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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ELIZABETH D. et al., Persons
Coming Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

APRIL D., et al.

Defendants and Appellants.

D061106

(Super. Ct. No. NJ12994 A&B)

APPEAL from a judgment of the Superior Court of San Diego County, Blaine
Bowman, Judge. Affirmed.

April D. and Richard D., the parents of Elizabeth D. and Adriana D., appeal the
judgment terminating their parental rights under Welfare and Institutions Code, section

366.26.¹ They contend the juvenile court erred by finding the girls were likely to be adopted within a reasonable time if parental rights were terminated and by not applying the beneficial parent/child relationship exception to adoption.

FACTS

This is the third dependency case involving the family.

In November 2004, Elizabeth was detained at birth after testing positive for methamphetamine. The San Diego County Health and Human Services Agency (Agency) filed a petition under section 300, subdivision (b). The juvenile court sustained the petition, ordered services for April and Richard, and placed Elizabeth in a foster home. After 10 months of services, Elizabeth was returned home for a 60-day trial visit, and the parents continued to work on their case plans. Adriana was born in December 2005 with a negative toxicology. The juvenile court terminated jurisdiction in early 2007.

Agency detained the children in August after April was hospitalized following a suicide attempt. April told the social worker that she and Richard had been manufacturing methamphetamine in the family home and using the drug for the previous six months. Adriana, then one year old, tested positive for exposure to methamphetamine. That month Richard had been arrested for domestic violence against April. Richard admitted he used marijuana. The following month, Richard tested positive for marijuana and methamphetamine. The juvenile court sustained dependency

¹ Statutory references are to the Welfare and Institutions Code.

petitions on behalf of Elizabeth and Adriana. (§ 300, subd. (b).) After April and Richard participated in 24 months of services, the juvenile court returned the children to their custody and terminated jurisdiction in August 2009.

This dependency began in March 2011 after Richard and April were arrested on drug charges. Elizabeth told the social worker that her parents frequently punched each other. Elizabeth also indicated that she had been sexually abused by Richard, who denied it. On March 25, Agency again filed petitions on behalf of Elizabeth and Adriana. (§ 300, subd. (b).)

Elizabeth was detained with her former foster parents and Adriana was detained in a separate foster home.

In June, the juvenile court sustained the petitions, ordered each child placed in a foster home, denied services for April and Richard and set a section 366.26 hearing. The court ordered supervised visitation for April and Richard.

Also in June, Agency removed Elizabeth from her foster home placement because of her aggressive conduct and defiant behavior -- holding her fists up to the foster mother and destroying property. Elizabeth also displayed cruelty to the family cat. In July, Agency removed Adriana from two foster homes placements because she was exhibiting dangerous and inappropriate behaviors, such as hitting others and throwing tantrums. One of the foster mothers expressed concern that Adriana might hurt the medically fragile baby in the home. The sisters remained at Polinsky Children's Center until August 8, when they were placed in a Foster Family Agency (FFA) home, with the highest level of treatment and services.

In August, Agency reported Elizabeth and Adriana were difficult to place in an adoptive home. Both girls were obese and had serious behavioral and psychological problems. Both girls had developmental delays; Elizabeth was required to repeat kindergarten. Both girls were diagnosed with attention deficit hyperactivity disorder (ADHD) and post-traumatic stress disorder (PTSD). The sisters also engaged in sexualized behavior such as masturbation.

Although Elizabeth and Adriana initially had difficulty in adjusting to the FFA foster home, both girls had stabilized in the placement by October. They were reported doing well in the structured setting in which they received intensive services from in-home behavioral coaches as well as psychiatric treatment and individual therapy. After Elizabeth started taking medication for her ADHD, her behavior improved; Adriana was able to manage her ADHD symptoms in the structured setting without taking medication.

Social Worker Fatimah Abdullah prepared the assessment report dated November 10, 2011. Abdullah opined Elizabeth and Adriana were generally adoptable, noting "[t]hey are cute, young, social, affectionate, Caucasian girls with mild developmental delays." Although the girls have some behavioral problems, they had responded well to treatment and were making progress, the social worker wrote. Abdullah reported no prospective adoptive parents had been identified for Elizabeth and Adriana, but seven approved adoptive families in San Diego County and 64 approved adoptive families

outside the county were willing to adopt two children with Elizabeth's and Adriana's characteristics.²

The social worker reported April and Richard, who no longer lived together and had restraining orders against each other, visited the children separately. Visitation by each parent was consistent and appropriate. Elizabeth and Adriana appeared to enjoy the visits and sometimes showed disappointment when the visit was ending. The parents' visits remained supervised.

Abdullah related that when she discussed the possibility of adoption with Elizabeth, the child said she would be sad if she did not see her parents anymore, but she would be "happy" as long as she was "safe." Elizabeth also said: " 'Adoption seems like a good idea if I can stay with them forever.' " Adriana did not understand the concept of adoption.

