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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re DESTINY C. et al., Persons Coming Under
the Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

C.G.,

Defendant and Appellant.

F068778

(Super. Ct. Nos. 07CEJ300163-1;
07CEJ300163-2)

OPINION

APPEAL from orders of the Superior Court of Fresno County. Mary Dolas,
Judge.

Carolyn S. Hurley, under appointment by the Court of Appeal, for Defendant and
Appellant.

Daniel C. Cederborg, County Counsel, and Amy K. Cobb, Deputy County
Counsel, for Plaintiff and Respondent.

C.G., mother of Destiny and Stephanie (together the children), appeals from the termination of her parental rights.¹ She contends the juvenile court erred in failing to find that the preservation of her relationship with the children or the relationship between the children and their younger siblings would be more beneficial to the children than the stability and permanence of adoption. She also alleges error in the juvenile court's failure to appoint separate counsel for each child. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Welfare and Institutions Code² Section 300 Petition and Detention June 2007

The children first came to the attention of the Department of Children and Family Services (the department) in June of 2007 when Destiny was then three years old and Stephanie was two. A petition filed by the department alleged that mother had failed to provide adequate care, supervision, and protection for her children, who were found residing in an unsanitary and unsafe environment. Mother was said to have a substance abuse problem, and easily accessible drug paraphernalia was found in the home. Mother, who was on probation for 2004 charges of child endangerment, was arrested and jailed. The children were detained.

Jurisdiction July 2007

At the jurisdictional hearing, mother submitted on the social worker's report, and the juvenile court found the allegations of the petition true.

Disposition August 2007

The report prepared in anticipation of disposition stated that mother, who tested positive for marijuana as recently as July 3, 2007, admitted to a drug problem and the need for treatment. She had been in a residential treatment program since July 23, 2007, was doing well and testing clean. Mother admitted to needing anger management and

¹ Stephanie and Destiny have different fathers - neither is a party to this appeal.

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

assistance with finding appropriate housing. Mother was appropriate with the children at visits, and the children appeared to be bonded to her. Mother was participating in mental health therapy.

Although the maternal grandparents wanted placement of the children, the department was concerned due to the grandparents' own Child Protective Service history and their lack of knowledge of mother's drug use and the condition of mother's home, which was on the same property as theirs.

At the disposition hearing, the juvenile court ordered reunification services for mother. Postdispositional mediation and a six-month review were set.

Postdispositional Mediation October 2007

After the postdispositional mediation, the juvenile court ordered liberal visits for mother with the children to be held at the treatment facility. Mother was participating in various programs at the treatment facility.

Six-Month Review November 2007

The report prepared in anticipation of the six-month review stated that mother was doing well in parenting classes and labs. She was reassessed and found not to need mental health treatment. The children were very attached to mother and mother was appropriate with them when they were together. Mother was expected to complete the residential treatment program in January of 2008, and would then enter a day program for an additional six months. The juvenile court found that mother was making significant progress and the next hearing was set for July of 2008.

Section 388 Modification Petition

On January 17, 2008, a section 388 modification petition filed by the department requested extended visits for mother. As a result, the children were placed with mother. Reunification services were terminated and family maintenance ordered. Mother and the children were doing well in a transitional home.

Interim Review April 2008

At an interim review in April of 2008, the department recommended continued family maintenance. Mother, who continued to test negative, was completing the transitional phase and entering the aftercare phase of drug treatment. She had found a home to rent. The children were in good health and enjoyed living with mother, who was meeting their needs.

Twelve-Month Review July 2008

Reports filed in anticipation of the 12-month review stated that mother had gotten her own apartment on May 18, 2008, but a day later regressed by using methamphetamine with a friend. She was required to attend 90 days of NA/AA, the aftercare phase of her treatment was extended 30 days, and she was to obtain a sponsor within two weeks. The children were reported to be very bonded to mother. The department requested an additional 90 days of services. A family maintenance review was set for November 2008.

