Filed 7/17/15 In re Victoria C. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re VICTORIA C., et al., Persons Coming Under the Juvenile Court Law.	B257367 (Los Angeles County Super. Ct. No. CK57497)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RICHARD C., Defendant and Appellant. VICTORIA C. et al., Defendants and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County, Rudolph Diaz, Judge. Affirmed.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Defendant and Appellant Richard C.

Janette Freeman Cochran, under appointment by the Court of Appeal, for Defendants and Appellants Victoria C., et al.

Tarkian & Associates and Arezoo Pichvai for Plaintiff and Respondent.

INTRODUCTION

Richard C. (father) appeals from a juvenile court order terminating his parental rights over six-year-old Joseph C. and four-year-old Nathaniel C. pursuant to Welfare and Institutions Code[1] section 366.26. Joseph's and Nathaniel's older siblings—16-year-old Victoria C., 14-year-old Monique C. and 12-year-old Richard C. (siblings)—also challenge the order. Father and the siblings contend the court erred in denying father's section 388 petition for modification and they argue the court should have applied the "sibling benefit exception" to adoption (see § 366.26, subd. (c)(1)(B)(v)). We conclude the juvenile court's findings were supported by substantial evidence and, therefore, affirm.

FACTS AND PROCEDURAL BACKGROUND

Father has six children with Dawn C. (mother): Victoria (born February 1999); Monique (born February 2001); Richard (born June 2002); Joshua (born August 2005); Joseph (born September 2008); and Nathaniel (born July 2010). Joshua is not a party to the older siblings' appeal.

The family initially came to the juvenile court's attention in December 2004, when the Department filed a section 300 petition on behalf of Victoria, Monique and Richard, alleging mother physically abused Victoria by striking the child about her body with a belt, while father failed to protect the child. The petition further alleged that father and mother had a history of domestic violence and that father had struck mother on a prior occasion. The juvenile court sustained the allegations, and sustained a subsequent petition filed on behalf of Joshua in 2007.

In December 2008, the Department filed a section 300 petition on behalf of Joseph, and a section 342 petition on behalf of Victoria, Monique, Richard and Joshua, alleging father inappropriately physically disciplined Victoria by striking her on the arm with an object, inflicting bruises. The petition also alleged that mother and father had a

[1] Statutory references are to the Welfare and Institutions Code unless otherwise indicated.

history of domestic violence, and that the parents had engaged in an altercation in the children's presence, resulting in father's arrest and conviction. The court sustained the allegations, removed the children from father's custody and ordered them placed with mother, with family reunification services and monitored visits for father.

On June 5, 2009, the Department filed a section 387 petition on behalf of the children alleging mother allowed father to reside in the home in violation of the court's order. The court ordered the children detained in foster care.

On June 19, 2009, the Department placed Victoria, Richard and Joseph in the foster home of Candace M. and Dennis M. Mr. and Mrs. M. were later approved as prospective adoptive parents for Joseph and Nathaniel, and we refer to them as such for the remainder of this opinion.

On August 13, 2009, the court sustained the section 387 petition, and ordered the children removed from mother's and father's custody with monitored visits for the parents. The court also ordered family reunification services with respect to Joseph only.

On October 2, 2009, the court found that father had failed to visit Joseph and had not made significant progress in resolving the problems that led to Joseph's removal. Accordingly, the court terminated father's family reunification services and set a section 366.21, subdivision (e) review hearing for Joseph.

On July 9, 2010, the court ordered Victoria, Monique, Richard and Joshua released to their maternal grandparents in Florida under the Interstate Compact on the Placement of Children (ICPC). Joseph remained placed with the prospective adoptive parents, and periodically spoke with his older siblings by telephone.

On July 28, 2010, mother gave birth to Nathaniel. Mother admitted that father was Nathaniel's biological father, but stated she did not have contact with father and did not know his whereabouts. In lieu of the Department filing a dependency petition with respect to Nathaniel, mother entered into a voluntary family maintenance agreement.

On October 3, 2010, a Department social worker visited mother's home and found father lying on the sofa, in violation of the family maintenance agreement. The Department detained Nathaniel and, on October 7, 2010, placed him in the prospective adoptive parents' home with Joseph. On October 13, 2010, the Department filed a dependency petition on behalf of Nathaniel. Father started having regular weekly visits with Joseph and Nathaniel on October 28, 2010.

