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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re DULCE N. et al., Persons Coming  
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

GUADALUPE A.,

Defendant and Appellant.

D061082

(Super. Ct. No. J516031)

APPEAL from an order of the Superior Court of San Diego County, Carol Isackson,  
Judge. Affirmed.

Guadalupe A. appeals the juvenile court's order at the Welfare and Institutions Code<sup>1</sup>  
section 366.26 hearing in the dependency case of her children Dulce N., Jose N. and B.N.  
(together the children). At the hearing, the court identified adoption as the permanent  
placement goal and ordered a search for an adoptive home to be completed within 180 days.

<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

(§ 366.26, subd. (c)(3).) Guadalupe contends the court erred by finding the children "[had] a probability for adoption but [were] difficult to place" (*id.*, subd. (c)(3)) and by finding the children's relationships with her (*id.*, subd. (c)(1)(B)(i) [beneficial relationship]) and with each other (*id.*, subd. (c)(1)(B)(v) [sibling relationship]) did not make termination of her parental rights detrimental to the children (*id.*, subd. (c)(3)). We affirm.

## BACKGROUND

In October 2005, the San Diego County Health and Human Services Agency (the Agency) filed dependency petitions for two-year-old Dulce, one-year-old Jose and newborn B.N. The petitions were based on Guadalupe's methamphetamine use. She had been using methamphetamine since she was 14 or 15 years old. She used it while she was pregnant with B.N. and had no prenatal care. The day B.N. was born, Guadalupe used methamphetamine and B.N. tested positive for methamphetamine.

B.N. was detained in a foster home, and Dulce and Jose were detained in Polinsky Children's Center. In November 2005, the children were moved to a new foster home. In December the juvenile court entered true findings on the petitions and ordered the children placed in foster care. At the 12-month review hearing in November 2006, the court ordered the children placed with Guadalupe. In August 2007, the court terminated dependency jurisdiction. In November the Agency opened a voluntary services case for Guadalupe after the police found Dulce and Jose unsupervised. The voluntary case closed in June 2008.

In November 2009, the Agency filed new dependency petitions. The petitions alleged the children were periodically exposed to violent confrontations between Guadalupe and her boyfriend, Juan E. The children saw Juan hit Guadalupe. On October 31, Juan held

Guadalupe against her will while threatening her with a knife. A month earlier, he had poured acid on her stomach and hit her ankle with a wine bottle. Guadalupe had a history of violent relationships and continued her contact with Juan.

The children were detained in Polinsky Children's Center for one day, then moved to a foster home. In December 2009, the juvenile court entered true findings on the petitions, ordered the children placed in foster care and ordered reunification services for Guadalupe. In February 2010, the children were moved to a new foster home where they remained for the rest of the case. At the 12-month review hearing in February 2011, the court terminated services and set a section 366.26 hearing.

The contested section 366.26 hearing began in September 2011 and concluded in November. The court found there were no exceptions to termination of parental rights and identified adoption as the permanent placement goal. The court found there was a probability of adoption, but the children's ages and membership in a sibling group made them difficult to place for adoption. The court directed the Agency to search for an adoptive home and set a new hearing for April 23, 2012, approximately 180 days later. (§ 366.26, subd. (c)(3).)

The Agency has filed a motion to augment the record on appeal with an addendum report it filed on March 12, 2012, for the April 23 hearing. The children's appellate counsel joins in the motion and Guadalupe opposes the motion. We grant the Agency's request for relief from failure to file the augmentation motion in a timely manner, and deny the augmentation motion.

## DISCUSSION

At the section 366.26 hearing, "[i]f the court finds that termination of parental rights would not be detrimental to the child [§ 366.26, subd. (c)(1)] and that the child has a probability for adoption but is difficult to place for adoption and there is no identified or available prospective adoptive parent, the court may identify adoption as the permanent placement goal and without terminating parental rights, order that efforts be made to locate an appropriate adoptive family for the child . . . within a period not to exceed 180 days. . . . At the expiration of this period, another hearing shall be held and the court shall proceed pursuant to paragraph (1) [termination of parental rights], . . . (3) [guardianship by a relative caregiver], (5) [guardianship by a nonrelative], or (6) [long-term foster care] of subdivision (b). [A] child may only be found to be difficult to place for adoption if there is no identified or available prospective adoptive parent for the child because of the child's membership in a sibling group, or the presence of a diagnosed medical, physical, or mental handicap, or the child is seven years of age or more." (§ 366.26, subd. (c)(3).)

