Filed 10/14/15 In re Isaac G. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re ISAAC G., a Person Coming Under the Juvenile Court Law.	B262359 (Los Angeles County Super. Ct. No. CK27448)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MARIA G., Defendant and Appellant.	

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

Johanna R. Shargel, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, Interim County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Melinda A. Green, Deputy County Counsel, for Plaintiff and Respondent.

Maria G. appeals from the juvenile court order terminating her parental rights to her nine-year-old son Ryan G.[1] pursuant to Welfare and Institutions Code section 366.26,[2] contending the court erred in failing to consider Ryan's wishes at the termination hearing and failing to apply the parent-child relation exception to termination (§ 366.26, subd. (c)(1)(B)(i)). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Initiation of Dependency Proceedings*; *Maria's Efforts To Comply with the Case Plan*

On April 22, 2011, after receiving a referral of general neglect, the Los Angeles County Department of Children and Family Services (Department) initiated dependency proceedings on behalf of then five-year-old Ryan and his 16-year-old stepbrother and 14-year-old sister pursuant to section 300, subdivisions (b) (failure to protect) and (g) (no provision for support), alleging the children were at risk due to Maria's abuse of methamphetamine. The reporting party had stated Ryan's sister was crying and did not want to go to school because Maria was waiting for a man to come to the family home to exchange drugs for sex. The reporting party also stated Ryan's siblings were aware of Maria's drug abuse.[3] Although Maria denied the allegations and Ryan's sister admitted she had lied "a little bit," Maria tested positive for methamphetamine. Maria, however, insisted she had not used illegal drugs for four years. The court detained the children, and they were placed with their adult sibling Julian.

On May 17, 2011, after Maria waived her trial rights and agreed to a disposition plan that included drug rehabilitation and random drug testing, the court sustained the

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1 We refer to Isaac as "Ryan," which is his middle name, as he has been throughout most of the proceedings. Ryan's father's parental rights were also terminated. The father is not a party to this appeal.

2 Statutory references are to this code.

3 Maria has a history with the Department. In March 1997 Maria's three older children were declared dependents of the juvenile court after their home, which was being used to manufacture drugs, caught fire. The children were returned to Maria's home in March 1999, and jurisdiction was terminated in December 1999.

petition, declared the children dependents of the court and ordered the Department to provide Maria with family reunification services. According to documents attached to an August 2011 interim review report, Maria had entered an outpatient drug treatment program on May 3, 2011, but was expelled from the program a month later for noncompliance, including failing to show for three random drug tests and testing positive for methamphetamine on three occasions. Maria then entered a residential treatment program on June 28, 2011, but was dismissed 12 days later for failing to follow the rules and arguing with the program's supervisor.

In mid-November 2011, in connection with the six-month review hearing (§ 366.21, subd. (e)), the Department reported Maria had admitted using methamphetamine on September 29, 2011 and had enrolled in an inpatient treatment program in late October. She was regularly visiting the children. In its report for the May 5, 2012 12-month, permanency review hearing (§ 366.21, subd. (f)), the Department stated Maria had successfully completed the drug treatment program on April 29, 2012 and had tested negative for drugs. The Department liberalized visits, and the children spoke positively about Maria. In accordance with the Department's recommendation, the court released the children to Maria with a home-of-parent order, subject to her continuing to comply with her case plan. The court ordered the Department to provide family maintenance services.

In mid-November 2012, prior to the section 364 review hearing, the Department reported Maria had missed several drug tests and tested positive for methamphetamine on September 6, 2012. At the hearing the court ordered that Maria, who was completing the intake process for another substance abuse treatment program, continue to receive family maintenance services. On December 19, 2012, however, the court ordered Ryan and his sister detained from Maria after the Department filed a supplemental petition under section 387 alleging she had tested positive for methamphetamine on November 29, 2012 and had been under the influence of illegal drugs while caring for the children. Ryan and his sister were placed with their paternal aunt. On March 8, 2013 the court sustained the section 387 petition as amended after Maria waived her rights.