Court Appointed Special Advocate (CASA) Jennifer Negre submitted a separate report in which she recommended adoption. Negre described Elizabeth as an outgoing and loving child who enjoys playing outdoors. Negre described Adriana as an active child who sometimes is slow to warm up to new people, but gets along well with her peers.

² At the section 366.26 hearing in December, Abdullah testified there were nine San Diego County families and 57 out-of-county families interested in adopting two girls with Elizabeth's and Adriana's characteristics.

In an addendum report, Abdullah described a recent visit between the girls and Richard. Elizabeth recalled the good times as well as the bad times with her father and told him that she could not get the bad times out of her head.

At the section 366.26 hearing in December, Abdullah testified that Elizabeth and Adriana had benefitted from the treatment in their FFA foster home placement and had shown significant improvement. The children no longer needed the highest level of treatment and services.

Abdullah, who has been an adoptions social worker for more than nine years, testified she was "extremely confident" that Elizabeth and Adriana would be adopted. The social worker said she considered "everything" in reaching this conclusion, including all of the girl's behavioral problems, educational issues, sexualized behavior and their PTSD and ADHD diagnoses. Abdullah testified she had handled cases in which children with worse behavioral problems than Elizabeth and Adriana were successfully placed in adoptive homes.

The juvenile court characterized social worker Abdullah as credible and experienced. The court found by clear and convincing evidence that Elizabeth and Adriana were likely to be adopted in a reasonable time and none of the statutory exceptions to adoption applied. The court terminated April's and Richard's parental rights and referred the children to Agency for adoptive placement.

DISCUSSION

I. Adoptability Finding

April and Richard contend substantial evidence does not support the juvenile court's finding that Elizabeth and Adriana were likely to be adopted within a reasonable time. The contention is without merit.

Agency bears the burden of proving adoptability. (*In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1557, 1560-1561.) The issue of adoptability posed in section 366.26 focuses on whether the child's age, physical condition and emotional health make it difficult to find a person willing to adopt the child. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) An adoptability finding does not require "that the minor already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.'" (*Ibid.*) "All that is required is clear and convincing evidence . . . that adoption will be realized within a reasonable time." (*In re Zeth S.* (2003) 31 Cal.4th 396, 406.) "Although a finding of adoptability must be supported by clear and convincing evidence, it is nevertheless a low threshold: The court must merely determine that it is 'likely' that the child will be adopted within a reasonable time. [Citations.] We review that finding only to determine whether there is evidence, contested or uncontested, from which a reasonable court could reach that conclusion. It is irrelevant that there may be evidence which would support a contrary conclusion. [Citation.]" (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292.)

Although a child's psychological, behavioral and developmental problems might make it more difficult to find adoptive homes, they do not necessarily preclude an

adoptability finding. (See, e.g., *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154 [finding no indication the behavioral problems identified "were so severe as to make the court's finding of adoptability unsupported"; *In re I.I.* (2008) 168 Cal.App.4th 857, 871 [children found adoptable with ADHD, bedwetting and tantrums]; *In re Helen W.* (2007) 150 Cal.App.4th 71 [children with special needs adoptable].) The possibility a child may have future problems does not mean the child is not likely to be adopted. (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223–225.)

There is substantial evidence supporting the court's finding that the children are adoptable. (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732.) The social worker testified as an expert and expressed extreme confidence that Elizabeth and Adriana were likely to be adopted. Social worker Abdullah considered all of the girls' behavioral problems and other issues in forming her opinion. (See *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1421 [social worker is qualified as expert to opine about child's adoptability under Evid. Code, § 720].) Abdullah had had cases in which successful adoptive placements had been found for children with worse behavioral problems than Elizabeth and Adriana had. The juvenile court was entitled to find the experienced social worker's opinion credible, and to give great weight to her assessment. We cannot reweigh the evidence or substitute our judgment for that of the trial court. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52–53.)

Additionally, the children are sociable and in general good health. Although Elizabeth and Adriana had displayed serious behavioral problems and had other problematic issues, the children showed remarkable progress since being placed in the

nurturing and structured environment of the FFA foster home. The social worker testified that by the time of the section 366.26 hearing, Adriana had no behavioral issues. Both girls showed enough advancement that the coordinating agencies decided they no longer needed the highest level of treatment and services. Thus, despite having spent most of their young lives in the dependency system and experiencing significant trauma in their parents' dysfunctional home, Elizabeth and Adriana have demonstrated the capacity to improve greatly.

Another factor supporting the court's adoptability finding is Agency's identification of nine local approved prospective families and 57 such families residing outside of San Diego County who are willing and able to adopt a sibling group with similar characteristics. (See fn. 2, *ante*.) The evidence of these families "willing to adopt a child of [this] 'age, physical condition, and emotional state' " is relevant to evaluating the likelihood of a child's adoption. (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1205.) Substantial evidence supports the court's finding that Elizabeth and Adriana were likely to be adopted within a reasonable time.