"The juvenile court must make at least three findings before it may defer selection of a permanent placement plan under [section 366.26,] subdivision (c)(3). In addition to finding the child has a probability of adoption, the court must also find that termination would not be detrimental to the child and that the child is difficult to adopt for specified reasons. (§ 366.26, subd. (c)(3).)" (*In re Gabriel G.* (2005) 134 Cal.App.4th 1428, 1436.) Guadalupe challenges two of these findings. First, she contends the court erred by finding

the children had "a probability for adoption."<sup>2</sup> (§ 366.26, subd. (c)(3).) Second, she contends the court erred by finding termination of parental rights would be not detrimental to the children. As to her second contention, Guadalupe argues the benefits the children derived from their relationships with her (§ 366.26, subd. (c)(1)(B)(i)) and with each other (§ 366.26, subd. (c)(1)(B)(v)) outweighed the benefits they would derive from adoption. Under either the abuse of discretion standard of review (*In re Ramone R.* (2005) 132 Cal.App.4th 1339, 1351) or the substantial evidence standard of review (*In re Gabriel G.*, at p. 1438),<sup>3</sup> we conclude there was no error.<sup>4</sup>

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<sup>2</sup> Guadalupe additionally contends there was not substantial evidence the children were adoptable. That contention is inapposite; it presupposes a determination by juvenile court "it is likely the child[ren] will be adopted" (§ 366.26, subd. (c)(1)), not a determination "the child[ren have] a probability for adoption" despite being "difficult to place." (§ 366.26, subd. (c)(3); *In re Gabriel G.*, *supra*, 134 Cal.App.4th at p. 1438.)

<sup>3</sup> In *In re Gabriel G.*, *supra*, 134 Cal.App.4th at page 1438, the sole authority cited for application of the substantial evidence standard of review was *In re Erik P.* (2002) 104 Cal.App.4th 395, 400. In that case, the issue was adoptability (*ibid.*), not whether Erik "ha[d] a probability for adoption but [was] difficult to place for adoption" (§ 366.26, subd. (c)(3)).

<sup>4</sup> In the juvenile court, all counsel agreed the Agency had the burden of proving a probability of adoption by clear and convincing evidence, and the court made its findings by clear and convincing evidence. (*In re Ramone R.*, *supra*, 132 Cal.App.4th at p. 1351.) The Agency now argues only a preponderance of the evidence was required. We need not address that argument.

When the section 366.26 hearing concluded in November, Dulce was eight and one-half years old, Jose was almost eight years old and B.N. was six years old. Dulce and B.N. had no developmental delays. Jose had a speech delay and received speech therapy at school. He was behind in reading and writing, but doing well in math, and had a tutor. The children were thriving and happy in their foster home. Although it was difficult to find an adoptive home for three children of the children's ages, the children were healthy, well behaved, sweet and respectful, qualities that made them attractive to prospective adoptive parents. There were two or three potential approved adoptive homes in the county and eight out of the county, and the Agency was looking for more potential homes through a recruiting event.

The foster mother was willing to assume guardianship of the children, but did not wish to adopt because she and her husband were elderly. A maternal aunt and uncle expressed an interest in adopting the children but, by June 2011, the aunt and uncle had decided the responsibility was too great. The aunt and uncle were 21 years old, lived in a

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Both the substantial evidence standard and the abuse of discretion standard are deferential. (*In re Ramone R.*, *supra*, 132 Cal.App.4th at p. 1351 [In reviewing a decision for abuse of discretion, "[w]e must accord the trial court a high degree of deference."]; *In re Dakota H.* (2005) 132 Cal.App.4th 212, 228 [In applying the substantial evidence standard, "[w]e do not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts. (Citation.) The judgment will be upheld if it is supported by substantial evidence, even though substantial evidence to the contrary also exists and the trial court might have reached a different result had it believed other evidence."].) Furthermore, "on appeal from a judgment required to be based upon clear and convincing evidence, 'the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.' [Citation.]" (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 881, 880, quoted in *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581.)

one-bedroom apartment with their three-year-old child and were expecting their second child.

In July and August 2011, two approved families decided not to pursue adoption of the children. Both families withdrew after speaking to the foster mother, and "mentioned that they had concerns about Jose's behavior and his possibility of being mentally retarded." One of the families also learned of a concern "that Dulce . . . had mental retardation, and that maybe Dulce had autism . . . years ago." All of these concerns were based on inaccurate and outdated information.

