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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re E.G. et al., Persons Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN & FAMILY SERVICES,

Plaintiff and Respondent;
v.

C.O.,
Defendant and Appellant.

E060235

(Super.Ct.Nos. J246667 &
J246668)

OPINION

APPEAL from the Superior Court of San Bernardino County. Cheryl C. Kersey,
Judge. Affirmed.

William D. Caldwell, under appointment by the Court of Appeal, for Defendant
and Appellant.

Jean-Rene Basle, County Counsel, and Kristina M. Robb, Deputy County
Counsel, for Plaintiff and Respondent.

Father, C.O.,¹ appeals from a judgment sustaining a supplemental petition (Welf. & Inst. Code,² § 387) and terminating his parental rights to two children, E.G. and N.G. E.G. was born testing positive for methamphetamine, and the children were removed by San Bernardino County Children and Family Services (CFS) a few months later, because the parents did not follow through with voluntary services. They were placed with their paternal grandmother. Father's services were terminated for failing to participate in services. After services were terminated, the paternal grandmother informed CFS she could no longer care for the children. CFS filed a supplemental petition and the children were placed in an adoptive home. At a combined hearing on the supplemental petition and the selection and implementation hearing (§ 366.26), the petition was sustained and parental rights were terminated. This appeal followed.

On appeal, father challenges the order sustaining the supplemental petition and the subsequent termination of his parental rights. We affirm.

BACKGROUND

E.G. was born in September 2012 with amphetamine in her system. Her mother, N.R.,³ admitted using methamphetamine while pregnant, and both parents had used it (and marijuana) throughout their eight year relationship. At the time of E.G.'s birth, the

¹ Father is named in the petition as C.O.-G., and has been referred to variously in briefs as C.O. and C.G. We will use C.O. and simply refer to him as father.

² All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

³ Mother is not a party to this appeal. We will only refer to her where necessary to provide context.

parents were separated, and N.G. (E.G.'s four year-old sister) was staying with father. Prior to their separation, the parents had violent arguments. Because mother's apartment was cleared, E.G. was released in mother's care after being discharged from the hospital.

The social worker attempted to contact the parents to follow up in the days after E.G.'s birth, but was unable to reach them until October 2012, when mother informed the social worker that she would test positive for methamphetamine. Subsequently, mother completed the intake process for a drug treatment program, but never participated and complained the classes were too hard. On November 1, 2012, a Team Decision Making (TDM) meeting was held. At the meeting, father admitted using methamphetamine for the past few days. Both parents described violent arguments that had taken place in the past, so the team decided it was necessary to remove the children.

CFS filed a petition as to both E.G. and N.G. alleging parental neglect. (§ 300, subd. (b).) The petition was grounded on mother's and father's history of substance abuse and their history of domestic violence.⁴ The children were ordered detained with non-relative extended family members, who were the former foster parents of the maternal grandmother, so they were very familiar with the family.

A jurisdictional report was submitted for the jurisdictional hearing. In the report, the social worker noted that each parent had a long history of drug use, specifically marijuana and amphetamine, but each minimized his or her respective use, denying any

⁴ The petition also included an allegation that father had a criminal history, but that history related to a tagging incident that occurred shortly after his graduation from high school. The allegation was dismissed at the time of the adjudicatory hearing.

substance abuse problems. The parents also admitted to having arguments, but father stated that mother was the aggressor. He reported that mother pulled a gun on him on one occasion, and mother admitted assaulting father with a knife after he threw a “boulder” at her, hitting her in the face. Father admitted he slapped mother on one occasion, but explained he did so because she was hitting herself in the abdomen while pregnant with E.G., in the presence of N.G.

In the section of the report related to dispositional evaluation, the social worker noted that father had worked as a cook at Chili’s, had been a laborer for a construction company, had worked at a construction supply store, done painting work for a painting contractor, and also did tattoos. The social worker indicated the paternal grandmother was being assessed for relative placement, and described the parents’ visits with the children as appropriate. According to the report, N.G. was attached to both parents, although she seemed to favor the father.

At the jurisdictional and dispositional hearing, father waived his constitutional rights and submitted the petition for adjudication on the basis of the social worker’s reports. At contested hearing, set by mother for November 28, 2012, mother also executed a waiver of rights and the matter of jurisdiction was submitted on the reports.

The juvenile court sustained the petition, making true findings on the allegations pertaining to parental substance abuse and domestic violence. The minors were declared dependents and removed from their parents’ custody, after the court found that placement with the noncustodial parent would be detrimental. Custody of the children was placed with CFS, which was given authority to place the children with their paternal

grandmother when approval was obtained, and the children were maintained in their placement with the non-relative extended family members. The parents were ordered to participate in family reunification services.

