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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re C.G., a Person Coming Under the
Juvenile Court Law.

SAN MATEO COUNTY HUMAN
SERVICES AGENCY,

Plaintiff and Respondent,

v.

ENRIQUE G.,

Defendant and Appellant.

A139418

(San Mateo County
Super. Ct. No. 82609)

Enrique G. (father) appeals from an order terminating his parental rights to his six-year-old daughter. He contends the court erred in finding that the parental benefit exception to the termination of parental rights did not apply. He argues further that he received ineffective assistance of counsel at the dispositional hearing at which the permanency planning hearing was set. We find no abuse of discretion in the termination order and conclude that father has waived his claim of ineffective assistance of counsel regarding the prior unappealed orders. Accordingly, we shall affirm.

Factual and Procedural History

On October 3, 2012, during a search of the family home, police found a loaded firearm under the mattress in the parents' bedroom. Father, who was on parole at the time, was arrested. Mother, who is disabled with rheumatoid arthritis and unable to care

for herself, was hospitalized. The child was detained and placed in an emergency foster home.

On October 5, 2012, the San Mateo Human Services Agency (agency) filed a dependency petition on behalf of the then four-year-old, alleging that she came within the provisions of Welfare and Institutions Code¹ section 300, subdivision (b) in that she had suffered, or there was a substantial risk that she would suffer, serious physical harm or illness as a result of the parents' inability to supervise or protect her adequately and to provide regular care for her. The petition alleged that the weapon found in the family home placed the child at risk because it was loaded and within the child's reach. The petition alleged further that the intake social worker who responded to the home on October 3 found the family home extremely disorganized, with clothes, shoes, toys and other items strewn about the entire apartment, dishes in the sink, no fresh food available, waste paper everywhere, piles of random objects and clothing, and the smell of urine in the living room and kitchen area. The petition also alleged that mother had a history of mental health and medical problems, and that her parental rights to the child's sibling and other maternal half-siblings had previously been terminated, and that father had a history of violence and child abuse and that his parental rights to the child's sibling had been terminated.

The agency's detention report details the family's prior child welfare history. The mother's three oldest children, the child's maternal half-siblings, had been placed with a relative after the mother had failed to reunify with them during a prior dependency. The child's older full sibling had been placed as a toddler with father's sister after the parents had failed to reunify with him. The paternal aunt later adopted the child's brother.

The report also indicates that in 1996 father was convicted of voluntary manslaughter, for which he served 11 years in prison. At the time of the report, father was in jail with pending charges of possession of firearms with a prior violent offense,

¹ All statutory references are to the Welfare and Institutions Code.

receiving known stolen property, and child cruelty for having a loaded weapon in a home where a minor was present.

The detention report further recounted that, upon her removal from the family home, the child became inconsolable. She cried so much that she made herself vomit, continually called out for her father and other relatives, and repeatedly asked to be taken home.

On October 9, 2012, the matter came on for a detention hearing. Because of the child's psychological distress, the court and the social worker had arranged for her to be in the courtroom and to talk and hold hands with her father. The juvenile court adopted the agency's recommendations and found that it was necessary for the child to be detained in out-of-home placement, with the paternal aunt, who lived in Southern California. Father, who remained incarcerated, was to receive a monthly contact visit with the child. Crisis counseling was ordered for the child.

In advance of the jurisdiction/disposition hearing scheduled for November 27, 2012, the agency filed a report recommending that the allegations in the petition be sustained, the child be declared a dependent, and upon parents' waiver of their rights to reunification services, a legal guardianship be established for the child with the paternal aunt pursuant to section 360, subdivision (a). He did not wish for the child to be adopted. The aunt was "more than happy" to be the child's legal guardian, and supportive of legal guardianship, because she felt the child had a connection with her parents. The child was healthy and developmentally on target. Since being placed with the paternal aunt, the child was engaging well with her peers, had begun preschool, was potty trained, and had not had any difficulty adjusting to a school setting.

