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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re TIMOTHY S. et al., Persons Coming
Under the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

SARAH S.,

Defendant and Appellant.

G045701

(Super. Ct. Nos. DP019127
& DP109128)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Jane Shade,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Lauren K. Johnson, under appointment by the Court of Appeal, for
Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Aurelio
Torre, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minors.

INTRODUCTION

This is the second appeal by Sarah S. of an order regarding her two young sons, five-year-old Timothy and four-year-old Mathew. The boys were removed from Sarah's care in 2009, when they were three and one; they have been in foster care ever since. Sarah's reunification services were terminated in September 2010; she appealed that ruling, and we affirmed.

Between May and August 2011, the juvenile court conducted the selection and implementation hearing mandated by Welfare and Institutions Code section 366.26¹, to determine a permanent plan for the boys.² The court found that the boys were adoptable and that the exception for terminating parental rights did not apply. Sarah appeals from this ruling.

We affirm. Substantial evidence supports the court's determination the boys are adoptable and Sarah has not carried her burden to show that terminating her rights would be detrimental to the boys.

FACTS

The facts that led to the boys' detention by social services can be swiftly summarized. Sarah was living with her boyfriend in San Bernardino County when the police picked up the two boys in 2009 after a telephone call from an alarmed friend. Sarah was hospitalized with drugs in her system, and the boys, then three and one, went into foster care. Eventually Sarah moved to Orange County, and Orange County Social Services Agency (SSA) took over the case.

Sarah did not comply sufficiently with her case plan, and her reunification services were terminated. At the end of the six-month review hearing, on September 30, 2010, the court found that Sarah "is unable to control her explosive anger or manipulative

¹ All further statutory references are to the Welfare and Institutions Code.

² The hearing took place during 28 sessions between May 9 and August 9, 2011.

conduct when her children are present even when social workers, visitation monitors or sheriff's deputies are present. [Sarah] blames her problems on others. [Sarah] lacks insight into her behavior.”

According to reports submitted to the court, things did not much improve after September 2010. Once again, Sarah showed herself to be loving and affectionate with the boys but refractory, surly, or belligerent with the adults whose duty it was to monitor her visits.³ She went public with her case, posting pictures and diatribes on her Facebook page and holding forth on a radio talk show. SSA obtained an ex parte order requiring her to take down any pictures of the children, their caretakers, and social workers from Facebook, an order Sarah violated. She insisted on bringing unauthorized people to her visits with the boys. She missed a visit in April 2011 because she did not give her contact information to SSA, and two of her four visits at the beginning of 2011 had to be terminated early because of her behavior. On May 24, 2011, the court issued a temporary restraining order against Sarah after she was discovered in the social worker's office building, which is a passcard-protected building. After testimony, the order was made permanent a month later.

When the termination hearing began in May 2011, the boys were three and four years old. By the time it ended, they had both had birthdays. They had been in foster care since July 2009, with the same foster father. At first, the foster father expressed an interest in adopting the boys; he lost his job and then changed his mind about adoption when his mother became ill. He stated, however, that he was willing to care for the boys until an adoptive home could be found for them.

The court obtained extensive evidence over the three months of the hearing. It heard from Sarah, both boys (in chambers), the social worker, two adoption workers, the foster father, and his sister, who took care of the boys during the week while the

³ Sarah's conduct during visits required SSA to assign two monitors per visit. In addition the visits had to be at the Eckhoff facility so that a sheriff could also be present.

foster father worked. It had several SSA reports, adoption work-ups, and psychological evaluations for both children.

The court issued its ruling on August 9, 2011. It found the children likely to be adopted, and it terminated Sarah's parental rights, finding that in the boys' best interests. It also found that Sarah had not maintained regular visitation and had not engaged in appropriate parental conduct in the boys' presence. As a result, a continuing relationship with her would not benefit them.

DISCUSSION

Section 366.26, subdivision (b), provides in pertinent part: "At the hearing, which shall be held in juvenile court for all children who are dependents of the juvenile court, the court, in order to provide stable, permanent homes for these children, shall review the report . . . , shall indicate that the court has read and considered it, shall receive other evidence that the parties may present, and then shall make findings and orders in the following order of preference: [¶] (1) Terminate the rights of the parent or parents and order that the child be placed for adoption and, upon the filing of a petition for adoption in the juvenile court, order that a hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted." The statute then provides, in order of preference, the other alternatives in default of adoption – relative guardianship, an order to find a prospective adoptive family, non- relative guardianship, or long-term foster care. (§ 366.26, subd. (b)(2)-(5).)

Section 366.26, subdivision (c)(1) provides in pertinent part: "If the court determines . . . , by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption." An exception to this mandatory termination is found in section 366.26, subdivision (c)(1)(B)(i): the court has found a "compelling reason for determining that termination would be detrimental to the child" because "[t]he parents have maintained regular

visitation and contact with the child and the child would benefit from continuing the relationship.”

Sarah has identified two issues on appeal. She asserts the trial court erred when it found the boys were adoptable and when it found it would not be detrimental to the boys if her rights were terminated. Sarah also maintains the trial court should have ordered long-term foster care for Timothy and Mathew.