On May 21, 2013, CFS submitted its six-month status review report, with a recommendation to terminate services. CFS recommended that the children be maintained in the home of the paternal grandmother, where they had been placed on January 16, 2013. The report noted father's hostility to the social worker and his failure to maintain contact with the worker. The social worker described him as hostile, defensive, uncooperative, and, at times, verbally abusive. The paternal grandmother also complained that father had argued with family members, which father denied. Father had enrolled in some services but had not made progress. The report also noted that father continued to deny and minimize the substance abuse and domestic violence problems, which prevented him from taking responsibility for his actions and working on reunification.

The social worker observed father was resistant to services, refused to modify his work schedule to participate in services, and blamed mother for the problems resulting in the dependency. He had started parenting classes on March 16, 2013, but did not return after enrolling, so he was terminated. Father did complete seven counseling sessions, but he was terminated from the program for poor attendance. Father enrolled in an outpatient substance abuse program, but was terminated from that program for failing to attend any group or individual sessions. He was referred for an anger management program in

November 2012, but attended only a couple of sessions and was terminated from that program.

Father also expressed that he did not feel the need to do services because the children were not removed from his care. Regarding visitation, the report noted that father visited regularly, engaged with his children in a positive way. However, because of an argument, on April 4, 2013, the paternal grandmother indicated she no longer was willing to supervise visits. According to the paternal grandmother, father appeared to be under the impression that she would allow him to have access to the children.

Father tested positive for methamphetamine on November 19, 2012, tested negative for drugs on December 13, 2012 and January 7, 2013, but he failed to test December 18, 2012, January 25, 2013, February 8, 2013, February 28, 2013, March 13, 2013, March 29, 2013, April 15, 2013, and May 8, 2013. Father missed tests because of work and informed the social worker he refused to stop working in order to drug test.

The juvenile court conducted the six-month status review hearing on June 10, 2013. The court found it would be detrimental to return the children to the parents' custody, and that the parents had failed to participate regularly in and make progress in the court ordered treatment plan. The court terminated services for both parents, reduced visitation to one time per month, and directed that a hearing pursuant to section 366.26 be held.

The social worker's section 366.26 report was submitted on September 27, 2013, and requested a continuance because the children were not in a concurrent planning

home. The report indicated that in late August 2013, the paternal grandmother had ruled herself out as a long term caretaker for the children due to medical issues.

On October 8, 2013, the juvenile court considered CFS's request to continue. At that time, the social worker informed the court that the paternal grandmother had given the social worker a letter from her doctor, in which the grandmother's doctor stated that grandmother stated she was unable to take care of the children. Father's counsel complained that the information was not included in the report and was inconsistent with other information, specifically, that the two paternal aunts who live in the home were able to assist.

The social worker advised that neither of the paternal aunts was willing to do so, but that the former foster parents (the non-relative extended family members) were willing to adopt the children and to keep the children in contact with the family on a regular basis. The court gave CFS authority to place the children in a concurrent planning home and to remove the children from the home of the paternal grandmother. However, father's counsel argued that it would be a contested issue and required the filing of a section 387 petition. The court gave CFS 30 days to file a section 387 petition.

On October 29, 2013, CFS filed the section 387 petition, alleging that the previous disposition had not been effective in the protection of the minors because the paternal grandmother was no longer able or willing to care for the children. In a supplemental detention report, the social worker stated that on September 10, 2013, the grandmother provided the social worker with a statement from the grandmother's doctor, indicating that due to grandmother's diagnosis of severe depression and fibromyalgia, she was

unable to care for the children. The social worker also received information that the grandmother had allowed father to have unauthorized and unsupervised contact with the children, as reported by the children.

CFS was provided with a list of grandmother's medications. Grandmother informed the social worker that there had been days when she had trouble getting out of bed to care for and supervise the children. A certificate of disability and a prescription voucher were attached. At the detention hearing respecting the section 387 petition, the court ordered the children detained with a non-relative extended family member, removing custody from the relative caretaker and placing temporary custody with CFS.

On November 8, 2013, CFS submitted its report pursuant to section 366.26 and an adoptability assessment. The social worker recommended termination of parental rights, indicating that the non-relative extended family members had agreed to adopt. The report reiterated the paternal grandmother's health problems, and the paternal aunt's unwillingness to assume the responsibility of adopting because of the added stress. The report also indicated that father was in denial about his mother's health problems, although he eventually conceded they existed and that it would best for the children to be with the non-relative extended family members.

