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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re N.L., a Person Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

T.L. et al.,

Defendants and Appellants.

G046544

(Super. Ct. No. DP010582)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Dennis J. Keough, Judge. Affirmed.

Liana Serobian, under appointment by the Court of Appeal, for Defendant and Appellant T.L.

Sharon S. Rollo, under appointment by the Court of Appeal, for Defendant and Appellant D.L.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Debbie Torrez, Deputy County Counsel, for Plaintiff and Respondent.

* * *

T.L. (mother) and D.L. (father) appeal from the juvenile court's order terminating their parental rights and freeing for adoption after nine years of dependency their now 11-year-old-daughter, N.L.. (Welf. & Inst. Code, § 366.26; all further unlabeled section references are to this code.) Minor's trial counsel argued in favor of terminating parental rights below, and makes no appearance on appeal. Mother and father contend the juvenile court erred in concluding they failed their burden to demonstrate the so-called "benefit exception" (§ 366.26, subd. (c)(1)(B)(i)) applied to avoid terminating parental rights. Finding no basis to overturn the juvenile court's conclusion, we affirm the termination order.

I

FACTUAL AND PROCEDURAL BACKGROUND

SSA first detained N.L. at age three in 2004 based on severe emotional distress caused by her parents' domestic violence altercations in her presence, including an incident where father grabbed mother, mother threatened father with a knife, and father screamed, "Go ahead and cut me." Police intervened, and the juvenile court placed N.L. with her maternal grandmother, Ruby, to protect her from her parents' violent eruptions and father's unresolved marijuana substance abuse problem. (§ 300, subd. (b).) By March 2005, father's and mother's progress in reunification services warranted a 60-day in-home trial visit, which went well, and the juvenile court in May 2005 returned N.L. to their care under family maintenance supervision.

Mother separated from father in October 2005, but invited renewed court scrutiny and monitored visitation because of concerns about the contact she permitted between N.L. and her new boyfriend, who had an extensive criminal record that included a felony conviction for sexual intercourse with a minor. Mother and father reunited after the boyfriend returned to jail, resuming their stormy pattern of domestic fights and arrests, including one where mother bloodied father's lip and threatened him with a butcher knife that she eventually relinquished, but left within N.L.'s reach.

Mother twice attempted suicide in the family home, first in March 2006 and again in April in N.L.'s presence, leading to a hospital visit where father exhibited incoherent behavior and appeared to be under the influence of drugs. A social worker detained N.L. and had her treated for dehydration and vomiting. The nursing staff found N.L. displayed extreme emotional tendencies and also noted she was far below a healthy weight, just 34 pounds at age five. Father and mother pleaded no contest to neglect allegations in a supplemental petition, and the juvenile court again placed N.L. with Ruby.

N.L. referred to Ruby as "mom" and Ruby wanted to adopt N.L., but because she worried protracted proceedings would harm the girl's fragile emotional state, she agreed when the parents stipulated to her appointment as N.L.'s guardian in February 2007, with weekly visitation for father and mother. By September 2007, SSA changed its recommended permanent plan to adoption to provide N.L. greater security and because the parents' monitored contact resembled "three six-year-old children playing together" rather than a parent-child relationship. This court denied the parents' writ petition challenging the juvenile court's independent authority to set a new permanency planning hearing (.26 hearing) absent a modification petition filed by SSA or Ruby. (*David L. v.*

Superior Court (2008) 166 Cal.App.4th 387, 392; accord, *In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1106.)

The juvenile court considered at the renewed .26 hearing a bonding study in which the therapist observed mother and N.L. had only a “teacher-student like interaction” and that while father had a stronger relationship with N.L., he had difficulty controlling his anger. The therapist diagnosed N.L. as a special needs child with posttraumatic stress disorder due to the violence she witnessed while in mother’s and father’s care, but also found Ruby’s sometimes angry responses to N.L.’s defiant behavior triggered further anxiety for N.L. The therapist recommended Ruby enroll in anger management classes to better parent N.L., the parties stipulated at the .26 hearing to Ruby’s continued role as N.L.’s guardian, and the juvenile court terminated dependency jurisdiction in September 2008, with exit orders for twice-monthly monitored visitation for mother and father.