Family Maintenance Review November 2008

At the family maintenance review hearing, the juvenile court ordered a supplemental report and set it for another hearing in February 2009.

The subsequent report stated that the social worker had interviewed Destiny, who said she was staying with her grandparents at times because her mother was in school. Her mother was at her apartment with Stephanie and mother's boyfriend. A visit to mother's apartment found Stephanie being babysat by a home schooled 12½-year-old girl. The apartment was filthy, although there was food in the apartment for Stephanie. A neighbor stated that mother and her boyfriend, who was a known crystal methamphetamine user, fought constantly, on one occasion causing mother a black eye. The grandparent's house where Destiny stayed was also filthy.

Section 387 Supplemental Petition November 2008

On November 24, 2008, the department filed a section 387 supplemental petition and the children were again detained. The petition alleged that the children were found residing in an unsafe and unsanitary environment, with filth and cockroaches everywhere. Domestic violence in the home was also a concern.

Section 387 Jurisdiction Hearing December 2008, February and March 2009

The social worker's report recommended termination of services for mother and setting a section 366.26 permanency review hearing to consider guardianship. A maternal aunt³ and her husband expressed interest and were approved for placement.

Mother submitted on the report and a section 366.26 hearing was set for June 23, 2009. Supervised visits were ordered.

Section 366.26 Selection and Implementation Hearing June 2009

The report prepared in anticipation of the section 366.26 hearing stated that the children had been placed with the aunt who was seeking guardianship. Visits with mother were going well. The children were happy to see her and she exhibited good parenting skills. The children were developmentally on target and likely to be adopted if parental rights were terminated. But the aunt with whom the children were placed did not want to pursue adoption at that time. In addition, the social worker opined that it would be detrimental to the children and not in their best interest to terminate parental rights. The children had a strong bond with mother and wanted to be returned to her if they had a choice.

The aunt was able to set clear structure and boundaries for the children. She had a positive relationship with the children and was prepared to care for the children as needed. The department recommended guardianship with dependency as the permanent plan.

³ At the time referred to as "maternal cousin."

On June 23, 2009, the juvenile court ordered guardianship and found that the children would benefit from continued visitation with mother. The visits were to be third-party supervised, but with discretion by the department for unsupervised visits. Letters of guardianship were issued August 4, 2009.

Guardianship Review December 2009

In September of 2009, the aunt, now guardian, reported that Destiny was exhibiting intolerable defiant behavior, including self-harm. Destiny was referred to a therapist who stated that she was torn between her loyalty to the guardian and mother, especially when the guardian and mother had disputes. By December of 2009, mother gave birth to another daughter, Sarah, and the children questioned why their new baby sister was allowed to live with mother and they were not.

Guardianship Review July 2010

Mother was ordered unsupervised visits with the children and discretion for liberal visitation, with notice. Mother was also allowed to attend extracurricular functions. Continued guardianship was found to be the appropriate permanent plan. Mother continued to drug test negative.

Guardianship Review February 2011

The children and guardians moved to a larger home and were doing well. The guardians were interested in Kin-GAP⁴ guardianship or adoption. Visits with mother were going well, except that mother's boyfriend, who was not to be present at visits unless he had taken domestic violence classes, had been there on one occasion. The children also had additional visits with their maternal grandparents. The social worker

⁴ Kin-GAP refers to the Kinship Guardianship Assistance Payment Program, which provides aid to children who leave the juvenile court system to live with a relative legal guardian. To qualify, the child must have resided with the relative caregiver for at least 12 consecutive months in court-ordered placement. Legal guardianship must be established with the relative caregiver and dependency must be dismissed at the same time or after establishment of the legal guardianship. (§§ 11360, 11362, 11363.)

reported that, while the children had benefited from visits with mother, the visits had not resulted in any substantial change in circumstance for mother to safely reunify with the children. The guardians were interested in adopting the children, but did not want to do so until both of the children were in agreement.