At the hearing on November 27, the matter was continued so that the social worker could consult with mother.

On December 13, the agency filed an addendum to the jurisdiction/disposition report. While the report continues to recommend legal guardianship for the child, the report also recommends that reunification services be bypassed pursuant to section 361.5,

subdivisions (b)(10) and (11). Nothing in the report mentions adoption or the setting of a section 366.26 hearing.

At the continued hearing on December 17, mother's counsel indicated that she had the opportunity to consult with her client and that mother was supportive of the aunt adopting her daughter. Father's counsel was quick to assert that he was surprised to hear anything about adoption and that father would support only the agency's recommendation for guardianship. Father was adamant that the only disposition he would agree to was guardianship. He was clear that "Adoption is not . . . even a factor." Minor's counsel indicated that should the court take jurisdiction, she thought the matter should be set for a section 366.26 hearing and that "at that point we can decide what's in [the child's] best interest, whether it's a guardianship [or] it's adoption." She argued, "I had a chance to talk to [the aunt] last time she was in court. She's very supportive of father. . . . But we need to look at what is in this child's best interest. And I'm glad that dad's trial is going to be before our next hearing, because we're going to know more information at that point. But I do think that we need to provide [the child] with permanency. And . . . so that all the parties are on the same page, it's my understanding that there will be a recommendation of proceeding to a .26 hearing at the next hearing." The trial court responded, "Sounds to me that what the recommendation is for bypass, but then once we do bypass . . . we then set it for a .26 hearing. And at the .26 hearing is when we decide whether it's going to be the guardianship or adoption, that would be the permanent plan." The court advised father: "[T]he next hearing will be whether or not . . . bypass is going to be ordered. And if everyone is in agreement with that, then we won't have a contested hearing. It sounds to me that what father and mother and possibly child's attorney and the aunt, the attorneys . . . may disagree on is whether there will be a guardianship or adoption. And that can be determined at a .26 hearing. That doesn't need to be determined at the next . . . court hearing." Father's counsel pointed out, however, that "The only problem with [the court's plan] is that dad's decision on whether to submit on [the] bypass question may have a lot to do with whether it's a guardianship at the end of the road or adoption." The court agreed, explaining that if dad submits to bypass and the

agency recommends adoption, he may have wanted to contest bypass and fight for reunification “[b]ut if it’s guardianship [that] is the recommendation, then sounds like dad will submit on bypass and go straight to guardianship.” Counsel for the agency indicated that it would need time to assess the situation before the next hearing. “[W]e may show up at the next hearing with the very same recommendation we have today, which is to go straight to guardianship. We may come and say, let’s set a .26 so we can look further, if we need to do that.” The court concluded by encouraging father to work with his sister to reach an agreement as to guardianship or adoption but reiterated that ultimately she will be looking at what is in the child’s best interests.

On January 11, 2013, the agency filed a second addendum to its jurisdiction/disposition report. This time the agency deleted its recommendation for creation of a legal guardianship under section 360, subdivision (a). Instead, the agency recommended reunification services be bypassed pursuant to section 361.5, subdivisions (b)(10) and (b)(11) and a section 366.26 hearing be set. The report does not include a recommendation for a permanent plan. Instead, the report states, “The undersigned . . . spoke with the aunt about permanency for the child. The aunt stated that the issue of guardianship versus adoption is very difficult for the family. The aunt stated that while ongoing permanent placement is in the best interest of the child she also stated that she understands what the brother (the father) is going through and why he would be opposed to the aunt adopting [the child]. . . . The aunt also stated that she is willing to either adopt or be the guardian of [the child] and is open to having the parents have continued visitation with the child.” The social worker also reported that she spoke with father and he continues to believe that legal guardianship is in the child’s best interest.