Mother and father filed modification petitions seeking N.L.’s return two years later, but the juvenile court concluded they met neither the predicate of changed circumstances, nor that N.L.’s best interests would be served by allowing her parents to regain custody. To the contrary, it later emerged that in September 2010 N.L. returned from a visit with mother and father crying, screaming, pulling her hair, and demanding never to see them again. Ruby decided not to “force[] visitation” at the time, believing it better if N.L. renewed visits when she felt ready, but mother and father began proceedings in January 2011 to hold Ruby in contempt of court as a means to compel visits.

The parties agreed to continue the matter several months for an investigation; SSA found N.L. remained steadfast in private that she did “not want to see

her parents ever again,” but to avoid hurting their feelings told them she would consider living with them, while maintaining in her mind she “never” wanted to do so. She had lived with Ruby almost nine years, loved her and thought of her as her mother, and did not want to move. She could not remember why visits with her parents stopped, but she did recall father and mother often told her they would take her to live with them.

N.L.’s counselor observed over many years that an “emotionally fragile” N.L. struggled to adapt to living in two families, one with Ruby and the other in visits with her parents, which the counselor noted had a “negative effect” on N.L. and would be “emotionally detrimental” if unmonitored. N.L. took on a parental role for her parents, worrying about their health (father, multiple sclerosis; mother, asthma and bipolar, schizo-affective disorders), while neither empathized with N.L., but instead cast aspersions on Ruby and directed N.L. not to speak with the counselor, which resulted in a new referral. The new counselor, however, similarly reported N.L. did not want to visit her parents anymore, or at least until, as N.L. put it, she turned 16 years old and could “better . . . deal with her emotions at that time.” The parents insisted N.L. always asked to live with them, but when SSA informed them N.L.’s new counselor recommended against visits, they lashed out at Ruby as a “backstabber.” The court in July 2011 found Ruby was not in contempt and instead granted Ruby’s modification petition requesting that the court set a new .26 hearing.

The court held the .26 hearing over several days in November 2011 and February 2012, after a continuance for father to obtain new counsel. SSA’s reports for the hearing showed N.L. thrived in Ruby’s home, performed well in fifth grade, and her most recent counselor confirmed their sessions were ending because N.L. had met her therapy goals to increase her independence and coping skills and to decrease anxiety.

Her twice-monthly, monitored visits with her parents had resumed, which she enjoyed, but she wanted Ruby to adopt her and remained unsure she wanted contact with father and mother after adoption. According to the social worker, N.L.'s "biggest concern at the end of this hearing was whether or not she'd be able to continue having a relationship with her CASA [Court Appointed Special Advocate]," rather than with her parents. "Again, she is concerned about her parents' health . . . and would like to every now and then be able to know, to check up on them to make certain that they are ok."

N.L.'s longtime therapist saw her during the .26 hearing continuance and relayed that N.L. only shrugged her shoulders when asked how she would feel if she no longer could visit with her parents, but N.L. did not want to disappoint her father or mother, and felt conflicted over her loyalty to Ruby. The therapist expressed concern the parents instructed N.L. to contact them on social media (Facebook) after Ruby was asleep, and that N.L. had lived most her life with lingering "uncertainty" that upset her need to know "where she belongs and who is in charge of parenting."

N.L. testified she enjoyed her visits with the parents, did not want them to end, and would not want to be adopted if the visits ceased. The three most important people in her life were "[m]y mom, my dad and my grandma," but if she could live with anyone "in the entire world" it would be her cousin Tara or her best friend Jamie, and if she had to move to do so, she would be "sort of sad" not to see her parents but would buy a webcam to video chat with them. She would only extend her visits with mother and father to "[t]wo-and-a-half hours at the most," and while she would enjoy weekend visits with them that Ruby had allowed in the past, she viewed Ruby as her true mother and home: "Like, I could stay with them [her parents] overnight. And then in the morning

when I wake up my mom could drive me home.” She did not remember ever living with her parents.