I. Adoptability

We review the trial court’s finding of adoptability by clear and convincing evidence for substantial evidence (even though the trial court standard was “clear and convincing” evidence). (*In re Y.R.* (2007) 152 Cal.App.4th 99, 112, disapproved on other grounds in *In re S.D.* (2009) 46 Cal.4th 529; *In re Brian P.* (2002) 99 Cal.App.4th 616, 623-624.) The question of adoptability usually focuses on whether the child’s age, physical condition, and emotional health make it difficult to find a person willing to adopt that child. (*In re Y.R.*, *supra*, 152 Cal.App.4th at p. 112.) A prospective adoptive parent’s willingness to adopt indicates a likelihood that the child will be adopted within a reasonable time (*ibid*), but it is not necessary to have a prospective adoptive family waiting in the wings in order to find a child adoptable. (*In re Josue G.* (2003) 106 Cal.App.4th 725, 733.)

Substantial evidence supported the court’s determination Timothy and Mathew were likely to be adopted. They are, of course, still quite young. The court had the opportunity to observe and interact with both boys in chambers. It had the evidence of the social worker, assigned to their case since December 2009, who had been in their company on at least 30 occasions – both in their foster home and during visits with Sarah – and who described them as cute, active, friendly, and affectionate.⁴ She testified they

⁴ “I think they’re very bright, adorable, outgoing, good kids. I think that they’re easily – are able to form bonds with adults and people in their lives including foster siblings, extended family members. They have adjusted well to new environment, and I believe that they’re really great kids, and I do believe they’re adoptable.”

had no mental or physical conditions that would impede adoption, and they played together and with other children normally for their ages. The representative of SSA's adoption division who prepared the planning assessment for the boys testified they were generally adoptable owing to their young age, their lack of serious behavioral or medical problems or need for medication, and their ability to engage in activities appropriate to their age. In fact, after considering the boys' characteristics while she was testifying, she changed her opinion on the stand; she decided that their adoption was "likely" instead of "probable," as she had originally believed, and that therefore SSA would probably not need another six months to find a suitable adoptive family.⁵ The biggest impediment to their adoption, in her opinion, was the fact they were a sibling set and thus somewhat harder to place than a single child. Their foster father was at one point interested in adopting them; his change of mind, he said, had nothing to do with the boys or their behaviors.

In asserting that the court erred in finding adoptability, Sarah relies on the testimony of the boys' caretakers (their foster father and his sister), the psychologist's reports, and the testimony of one of the adoption workers that a child with one bipolar parent was more difficult to place for adoption than one without this disadvantage.⁶ The court, of course, had listened to the testimony and had read the reports.

The court did not find the psychological reports compelling, or even particularly helpful. Their value was severely undercut when the foster father's sister revealed that the psychologist had spent a total of only 20 to 30 minutes observing the

⁵ The only reason the witness had checked the "probable" box on the SSA form instead of the "likely" box was that the boys were a sibling set. On further reflection, she did not believe this factor to be as great a hurdle to adoption as she had first thought.

The adoption worker's assessment was borne out later by an addendum report dated October 28, 2011, informing the trial court that the boys had been placed in a prospective adoptive home on September 19 and were making progress in adapting to their new surroundings. SSA moved to augment the record to include this postjudgment report, a motion we hereby grant. (See *In re Salvador M.* (2005) 133 Cal.App.4th 1415, 1421-1422.) Although this report does not render Sarah's contention that the boys are not adoptable entirely moot – as this is only a prospective adoptive placement – it adds to the already substantial evidence of adoptability.

⁶ Sarah had been diagnosed as bipolar in 2009, when she was evaluated psychologically.

boys before writing them up. The sister, whom the psychologist took to be the “foster mother,” also denied making some of the statements attributed to her in the reports. The primary adoption worker testified she had read the psychologist’s reports, and she did not consider the behaviors identified in them serious enough to prevent the boys from being adopted.⁷ Children wound up in the SSA adoption pool because they had been abused or neglected, and families seeking to adopt from this population were aware that the children would probably have some behavioral problems. In her opinion, the behaviors mentioned in the psychologist’s reports were not of the variety that would make the boys unadoptable.

The court specifically considered the testimony of the foster father and his sister when making its determination. And, of course, it had had the opportunity to meet the children themselves.⁸

The court clearly believed Sarah’s claims of behavioral problems, such as aggression and hyperactivity, were greatly exaggerated.⁹ “Boys who are three and four are lively and energetic. They jump. They hop. They run around and generally live life at 100 miles an hour unless they’re asleep. These two boys are simply boys. Sometimes they exhibit sibling rivalry. They whine and they sulk when they don’t get their way. . . . Sometimes they push or shove other children or their caretakers. [¶] And there’s no doubt they’ve seen some behavior by adults that should not have seen and that adult behavior, some of it, has been very troubling for the boys.” The court agreed with the social worker and their therapist that that the boys were adorable, “great kids,” and not at all shy around strangers, as the foster father had reported.

