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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re SKYLER T., a Person Coming Under
the Juvenile Court Law.

2d Juv. No. B240931
(Super. Ct. No.)
(Santa Barbara County)

VENTURA COUNTY HUMAN
SERVICES AGENCY,

Plaintiff and Respondent,

v.

KELLY T. AND DARRIN T.,

Defendants and Appellants.

Darrin T. and Kelly T. appeal an order of the juvenile court terminating their parental rights to their daughter, Skyler T. (Welf. & Inst. Code, § 366.26, subd. (c)(1).)¹ They contend that a sibling bond precluded termination of parental rights as to one of their three daughters, Skyler T. They also contend the court improperly delegated its authority over visitation to the Human Services Agency (HSA) and that the court should have replaced the children's counsel when a conflict of interest developed. We affirm.

¹ All statutory references are to the Welfare & Institutions Code unless otherwise stated.

FACTUAL AND PROCEDURAL BACKGROUND

In 2008, the juvenile court removed Skyler T. (age 4) and her two sisters, Stephanie (age 13) and Brianna (age 15), from their parents' care based on allegations that Darrin had sexually molested Brianna and that Kelly had not protected her.

The court appointed Pete Dowler of Dependent Children's Advocates (DCA) to represent the three sisters. At the first appearance, Dowler told the court he had "spoken to [Brianna] and given her some advice," but had not spoken to Stephanie or Skyler, who were not present. He did not think return was in the best interests of the children because Kelly did not believe Brianna's allegations of abuse. Skyler T. later disclosed that she too had been molested.

Jurisdiction and Disposition Hearing

Mandee Sanderson of DCA represented the children at the jurisdiction and disposition hearing in June 2008. She submitted on the HSA's report and recommendation. Kelly and Darrin also submitted on the report and waived their rights to contest the allegations of sexual abuse and failure to protect. Skyler was in one foster home and Stephanie and Brianna were together in another.

The court sustained the petitions to remove the children and adopted HSA's recommendations for reunification services to both parents. It ordered no contact for Darrin and weekly supervised visitation for Kelly "consistent with the well-being of the child(ren)." It granted the Agency discretion to liberalize visitation. It ordered joint therapy only if recommended by the children's therapists. This was never recommended.

Three Month Review

Andrew Wolf of DCA represented the children at the three-month review hearing. There had been weekly supervised visits between Kelly, Skyler, and Stephanie. Brianna had "elected to not" visit. The foster families were facilitating frequent contact and overnight visits between the sisters. A maternal aunt in Kern County and her husband hoped to foster the three sisters together. The girls wanted to live with them.

Kelly and Darrin told HSA they were living separately with various friends and were not "together." The social worker reported that Kelly "vacillated with her support of the girls in regards to the allegations." Kelly said, "Skyler was 'coached,'" and "Briana is lying," and Kelly "minimized Stephanie's disclosure that the father would hit and punch her and that the mother would not do anything except defend the father." Darrin told the social worker that Briana "lied" and he needed to be back together with Kelly.

Wolf told the court that Briana should not be forced to visit Kelly. Kelly's counsel expressed Kelly's "hope that, you know, the Agency is taking some steps to work with Briana so we can, you know, we can get beyond this refusal on Briana's part to see her mother." She said Kelly "is supportive of Brianna and . . . she does acknowledge that something happened here." Counsel for HSA agreed to work with Briana on visitation therapeutically. The court continued the prior orders. Brianna never visited Kelly and is now an adult.

Six Month Review

Sanderson appeared for the children at a six-month review hearing and expressed their shared desire to be placed together with their aunt in Kern County. Kelly objected to the placement and the matter was set for a contested review the next month. The court ordered an extended visit to the aunt's home pending license approval.

Before the contested six-month review hearing, HSA reported that, "Skyler is observed to be very close to her older sisters; and she frequently asks to be with them." There was a "very strong bond" between the girls and it was HSA's opinion that "they would be benefitted by being in the same placement." Stephanie and Skyler continued to have weekly supervised visits with Kelly. Those visits had "evolved" into "better dynamics," and Kelly was "more interactive with the girls and less critical of Briana." Kelly was participating in services. Darrin was not. He was not charged with a crime.