Father and mother testified that after the dependency initially resulted in Ruby’s guardianship, Ruby allowed them liberal visitation, including overnight visits, before abruptly ceasing contact in September 2010. The parents were unaware of any anxiety, stress, or difficulty in school arising from the visits. Nor did they view N.L. as “parentified” with concern over their health: mother felt her daughter worried for her only as much as any other child would, and while father had told N.L. about his heart attack four years earlier and she knew of his multiple sclerosis from his poor physique and trips to the emergency room, he tried not to burden her with it and would instruct her not to worry. Both parents believed they had a strong bond with N.L.. Mother felt the bond was both parental and one of friendship, describing N.L. as her “buddy” and “best little friend.” Father parented N.L. by advising her of the dangers of drugs and smoking, but acknowledged his continued smoking might confuse N.L..

The juvenile court concluded father and mother had maintained consistent contact with N.L., but that imposing a guardianship instead of adoption had not met N.L.’s needs for stability and security, creating instead “complications” in N.L.’s ability to navigate her relationship with Ruby and her parents. The court found the circumstances particularly “poignant” given the record showing N.L.’s concern to ensure her parents took their medication or made it to the hospital, which demonstrated N.L. attempted to assume the role of a parent. The court recognized that if parental rights were terminated, caregiver promises of continued contact with a parent were unenforceable, but the court nevertheless concluded N.L. would not be “greatly harmed by the severance of the relationship that she has with her parents.” The court concluded,

as the parents acknowledged, that N.L. was readily adoptable, and because the court found the benefits of adoption outweighed any benefit in preserving mother's and father's legal ties of kinship, the court terminated their parental rights, and they both now appeal.

II

DISCUSSION

Mother argues the juvenile court erred by failing to apply the parental benefit exception (§ 366.26, subd. (c)(1)(B)(i)) to avoid terminating her parental rights, and father joins her argument to the extent it benefits him (*In re A.L.* (2010) 190 Cal.App.4th 75 [father's parental rights reinstated with mother's]). The court did not err.

Section 366.26 provides that after reunification efforts have failed and the court finds the child is likely to be adopted, “the court shall terminate parental rights” (§ 366.26, subd. (c)(1)), unless specified circumstances exist. One exception is where “[t]he court finds a compelling reason for determining that termination would be detrimental” because “[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).) “[T]he burden is on the party seeking to establish the existence of one of the section 366.26, subdivision (c)(1) exceptions to produce that evidence.” (*In re Megan S.* (2002) 104 Cal.App.4th 247, 252.)

The statutory exception requires that the child “benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) The benefit 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 (*Jasmine D.*.) To the contrary, once the mandated period for reunification has passed, the parent bears the burden of proving that termination of parental rights will be detrimental to the child. (*Id.* at p. 1350.) After reunification efforts end, the Legislature's preferred permanent plan calls for 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.]” (*Jasmine D.*, at p. 1348.) Thus, the benefit prong of section 366.26, subdivision (c)(1)(B)(i), is satisfied only if “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 re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*.) “In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer.” (*Ibid.*) The court’s balancing of competing considerations must be performed on a case-by-case basis, taking into account variables such as the child’s age, “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. [Citation.]” (*Jasmine D.*, at pp. 1349–1350; *Autumn H.*, at pp. 575–576.)

We will not disturb the juvenile court’s balancing of interests unless the order is not supported by substantial evidence (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 425), or the court abused its discretion (*Jasmine D.*, supra, 78 Cal.App.4th at p. 1351; see *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314 [substantial evidence standard of review applies to existence of a beneficial parental or sibling relationship;

abuse of discretion standard applies to whether existence of relationship constitutes a compelling reason for determining that termination would be detrimental].)