In its reports for the combined May 14, 2013 hearings (the 18-month permanency review hearing on the original petition (§ 366.22) and disposition on the section 387 petition), the Department stated Maria had been attending an outpatient substance abuse treatment program and testing negative for drugs. Although Ryan wanted to return home to Maria, the Department believed Maria was "not stable and ha[d] not yet learned new techniques to cope with life's challenges." The Department explained, "The children need their mother to be available drug free. The children have high level needs and have serious ongoing issues."[4] The paternal aunt indicated Ryan, who liked living with her notwithstanding his desire to return home to Maria, could stay with her as long as necessary. At the hearing the court terminated Maria's reunification services because the statutory time limit for services had been exceeded and set a permanent plan selection and implementation hearing (§ 366.26) for September 10, 2013.

2. *The Selection and Implementation Hearing*; *Termination of Maria's Parental Rights*

On September 10, 2013 the court continued the section 366.26 hearing for six months to permit the Department more time to determine a permanent plan for Ryan and his sister. The paternal aunt had informed the Department she was no longer interested in adopting Ryan because she was having a difficult time with Maria with respect to visitation and had "exhausted efforts in trying to work with her."

On February 10, 2014 Maria filed a section 388 petition requesting the children be returned to her custody or, alternatively, she be provided further reunification services and unmonitored overnight visitation. Maria asserted she had complied with the court-ordered case plan and had proved she was "clean and sober." She insisted her children were "her first priority," and wanted to be a "positive influence [in] their lives." Maria, however, had been arrested for possession of cocaine for sale three weeks earlier. On March 11, 2014, after considering Maria's argument she had not been charged with the commission of any crime and her challenge to the description of the incident in the police

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4 For instance, Ryan's sister was diagnosed with bipolar disorder and had attempted suicide.

report, the court denied the section 388 petition. The court continued the selection and implementation hearing for Ryan until June 10, 2014 to allow the Department more time to assess the best permanent plan for him and ordered it to interview Ryan regarding his wishes.

For the June 10, 2014 hearing the Department reported the paternal aunt was now committed to adopting Ryan despite being physically and verbally bullied and threatened by family members, including Maria and her daughter. The Department further reported, "Ryan is comfortable in the home. He is thriving and stable. When visitations with relatives are unmonitored, he misbehaves and does not comply with school and home rules. [¶] Ryan has stated that he loves his current home but does miss his mom. . . . He has stated that he does not wish to live anywhere else that is not his aunt's house if he cannot return to his mom." The selection and implementation hearing was continued yet again, however, because the home study had not been completed. The hearing was continued two more times, including to allow for proper notice to Ryan's father, until February 23, 2015.

In reports prepared for the February 23, 2015 hearing the Department stated the adoption home study had been approved and there were no impediments to the paternal aunt adopting Ryan. Ryan continued to have once or twice monthly monitored visits with Maria and his sister, but the social worker had observed they did not "play or interact much with Ryan[;] they mainly observe him play and interact with the other children." A November 7, 2014 letter from Ryan's therapist stated Ryan had been assessed in September 2014 because he had symptoms and behaviors including sadness, irritability, guilt, and angry outbursts that impacted his daily functioning at home and school. "Ryan also stated feeling 'nervous' after his visitations from his mother and 'worried' about 'hurting her feelings' if he agreed with the adoption by his aunt. His treatment goals were developed towards helping him reduce his symptoms of anxiety, and his angry reactions and disruptive behaviors at home and school. Ryan had made some progress towards his goals, while experiencing moderate setbacks in the past

month, possibly stemming from his apparent conflicting thoughts and feelings related to his mother and being formally adopted by his aunt."

At the contested hearing counsel for Maria stated she had wanted to call Ryan to testify but he was not present in court. After noting Ryan had not been ordered to appear at the hearing, the court stated, "[H]e's nine years of age[.] [W]hatever issues this child has [are] not relevant to the .26." Maria's counsel argued, "I do think that Mother has a right to have Ryan called to testify to the nature of his relationship with not just his mother and his sibling but the family as a whole, if he understands what adoption is and for the court to assess his wishes. The report does not address what Ryan's wishes are. And under the code 366.26 that is something the court is required to consider." Ryan's counsel responded, "[T]his is a nine-year-old child. I do represent him so I can speak as to him. He's a very conflicted child. As we all know, when it's an adoption of an older child and very familiar with the family, they visit with their family there is a conflict there. That's not to say that he is not in a good placement right now and thriving in his current placement. And there [have] been lots of issues in the past with family visits."