According to everyone except the foster mother, the children had no behavioral problems. The adult daughter of the foster mother, who lived in the foster home and observed the children every day, testified the children did not have behavioral problems. The foster mother agreed, but testified Jose and B.N. had tantrums. Social worker Jose Santana, who had been to the foster home many times, had taken the children to therapy and psychological evaluations and had observed six of the children's visits with Guadalupe, testified the children were sweet, well behaved and able to form attachments, and any behavioral problems were normal for the children's ages.<sup>5</sup> Information from Jose's school described him as hardworking and attentive, with no behavioral problems.

Santana testified Jose had received a diagnosis of mental retardation when he was two or three years old, and there had been a suggestion "years ago" that Dulce might suffer from mental retardation or autism. Dulce and Jose had been in an Individualized

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<sup>5</sup> Santana had been a social worker for 27 years.

Educational Program (IEP) because Dulce had speech and language delays and Jose had problems with auditory memory and processing verbal information.

By the time of the hearing, Dulce had overcome her learning disability and no longer had an IEP. Psychologist Martha Hillyard<sup>6</sup> evaluated Jose in September 2011 and concluded his cognitive abilities were above average. Jose continued to have severe speech and language delays; his auditory and memory deficits placed his verbal abilities in the extremely low range; and he required concrete and repetitive verbal communication.

The foster mother believed Jose was "delayed" because she had to repeat directions for him, he could not dress himself and he did not know when to get out of the shower. The foster mother, who had difficulty understanding English, testified Jose "refuses to speak Spanish." Dr. Hillyard determined English was Jose's dominant language "and he in fact speaks little Spanish." Dr. Hillyard stated Jose was able to understand a speaker who spoke slowly, quietly and distinctly, and concluded Jose's short memory span explained his trouble following directions. Dr. Hillyard suggested the language barrier between Jose and the foster mother, "along with Jose's severe language delays, should be taken into consideration in evaluating" the foster mother's ratings of Jose's behavioral and emotional functioning. The juvenile court expressly found "the foster mother's perceptions of Jose as retarded and having significant language issues and her descriptions of the behavioral issues . . . may well have impacted and probably did impact the ability of the [A]gency to find an adoptive home for these children to date."

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<sup>6</sup> Dr. Hillyard had been a licensed psychologist since 1982. Her practice was limited to evaluations of and psychotherapy for children.

Guadalupe contends the children's bond with her lessened the probability of adoption and meant that termination of parental rights would be detrimental to the children. Santana believed the children loved Guadalupe, were attached to her and wanted to live with her. Dr. Hillyard, who had evaluated Dulce as well as Jose, agreed that Dulce wished to live with Guadalupe,<sup>7</sup> and Jose loved Guadalupe and shared a strong bond with her. Psychologist Beatriz Heller,<sup>8</sup> who conducted bonding studies in September 2011, observed a "strong emotional bond" between Jose and Guadalupe. Dr. Heller believed Guadalupe was "a significant figure in Dulce's human world, and perhaps the most important attachment that she has." Dr. Heller reported B.N. "appears to view [Guadalupe] as an important figure in her life." Unlike Santana and Dr. Hillyard, Dr. Heller believed the children's bond with Guadalupe lessened the probability of adoption and meant that termination of parental rights would be detrimental to the children.

Dr. Heller reported: "The disruption of the mother-child relationship . . . is highly likely to have a significant deleterious effect on [Dulce]'s development of stability of interpersonal relationships and stability in her attitude toward endeavors." Dr. Heller believed that removing Dulce from the foster home and placing her in "another unfamiliar environment . . . will most likely undo the benefits of the stability provided by adoption." At trial, Dr. Heller testified Dulce's relationship with Guadalupe would impede Dulce's

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<sup>7</sup> After saying she wanted to live with her family, Dulce said she disliked the foster home because she had to take long naps, but "[w]ith [Guadalupe], we get to sleep whenever we want."

<sup>8</sup> Dr. Heller was an expert on bonding and attachment, but did not practice psychotherapy and was not familiar with attachment therapy.

ability to bond with adoptive parents, and severing the relationship would be detrimental to Dulce, might make her angry and rebellious and might lead to behavioral problems. In her report, Dr. Heller stated Dulce did not include Guadalupe when drawing a picture of her family, but at trial, Dr. Heller testified Dulce included Guadalupe in the picture.

Dr. Heller reported "disruption of [Jose's] relationship with [Guadalupe] may not cause immediate psychological damage but is likely to show its effect during later developmental stages, in terms of generating confusion and dismay, and ultimately impinging upon his ability to establish reciprocal relationships with other individuals, including those who will provide primary parenting." At trial, Dr. Heller testified Guadalupe was "an important figure" to Jose, "a part of his family" and someone "that he loves or he is supposed to love." Dr. Heller testified that severing Jose's relationship with Guadalupe would affect him because he needed "something to give him validity, to give a sense he will not be vulnerable in the world, a sense of stability." Dr. Heller testified that "usually" a child's difficulty in bonding with adoptive parents leads to behavioral problems, but was unable to explain how Jose's bond with Guadalupe would affect his ability to bond with adoptive parents.