⁷ The social worker testified that both boys were in therapy as of June 2011 and that the therapist believed they suffered from a form of post-traumatic stress disorder, which could be resolved through therapy. The therapist also told the social worker the boys were “adorable” and any family would be lucky to have them.

⁸ During the boys’ appearance in chambers, Timothy put a place mat on his head, and Mathew decided he would be more comfortable on the floor.

⁹ The boys’ foster father, who had been taking foster children for seven years at the time of trial, testified that he mostly fostered adolescents.

The fact that Sarah had been diagnosed as bipolar is only one factor to be considered in the entire picture. Although one of the adoption workers acknowledged that such a diagnosis made finding an adoptive family “more difficult,” he did not testify that it would make the boys’ adoption unlikely or improbable. The adoption worker himself, after talking to their caretaker and observing the children for about an hour, concluded that they were behaving normally for their age.

The court’s determination of adoptability by clear and convincing evidence was based on substantial evidence. We therefore affirm this determination.¹⁰

II. Detrimental Termination Exception

If the court determines a child to be adoptable, the parents then have the burden to show that terminating their rights would be detrimental to the child under one of the exceptions set forth in subdivision (c)(1)(B) of section 366.26. (*In re C.F.* (2011) 193 Cal.App.4th 549, 553.) The exception Sarah wishes to apply has two conditions: (1) regular visitation and contact and (2) benefit to the child. (See § 366.26, subd. (c)(1)(B)(i).) Sarah must meet both conditions if the exception is to apply.

We review the court’s findings on the application of the exception for substantial evidence, drawing all conclusions in favor of the prevailing party. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1235.) We affirm a ruling supported by substantial evidence. (*In re C.F., supra*, 193 Cal.App.4th at p. 554.)

A. Regular Visitation and Contact

In 2011, Sarah was allowed monthly two-hour visits with her sons.¹¹ She was generally reliable about showing up, missing only one visit in April 2011. The visits, however, were sometimes cut short, because Sarah would sacrifice a pleasant two hours with her children to her desire to vent her emotions against the people in charge. As a

¹⁰ Because we affirm the court’s finding of adoptability, we need not address Sarah’s assertion the court should have ordered long-term foster care for the boys.

¹¹ Sarah had originally been granted two-hour visits twice a week with the boys, but because of her remarkably bad behavior in June 2010, the visits had to be curtailed to one a month.

result, visitation was irregular, in that the boys could never be sure whether their mother's behavior would cause a visit to end early. Even when the visit lasted the full two hours, Sarah's attention would sometimes be distracted from the children by her phone or by taking pictures to post on her Facebook page. Her inability to focus on the boys during the entire time, even while she was physically present in the same room, deprived them of the full parental attention a visit implies. Given that she had only two hours a month with them, one would have expected her to concentrate wholly on them during that time.

We agree with SSA that visitation involves more than the parent's mere physical presence in the same room as the child and that regular visitation does not include visits that end prematurely because a parent gets out of control. Sarah did not meet her burden to show that she had maintained regular visitation and contact with Timothy and Mathew. The court based its determination on that issue on substantial evidence.

B. Benefit to the Child

As the court stated in *In re Autumn H.* (1994) 27 Cal.App.4th 567, the "continuing-benefit" exception means "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. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and 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." (*Id.* at p. 575.) The factors to be considered are the child's age, how long he or she lived with the parent, the effect of interaction between parent and child, and the child's particular needs. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467.)

Timothy and Mathew were removed from Sarah's care in 2009, when they were three and one. They have lived with the same foster parent since that time. By the end of the hearing, they were five and four years old. The social worker testified that the boys had bonded with their foster father. As they grew older, they inquired less and less often about their mother, preferring to stay with their foster father, whom they called "dad." Mathew was now calling Sarah his "visit mom." The foster father reported in June 2011 that the boys had not asked about their mother for several months. When a visit had to be terminated after less than 45 minutes, because of Sarah's misbehavior, the boys were not upset. It appeared from the evidence the boys were interested in seeing Sarah in large part because she brought them food and toys.

A continuing benefit to the child requires more than just fun visits with affectionate hugs at the beginning and end. Of course a child would want to continue to see someone who brings him candy and toys and plays games with him. The continuing benefit involves much more than that. There must be an emotional attachment that is more than just that of a child to a friendly visitor or nice aunt. (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 464.) It must be so significant that maintaining it outweighs the benefits of a stable, permanent home with an adoptive family. (*Ibid.*) Sarah did not carry her burden of showing she had that kind of relationship with her boys.

No one disputed that Sarah treated her children lovingly or that they expressed affection for her. But Sarah still has not addressed the problems that brought the boys into the dependency system in the first place or shown that she could place the boys' needs above her own, as evidenced by the reduction in visitation and the termination of visits when they did happen. The court specifically referred to Sarah's numerous outbursts during visits as setting a bad example for the boys and, in general, a refusal to behave as a parent should before small children. A steady diet of such conduct cannot possibly benefit Timothy and Mathew as they grow up.

DISPOSITION

The judgment is affirmed. SSA's motion of November 28, 2011, to augment the record is granted.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.