The report indicated that the children were adjusting well to the transfer, that the parents had maintained consistent contact, and both children appeared to have maintained a bond and attachment to the parents. A combined hearing was conducted on the jurisdictional and dispositional aspects of the section 387 petition, as well as the section 366.26 hearing. At the hearing, the paternal grandmother testified, acknowledging her

health issues, but denying that her diagnoses affected her ability to care for the children. Grandmother wanted to continue to provide care for the children, and wanted to have them returned.

Grandmother acknowledged that she had allowed father to have unsupervised contact with the children on one occasion, in violation of the court's orders. Father was permitted to take N.G. to church, unsupervised. Grandmother felt that the child was safe with her father and knew her son would not harm the child. After hearing the testimony and considering the other evidence, the court found the allegation of the supplemental petition to be true, that the previous disposition is not effective in the protection of the children, and the paternal grandmother is no longer able or willing to care for the children due to health concerns.

The court then proceeded with the section 366.26 hearing, and father testified on his own behalf. Father testified that he visited regularly, the children were happy to see him. Father disagreed with the recommendation of terminating parental rights because he loves his children and believed the children were bonded to him. The juvenile court found father had not met the burden of establishing the parental bond exception. The court found the children adoptable by clear and convincing evidence and terminated parental rights. Father appealed.

DISCUSSION

1. The Section 387 Petition Was Properly Sustained.

Father argues that the true finding on the section 387 petition must be reversed because (1) there is insufficient evidence to support the allegation, and (2) the court did

not follow pertinent statutes and court rules in detaining E.G. and N.G. from their paternal grandmother's home. Specifically, father asserts the lower court failed to properly apply the relative preference criteria of section 361.3 in placing the children in the non-relative extended family home.⁵ We disagree.

Section 387, subdivision (a), provides that an order changing or modifying a previous order by removing a child from the physical custody of a parent, guardian, relative, or friend and directing placement in a foster home, or commitment to a private or county institution, shall be made only after a noticed hearing upon a supplemental petition. The social worker must provide a concise statement of facts to support the conclusion that the previous disposition has not been effective in the rehabilitation or protection of the child, or, in the case of a placement with a relative, sufficient to show that the placement is not appropriate in view of the criteria in section 361.3. (§ 387, subd. (b).)

A section 387 petition need not allege any new jurisdictional facts, or urge different or additional grounds for dependency because a basis for juvenile court jurisdiction already exists. (*In re T. W.* (2013) 214 Cal.App.4th 1154, 1161.) A section

⁵ In its Respondent's Brief, CFS argues that the issue of placement did not require any supplemental petition because the children were placed in the custody of CFS in the first place, and that the supplemental petition was not necessary. Father argues in reply that CFS forfeited this claim by not raising it in the trial court. We note that it was father who informed the court and CFS that a section 387 petition was required when CFS first raised the issue of the need for a new placement. We do not need to address forfeiture because the proposed move of the children involved a more restrictive level of custody; a supplemental petition was the appropriate vehicle. (*In re A.O.* (2010) 185 Cal.App.4th 103, 110.)

387 petition must be filed when the agency seeks to change the placement of a dependent child from relative care to a more restrictive placement, such as foster care. (*In re H.G.* (2006) 146 Cal.App.4th 1, 10.) Procedurally, if the court finds the allegations are true, it conducts a dispositional hearing to determine whether removing custody is appropriate. (*In re T.W.*, *supra*, at p. 1161, citing *In re H.G.*, *supra*, 146 Cal.App.4th at p. 11; see also, *In re Javier G.* (2006) 137 Cal.App.4th 453, 462; *In re Miguel E.* (2004) 120 Cal.App.4th 521, 542.) When a petition is filed to remove children from the custody of a relative, the court uses the preponderance of the evidence burden of proof and need not look at less restrictive alternatives. (*In re A.O.* (2004) 120 Cal.App.4th 1054, 1061.)

Where the agency invokes a 387 petition to seek a change of the child's placement because the relative with whom the child had been placed no longer meets the criteria in section 361.3, there are several factors to be considered. Those factors include (1) the best interest of the child; (2) the wishes of the parent; (3) the provisions of the Family Code regarding relative placement; (4) placement of siblings and half siblings, if that placement is found to be in the best interest of each of the children; (5) the good moral character of the relative and any other adult living in the home; (6) the nature and duration of the relationship between the child and the relative; (7) the ability of the relative to provide a safe and secure environment for the child, etc.; and (8) the safety of the relative's home. (§ 361.3, subd. (a).)