Mother relies primarily on *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*), but her reliance is misplaced. There, the juvenile court found father had maintained consistent and appropriate visitation with his daughter throughout the dependency proceedings and they shared an emotionally significant relationship. (*Id.* at p. 298.) The father had been S.B.'s primary caretaker for three years and the record showed "S.B. loved her father, wanted their relationship to continue and derived some measure of benefit from his visits." (*Id.* at pp. 300–301.) An expert who had conducted a bonding study of father and daughter testified that, due to their "fairly strong" bond, "there was a potential for harm to S.B. were she to lose the parent-child relationship." (*Id.* at pp. 295–296.) The appellate court concluded that "[b]ased on this record, the only reasonable inference is that S.B. would be greatly harmed by the loss of her significant, positive relationship with [the father]. [Citation.]" (*Id.* at p. 301.)

Here, there was no testimony from a psychological expert or other disinterested person suggesting termination of mother's parental rights would cause lasting detriment by severing a strong bond. To the contrary, the bonding study revealed more of a teacher-student than parental bond between mother and N.L., and the record suggested the two shared a relationship more as playmates than parent and child. And as stated in *In re Jason J.* (2009) 175 Cal.App.4th 922 (*Jason J.*), the same appellate court that decided *S.B.*, "The *S.B.* opinion must be viewed in light of its particular facts. It does not, of course, stand for the proposition that a termination order is subject to reversal whenever there is 'some measure of benefit' in continued contact between parent and child." (*Jason J.*, at p. 937.)

Mother sees as “the only logical deduction” from N.L.’s success in therapy a favorable conclusion that it was “resum[ing] visits with her parents [that] made N.L. feel whole, happy, and in peace,” but we must view the record in the light most favorable to the juvenile court’s order. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) The juvenile court reasonably could conclude that after nine years without mother (or father) as a primary caretaker, the strength of any dwindling parent-child bond could be measured in the relative ease with which N.L. weathered periods without visits: it was not marked by tears or notable sadness. Indeed, the record reflected increased visits *with* mother and father previously marked a decline in her behavior and mental state, she remained ambivalent about seeing the parents and did not want her visits meaningfully lengthened, and the future prospect of not seeing her parents only made her “sort of sad.” Given the Legislative preference for adoption and a record showing N.L. would not be greatly harmed by severing the parental bond (*id.* at p. 575), the juvenile court reasonably could conclude terminating parental rights was in N.L.’s best interest so she could be adopted.

Mother also argues the evidence does not support the conclusion N.L. was parentified; rather, her “ability to empathize with others, including her parents and her aunt who was recently diagnosed with cancer . . . , only showed that she was a kind [and] compassionate little girl . . . ,” but this again turns the standard of review on its head. The record supports the conclusion N.L. minimized her own feelings to avoid disappointing her parents, consistently expressing to others little interest in seeing them except to confirm *their* needs were met, including a touching concern that *they* would miss not seeing her because she was their only child. The trial court reasonably could conclude this upended the proper parent-child relationship.

Mother argues N.L.'s stated interest in maintaining the visitation schedule and her opposition to adoption absent continued visits should be controlling because N.L. was almost 11 years old. Mother notes a 12-year-old child may refuse to consent to adoption (Fam. Code, § 8602), and mother contends the result should be the same here. But placing ultimate authority on a 10-year-old's shoulders is an improper role reversal, and the juvenile court properly relieved N.L. of this burden. Mother also challenges the foundation for the social worker's opinion that the benefits of adoption outweighed preserving mother's legal status as a parent, but this argument misses the mark. The juvenile court, not a social worker, is vested with the authority to terminate parental rights, and the record amply supports the juvenile court's decision.

III

DISPOSITION

The order of the juvenile court terminating mother's and father's parental rights is affirmed.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.