Guardianship Review August 2011

The report prepared in anticipation of the review hearing recommended the permanent plan remain one of guardianship. Mother was not ready for the return of the children because of continued domestic violence issues with her boyfriend, she did not have a place of her own, and she could not provide for the children without the assistance of family. The guardians wished to adopt the children. Destiny was in favor; Stephanie was not.

Section 388 Modification Petition and Hearing January and February 2012;
Guardianship Review February 2012

On January 13, 2012, the social worker filed a section 388 petition requesting a reduction in visitation for mother to twice a month for one hour, supervised, and separate for each child. The request was made because Destiny felt rejected, ignored and unloved. The court issued a temporary order, approving the new visitation plan, but not separating the children. A contested section 388 hearing was set for the end of the month.

The juvenile court subsequently ordered the earlier temporary order, allowing the children together to visit mother twice a month, remain in place. The juvenile court found the continued current placement of the children necessary and appropriate.

Guardianship Review August 2012

The report in anticipation of review recommended a Kin-GAP guardianship with dismissal of dependency. The children wanted a permanent home with their aunt and to continue visits with mother and maternal grandparents. Mother, who was living with her parents, had been taking classes to become a medical assistant and she got her driver's license. Destiny's therapist reported that Destiny spoke fondly of mother and opined that, if adoption led to less visits, her anxiety and irritability could increase.

The juvenile court granted the Kin-GAP guardianship, dismissed dependency, and ordered unsupervised visits for maternal grandparents and supervised visits with mother.

Section 388 Modification Petition March 2013

In March of 2013, the guardian filed a section 388 petition requesting reinstatement of dependency and adoption of the children. The children's maternal grandfather also filed a section 388 petition to request that visits, which were stopped by the guardian when dependency was dismissed, be reinstated. By this time, the maternal grandmother had passed away. Following a continuation for investigation purposes, the juvenile court granted the guardian's petition and denied grandfather's petition, but ordered that the prior visitation order remain in effect. A section 366.26 permanency plan hearing was set for August of 2013.

Section 366.26 Permanency Plan Hearing January 2014

The report filed in anticipation of the section 366.26 hearing stated that the children were seeing mother at one overnight visit per month and a second all day Sunday visit each month, supervised by maternal grandfather. Mother, who was now pregnant with twins, did not want the guardians to supervise the visits and she did not want the visits to take place at the guardians' home.

The report recommended that mother's parental rights be terminated and to implement a permanent plan of adoption for the children. The children had been in the guardians' home for four years and they wished to adopt them. The report opined that the children were generally adoptable. They were active, healthy and content, and developmentally on target. They interacted well with everyone in the family. The children were excited to see mother, who took on a parental role at the visits. Mother's interaction with the children was attentive and appropriate. Destiny did not wish to continue overnight visits with mother, but Stephanie did.

The children responded to the guardians as parents. They referred to their uncle as “dad” and would like to call their aunt “mom,” but mother told them not to. The guardians displayed adequate skills in their role as parents.

The bonding study prepared for the hearing noted that the guardian believed mother was only permitted to have two hours a month visitation, but that she also attended the grandfather’s visits. Mother wished to complete school, get a job, and reunify with the children, although school was expected to take another two and a half years to complete. While Stephanie was close to mother’s new daughter Sarah, Destiny was not and did not enjoy visits with mother because she was excluded. Destiny felt safest with the guardians and wanted to be adopted, but also stated she wanted more visits with mother. Stephanie was not sure she wanted to be adopted and was sad that her mother was sad.

An observation of the guardians found the aunt had a harsher presentation with the girls, but still met their nurturing needs. The uncle balanced out the aunt’s stern approach with a gentler style. The observer opined that the guardians provided the stable, consistent and predictable care for the children, while mother was rigid and unnurturing and not parental in nature. It was further opined that there was no emotional attachment to mother such that the children would be emotionally harmed if the relationship were terminated. But there was a substantial relationship with mother and ongoing contact would benefit the children’s well-being. While mother provided some element of nurturing and engagement, it did not promote the well-being of the children to such a degree as to outweigh the benefit gained in a permanent home with adoptive parents.