At the hearing on January 15, father waived his rights to a contested hearing and submitted to jurisdiction on the basis of the social worker’s report. Father’s counsel did not challenge the agency’s recommendation that reunification services be bypassed and a section 366.26 hearing set. The court sustained the allegations of the petition and declared the child to be a dependant. The section 366.26 hearing was set for April 24,

2013.² Father was given notice both in writing and orally at the hearing of his right to file an extraordinary writ challenging the setting of the section 366.26 hearing. No writ petition was filed.

On February 27, father was served with written notice of the section 366.26 hearing to select a permanent plan, scheduled for April 24, 2013. The notice specified that the agency recommended termination of parental rights and implementation of a plan of adoption. On April 5, 2013, the agency filed its section 366.26 report recommending that adoption be approved as the permanent plan and that parental rights be terminated. The report indicates that the child is adoptable, the paternal aunt and uncle are in the process of completing an adoption home study and they are committed to the permanent plan of adoption. The report also indicates that father has had regular contact visits with the child at the correctional facility. The child appears happy to see father when she visits and frequently hugs him throughout the visit. The report recommends, however, that visits with father be terminated after the section 366.26 hearing, after one closure visit.

On March 15, the agency wrote to the court informing the judge of a possible threat made by father against the social worker and father's attorney. The letter explained that father was very angry about the recommended permanent plan for his daughter. He explained that his attorney made him sign away his rights to his older child and his attorney "was not making him sign away his rights again."

At the hearing on April 24, the social worker testified that she was recommending the permanent plan of adoption because the paternal aunt had chosen adoption, after

² The written order signed by the court following the January hearing and filed and served on January 22 includes those findings made orally at the hearing, including that reunification services had been bypassed pursuant to section 361.5, subdivision (b)(10) and (11) and that a contested section 366.26 hearing had been set for April 2013. The order also includes, however, findings that were not made orally at the hearing, including that parents agreed to the appointment of a legal guardianship for the child pursuant to section 360, subdivision (a), and that a legal guardianship was in the best interests of the child. The order further appoints the paternal aunt and uncle as legal guardians of the child and orders that letters of guardianship be issued. These additional findings and orders were deleted by a subsequent order filed on February 15.

initially requesting guardianship. The social worker did not testify that the aunt would not consider guardianship, but that when given the choice, she selected adoption. The social worker acknowledged that there was “definitely a connection” and a “bond” between the child and father. During visits, father “interact[ed] well with the child” and the child “does get excited, and when she sees him, she does respond to him.” She noted, however, that the child does not ask for visits or talk about her parents unless prompted and that she looks to the paternal aunt and uncle as her primary caregivers for day-to-day activities. The social worker did not believe that any harm the child would experience would be significant enough to weigh against terminating father’s parental rights.

At the conclusion of the section 366.26 hearing, the court found that it was not in the child’s best interest to terminate father’s parental rights. Rather, legal guardianship would be in the child’s best interests. The court explained, “I’m very familiar with this case, having presided over it from the very beginning. And I do think that there is an extremely strong bond between the father and the child. As you all remember, when this case first came into court, the social worker was so concerned about the child because the child had cried inconsolably without stopping from the minute she fell asleep to the moment she woke up, because of the removal. [¶] And I remember when the child was brought to court and saw her father for the first time, it was an incredible moment. She . . . she just burst into tears. And I think anyone who was in the courtroom would have taken notice that there was a very strong bond between [the child] and her father. [¶] I also heard testimony in the very beginning of the case that the father’s efforts to keep the mother alive. She has a very rare disease that requires him to be her sole caretaker. . . . And he was still able to keep the family intact. [¶] This is not a case where we have a father who’s been neglectful of the child due to actions towards the child or not taking care of the child. We have a father who made a lot of wrong decisions and resulted in criminal charges being brought against him and him being incarcerated.” The court recognized that the ruling “goes against the agency’s recommendation to terminate parental rights” but explains that termination of parental rights is not “in the child’s best interest at this time. [¶] And I do think legal guardianship, if the caregiver is willing to

look at that, would be the appropriate way to go. And we can monitor how it's going when the child — when the father gets out of custody. But I think for this child, I think that would be in her best interest.”