Dr. Heller reported B.N. "appears to view [Guadalupe] as an important figure in her life" and "discontinuing the mother-child relationship presages the development of serious emotional conflicts. Given [B.N.]'s shyness and retiring attitude, she will most likely develop problems establishing relationships with others, peers and adults, and testing her capabilities." At trial, Dr. Heller testified Guadalupe's role in B.N.'s life was unclear, B.N.'s

"main loyalty is with her sister and brother" and the effect of termination of parental rights and adoption on B.N. would depend on her siblings' reactions.

At trial, Dr. Heller acknowledged she had not evaluated Guadalupe's parenting abilities, and could not say whether adoption would be the best option for the children. Dr. Heller testified the children "might get used to being parented by other adults," she had not taken into account the willingness of prospective adoptive parents to participate in attachment therapy and allowing contact with Guadalupe would mitigate the harmful effects of severing the parent-child relationship.

Dr. Hillyard noted Jose's experiences with Guadalupe had been negative as well as positive. Dr. Hillyard described Jose as affectionate, resilient and able to form new attachments. Her evaluation did not reveal any impediments to his successful transition into an adoptive home after a period of adjustment. Dr. Hillyard predicted Jose would form an attachment to adoptive parents who were warm, accepting and able to communicate with him. Referring to a hypothetical question regarding Dr. Heller's bonding study, Dr. Hillyard testified "the farther out we try and project our guesses about what might happen, the less accurate we are probably likely to be."

After evaluating Dulce in October 2011, Dr. Hillyard concluded "under the right circumstances, [Dulce] could accept an adoptive placement." Dr. Hillyard stated Dulce "is most likely to thrive with adoptive parents who . . . will respect her strong sense of family

and who will respect her need to mourn the loss of contact with her biological relatives . . . ." Therapy would help Dulce adapt to the change.<sup>9</sup>

Santana testified the children needed a permanent home. The children were in therapy, and that would help with their transition to an adoptive home.

The court noted Dr. Heller's contact with the children was brief, her focus was narrow, she reviewed only some of the Agency's reports, she did not consider treatment or transitional planning for the children and she did not weigh their need for permanence against the benefit they might derive from their relationship with Guadalupe. The court stated Dr. Heller's reports "reflect[ed] a rather superficial view of the children's relationship with [Guadalupe]." The court characterized the analysis in Dr. Heller's reports as "limited," and her prediction of great harm to the children if parental rights were terminated as "speculative." The court found the children's relationship with Guadalupe was depicted more accurately in Dr. Heller's testimony, Dr. Hillyard's testimony and reports and Santana's testimony. Dr. Hillyard employed a broad range of tests, spoke to numerous collateral sources and reviewed numerous reports. The court described Santana as credible, honest, caring, forthright, "well informed about the children and clearly conscientious and thorough in his assessment." We will not second-guess the court's credibility determinations.

The court concluded the children saw Guadalupe as a loving visitor and a symbol of the permanence they wanted and needed, and their need for permanence outweighed the value to the children of continuing their relationship with Guadalupe. Substantial evidence supports this finding the beneficial relationship exception did not apply. (*In re Autumn H.*

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<sup>9</sup> Dr. Hillyard did not evaluate B.N.

(1994) 27 Cal.App.4th 567, 576.) Guadalupe appeared to be content with one weekly two-hour visit. The children enjoyed the visits and, in the six months before the hearing, Guadalupe's visitation was regular and appropriate. The children had been out of Guadalupe's care for a total of more than three years, and when they were in her care they were neglected and exposed to domestic violence and drugs. The evidence outlined above shows their need for a stable home after years of uncertainty.

Similarly, substantial evidence supports the conclusion the sibling relationship exception did not apply. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 952-953.) The children shared a strong bond, and the Agency's search for an adoptive home was confined to homes that would accept three children. Thus, there was no evidence termination of parental rights would substantially interfere with the sibling relationship. (§ 366.26, subd. (c)(1)(B)(v).)

The court did not err by finding there was a probability of adoption, although the children were difficult to place, and by ordering that further efforts be made to locate adoptive families for the children within 180 days.

#### DISPOSITION

The order is affirmed.

MCDONALD, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.