On November 7, 2010, Richard was replaced in the prospective adoptive parents' home with Joseph and Nathaniel.

On January 10, 2011, father tested positive for marijuana use. He admitted that he smoked marijuana when he became "stressed" but maintained it was "better than [drinking] alcohol." The Department filed a section 342 petition as to Joseph and Nathaniel based on father's positive drug test. The court sustained the petition.

On June 16, 2011, mother filed a section 388 petition, requesting, among other things, unmonitored visits with all children. The court granted the petition and ordered the unmonitored visits for mother, with discretion vested in the Department to liberalize. On June 27, 2011, mother's visits were liberalized to unmonitored overnight visits with Nathaniel. On July 26, 2011, the four oldest children—Victoria, Monique, Richard, and Joshua—returned to mother's custody. Joseph and Nathaniel remained placed with the prospective adoptive parents.

On November 6, 2011, father showed up to mother's home highly intoxicated. Police arrested father for violating a restraining order, at which time father admitted that he had consumed excessive amounts of alcohol. The officers also found marijuana in father's possession.

In February 2012, the Department detained the four oldest children when mother left them without appropriate supervision while she visited Mexico. The Department filed a section 387 petition, which the court sustained on April 9, 2012. The court ordered an expedited ICPC to place the four older children with the maternal grandparents in Florida.

On May 2, 2012, the court terminated reunification services for all six children. The court granted the prospective adoptive parents de facto parent status as to Joseph and Nathaniel and set a section 366.26 hearing for the children. The court also found that Victoria, Monique, Richard and Joshua were a sibling group. The older siblings had weekly visits with Joseph and Nathaniel.

On September 13, 2012, mother informed the Department that she was still in Mexico and that she was in agreement with the plan of adoption for Joseph and Nathaniel.

After several continuances, on July 11, 2013, the section 366.26 hearing for Joseph and Nathaniel came on calendar. Father requested a contested hearing and continuance to file a section 388 petition. The court ordered adoption as the permanent plan for Joseph and Nathaniel and set the contested section 366.26 hearing for September 23, 2013.

On September 20, 2013, father filed a section 388 petition for modification of the court order terminating reunification services. Father attached evidence to his petition showing that he enrolled in an outpatient drug and alcohol program in February 2013 and that he completed a 52-week domestic violence counseling program for batterers.

After several more continuances, on March 4, 2014, the court began the contested hearing on father's section 388 petition. Hearings continued on March 5, March 11, March 24, April 22, May 16, May 19, May 27, June 4, June 18 and June 20 of 2014. In addition to father, Victoria, Monique and Richard testified about their weekly visits with Joseph and Nathaniel. All three siblings testified that they enjoyed their visits and would miss Joseph and Nathaniel if they were adopted. Victoria and Richard acknowledged that the prospective adoptive parents had agreed to allow the sibling visits to continue after adoption and they believed the adoptive parents would keep their word.

On June 19, 2014, the juvenile court denied father's section 388 petition as to Joseph and Nathaniel.[2] Though the court found that Joseph and Nathaniel had developed a sibling relationship with the other children, it concluded that modifying the order to reinstate father's reunification services would disrupt the permanency the children had enjoyed for several years in the prospective adoptive parents' home. Accordingly, the court found the proposed modification would not be in Joseph's and Nathaniel's best interests.

On June 20, 2014, the court completed the section 366.26 hearing for Joseph and Nathaniel. The court found the children were likely to be adopted and that the bond they had developed with their prospective adoptive parents was "substantially significant, and certainly that bond . . . outweighs the bonds that the children, the siblings, and the father may have with Joseph and Nathaniel." Accordingly, the court terminated father's parental rights and freed Joseph and Nathaniel for adoption. Father and the siblings appealed.

