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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

In re R.A., a Person Coming Under the
Juvenile Court Law.

BUTTE COUNTY DEPARTMENT OF EMPLOYMENT
AND SOCIAL SERVICES,

Plaintiff and Respondent,

v.

H.A.,

Defendant and Appellant.

C068628

(Super. Ct. No.
J33677)

Father H.A. appeals from a juvenile court order terminating his parental rights regarding minor R.A. (Welf. & Inst. Code, §§ 395, 366.26.)¹ Father contends the juvenile court abused its discretion in finding that the beneficial parent-child

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

relationship exception to adoption did not apply. We will affirm the order.

BACKGROUND

In October 2007, minor and her three older siblings were detained after father assaulted one of her brothers inside a grocery store. The mother and the other siblings are not parties to this appeal. Two of the siblings reported that father pulled their hair and ears when they were in trouble and sometimes hit them with a belt.

Butte County Department of Employment and Social Services (DESS) filed a dependency petition in October 2007, alleging jurisdiction pursuant to section 300, subdivision (j) (abuse of sibling). The January 2008 jurisdiction report related the family's significant child welfare history, with over 36 referrals in the last nine years. The juvenile court sustained the dependency petition.

DESS recommended reunification services for the parents in the February 2008 disposition report. The report described minor as emotionally and mentally appropriate for her age. She participated in weekly supervised visits with father. The juvenile court ordered reunification services for father and no services for mother.

The June 2008 status report noted that two of the siblings refused to visit father because he had mistreated them, but minor wanted to see father. Father pleaded guilty to misdemeanor child abuse. Services were continued at the July 2008 six-month review hearing.

The December 2008 12-month report recommended returning minor and one of the siblings to the mother and continuing another sibling in foster care, with services for both parents. Mother completed extensive services on her own and had an extended visit with the children in November 2008. Minor told her therapist in September 2008 that father was "mean."

The juvenile court returned minor and one of the siblings to mother with maintenance services and continued another sibling in foster care with an additional six months of services for the parents. But mother abandoned minor and her sibling at a DESS office in March 2009 after being asked to drug test. DESS filed a supplemental petition for more restrictive placement. (§ 387.) Minor and her sibling were detained later that month. The juvenile court sustained the amended petition in May 2009.

The June 2009 disposition report substantiated allegations that father molested minor's sister. Minor visited father all day twice a week, but she would urinate in her pants after the visits. The visits were reduced to two-hour supervised visits twice a week when the sexual abuse allegations were substantiated.

Following a contested hearing in September 2009, the juvenile court terminated services for both parents and set a section 366.26 hearing.

The California Department of Social Services (CDSS) issued an adoption assessment in December 2009 recommending a plan of adoption without a current termination of parental rights.

Minor enjoyed the treats and presents father brought on his visits, but the visits were a source of conflict between minor and her sister.

The January 2010 section 366.26 report recommended adoption without terminating parental rights because potential adoptive homes had not been found. Minor continued to have supervised visits with father twice a week.

In June 2010, the juvenile court found by clear and convincing evidence that the children were likely to be adopted. It also found inapplicable the exceptions to terminating parental rights. The juvenile court set a permanent plan of adoption without terminating parental rights.

According to a December 2010 report from CDSS, minor expressed a desire to remain with her potential adoptive family and the potential adoptive family was committed to adopting her. Minor referred to the foster parents as her mother and father and wanted to be adopted by them.

The adoption specialist concluded that termination of parental rights would not be detrimental to minor. Minor viewed her relationship with father as one where she could get whatever she wanted. She was in control during visits with him, but when she was not visiting father she did not ask for him and her actions did not indicate that separation was detrimental.

There was another 366.26 report in January 2011. Visits with father were reduced to once a month and minor readily adjusted. She viewed the visits as an activity where she had control, received what she wanted, and was never told no.

Minor's therapist reported that minor appeared to benefit from her relationship with the foster parents and would benefit from adoption with that family. Minor wanted to live with father, but the therapist did not think minor understood what that involved. After her prospective adoptive placement, minor was more open and honest about her feelings and could accept redirection and correction.

At a second contested section 366.26 hearing, minor confirmed visiting father once a month, but wanted to visit him every day. She denied liking visits only for the gifts; she would be happy if father came without gifts. She loved father very much and called him "Daddy."