At the contested hearing held January 7, 2014, the social worker supervisor in the assessment adoption division testified that the social worker had discussed the meaning of adoption with the children. Both children wished to stay with the guardians but Stephanie stated that she wanted to continue to have contact with mother. While it was hoped that the children could continue visits with mother and maternal grandfather,

postadoptive contact is up to the adoptive families. The guardians continued to be committed to the children and wished to adopt them. The social worker noted a reference in the bonding study that Stephanie was close to her younger sister Sarah, but the children's relationship with their younger siblings, newborn twin boys - who had been due in October of 2013 - was not known.

Stephanie testified, without the adult family members present, that she was eight years old. She testified that she loves her mom and her younger siblings, whom she sees when she spends the night at her grandfather's. She did not really understand what adoption meant, but would be sad if she could not visit her mother or siblings. Stephanie does not call her aunt "mom," but she has called her uncle "dad" since she moved in. Stephanie stated that she was "okay" with living with her aunt until she grows up.

Destiny testified that she was 10. She understood being adopted meant that her aunt and uncle would become her mom and dad, her cousins would become her sister and brother, and she would live with them permanently. Destiny wanted to continue to see her mother. She felt like she was "betrayed" by her younger siblings and wants all of them, including her mother, to know her better. She did not think she would see her mother enough if she were adopted. She would prefer not to be adopted "right now" because she wanted to see if she and her sister could go back and live with her mother and the younger siblings.

Mother testified to the various visiting arrangements she has had with the children. Although she claimed never to miss a visit, she testified that she had to give up a visit in exchange for allowing the children to stay longer at their younger sister's birthday party. Mother did not think the visits confused the children - they know they visit with mother and live with their aunt. Mother testified that her relationship with the aunt is tense at times. She claimed the children had been with her for about half their lives. The children discuss various issues with her and they are affectionate with each other. Mother testified

that, if the children were adopted and she was allowed to see them, she would find a way to do so.

The juvenile court terminated mother's parental rights and found that adoption was the appropriate permanent plan for the children. The juvenile court found that mother failed to carry her burden of proof that the benefit of continuing her relationship with the children or the children's relationship with their siblings was so significant or strong that it outweighed the benefit of adoption. Instead, adoption outweighed the friendly relationship the children had with mother.

DISCUSSION

I. BENEFICIAL PARENTAL RELATIONSHIP EXCEPTION

Mother contends the juvenile court erred in failing to find her relationship with the children outweighed the benefits of adoption. We find no error.

Adoption is the preferred permanent plan for dependent children who have not reunified with their parents. (§ 366.26, subd. (b)(1).) Thus, the juvenile court will ordinarily terminate parental rights at a permanent plan selection hearing, if it finds by clear and convincing evidence that a child is adoptable. The termination of parental rights to an adoptable child can be avoided, however, if the court finds "a compelling reason for determining that termination would be detrimental to the child" due to at least one of several statutorily-described circumstances. (§ 366.26, subd. (c)(1)(B)(i)-(vi).) The so-called beneficial relationship exception describes circumstances where "[t]he 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).)

In order to prove the beneficial relationship exception applies, a parent must overcome the strong presumption in favor of adoption and show that the relationship between her and the child is so beneficial that its severance would render the termination of parental rights detrimental to the child. (*In re Helen W.* (2007) 150 Cal.App.4th 71, 80-81.) "To meet the burden of proof, the parent must show more than frequent and

loving contact, an emotional bond with the child, or pleasant visits.” (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.)