County counsel objected to the court's ruling, arguing that the “best interest standard” is not the correct standard in a section 366.26 proceeding. The court ordered additional briefing on the issue and continued the hearing to June 25.

On June 20, the agency filed an addendum report to its section 366.26 report in anticipation of the hearing set for June 25. According to the report, the child appeared excited to see father at their visits. At a recent visit, she laughed with father, told him she loved to be tickled, and told him she loved him and her mother. At the end of the visit, she gave father a big hug. The report observes, however, that the child was “bonded” to her paternal aunt and uncle, and recognized them as her primary caregivers. According to the paternal aunt, the child has begun to call her “mom” and the paternal uncle “dad.” She referred to her father as “didi.” Finally, the report indicates that the paternal aunt is planning to move to Texas as soon as possible with the child.

At the continued hearing on June 25, father argued the continuing beneficial relationship applied and thus, pursuant to section 366.26(c)(1)(B)(i), legal guardianship, rather than adoption, should be selected as the child's permanent plan. The agency and the child's counsel argued that adoption should be selected as the child's permanent plan. Ultimately, the court found that there was clear and convincing evidence that the child would be adopted, terminated the parental rights of both parents, and selected adoption as the permanent plan.

The court recognized that “this is just such an unfortunate case” and expressed concern that the “waivers of . . . reunification services that [father] entered into, was done . . . with the expectation that his sister would provide legal guardianship and not be seeking adoption. But [the aunt] has apparently changed her mind and [is] seeking adoption and wants to move to Texas.” Nonetheless, the court explained, “the way the law is, is that it's not just the relationship that the parent has with the child” but whether “the relationship promotes the well-being of the child to such a degree to outweigh the

well-being of the child being in a permanent home with the new adoptive parents.” The court explained further: “I don’t think that the father has met the burden needed, which is a pretty high burden to meet, on the beneficial relationship exception. [¶] The way the law is set up, . . . I look at father, but . . . I really have to keep [the child] in mind. And right now she’s in a stable placement. She is bonding and is bonded with her caregivers. She has a relationship, a loving relationship, with her father. The visitations have gone very well. But I don’t think it’s enough to overcome the burden that needs to [be] show[n]” The court continued, “I also have not heard any evidence that the termination of parental rights would be detrimental to the child. . . . [¶] . . . I’ve heard you say . . . that it would be beneficial for her to have her father keep his legal status, so that she would know that he’s her father and he would have a legal relationship. But the termination of rights, I think, in the balancing, . . . would [not] be detrimental to her [¶] . . . And that’s probably because . . . the child has a good relationship, a solid relationship with her father, but also with her caregivers.” The court also noted that although the court was concerned previously about how the child would react when father got out of jail and she could not return to living with him, she observed that with the passage of time, the child had become “even more closer to the caregivers” and she now “has a relationship where she feels comfortable calling them mom and dad.”

Father timely filed a notice of appeal from the termination of his parental rights.

Discussion

1. *The Parental Benefit Exception*

Once a section 366.26 hearing has been set, “the focus of a dependency proceeding shifts from family preservation to promoting the best interest of the child including the child's interest in a ‘placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child.’ ” (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.) At the selection and implementation hearing, the court has three options: (1) terminate parental rights and order adoption as the permanent plan; (2) appoint a legal guardian for the child; or (3) order the child placed in long-term foster care. (*Ibid.*; § 366.26, subd. (b).) “Adoption is the preferred plan and, absent an

enumerated exception, the juvenile court is required to select adoption as the permanent plan. [Citation.] The burden falls to the parent to show that the termination of parental rights would be detrimental to the child under one of the exceptions.” (*Ibid.*; § 366.26, subs. (c)(1)(A), (c)(1)(B)(i)-(vi).)