The court found by clear and convincing evidence that Ryan was likely to be adopted, ordered adoption as his permanent plan and terminated the parental rights of Maria and Ryan's father (including any identity unknown father).

DISCUSSION

1. *Governing Law*

Section 366.26 governs the juvenile court's selection and implementation of a permanent plan for a dependent child. The express purpose of a section 366.26 hearing is "to provide stable, permanent homes" for dependent children. (§ 366.26, subd. (b).) Once the court has decided to end parent-child reunification services, the legislative preference is for adoption. (§ 366.26, subd. (b)(1); *In re Celine R.* (2003) 31 Cal.4th 45, 53 ["[I]f the child is adoptable . . . adoption is the norm. Indeed, the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to the child."]; see *In re Marilyn H.* (1993) 5 Cal.4th

295, 307 [once reunification efforts have been found unsuccessful, the state has a "compelling" interest in "providing stable, permanent homes for children who have been removed from parental custody" and the court then must "concentrate its efforts . . . on the child's placement and well-being, rather than on a parent's challenge to a custody order"]; *In re G.B.* (2014) 227 Cal.App.4th 1147, 1163.)

Section 366.26 requires the juvenile court to conduct a two-part inquiry at the selection and implementation hearing. First, it determines whether there is clear and convincing evidence the child is likely to be adopted within a reasonable time. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249-250; *In re D.M.* (2012) 205 Cal.App.4th 283, 290.) Then, if the court finds by clear and convincing evidence the child is likely to be adopted, the statute mandates judicial termination of parental rights unless the parent opposing termination can demonstrate one of the enumerated statutory exceptions applies. (§ 366.26, subd. (c)(1)(A) & (B); see *Cynthia D.*, at pp. 250, 259 [when child adoptable and declining to apply one of the statutory exceptions would not cause detriment to the child, the decision to terminate parental rights is relatively automatic].)

One of the statutory exceptions to termination is contained in section 366.26, subdivision (c)(1)(B)(i), which permits the court to order some other permanent plan if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." The "benefit" prong of the exception requires the parent to prove his or her relationship with the child "'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 Marcelo B.* (2012) 209 Cal.App.4th 635, 643; accord, *In re Amber M.* (2002) 103 Cal.App.4th 681, 689; see *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 ["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"].)

A showing the child derives some benefit from the relationship is not a sufficient ground to depart from the statutory preference for adoption. (See *In re Angel B.* (2002)

97 Cal.App.4th 454, 466 ["[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"].) No matter how loving and frequent the contact, and notwithstanding the existence of an "'emotional bond'" with the child, "'the parents must show that they occupy "a parental role" in the child's life.'" (*In re K.P.* (2012) 203 Cal.App.4th 614, 621.) Factors to consider include "'[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.'" (*In re Marcelo B.*, *supra*, 209 Cal.App.4th at p. 643.)

The court is required to "'consider the child's wishes to the extent ascertainable' prior to entering an order terminating parental rights." (*In re Leo M.* (1993) 19 Cal.App.4th 1583, 1591; see *In re Amber M.*, *supra*, 103 Cal.App.4th at p. 687; see generally § 366.26, subd. (h)(1).) To that end, the dependency statutes also require that an assessment prepared for a section 366.26 hearing include a "statement from the child concerning placement and the adoption or guardianship, . . . unless the child's age or physical, emotional or other condition precluded his or her meaningful response, and if so, a description of the condition." (§§ 366.21, subd. (i)(1)(E), 366.22, subd. (c)(1)(E).) Further, section 317, subdivision (e), regarding the responsibilities of the dependent child's counsel, states, if the child is four years of age or older, counsel must interview the child to determine the child's wishes and assess the child's well-being and advise the court of the child's wishes. Notwithstanding a child's wishes, however, "[b]ecause 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.* (2000) 78 Cal.App.4th 1339, 1350; accord, *In re C.B.* (2010) 190 Cal.App.4th 102, 122; see *In re Celine R.*, *supra*, 31 Cal.4th at p. 53 ["[t]he statutory exceptions merely permit the court, in *exceptional circumstances* [citation] to choose an option other than the norm, which remains adoption"].)