Briana continued to "strenuously object" to contact with Kelly. Stephanie and Briana both had "high hopes" that they could be placed with Skyler at their aunt's home. HSA reported that Briana and Stephanie did not trust their parents' representation that they were not "together," because friends had told them "their parents are seen together." Kelly "continue[d] to project herself as a victim" in most conversations. She wanted to visit with Briana and have more visits with Stephanie and Skyler.

Dowler represented the children at the contested review hearing in December 2008. He submitted on HSA's report and recommendation that they be placed with their aunt in Kern County. Briana and Stephanie were present. Kelly asked for unsupervised visits. Dowler opposed that request on behalf of the children and opposed Darrin's request for contact. The court ordered the children placed with the maternal aunt, over objection of Darrin that the uncle "drinks a lot." The court continued the visitation orders for Kelly and no contact for Darrin.

The children lived together in Kern County for four months. In April 2009, HSA removed them to a foster home in Ventura because the aunt's husband was abusing alcohol.

Termination of Reunification Services

Sanderson appeared for the children, who were not present, at the twelve month permanency hearing in June 2009. Darrin agreed that his reunification services could be terminated. Kelly did not appear and the court continued the matter.

Dowler appeared next for the children and the court set the matter for a contested hearing on whether services should be terminated for Kelly and whether she should be granted therapy with the girls. He also represented the children at the contested hearing.

Briana (now almost 17) and Stephanie (now almost 15) were present. HSA reported an "obvious bond" between the girls, especially between Briana and Skyler. It reported that the girls had created "their own family unit." According to their therapist, "it would be especially devastating to all of the girls should they be

separated." Kelly and Darrin continued to report that they were not together. But in April 2009, the girls had seen them driving, one car just behind the other, toward a bowling alley where they used to bowl together.

Stephanie had frequently refused to visit with Kelly because "her mother lie[d]" and showed more interest in Skyler. Skyler "willingly" attended supervised visits. Kelly's interaction with Skyler was mostly positive. The children's therapist did not recommend family therapy.

Kelly testified that she and Darrin were not in a relationship. She said she could keep the children safe from him if they returned to her. She said she now believed that Darrin "said inappropriate things" to Briana, and "may have accidentally fondled" Briana. She said it "might not have been an accident at times," but it was not "molesting." She said he may have "yelled" at Stephanie. She had not filed for divorce because she hoped Darrin would "change for the kids." If the girls came to live with Kelly, it would be "up to the children" whether Darrin lived with them. Kelly said she had not spent any time with Darrin since the children were taken away in June 2007.

Stephanie testified that this was "a lie." Stephanie did not want to participate in therapy with Kelly because she was "tired of being lied to and hurt by her."

Briana testified that she had seen Kelly and Darrin driving and, three weeks earlier, walking together in a park. She did not want contact with Kelly and had no confidence that Kelly could protect or support her. Neither Briana nor Stephanie wanted therapy with Kelly.

The trial court terminated Kelly's reunification services, finding that her participation in services had not resulted in progress in resolving the problems that led to removal. It ordered long-term foster care for all three children with continuing visitation for Kelly. The court found reasonable services had been provided, notwithstanding the lack of visits with Briana, because reasonable efforts had been made to repair the relationship through counseling.

Post-Permanent Plan Review December 2009- January 2010

Mandee Sanderson of DCA represented the children at a post-permanent plan hearing in December 2009 at which the children were present. The children were living together at a foster home and another relative was being investigated as a possible placement. Sanderson had discussed the case with Dowler. She acquiesced in HSA's determination that the new placement with relatives would not be appropriate. She conveyed the children's disappointment. The court set a contested hearing on Kelly's request to expand visitation with Skyler.

Peter Dowler of DCA appeared for the children at the contested hearing in January 2010. The court refused Kelly's request for expanded and unsupervised visits with Skyler. Kelly testified that she had no relationship with Darrin and had not had even casual contact with him for three years. An HSA social worker testified that HSA would be requesting guardianship of Stephanie and Skyler with the foster mother. Briana would be turning 18. She said the girls were "very very close."