We review the court's jurisdictional and dispositional findings on a supplemental petition for substantial evidence. (*In re T.W.*, *supra*, 214 Cal.App.4th at p. 1161.)

Evidence is substantial if it is "reasonable, credible, and of solid value"; such that a

reasonable trier of fact could make such findings.” (*In re S.A.* (2010) 182 Cal.App.4th 1128, 1140, citing *In re Sheila B.* (1993) 19 Cal.App.4th 187, 199.) As a reviewing court, we defer to the trier of fact on such determinations, and have no power to judge the effect or value of, or to weigh the evidence, consider the credibility of witnesses, or resolve conflicts in the evidence. (*In re Sheila B.*, at p. 199.) Issues of fact and credibility are questions for the trial court. (*In re S.A.* (2010) 182 Cal.App.4th 1128, 1140, citing *In re Sheila B.*, *supra.*)

Father’s argument centers on the contradictory evidence of the paternal grandmother’s willingness and ability to care for her grandchildren. Father acknowledged that the grandmother initially ruled herself out as a long term caretaker due to her health problems, but asks us to focus on grandmother’s testimony at the hearing regarding her *willingness* to care for them. Father attempts to explain grandmother’s initial unwillingness as her effort to seek medication and to support her disability application. In other words, father asks us to reweigh the evidence.

The trial court reviewed the reports and heard grandmother’s testimony. Even accepting as true that grandmother had experienced a change of heart just prior to the hearing and was now “willing” to provide long term care for her grandchildren, the court had to consider all of the section 361.3 factors. Here, grandmother’s health issues compromised her *ability* to care for and supervise the young children. At the time of the filing of the supplemental petition, her daughters were unwilling to assist her, although apparently one daughter was willing to assist grandmother at the time of the hearing. In addition to the wavering commitments of the paternal grandmother and one of her

daughters, grandmother had allowed the children to have unsupervised contact with the father.

Father urges that this case is similar to, and should be governed by the holding of, *In re H.G.*, *supra*, 146 Cal.App.4th 1. In that case, the decision to remove the children from the grandmother's home solely because the relative had allowed the child's father to have unauthorized contact with the child in violation of the orders of the court. (*Id.* at p. 13.) The reviewing court found that there was sufficient evidence to support the findings of fact made by the juvenile court. (*Id.* at p. 14.)

As to disposition, however, the reviewing court concluded that the juvenile court failed to consider whether the placement was not appropriate for the child in view of the criteria in section 361.3. (*In re H.G.*, *supra*, 146 Cal.App.4th at pp. 14-15.) The appellate court pointed out that the agency did not allege, nor did the court find, that any of the other criteria in section 361.3 had changed from the initial determination that the grandparents were appropriate custodians. (*In re H.G.*, at p. 16.) It is noteworthy that in *In re H.G.*, it was not the grandparent who initially sought the child's removal. *In re H.G.* does not stand for the proposition that a section 387 order is reversible where the section 387 petition is grounded on the fact the parent or other caretaker has allowed unauthorized contact with the parent. (See *In re T.W.*, *supra*, 214 Cal.App.4th at p. 1162 [mother allowed father to have unauthorized contact after father had sexually abused T.W.'s sister, warranting removal].) Instead, the reviewing court in *H.G.* held that the failure to conduct a dispositional hearing as to the section 387 petition, at which it

considered the section 361.3 criteria, required reversal. (*In re H.G., supra*, 146 Cal.App.4th at p. 17.)

Here, the father did not object at trial to the combined jurisdiction-disposition aspect of the supplemental petition proceeding, and did not argue that the court failed to consider section 361.3 criteria for dispositional purposes. Instead, father argued that the court should not find the allegation true, and should dismiss the petition. The court considered the reports as well as the grandmother's testimony and made a true finding on the allegation. That evidence showed (1) grandmother's health was severely compromised, to the point where she had difficulty getting out of bed some days; (2) she had informed her doctor that she was unable to provide long term care for her grandchildren; (3) her doctor prepared the certificate to that effect; and (4) grandmother presented that certificate to the social worker.

For whatever reason, grandmother had a change of heart at the time of the hearing on the petition. Nevertheless, the evidence demonstrated that she was unable to provide long term care for her grandchildren due to her health, and had permitted father to have unauthorized contact with the children. As to relative placement criteria, there was contradictory evidence of the paternal aunts' willingness to assist her.