2. *Maria Failed To Establish the (c)(1)(B)(i) Exception to Termination of Parental Rights*

The parent has the burden of proving the statutory exception applies. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) The court's decision a parent has not satisfied this burden may be based on either or both of two component determinations—whether a beneficial parental relationship exists and whether the existence of that relationship constitutes "a compelling reason for determining that termination would be detrimental to the child . . . ." (§ 366.26, subd. (c)(1)(B); see *In re K.P.*, *supra*, 203 Cal.App.4th at p. 622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.) When the juvenile court finds the parent has not established the existence of the requisite beneficial relationship, our review is limited to determining whether the evidence compels a finding in favor of the parent on this issue as a matter of law. (See *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527-1528.)[5] When the juvenile court concludes the benefit to the child derived from preserving parental rights is not sufficiently compelling to outweigh the benefit achieved by the permanency of adoption, we review that determination for abuse of discretion. (*In re K.P.*, at pp. 621-622; *In re Bailey J.*, at pp. 1314-1315.)

Maria contends the evidence established she had maintained regular visitation and contact with Ryan, demonstrating she was dedicated to visiting him whenever possible

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5 Because the juvenile court's factual determinations are generally reviewed for substantial evidence, it has often been posited a challenge to a finding that no beneficial relationship exists is similarly reviewed for substantial evidence. (See, e.g., *In re Bailey J., supra,* 189 Cal.App.4th at p. 1314; *In re Jasmine D., supra,* 78 Cal.App.4th at p. 1351.) Indeed, Maria argues there was substantial evidence to support the subdivision (c)(1)(B)(i) exception. The parent's failure to carry his or her burden of proof on this point, however, is properly reviewed, as in all failure-of-proof cases, for whether the evidence compels a finding in favor of the appellant as a matter of law. (See *Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838 ["where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law"]; *In re I.W., supra,* 180 Cal.App.4th at pp. 1527-1528 [same].)

and the visits were consistently appropriate and did not raise any concerns. Maria's twice monthly visits, however, were monitored and not without incident. The paternal aunt had refused to monitor visits because of the abuse from Maria and Ryan's sister, and Ryan's therapist reported he was nervous after the visits.[6] Moreover, absent extraordinary circumstances not present here, twice monthly supervised visitation does not create the opportunity for a mother or father to assume a parental role in the child's life and is thus insufficient to outweigh the statutory preference for adoption. (See *In re K.P.*, *supra*, 203 Cal.App.4th at p. 621 ["[t]he relationship that gives rise to this exception to the statutory preference for adoption 'characteristically aris[es] from day-to-day interaction, companionship and shared experiences'"]; *In re Casey D.* (1999) 70 Cal.App.4th 38, 51 [while day-to-day contact is not required, it is difficult to demonstrate a beneficial parent-child relationship when visits remain monitored]; *In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1109 [parent's failure to progress beyond monitored visitation with a child and to fulfill a "meaningful and significant parental role" justifies order terminating parental rights].)[7] Additionally, there was no evidence termination of Maria's rights would deprive Ryan "of a *substantial,* positive emotional attachment such that the child would be *greatly* harmed" (*In re Angel B., supra,* 97 Cal.App.4th at p. 466 [italics in original].) To be sure, although Ryan spoke positively about Maria, he also liked his paternal aunt

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6 The record also suggests Maria and Ryan's sister were talking with him about the status of the case during their visits, which could have contributed to Ryan's anxiety. At the August 25, 2014 hearing, after Ryan's counsel raised a concern, the court admonished Maria, "[T]hese visits are for you and your son only. And you may not have any discussion of any of the facts of the case with your son. . . . Do not make any comments regarding the child and where he is and what is going to happen to him in the future. You can rest assured I will order the social worker to stop the visits and you will have no more visits."