April argues that the girls' ages -- by the section 366.26 hearing, Elizabeth was seven years old and Adriana had just had her sixth birthday -- and their status as a sibling group were impediments to adoption court. We disagree. Although children who are seven years old or older are generally considered unlikely to be adopted (*In re Salvador M.* (2005) 133 Cal.App.4th 1415, 1422), age alone is not an insurmountable obstacle to adoption. Adoptability focuses on all of the child's individual characteristics. (*In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 1649.) Although membership in a sibling group is

a potential barrier to adoptability (§ 366.26, subd. (c)(3)), Elizabeth's and Adriana's sibling group status did not prevent Agency from identifying potential families willing to adopt children with Elizabeth's and Adriana's characteristics as a sibling group. (See fn. 2, *ante*.)

To the extent Richard challenges the sufficiency of the adoption assessment report, he has forfeited the issue because he failed to raise it below. (*In re Crystal J.* (1993) 12 Cal.App.4th 407, 411-412.)

II. *Beneficial Parent-Child Relationship Exception to Adoption*

April and Richard contend that the juvenile court erred by not applying the beneficial parent-child relationship exception to adoption (§ 366.26, subd. (c)(1)(B)(i)). The contention is without merit.

Adoption is the permanent plan preferred by the Legislature. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) At the selection and implementation hearing, the juvenile court must terminate parental rights if the child is likely to be adopted within a reasonable time unless one of the statutory exceptions applies. (§ 366.26, subd. (c)(1).) Section 366.26, subdivision (c)(1)(B)(i), provides an exception to termination of parental rights when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." The exception applies only if both prongs are met. The parent bears the burden to establish by a preponderance of the evidence that an exception to the statutory preference for adoption applies. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.)

Our standard of review is the substantial evidence test. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) We determine if there is substantial evidence, contradicted or uncontradicted, to support the conclusions of the juvenile court, resolving all conflicts favorably to the prevailing party, and drawing all legitimate inferences to uphold the lower court's ruling. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.)

The juvenile court found that both parents had maintained regular contact with Elizabeth and Adriana. Agency does not dispute this finding.

However, to establish a beneficial parent-child relationship, April and Richard also needed to show that Elizabeth and Adriana would benefit from continuing their relationship with their parents. Such a showing requires more than frequent and loving contact, an emotional bond with the child, pleasant visits, or incidental benefit to the child. (*In re Derek W., supra*, 73 Cal.App.4th at p. 827.) To overcome the statutory preference for adoption, a parent must prove that he or she occupies a parental role in the child's life, resulting in a significant, positive emotional attachment of the child to the parent. (*Ibid; In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

In *In re Autumn H., supra*, 27 Cal.App.4th at page 575, this court explained that to come within the beneficial parent-child relationship exception to adoption, a parent must show the "relationship 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." (Italics added.) The court must balance "the strength and quality of the . . . 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." (*Ibid.*) The court's balancing test must be performed on a case-by-case basis, taking into account variables such as "[t]he age of the child, the portion of the child's life spent in custody, the 'positive' or 'negative' effect of interaction between parent and child and the child's particular needs" (*Id.* at pp. 575-576.)

Further, the parent must show that the benefit arises from a parental relationship rather than a caretaker or friendly visitor relationship. (See *In re Beatrice M.*, *supra*, 29 Cal.App.4th at p. 1420.) We affirmed this balancing test, explaining the standard "reflects the legislative intent that adoption should be ordered unless *exceptional circumstances* exist." (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51, italics added.)

Substantial evidence supported the juvenile court's finding that April had not demonstrated that Elizabeth and Adriana would benefit from continuing their relationship with their mother. April's consistent visitation showed that a bond may have existed between her and the girls and that they have had mostly pleasant visits and loving contact. However, even frequent and loving contact between parent and child is not sufficient to establish the requisite benefit to the child if the mother does not occupy a parental role and is unable to take custody. (*In re Teneka W.* (1995) 37 Cal.App.4th 721, 728.) We also note that April's visits remained supervised during the eight months leading up to the section 366.26 hearing. Parents who have not advanced beyond

supervised visitation will have a difficult time establishing the beneficial parent-child relationship exception. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.)