“[T]he exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) ““The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child’s life spent in the parent’s custody, the “positive” or “negative” effect of interaction between parent and child, and the child’s particular needs are some of the variables which logically affect a parent/child bond.’ [Citation.]” (*In re C.B.* (2010) 190 Cal.App.4th 102, 124.) Only in an “extraordinary case” can a parent establish the exception because the permanent plan hearing occurs after the court has repeatedly found the parent unable to meet the child’s needs. (*In re Jasmine D.*, *supra*, at p. 1350.)

We reject mother’s claim that the evidence is insufficient to support the juvenile court’s finding that the beneficial parental relationship exception did not apply. Historically, courts have applied the substantial evidence standard of review to such determinations. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575-576.) More recently, some courts have applied this standard to the juvenile court’s determination whether a beneficial relationship exists, and the abuse of discretion standard to the determination whether the relationship is important enough to preclude adoption. (See *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) Under either standard, we can reverse only ““if we find that under all the evidence, viewed most favorably in support of the trial court’s action, no judge could reasonably have made the order that he did.” [Citations.]’ [Citation.]” (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.)

Here, the juvenile court correctly balanced the potential benefit of adoption to the children with the potential detriment from losing their relationship with mother.

Although mother maintained regular visitation with the children, she never advanced beyond visits and did not occupy a true parental role in the children's lives. While the children loved their mother and enjoyed visits with her, there was no evidence that foregoing that relationship would outweigh the benefit of adoption. "[A] child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child's need for a parent." (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.) "Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citations.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

The children were eight and 10 years old at the time of the hearing and had spent over half of their young lives with their guardians, who had provided them with a stable, loving family environment and tended to their daily needs. Adoption would continue that stability and security for the children.

In light of this evidence, the court could reasonably find that mother failed to meet her burden of proving the beneficial parental relationship to adoption applied.

II. SIBLING RELATIONSHIP EXCEPTION

Mother also contends the court erred in finding that the sibling relationship exception to adoption did not apply. As we have noted, we can only reverse such determinations "“if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did.”" (*In re Robert L.*, *supra*, 21 Cal.App.4th at p. 1067.) We can make no such findings here.

Section 366.26, subdivision (c)(1)(B)(v) provides an exception to the statutory preference for adoption where “the juvenile court determines that there is a ‘compelling reason’ for concluding that the termination of parental rights would be ‘detrimental’ to the child due to ‘substantial interference’ with a sibling relationship.” (*In re Daniel H.* (2002) 99 Cal.App.4th 804, 813.) “Reflecting the Legislature’s preference for adoption when possible, the ‘sibling relationship exception contains strong language creating a heavy burden for the party opposing adoption.” (*In re Celine R.* (2003) 31 Cal.4th 45, 61.) “Furthermore, the language focuses exclusively on the benefits and burdens to the adoptive child, not the other siblings.” (*In re Daniel H., supra*, at p. 813.)

“[E]ven if adoption would interfere with a strong sibling relationship, the court must nevertheless weigh the benefit to the child of continuing the sibling relationship against the benefit the child would receive by gaining a permanent home through adoption.” (*In re Celine R., supra*, 31 Cal.4th at p. 61.) In doing so, the juvenile court is directed to consider “the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child’s best interest, including the child’s long-term emotional interest, as compared to the benefit of legal permanence through adoption.” (§ 366.26, subd. (c)(1)(B)(v).)

The juvenile court did not err in finding that mother also failed to meet her burden of proving the children’s adoption was precluded under the sibling relationship exception. There was no evidence that the children were ever raised in the home with their younger siblings, nor was there any evidence of close and strong bonds with the younger siblings. The only evidence before the juvenile court of any relationship between the children and their younger sister Sarah and their new twin brothers was Destiny and Stephanie’s testimony that they liked spending time with their siblings and wished to see more of them. Destiny testified she was “betrayed by the babies and Sarah” and wanted them all

to know her better. Mother testified that Stephanie was closer to Sarah than Destiny was. Mother mentioned in passing that the children had attended Sarah's birthday party, mentioned no other family activities or occasions where they were all together and acknowledged that neither Stephanie nor Destiny had ever lived with Sarah or the twins.