DISCUSSION

1. *Substantial Evidence Supports the Juvenile Court's Finding that Modifying the Existing Disposition Order Was Not in the Children's Best Interests; The Court Properly Denied Father's Section 388 Petition*

Father and the siblings contend the juvenile court erred by concluding Joseph's and Nathaniel's best interests would not be served by modifying the existing order to reinstate father's reunification services. They principally argue the court ignored the relationship Joseph and Nathaniel had with father and the siblings, and "devalued" the children's interest in "preserving an existing family unit," which they implicitly claim should have been the dispositive factor in granting father's section 388 petition. We disagree.

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[2] The court granted father's section 388 petition as to Victoria, Monique, Richard and Joshua, and reinstated reunification services as to the sibling group.

"A juvenile court dependency order may be changed, modified, or set aside at any time. (§ 385.) A parent may petition the court for such a modification on grounds of change of circumstance or new evidence. (§ 388, subd. (a).) The parent, however, must also show that the proposed change would promote the best interests of the child. (§ 388, subd. (a)(2); *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.)" (*In re J.C.* (2014) 226 Cal.App.4th 503, 525 (*J.C.*).)

Whether the juvenile court should modify a prior order rests within its discretion, and its determination will not be disturbed unless there has been a clear abuse of discretion. (*J.C., supra*, 226 Cal.App.4th at p. 525; *In re Stephanie M.* (1994) 7 Cal.4th 295, 318 (*Stephanie M.*).) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479; *Stephanie M.*, at pp. 318-319.)

Our Supreme Court's discussion in *Stephanie M.* about the change in focus following the termination of reunification services necessarily frames the best interest analysis in the context of a section 388 petition brought, as in this case, on the eve of a section 366.26 hearing. As the high court explained, "[a]fter the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability' [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. [Citation.] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child." (*Stephanie M., supra*, 7 Cal.4th at p. 317.) We conclude the juvenile court in this case properly focused on Joseph's and Nathaniel's overriding interest in stability when it denied father's section 388 petition.

The evidence before the juvenile court showed that Joseph and Nathaniel had spent the majority of their young lives in the care and custody of their prospective adoptive parents, beginning when Joseph was ten months old and Nathaniel was just two months old. Since their placement, neither child had ever returned to father's (or mother's) physical custody. The Department reported both children had a strong bond with the prospective adoptive parents and had grown to be an integral part of the adoptive parents' family. The adoptive parents had cared for and nurtured Joseph and Nathaniel for most of their lives; they had potty trained Joseph and ensured that he attended Head Start on a daily basis, and they provided a stable home for Nathaniel where he slept well through the night, maintained a healthy appetite, and played and bonded with the other toddlers in the home. While father and the siblings had maintained weekly one-hour visits with Joseph and Nathaniel during a substantial part of these protracted dependency proceedings, this fact does not establish that the juvenile court acted unreasonably by giving greater weight to the evidence concerning the consistency and stability Joseph and Nathaniel enjoyed in their prospective adoptive parents' home. On the contrary, the court's focus on stability was entirely consistent with our Supreme Court's analysis in *Stephanie M.* (See *Stephanie M., supra,* 7 Cal.4th at p. 317.)

For this reason we reject father's and the sibling's contention that the factors delineated by the appellate court in *In re Kimberly F.* (1997) 56 Cal.App.4th 519 (*Kimberly F.*) dictated a different finding with respect to Joseph's and Nathaniel's best interests.[3] As the court explained in *J.C.*, the *Kimberly F.* factors cannot be dispositive at this stage of a dependency proceeding because "they do not take into account the Supreme Court's analysis in *Stephanie M.*, [which is] applicable after reunification efforts have been terminated." (*J.C., supra,* 226 Cal.App.4th at p. 527.) While it is true

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[3] The *Kimberly F.* factors include "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*Kimberly F., supra,* 56 Cal.App.4th at p. 532.)

that dependent children and their biological family share a fundamental interest in reuniting, those interests have diverged in critical ways by the time the court terminates reunification efforts and sets a section 366.26 hearing to select and implement a permanent plan. (*Ibid.*) "[C]hildren have a fundamental independent interest in belonging to a family unit [citation], and they have compelling rights to . . . have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) "Adoption gives a child the best chance at a full emotional commitment from a responsible caretaker." (*J.C.*, at p. 527.) "Consequently, after reunification efforts have terminated, the court's focus shifts from family reunification toward promoting the child's needs for permanency and stability." (*Ibid.*; *Stephanie M., supra,* 7 Cal.4th at p. 317.) The juvenile court properly accounted for this shift when it denied father's section 388 petition with respect to Joseph and Nathaniel. We find no abuse of discretion.