In June 2010, Stephanie and Skyler were thriving together in the foster home. Kelly told them she was going to divorce Darrin, but they saw her leaving a store with him, holding hands. Skyler became mistrustful and angry toward Kelly. Skyler's visits were reduced from weekly to alternate weeks. The court set Skyler's case for a 366.26 hearing and reduced visits to every other month.

In July 2011, HSA removed Stephanie from the foster home because she was engaging in sexual behavior and substance abuse and she had run away several times, taking Skyler with her once. Stephanie was placed in a group home and Skyler remained with the foster mother. Stephanie was "mad" at the foster mother because she wanted to adopt Skyler.

In October 2011, HSA reported that Skyler wanted to be adopted by her foster mother. She described the possibility as "awesome." She did not trust Kelly. She had no reservations about never seeing Darrin or Kelly. Stephanie did not want Skyler to be adopted.

Post Permanency Review Hearing October 2011

Sanderson appeared for Skyler and Stephanie at an October 24, 2011, review hearing and announced she "may have a conflict representing both children." The court continued the hearing to the next day when Dowler appeared for Skyler and Sanderson appeared for Stephanie. They told the court that this would "satisfy the problem." Kelly and Darrin were present with counsel and did not object.

Sanderson told the court that Stephanie wished to live with Kelly and Sanderson told Stephanie "that's not going to happen at this point." The court agreed and ordered continued long term foster care for Stephanie. It set a 366.26 hearing for Skyler.

Sanderson filed a section 388 petition on behalf of Stephanie, asking the court to order Skyler to remain in long term foster care "[s]o that Stephanie and Skylar can maintain their sibling relationship." The petition noted that "Dowler believes it is in Skyler's best interest to be adopted by her current caregiver." The court deemed Stephanie's 388 petition to be a request to participate in Skyler's 366.26 hearing, and granted it.

Skyler's 366.26 Hearing

Dowler appeared for Skyler and Wolf appeared for Stephanie at Skyler's 366.26 hearing. Wolf reported that "it was determined that Ms. Sanderson had a conflict in representing Stephanie certainly in this proceeding today." He said, "we're going to address and waive any potential conflict" concerning her prior representation. Wolf stated that he waived any conflict of interest on behalf of Stephanie. Dowler represented that he had "never had any confidential conversations with" Stephanie and that he did not "plan to disclose anything that she's told me in confidence." Wolf said he had met with Stephanie and "explained to her the--the conflict of interest--or the potential conflict of interest," and that Stephanie agreed there had been no confidential communications with Dowler. The court accepted Stephanie's waiver. Kelly and Darrin were present with counsel and did not object or move to disqualify counsel.

Kelly testified about the close bond between her daughters. She had not seen Skyler for just over a year. She said she had divorced Darrin a month earlier.

Skyler and Stephanie had not seen each other for four months. Skyler's social worker testified that after Stephanie moved to the group home, HSA had delegated responsibility for visit between the girls to Skyler's foster mother, Stephanie's group home, and the court appointed advocates. The girls had visits with each other for the first months after Stephanie moved, but not in the four months since Christmas. It was the social worker's understanding that Stephanie had been choosing to spend her free time with Kelly instead of visiting Skyler. The foster mother continued to offer visits to Stephanie but Stephanie did not follow through.

Stephanie (now 17 years and 8 months old) was present but did not testify. The court accepted, without objection, Wolf's offer of proof that Stephanie would testify she did have a close bond with her sisters as Kelly had described. She had not seen Skyler since Christmas. No one had talked to her about visits since Christmas. She did not want her relationship with Skyler to end.

Briana (now 19) testified that Stephanie had refused to see her since Christmas. Briana said she tried to arrange visits with Skyler, but she could not because Stephanie "doesn't want any part of it." Briana stopped making efforts after Christmas because Stephanie would not speak to her.

The foster mother testified about her positive relationship with Skyler over the past three years. After Stephanie moved nine months earlier, she facilitated many visits between Stephanie and Skyler. But it had become hard to contact Stephanie because she was on restrictions at her group home. The foster mother remained willing to facilitate visits between the girls after adoption. She hoped they could have as good a relationship as they were having with Briana.