"Interaction between natural parent and child will always confer some incidental benefit to the child." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Nonetheless, April had not demonstrated that her relationship with Elizabeth and Adriana outweighs the benefits of adoption. Despite 52 months of services, April has been unable to progress to the point that she is able to safely parent the girls. Consequently, Elizabeth and Adriana have spent their short lives in a revolving door of moves between a dysfunctional family home and foster care placements. April has exposed her children to substance abuse, domestic violence, emotional abuse, criminal activity and mental health episodes, such as her suicide attempt.³ As social worker Abdullah aptly put it: "As a result of the trauma imposed on the children in the care of [April and Richard], both children display behaviors indicative of the chaotic environment (i.e., aggression, impulsivity, etc.)." April acknowledged the negative impact on the girls, saying: "My children deserve better."

Furthermore, the revolving door of placements deprived Elizabeth and Adriana of the stability young children need. At the selection and implementation hearing, the juvenile court's foremost concern is the child's interest in stability and permanency. (*In re Beatrice M.*, *supra*, 29 Cal.App.4th at p. 1418.) "The purpose of section 366.26 is

³ The children have also reported they were sexually abused by both parents. Although the record before us does not indicate that this allegation was substantiated, there is documentation that both girls engaged in sexualized behavior.

to select a permanent plan for a child who cannot return home because reunification efforts have failed." (*Ibid.*) April did not establish that severing her relationship with Elizabeth and Adriana in favor of "the security and the sense of belonging" provided by an adoptive family would harm the girls. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Simply put, the relationship between April and the girls did not "outweigh the well-being [Elizabeth and Adriana] would gain in a permanent home with new, adoptive parents." (*Ibid.*) A dependent child should not be made to wait indefinitely for her mother to become an adequate parent. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.)

April's reliance on *In re Amber M.* (2002) 103 Cal.App.4th 681 is misplaced as that case is readily distinguishable. In *In re Amber M.*, *supra*, at pages 689-690, a psychologist who conducted a bonding study opined termination of parental rights would be detrimental because the mother and child shared a primary attachment and primary maternal relationship. The child's therapist and the child's court-appointed special advocate believed the relationship should continue because the mother and child shared a strong bond. (*Ibid.*) April did not present similar expert bonding evidence or expert evidence that severing her legal relationship with Elizabeth and Adriana would be detrimental to them. Rather the only expert evidence before the court was the social worker's report that termination of April's parental rights would not be detrimental to the girls. The juvenile court was entitled to accept the social worker's expert opinion and rely on it. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 53.)

Substantial evidence also supports the court's finding that Richard had not demonstrated that Elizabeth and Adriana would benefit from continuing their relationship

with their father. As with April, Richard regularly visited the girls and the visits were pleasant and appropriate. A relationship that is "pleasant" is not enough to establish a benefit to the child because "it bears no resemblance to the sort of consistent, daily nurturing that marks a parental relationship." (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) Moreover, Richard never advanced to unsupervised visits during the eight months leading up to the section 366.26 hearing, which is indicative that a beneficial parent-child relationship within the meaning of the statute does not exist. (§ 366.26, subd. (c)(1)(B)(i); *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.) A true parental relationship would not require a third party to monitor parent-child visits.

Richard, like April, received 52 months of services without resolving his detriment issues -- principally, substance abuse and criminality -- that have persisted throughout these proceedings. Among the factors to consider in determining whether a beneficial parent-child relationship exists are "the 'positive' or 'negative' effect of interaction between the parent and the child." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.) In this regard, perhaps nothing could be more telling than Elizabeth's comments to Richard during one of their supervised visits shortly before the section 366.26 hearing. Elizabeth said she remembered good times as well as bad times with her father, but she could not get the bad times out of her head. Also, in discussing adoption with the social worker, Elizabeth said she would be sad if she did not see her parents anymore, but she would be "happy" as long as she was "safe." Elizabeth also told the social worker: "Adoption seems like a good idea if I can stay with them forever."

In short, Richard has not demonstrated that severing his relationship with Elizabeth and Adriana would be detrimental to the girls. Richard also failed to show that his relationship with the girls promoted their well-being to such a degree that it outweighed the well-being that Elizabeth and Adriana would gain in a permanent adoptive home. "The reality is that childhood is brief; it does not wait while a parent rehabilitates himself or herself. The nurturing required must be given by someone, at the time the child needs it, not when the parent is ready to give it." (*In re Debra M.* (1987) 189 Cal.App.3d 1032, 1038.)

To the extent that April and Richard argue that the juvenile court should have considered guardianship or long-term foster care rather than adoption as the girls' permanent plan, the argument is without merit. There is not a "best interests" exception to adoption. (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 427.) That is so because "consideration of the child's best interests is inherent in the legislative procedure for selecting and implementing a permanent plan." (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1165.) The statutory exceptions to adoption "are a final check to ensure termination of parental rights is in the best interests of the minor and is the least detrimental alternative." (*Ibid.*) Thus, once the court makes the necessary findings under the statutory scheme to terminate parental rights, it is not required to further consider whether the child's best interests would be better served by a permanent plan of guardianship or long-term foster care. (*Ibid.*)

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

McINTYRE, J.