7 Maria assert she picked Ryan up from school and cooked for him during the dependency proceedings. Maria's citations to the record, however, reveal this had occurred in April and May 2012, when Maria was in compliance with her case plan, and in January 2013, the month after Ryan had been removed and placed with his paternal aunt. Maria fails to identify evidence in the record demonstrating this was characteristic of their interaction during the period before her parental rights were terminated.

and was thriving in her home. The conflict Ryan experienced as a result of being in an unresolved situation contributed to his anxiety. Given Maria's hostility toward the paternal aunt, that anxiety was not going to be ameliorated short of implementing a permanent plan for Ryan.

3. *The Record Before the Court Contained Sufficient Information About Ryan's Wishes, and the Court's Comment They Were Irrelevant Was Harmless Error*

Maria emphasizes that Ryan was not present at the selection and implementation hearing when it was finally held on February 23, 2015 even though the court had twice ordered his appearance and never withdrew or modified that order. She further notes the Department's final report for the selection and implementation hearing did not include an interview with Ryan regarding his plan preferences, but only cursorily reported he had stated, "I like living with my aunt. I miss my family." Maria argues the court's refusal to continue the hearing to allow Ryan to testify, or at least to require an interview exploring his relationship with her and his paternal aunt, and its comment Ryan's wishes were irrelevant constituted prejudicial error.

The child's wishes regarding adoption "need not be in the form of direct testimony in court or chambers; it can be found in court reports prepared for the hearing." (*In re Amanda D.* (1997) 55 Cal.App.4th 813, 820; see *In re Leo M.*, *supra*, 19 Cal.App.4th at pp. 1591-1592.) Here, the record contained evidence describing Ryan's feelings from which his wishes about adoption could be readily inferred. (See *In re Leo M.*, at p. 1594 ["even though Leo did not directly express his wishes, it is a reasonable and compelling inference on this evidence that Leo would prefer to live with the only mother and father he has acknowledged"].) Ryan had told the Department he liked living with his paternal aunt, but he also spoke positively about his mother. At one point he had said he wanted to live with his aunt if he could not be returned to his mother's home. Ryan's therapist, however, reported Ryan was worried about hurting his mother's feelings if he "agreed with the adoption." As Ryan's counsel aptly summarized it, Ryan was a conflicted child. He had positive experiences with both his mother and aunt, but the lack of resolution caused him anxiety. It is hard to imagine what more Ryan

could have said had he been put through the trauma of testifying in court, as Maria preferred, or coaxed by the Department to say more in an interview. The court did not abuse its discretion in declining to continue the hearing to order Ryan to be present or to have the Department conduct a more formal interview.

The court, nevertheless, was clearly incorrect in stating "whatever issues [Ryan] has [are] not relevant to the .26." The juvenile court is required to consider a child's wishes before terminating parental rights to the extent ascertainable (§ 366.26, subd. (h)(1); *In re Leo M.*, *supra*, 19 Cal.App.4th at p. 1591). On this record, however, the court's misstatement was not prejudicial. As discussed, Ryan's conflicting views toward living with his aunt rather than with his mother were set out in the reports before the court, which the court said at the outset of the February 23, 2015 hearing it had read and considered. Whatever the court actually meant by its statement regarding Ryan's "issues," made in response to the request for yet another continuance to permit Maria to offer Ryan's live testimony, we must presume the court in fact read those reports and was aware of Ryan's preferences and concerns. (See Evid. Code, § 664; cf. *In re S.B.* (2009) 174 Cal.App.4th 808, 812-813.) Moreover, the court is not required to conform its order to the child's wishes unless he or she is 12 years of age or older and objects to termination of parental rights. (§ 366.26, subd. (c)(1)(B)(ii).) Given the statutory preference for adoption if, as here, a child is adoptable and the court's appropriate exercise of discretion in declining to continue the hearing to permit Ryan to testify, it is not reasonably probable a different result would have occurred in the absence of the that misstatement. (Cal. Const., art. VI, § 13; *In re Celine R.*, *supra*, 31 Cal.4th at pp. 59-60.)

DISPOSITION

The juvenile court's order is affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J.

BECKLOFF, J.*

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