The court found that Skyler was adoptable and no exception had been established. It acknowledged a significant sibling relationship, but found there was no evidence that adoption would substantially interfere with it, and that the court would,

in any case, "have a very hard time finding that any potential detriment would outweigh the benefit of a permanent placement" for Skyler.

DISCUSSION

Sibling Bond Exception

Kelly and Darrin contend that the court should not have terminated their parental rights because adoption would substantially interfere with Skyler's relationship with Stephanie. (§ 366.26, subd. (c)(1)(E).)

Reunification efforts did not succeed and an appropriate family was available to Skyler. The court was therefore required to choose adoption as Skyler's permanent plan unless it found a compelling reason for determining that termination would be detrimental to the child under one or more statutory exception. (§ 366.26, subd. (c)(1); *In re Celine R.* (2003) 31 Cal.4th 45, 53.) The court may reject adoption based on substantial interference with a child's sibling relationship "only if it finds adoption would be detrimental to the child whose welfare is being considered." (*In re Celine R.*, at p. 51.) The court must consider the nature and extent of the sibling relationship and "balance the beneficial interest of the child in maintaining the sibling relationship, which might leave the child in a tenuous guardianship or foster home placement, against the sense of security and belonging adoption and a new home would confer." (*In re L.Y.L.* (2002) 101 Cal.App. 4th 942, 951.) Our role is to assess whether substantial evidence supports the trial court's ruling. (*In re Megan S.*, *supra*, 104 Cal.App.4th at pp. 250-251.) We must focus on detriment to Skyler, not on detriment to her sisters. (*In re Celine R.*, *supra*, 31 Cal.4th at p. 54.)

The bond between Skyler and Stephanie was very strong, at least until nine months before the 366.26 hearing. But there is substantial evidence that Skyler's interest in maintaining her relationship with Stephanie was not as great as Skyler's need for a secure home. Skyler was nine years old and had been in foster care for six years. Her sisters were an adult and a seventeen-year-old with different needs. Skyler had enjoyed a healthy relationship with the foster mother for three years. The foster mother had a history of facilitating Skyler's relationship with her sisters. She

expressed willingness to continue those efforts. Substantial evidence supports the court's determination that an exception to the adoption preference was not established.

Denial of Visitation Resulting in Termination of Parental Rights

Kelly and Darrin contend that the court improperly delegated authority to HSA to control visitation between Kelly and Skylar, resulting in an arbitrary denial of visitation. They did not preserve the issue for appeal.

Kelly and Darrin consented to the original recommendation of weekly supervised visits for Kelly "consistent with the well-being of the children," in HSA's discretion. Kelly did not appeal the court's denial of her request to expand visits in 2009 or its order reducing frequency in 2010. (*In re Christina L.* (1992) 3 Cal.App.4th 404, 416.) The court diligently oversaw implementation of its visitation orders and independently heard and considered each of Kelly's requests for increased visitation. The court did not abuse its broad discretion in determining the appropriate terms and conditions of visitation. (*In re Megan B.* (1991) 235 Cal.App.3d 942, 953.)

Conflict of Interest

Kelly and Darrin contend that the DCA attorneys improperly represented clients with conflicting interests, thereby prejudicing the parents' efforts to prove the sibling bond as a defense to termination of parental rights. Neither parent moved to disqualify counsel in the trial court or otherwise raised an objection there. We nevertheless consider their claim out of concern for the integrity of the judicial process. We agree that the DCA attorneys had a conflict of interest, but conclude there was no reasonable probability that the court would have chosen a different permanent plan for Skyler if counsel had been replaced. (*In re Celine R., supra*, 31 Cal.4th at p. 59.)

The siblings' best interests were initially aligned, but an actual conflict arose before the 366.26 hearing when Stephanie began to protest adoption as a permanent plan for Skyler, Skyler wanted to be adopted, and Brianna (now an adult) also favored adoption. There was no possibility of returning any child to Kelly or Darrin at the 366.26 hearing. The court's options at the 366.26 hearing were to order

adoption or long-term foster care as Skyler's permanent plan. If it ordered adoption, it would lose authority over visitation. If it ordered long-term foster care, it could require visitation between Skyler and Stephanie, at least for the remaining four months of Stephanie's minority. The DCA attorneys determined that Skyler's best interest was in the plan of adoption and Stephanie's best interest was in the plan of long-term foster care.