The juvenile court did not err in concluding that mother had failed to meet her "heavy burden" of proving the sibling relationship exception to adoption applied, and we reject her claim to the contrary. (*In re Celine R.*, *supra*, 31 Cal.4th at p. 61.)

III. SEPARATE COUNSEL

For the first time on appeal, mother argues reversal is required because separate counsel should have been appointed for Destiny and Stephanie. She argues that the interests of the children varied and were in conflict because, while Destiny stated she wanted to be adopted, Stephanie never did. Mother argues that, by advocating adoption for Destiny, counsel was unable to advocate in favor of Stephanie's preference not to be adopted. As such, she contends the juvenile court erred by failing to appoint separate counsel for each child.

The department contends mother forfeited the issue by failing to raise it in the juvenile court. The department further maintains that, in any event, there was no actual conflict or prejudice shown.

We agree that mother has forfeited the issue on appeal (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.) Nonetheless, we will address the issue on the merits. In reviewing mother's claim, we presume mother has established how any alleged conflict of interest pertaining to counsel for the children has affected her sufficiency to establish "standing" to make the claim.

A primary responsibility of court-appointed minors' counsel is "to advocate for the protection, safety, and physical and emotional well-being of the child." (§ 317, subd. (c).) Counsel must not represent another party "whose interests conflict with the child's ... interests." (*Ibid.*) "[C]ounsel's paramount duty is to serve the minor's best interests,

rather than the minor's wishes" (*In re Zamer G.* (2007) 153 Cal.App.4th 1253, 1265.)

The issue was addressed by the Supreme Court in *In re Celine R.*, *supra*, 31 Cal.4th 45. There the court held "that the court may appoint a single attorney to represent all of the siblings unless, at the time of appointment, an actual conflict of interest exists among them or it appears from circumstances specific to the case that it is reasonably likely an actual conflict will arise. After the initial appointment, the court must relieve counsel from the joint representation when, but only when, an actual conflict of interest arises." (*Id.* at p. 50.) Further, "error in not appointing separate counsel for a child or relieving conflicted counsel" requires reversal only if it is reasonably probable the outcome would have been different but for the error. (*Id.* at p. 60.)

As noted above, after reunification efforts end, the Legislature's preferred permanent plan becomes termination of parental rights and subsequent adoption. (*In re Jose V.* (1996) 50 Cal.App.4th 1792, 1799; *In re Cody W.* (1994) 31 Cal.App.4th 221, 227-231.) "Adoption is the Legislature's first choice because it gives the child the best chance at ... commitment from a responsible caretaker. [Citations.]" (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1348.) Where the child is likely to be adopted, the court must terminate parental rights unless "the court finds a compelling reason for determining that termination would be detrimental to the child" (*Id.* at p. 1343.)

Here, adoption was in the best interests of both children. As explained above, minors' counsel may have reasonably determined neither child was likely to suffer detriment from termination based on parental and sibling relationships. Thus, counsel could responsibly advocate on behalf of both children because their interests did not conflict. (*In re Zamer G.*, *supra*, 153 Cal.App.4th at p. 1266.)

We agree with the Supreme Court's observation that "[c]hildren's interests are not always adversarial, and ... should not always be treated as such." (*In re Celine R.*, *supra*, 31 Cal.4th at p. 56.) Here, the best interests of the children required counsel to argue for

adoption. In pursuing this goal, counsel was not faced with the prospect of harming one client by advocating for the other. Simply put, there was no evidence of an actual conflict of interest between Destiny and Stephanie requiring separate counsel.

DISPOSITION

The order terminating parental rights is affirmed.

Franson, J.

WE CONCUR:

Cornell, Acting P.J.

Kane, J.