the dependency court made an interim order changing Father's visits to monitored.

DCFS's initial section 366.26 report, submitted on March 2, 2011, noted how Angel was doing very well in school and had won a student of the month award. Zachariah, however, had difficulty in school when he learned he would not be reunifying with Father. The children had witnessed Father verbally assaulting their foster father, blaming him and the social worker for causing Father to lose the children.

The report further stated how the children's maternal aunt, Ruth P., and grandmother, Susan T., had both been located, as had the boys' two half sisters. The aunt and grandmother both told the social worker that, because Mother had been estranged from the family for years, they did not know the boys were in the foster care system. The grandmother previously had been granted guardianship of the two half sisters and the family had moved to Indiana. The grandmother was unable to accept Angel and Zachariah into her home because she was caring for their sick grandfather, but the aunt expressed immediate interest in caring for the boys. The aunt lived in a large, spacious home in Indiana and had the monetary means to support them. When the boys were asked if they would like to be placed with the aunt for adoption Angel was very open to the idea, but Zachariah was ambivalent, knowing that it could prevent him from returning

to Father. After receiving therapy about the future placement and loss and abandonment issues, however, Zachariah became more receptive to the idea of moving to Indiana. An adoption home study could only be initiated by the State of Indiana if parental rights were terminated, so DCFS recommended termination.

A further report from May 2011 related how the children were very excited about connecting with their sisters, maternal grandparents, aunt, and cousins in Indiana. The aunt and a sister had come to visit during spring break and they all had a good time. Meanwhile, Father continued to frequently miss drug tests. One test he did submit to, in March 2011, came back with all negative results. He continued to visit the children frequently, missing only one visit. The children reported that they enjoyed their visits with Father.

In June 2011, DCFS provided last-minute information for the court that the maternal aunt had maintained regular contact with the children and was eager to adopt them. Meanwhile, Father had recently been arrested twice. The first time was in May 2011 in El Monte for receiving stolen property, and the second arrest was in June 2011 in Arcadia for burglary.

The section 366.26 hearing had been scheduled for June 29, 2011, but was continued. During the month of August, the children visited with their aunt and other relatives in Indiana, and greatly enjoyed their time there. After their return, they told the social worker that they would like to live with their aunt on a permanent basis. The aunt continued to express interest in placement and adoption, and her home study was in the process of being completed.

An October 2011 continued section 366.26 report stated that Father had continued to visit the children on a weekly basis, but the quality of the visits was lacking. During visits, Father would hug the children when he first saw them but would not interact with them much after the hug. A further status review report noted how the children told the social worker that they could not wait to move to Indiana to live.

The contested section 366.26 hearing was held on October 19 and November 1, 2011. Father's counsel argued that parental rights should not be terminated because

Father had a beneficial relationship with the children. Mother's counsel joined in Father's argument, while minors' counsel and counsel for DCFS argued that termination of parental rights was necessary so that the children could be adopted and live with their aunt in Indiana. The court found that Father had consistently visited the children, but the nature and quality of their relationship did not rise to the level of a parenting relationship. Furthermore, the children's need for stability and permanence far outweighed a continued relationship with Father. The court found that the children were adoptable and would be adopted, and terminated parental rights.

Father timely appealed from the order terminating parental rights.

DISCUSSION

On appeal from an order terminating parental rights, we determine if there is any substantial evidence to support the conclusions of the dependency court. All conflicts are resolved in favor of the prevailing party and all legitimate inferences are drawn to uphold the lower court's ruling. (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732; *In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.) We cannot reweigh the evidence or substitute our judgment for that of the trial court. (*In re Jamie R.* (2001) 90 Cal.App.4th 766, 774.)

At the selection and implementation hearing under section 366.26, subject to certain exceptions, the court must select adoption as the permanent plan and terminate parental rights if it finds that a child is likely to be adopted. (§ 366.26, subd. (c)(1); *In re Celine R.* (2003) 31 Cal.4th 45, 49; *In re Jamie R.*, *supra*, 90 Cal.App.4th at p. 773.) Adoption, when possible, is the permanent plan preferred by the Legislature. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826; *In re Ronell A.* (1995) 44 Cal.App.4th 1352, 1368.) A parent may avoid termination of parental rights by showing that termination would be detrimental to the child. (*In re Celine R.*, *supra*, 31 Cal.4th at p. 53.)

Father contends that the dependency court erred because it did not rule in his favor pursuant to the "beneficial relationship exception" found at section 366.26, subdivision (c)(1)(B)(i), which applies when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

Father bears the burden of showing that this statutory exception applies, and that termination would be detrimental to the children. (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 826; *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252.)

There is little question from the record that Father consistently visited the children and made efforts to reunify with them. It is also clear that Father loves the children, and that they love him. Nevertheless, we find that the trial court's decision to terminate parental rights was supported by substantial evidence.

In his opening brief, Father asserts that we should consider four factors identified in *In re Angel B.* (2002) 97 Cal.App.4th 454, 467, to determine whether a beneficial relationship existed that would preclude termination of parental rights. These four factors 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." (*Ibid.*, fn omitted.) Applying these factors, Angel was 13 at the time of the section 366.26 hearing and Zachariah was nine. The children were old enough to have developed a close relationship with Father, and so the first factor would favor him. The second factor was more evenly balanced. Although the children had significant contact with Father, they spent most of their earlier lives with Mother, staying with Father only on weekends. Further, leading up to the section 366.26 hearing, they had spent most of their time living with their foster family.

The third and fourth factors strongly weighed in favor of termination. Father and the children's interactions with each other were generally positive emotionally, but Father never showed that he was capable of caring for them. Indeed, many of the interactions were negative in consequence. Father would take the children for long periods of time without feeding them. He would show up to visits with alcohol on his breath and then take the children to his friend's house, where he would drink alcohol and then transport the children back to their foster family. There was also the visit to the beach where Father disappeared, causing the children great anxiety.

Furthermore, Father's repeated refusal to drug test at DCFS-referred facilities, his positive test for hydrocodone, his many missed drug tests, and his two arrests prior to

termination were further evidence of the negative effect of the relationship and Father's inability to meet the children's needs. The beneficial relationship exception is not a means for a parent to avoid the consequences of having failed to reunify. (See *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) Father did not demonstrate that he would be able to lead a responsible, drug-free life if his parental rights were maintained.

Moreover, the children's particular needs militated in favor of termination. "DCFS is *not* required to produce evidence demonstrating that a minor would *not* benefit from continued parental contact. [Citation.] [¶] To overcome the preference for adoption and avoid termination of the natural parent's rights, 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.] 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, original italics.) A parent who wishes to invoke the beneficial relationship exception must show 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 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." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

Because the State of Indiana required termination of parental rights before initiating an adoption home study, adoption by the maternal aunt could only go forward if

Father's parental rights were terminated. This, in itself, would likely be insufficient to justify the termination of parental rights. But there were further substantive reasons supporting termination. Father's living situation was precarious, and he had apparently not kicked his drug problem. In contrast, the maternal aunt could provide a stable and safe home for the boys. Although the boys expressed love for Father, they also both agreed that they would like to move to Indiana and be adopted by the aunt. They enjoyed their visits with the aunt and the month they spent living with her. In Indiana, they could be around their sisters, their grandparents, and cousins. The boys likely benefited to some degree from their relationship with Father, but he had not met their need for a parent. Therefore, the termination of parental rights, which would allow the boys to be adopted, was justified.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.