The juvenile court gave "very little weight" to minor's testimony. It found that minor had difficulty answering yes or no to questions, that many of counsel's questions were leading, and that many times counsel "suggested what her gesticulations and nodding up and down meant." The juvenile court found that minor was adoptable and that none of the exceptions to adoption applied. The juvenile court terminated parental rights.

DISCUSSION

Father contends the juvenile court should have applied the beneficial parent-child relationship exception to adoption. DESS counters that father cannot assert the beneficial parent-child relationship exception in this appeal because the juvenile court found the exception did not apply in the first section 366.26 hearing. Father appealed the juvenile court's orders in

the first section 366.26 hearing and this court affirmed the orders. (*In re H.A.* (Aug. 4, 2011, C065684) [nonpub. opn].)

DESS relies on *In re A.G.* (2008) 161 Cal.App.4th 664 (*A.G.*), which held that a juvenile court is not required to revisit an issue decided in a prior section 366.26 hearing unless circumstances change or new evidence emerges. (*Id.* at p. 666.) But *A.G.* is distinguishable. The second section 366.26 hearing in *A.G.* took place three months after the first one, and mother's counsel told the juvenile court that there were no changed circumstances between the first and second hearings. (*Id.* at pp. 670-671.) Here, however, the second section 366.26 hearing took place one year after the first hearing (CT 572-573, 700-701), and minor's testimony at the second hearing created new evidence. Minor did not testify at the first section 366.26 hearing. Under these circumstances, *A.G.* does not prevent father from asserting the beneficial parent-child relationship exception in this appeal.

Accordingly, we turn to the merits of father's contention. At a hearing under section 366.26, if the juvenile court finds by clear and convincing evidence that a minor is likely to be adopted, the juvenile court must terminate parental rights and order the minor placed for adoption unless "[t]he court finds a compelling reason for determining that termination would be detrimental" due to one of the statutorily enumerated exceptions. (§ 366.26, subd. (c)(1)(B).)

The parent has the burden of establishing an exception to termination of parental rights. (*In re Zachary G.* (1999)

77 Cal.App.4th 799, 809.) "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.)

The juvenile court's ruling declining to find an exception to adoption must be affirmed if it is supported by substantial evidence. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 809; *In re Derek W.* (1999) 73 Cal.App.4th 823, 827; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) "On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citations.]" (*Autumn H.*, at p. 576.)

Section 366.26, subdivision (c)(1)(B)(i) provides an exception to adoption when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." However, a parent may not claim this exception "simply by demonstrating some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights." (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1349.) The benefit to the child must 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 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.*, *supra*, 27 Cal.App.4th at p. 575.)

Citing studies purporting to show that children are scarred by adoption when there is at least one surviving parent, father argues the beneficial parent-child relationship exception should apply if severing the relationship would deprive the child of a "substantial, positive emotional attachment to that parent." Of course, we cannot consider the studies cited by father on appeal because they were not presented to the juvenile court. But more importantly, we cannot disregard the established legal requirements, articulated above, for establishing the beneficial parent-child relationship exception. Father's contention is inconsistent with those requirements.

Father further asserts that the juvenile court erred in discounting minor's testimony. He identifies passages where minor was not subjected to leading questions. Father asks us to ignore the weight given by the juvenile court to the evidence and to accept minor's testimony.

But an appellate court must defer to the juvenile court regarding factual findings and cannot reweigh the evidence. (*In*

re Rubisela E. (2000) 85 Cal.App.4th 177, 194.) Moreover, although father argues otherwise, the juvenile court's determinations are not arbitrary but instead are supported by the record.

Minor was born in January 2004 and detained in October 2007. By the time parental rights were terminated in June 2011, minor spent nearly half her life outside father's custody. Father was convicted of physically abusing one of minor's siblings and DESS substantiated claims of sexual abuse against another sibling. Although minor enjoyed father's visits, she also controlled the visits and viewed them as an opportunity to receive gifts from father. Minor did not exhibit separation anxiety between visits and easily adjusted when visits were reduced.

On this record, the juvenile court did not abuse its discretion in concluding that the beneficial parent-child relationship exception to adoption did not apply.

DISPOSITION

The order of the juvenile court is affirmed.

MAURO, J.

We concur:

HULL, Acting P. J.

HOCH, J.