An attorney's duty of undivided loyalty to the client precludes representation of conflicting interests. (Cal. Rules of Prof. Conduct of the State Bar, rule 3-310.) An attorney may not, without informed written consent, represent more than one client in a matter in which the interests of the clients conflict. (Rule 3-310(C)(1) & (2).) Nor may the attorney represent interests adverse to a former client where, by reason of the former representation, the attorney has obtained material confidential information. (Rule 3-310(E).) If there is a substantial relationship between former and current adverse representations, the attorney is automatically disqualified. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283; *In re Charlisse C.* (2008) 45 Cal.4th 145, 161.)

Specific conflict-of-interest rules govern the representation of siblings in dependency actions. (Cal. Rules of Court, rule 5.660.) Rule 5.660 allows the court to appoint a single attorney to represent a group of siblings in a dependency action where there is no actual or apparent potential conflict at the outset of the proceedings. (Rule 5.660(c)(1)(A) & (B).) But if an actual conflict of interest develops during the course of representation, the siblings' attorney must "take any action to ensure the siblings' interests are not prejudiced," including notifying the court, and requesting to withdraw "from representation of some or all of the siblings." (Cal. Rules of Court, rule 5.660(c)(2)(D).)

When the conflict arose here, Sanderson properly notified the court and asked that she be permitted to withdraw from representing Skyler. But she continued to represent Stephanie. Each of the DCA attorneys subsequently represented one sibling in a position adverse to another. And they had each previously appeared for all

three siblings as a group. Sanderson took a position adverse to Skyler when she filed a 388 petition for Stephanie in which she protested Skyler's adoption. Wolf took a position adverse to Skyler when he represented Stephanie at the 366.26 hearing and argued against Skyler's adoption. Dowler took a position adverse to Stephanie when he appeared for Skyler at the 366.26 and argued in favor of adoption.

After a conflict among siblings arises, an attorney may continue to represent one or more whose interests do not conflict "only if" they have withdrawn from representation of the siblings whose interests conflict, have exchanged no confidential information with the siblings whose interests conflict, and continued representation would not otherwise prejudice the siblings. (Cal. Rules of Court, rule 5.660(c)(1)(F).) Dowler represented to the court that he had exchanged no confidential information with Stephanie. Sanderson and Wolf made no such representation. Knowledge obtained by one member of a firm is generally imputed to all other members. (*Rosenfeld Construction Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 573.) The record does not establish whether DCA is a law firm, but we will assume for the purposes of discussion that it is.

Error, if any, in not relieving counsel is harmless. "A court should set aside a judgment due to error in not appointing separate counsel for a child or relieving conflicted counsel only if it finds a reasonable probability the outcome would have been different but for the error." (*In re Celine R. supra*, 31 Cal.4th at p. 60.) It does not appear reasonably probable that the trial court would have chosen a different permanent plan for Skyler if it had replaced counsel. The strong sibling bond was well-documented. Wolf aptly argued the bond was substantial and the court so found. The court was well-informed about Stephanie's objection to adoption from the HSA reports and her own proffered testimony. Darrin and Kelly did not object to the proffer or request that Stephanie testify. Darrin and Kelly endorsed and joined in Wolf's presentation and arguments. The evidence in favor of adoption as a permanent plan was overwhelming and the evidence that the foster mother would interfere with

Skyler's relationship with Stephanie was slight or non-existent. Any error in not replacing counsel was harmless.

Our conclusion does not condone conflicting representation of dependent children. Conflicts will arise between sibling groups. When considering disqualification, the CDA and the trial court should look for guidance to cases that apply the rule of vicarious disqualification in the context of public law offices and consider whether DCA adequately protects each sibling's confidences through timely, appropriate, and effective screening measures and structural safeguards. (*See e.g., In re Charlisse C., supra*, 45 Cal.4th at p. 165.) The burden will be on the party resisting disqualification to show effective screening. (*Id.* at p. 166.)

DISPOSITION

The order appealed from is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Ellen Gay Conroy, Judge
Superior Court County of Ventura

Aida Aslanian, under appointment by the Court of Appeal, for Defendant and Appellant, Darrin T.

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