Even discounting the grandmother's health issue, the paternal grandmother was unapologetic about allowing N.G. to accompany her father on an outing, insisting that father would not harm his children, attempting to minimize any risk. In the six month status review report, prior to the termination of services, the paternal grandmother informed the social worker that father was under the impression he could have access to

the children while under her supervision. Despite the paternal grandmother's prior assurances at that stage that she would not put the children's placement at risk for the parents, she had done so again. This posed an ongoing risk for the children's safety, given father's refusal to participate in reunification services.

There is substantial evidence to support the court's ruling on the supplemental petition.

2. The 387 Petition Did Not Prevent Father From Establishing a Beneficial Parent-Child Relationship.

Father argues that the juvenile court's true finding on the supplemental petition prevented him from "raising the section 366.26, subdivision (c)(1)(A)⁶ exception to terminating his parental rights." However, Father presented testimony relating to the exception at the hearing and argued that the exception applied. The true finding on the supplemental petition did not preclude father from arguing the existence of the exception. We therefore treat his argument as a challenge to the court's finding that no exception to adoptability exists, as respondent has done.

Section 366.26, subdivision (c)(1), provides that if the court determines, based on the [adoption] assessment and any other relevant evidence, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption, unless one of several statutory exceptions applies. Once the court determines a child is likely to be adopted, the burden shifts to the parent to show that termination of

⁶ In 2007, former section 366.26, subdivision (c)(1)(A), was amended, effective in 2007 (Stats. 2007, c. 565 (Assem. Bill 298)), and the beneficial parent child exception is currently found in section 366.26, subdivision (c)(1)(B)(i).

parental rights would be detrimental under one of the exceptions listed in section 366.26, subdivision (c)(1)(B). (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809, citing *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.) The determination of whether a beneficial parent-child relationship exists is reviewed for substantial evidence. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.) We must affirm a trial court's rejection of the exceptions if the ruling is supported by substantial evidence. (*In re Zachary G.*, *supra*, at p. 809.)

The beneficial parent-child relationship exception applies when the court finds a compelling reason for determining that termination would be detrimental to the child because the parents have maintained regular visitation and contact with the child, and the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i).) This exception applies only when the relationship with a natural parent 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 re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

A parent must show more than frequent and loving contact or pleasant visits. (*In re C.F.* (2011) 193 Cal.App.4th 549, 555.) Further, the exception is not established by merely showing the child derives some measure of benefit from maintaining contact. (*Id.*, at p. 557.) To meet the burden, the parent must show that he or she occupies a parental role in the life of the child. (*In re C.B.* (2010) 190 Cal.App.4th 102, 126, citing *In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) The parent must also show the child

would suffer detriment if his or her relationship were terminated. (*In re C.F.*, *supra*, citing *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

To establish that the parents have occupied a “parental role,” it is not necessary for a parent to show day-to-day contact and interaction. (*In re S.B.* (2008) 164 Cal.App.4th 289, 299; *In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) As the court observed in *In re S.B.*, *supra*, if that were the standard, the rule would swallow the exception. (*In re S.B.*, *supra*, 164 Cal.App.4th at p. 299.) Instead, the court determines whether the parent has maintained a parental relationship, or an emotionally significant relationship, with the child, through consistent contact and visitation. (*Id.* at pp. 298, 300-301.)

The social worker’s reports throughout the dependency commented on the existence of a bond between the children and the parents. Father’s testimony at the section 366.26 hearing described the children’s reactions to him and how much they enjoyed their visits with him. However, due to father’s failure to address the issues which brought the children to the attention of CFS, he never progressed to more frequent or unsupervised visits. Father also acknowledged that he never requested more frequent visits. While father was able to establish that he maintained regular contact and visitation with the children, he failed to establish the second prong of the exception, that termination of parental rights would be detrimental.

In *In re C.F.*, *supra*, the mother had regular pleasant visits with her children, and her daughter was sometimes sad to see the visits end. (*In re C.F.*, *supra*, 193 Cal.App.4th at p. 557.) However, the court noted that the absence of a bonding study or other evidence to show that the mother occupied a parental role in the lives of her children, or

that the children would suffer any actual detriment upon termination of parental rights.

(Ibid.)

The same is true here. We have no doubt that father loves his children and that they love him back. But that is not sufficient to establish a “compelling reason for determining that termination would be detrimental to the child.” (§ 366.26, subd. (c)(1)(B).) Father failed to present evidence showing that termination of parental rights would be detrimental to the children. Without compelling evidence on this point, the juvenile court’s findings must stand.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

RICHLI
J.

MILLER
J.