Section 366.26, subdivision (c)(1)(B)(i) provides an exception to the adoption preference if termination of parental rights would be detrimental to the child because “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” Courts have interpreted the phrase “benefit from continuing the relationship” to refer to a parent-child relationship that “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.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) The parent must show he or she occupies a “parental role” in the child’s life, resulting in “a significant, positive, emotional attachment” from child to parent. (*Ibid.*; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

In this case, there is no dispute that father, to the extent he could, maintained regular visitation and contact with his daughter and has a loving, nurturing, and bonded relationship with her. The trial court found, however, that the child also has a loving, bonded relationship with her aunt and uncle and that, with the passage of time, her aunt and uncle had taken on the primary parental role in the child’s life. The court recognized that as the proceedings progressed the child had adjusted to her new home and had begun

to recover from the trauma inflicted at removal. She was, at the time of the last hearing, in a stable placement with loving parental figures. While the court encouraged the agency to try to facilitate continued visitation, the court did not, as father suggests, rely on continued contact to justify the decision to terminate parental rights. On balance, the court did not abuse its discretion in finding that father’s relationship with his daughter, while strong, did not “promote[] 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 Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

2. *Ineffective Assistance of counsel*

Under section 317.5, subdivision (a), “[a]ll parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel.” “To establish ineffective assistance of counsel in dependency proceedings, a parent ‘must demonstrate both that: (1) his appointed counsel failed to act in a manner expected of reasonably competent attorneys acting as diligent advocates; and that (2) his failure made a determinative difference in the outcome, rendering the proceedings fundamentally unfair in that it is reasonably probable that but for such failure, a determination more favorable for [the parent’s] interest would have resulted.’ [Citations.] In short, appellant has the burden of proving both that his attorney’s representation was deficient and that this deficiency resulted in prejudice.” (*In re Dennis H.* (2001) 88 Cal.App.4th 94, 98, capitalization altered.)

Father contends that his counsel rendered ineffective assistance by failing to request at disposition that a legal guardianship be established pursuant to section 360, subdivision (a)³ and by failing to file a petition for an extraordinary writ challenging the setting of the section 366.26 hearing.

³ Section 360 provides in relevant part: “After receiving and considering the evidence on the proper disposition of the case, the juvenile court may enter judgment as follows: [¶] (a) Notwithstanding any other provision of law, if the court finds that the child is a person described by Section 300 and the parent has advised the court that the parent is not interested in family maintenance or family reunification services, it may, in addition to or in lieu of adjudicating the child a dependent child of the court, order a legal guardianship,

Generally, “an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order.” (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150-1151 [applying waiver rule “even though the issues raised involve the important constitutional and statutory rights to counsel and to the effective assistance of counsel”].) In *Meranda P.* the court explained, “Enforcing the waiver rule against the mother's representational claims does not infringe her due process rights. Three elements must be assessed in order to determine ‘ “what due process requires” for fundamental fairness, specifically, “the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions.” ’ [Citation.] The interplay of these three factors favors application of the waiver rule because, whatever benefits might accrue to the parent in the absence of the rule, the resulting costs to the child and the state are ‘greater.’ [Citation.] Of the many private and public concerns which collide in a dependency proceeding, time is among the most important. [Citation.] The action ‘ “must be concluded as rapidly as is consistent with fairness” ’ [Citations.] The state’s interest in expedition and finality is “strong.” [Citation.] The child's interest in securing a stable, ‘normal’ home ‘support[s] the state's particular interest in finality.’ [Citation.] To permit a parent to raise issues which go to the validity of a final earlier appealable order would directly undermine these dominant concerns of finality and reasonable expedition.” (*Id.* at pp. 1151-1152, fn. omitted.) The court noted that while “ ‘[a] parent who is unable to present an adequate defense from the outset may be seriously disadvantaged later,’ . . . there are significant safeguards built into this state’s dependency statutes which tend to work against the wrongful termination of a parent’s right to a child even though a parent may be unrepresented or poorly

appoint a legal guardian, and issue letters of guardianship, if the court determines that a guardianship is in the best interest of the child, provided the parent and the child agree to the guardianship, unless the child's age or physical, emotional, or mental condition prevents the child's meaningful response. The court shall advise the parent and the child that no reunification services will be provided as a result of the establishment of a guardianship. The proceeding for the appointment of a guardian shall be in the juvenile court.”