2. *Substantial Evidence Supports the Juvenile Court's Finding that Adoption Promoted the Children's Best Interests; The Court Properly Rejected the Sibling Benefit Exception in Terminating Father's Parental Rights*

A section 366.26 hearing proceeds on the premise that the efforts to reunify the parents and child are over, "and the focus of the hearing is on the long-term plan for care and custody." (*In re Jasmine J.* (1996) 46 Cal.App.4th 1802, 1808.) As a general rule, "[t]he court must . . . terminate parental rights if clear and convincing evidence shows that it is likely that the minor will be adopted." (*Ibid.*) "Because 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.)

We review a juvenile court's order terminating parental rights under the substantial evidence standard. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576; but see *In re Jasmine D., supra,* 78 Cal.App.4th at p. 1351 [concluding the abuse of discretion standard applies to determination regarding the type of custody that is appropriate, but recognizing "[t]he practical differences between the two standards of review are not significant"]; see also *In re Bailey J*. (2010) 189 Cal.App.4th 1308, 1314 [holding "both standards of review come into play"; substantial evidence applies to findings concerning the existence of a beneficial relationship, while abuse of discretion applies to determination whether the existence of that relationship constitutes a compelling reason for determining termination of parental rights would be detrimental].)

Section 366.26, subdivision (c)(1)(B)(v) provides an exception to the statutory preference for adoption where "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." (*In re Daniel H.* (2002) 99 Cal.App.4th 804, 813.) "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.' " (*In re Celine R.* (2003) 31 Cal.4th 45, 61.) "Furthermore, the language focuses exclusively on the benefits and burdens to the adoptive child, not the other siblings." (*In re Daniel H.*, at p. 813.)

"[E]ven if adoption would interfere with a strong sibling relationship, the court must nevertheless weigh the benefit to the child of continuing the sibling relationship against the benefit the child would receive by gaining a permanent home through adoption." (*In re Celine R., supra,* 31 Cal.4th at p. 61.) In doing so, the juvenile court is directed to consider "the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(B)(v).)

To be sure, the siblings' testimony about their weekly visits with Joseph and Nathaniel is some evidence of a sibling bond. However, as the foregoing authorities underscore, the existence of a sibling bond is not dispositive, and evidence of such a bond is not alone sufficient to establish error. Here, the question is not whether a sibling relationship existed; the question is whether substantial evidence supported the court's conclusion that Joseph's and Nathaniel's interest in gaining a permanent home through adoption outweighed the benefit of maintaining the relationship with their older siblings. (See *In re Celine R., supra,* 31 Cal.4th at p. 61.) The evidence most definitely supported the court's conclusion.

As discussed above, Joseph and Nathaniel have spent the majority of their young lives in the care and custody of their prospective adoptive parents. The evidence presented to the juvenile court showed that both children had a strong bond with the adoptive parents and had developed close ties to the adoptive family. As of the date the court terminated father's parental rights, Joseph had enjoyed the consistency and stability of his adoptive parents' home for nearly five years, while Nathaniel had lived with the adoptive parents for almost four years, starting when he was just two months old. Thus, notwithstanding the siblings' sincere testimony about the bond they developed with Joseph and Nathaniel during the brief periods they lived together and during the weekly visits they enjoyed with their younger siblings, we cannot say that the juvenile court's decision was not supported by substantial evidence.[4] Accordingly, we must affirm the court's ruling rejecting the sibling benefit exception and terminating father's parental rights. (See *In re Autumn H., supra,* 27 Cal.App.4th at p. 576.)

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[4] Though not necessary to our conclusion, we also note that the prospective adoptive parents had affirmed their willingness to continue visitation with the biological family if parental rights were terminated. Victoria as well as Richard, who lived with the prospective adoptive parents for a brief time, each testified that they believed the adoptive parents would allow visits to continue.

DISPOSITION

The juvenile court's order terminating father's parental rights is affirmed.

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KITCHING, J.

We concur:

EDMON, P. J.

EGERTON, J. *

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