represented.” (*Id.* at p. 1154.) These safeguards include the “ ‘remarkable system of checks and balances’ [citation] designed to ‘preserve the parent-child relationship and to reduce the risk of erroneous fact-finding in . . . many different ways’ ” and the “ ‘precise and demanding substantive and procedural requirements’ which the petitioning agency must fulfill before it can propose termination.” (*Ibid.*)

In *In re Janee J.* (1999) 74 Cal.App.4th 198, 208, the court concluded that the waiver rule, as described in *Meranda P.*, does not constitute an absolute bar to “ineffective assistance, right to counsel, or other claims tardily presented on a [section 366].26 hearing appeal.” Rather, “the waiver rule will be enforced unless due process forbids it.” (*Ibid.*) The court proposed the following guidelines for when the waiver rule should not be applied: “First, there must be some defect that fundamentally undermined the statutory scheme so that the parent would have been kept from availing himself or herself of the protections afforded by the scheme as a whole. Lack of notice of rule 39.1B rights [is] one such example Second, to fall outside the waiver rule, defects must go beyond mere errors that might have been held reversible had they been properly and timely reviewed. To allow an exception for mere ‘reversible error’ of that sort would abrogate the review scheme [citation] and turn the question of waiver into a review on the merits.” (*Id.* at pp. 208-209.)

In this case, there is no fundamental defect in the statutory scheme that permits an exception to the waiver rule. Father actively participated in the proceedings and was given notice of the relevant hearings and of his appellate rights. Contrary to father’s argument, he was not deprived of notice of his appellate rights by the court’s sua sponte correction of the written order entered following the disposition hearing. (See fn. 2, *ante.*) Father was present when the section 366.26 hearing was set and he was properly advised both in writing and orally of his right to file an extraordinary writ. The inclusion in the written order of guardianship findings that the court had not made at the hearing, which order was filed after father had been given notice of his appellate rights, and the court’s subsequent correction of that order did not diminish the import of the prior legally adequate notice.

Even assuming that father's attorney rendered ineffective assistance and that with proper advice father might have obtained the reversal of the dispositional order or the order setting the section 366.26 hearing, the prejudice to father nonetheless is not of the magnitude to render the subsequent proceedings fundamentally unfair. Ultimately the court held a contested hearing and considered at length the interests of both father and child. Father offered considerable evidence in support of his claim that guardianship should be selected as the child's permanent plan. Although the court was required to apply a more restrictive standard at the termination hearing than would have been applicable at the dispositional hearing, the end result was a determination that adoption would best serve the child's interest in finality and permanency. Were we to reverse the termination order and remand for a new dispositional hearing, the outcome at this point likely would be no different. When the matter was decided in June 2013, the paternal aunt had made clear her desire to adopt, she was about to move to Texas, and the court found that the statutorily preferred plan of adoption was in the child's best interests despite her affection for her natural father. It is difficult to imagine under what circumstances, more than a year later, the court could find that guardianship under section 360 would now be more appropriate. Reversal and remand would undermine the child's interest in stability and the state's interest in timeliness and finality. Unfortunate as this case may be—and we echo the trial court's sentiments in this regard—any attempt to turn back the clock to pursue father's interests in reunifying with his daughter undoubtedly would be futile. Accordingly, we find no cause to avoid enforcement of the waiver of father's challenges to the prior unappealed orders.

Disposition

The order terminating parental rights is affirmed.

Pollak, J.

We concur:

McGuiness, P. J.

Jenkins, J.