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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re A.L. et al., Persons Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

C.G. et al.,

Defendants and Appellants.

G050535

(Super. Ct. Nos. DP016781,
DP016782, DP023284 & DP023285)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Deborah C.
Servino, Judge. Affirmed.

Pamela Rae Tripp, under appointment by the Court of Appeal, for
Defendant and Appellant C.G.

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

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

No appearance for the Minors.

* * *

Defendants C.G. (mother) and J.C. (father) separately appeal from an order terminating their parental rights to and freeing for adoption their four children, now ages eight and a half, six and a half, three, and two, respectively.¹ Mother argues the court erred by refusing to allow the two older children to testify about their relationship with mother and whether they wanted to be adopted and by failing to apply the benefit exception under Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i). (All further statutory references are to this code.) Father joins in mother's arguments, contending that if her parental rights are not terminated, the court has no authority to terminate his. We conclude the court did not err and affirm.

FACTS AND PROCEDURAL HISTORY

This is the second time this case has been before us. In *In re A.L.* (Feb. 9, 2015, G050239) (nonpub. opn.), mother appealed from orders summarily denying her section 388 petition to obtain family reunification services and from a section 388 petition filed by plaintiff Orange County Social Services Agency (SSA) to reduce mother's visitation with the children. Father, who is the father of the three youngest children, was not a party to that appeal. Most of the facts and procedural history were recited in the first decision and do not need repeating here. Relevant portions of SSA reports and testimony at the permanency hearing (§ 366.26) are set out here.

¹ Because all of the children's names start with the same initial and some have the same last name, for their privacy and for ease of reference we refer to the children as child 1, child 2, child 3, and child 4, from oldest to youngest, and refer to all four or any group of them collectively as the children.

In addenda to the permanency hearing reports, social worker Marisa Leon noted the four children had been placed together in the home of prospective adoptive parents, resulting in an “amazing[]” adjustment. They were “safe, comfortable, and secure.” The prospective adoptive parents were meeting the children’s needs and the children looked to them as “parental figures.” The behaviors of both child 1 and child 2 had improved since being placed with the prospective adoptive parents. The children were “progressing exceptionally well.”

The two older children told the social worker that if they could not return to their parents, they would like to live with these caregivers. Child 3 and child 4 were not old enough to convey their feelings but child 3 had a “close relationship” with the caregivers and child 4 was reaching that point.

When Leon again spoke with child 1 about adoption, he said he liked living with the prospective adoptive parents and wanted to stay there. But he was not sure about being adopted and asked, “What about my mom.” He asked for some time to think about it. A week later, when Leon brought up the prior conversation, child 1 said, “yes” before she could even ask the question. When she finally did ask him if he wanted to be adopted, her replied, “I said yes. Bye.” His therapist reported child 1 seemed happier and calmer in this placement.

When Leon asked child 2 about her placement with the prospective adoptive parents, she responded positively, saying “all good.” When asked if she wanted to stay with the prospective adoptive parents, while jumping up and down she said, “Yeah, yeah, I want to stay here.” As to adoption, she said, “If I go back to my mom, I’ll cry for this mom (referring to foster mother) and if I’m here, I’ll cry for my other mom.” She continued, “I live with mommy (foster mother) a lot and I live with mommy (biological mother) a long time too.” When Leon asked, “If the judge asks who you want to live with, what should I tell them,” child 2 answered, “Both! Mommy . . . and my mom.”

Child 3 called the caregivers “mommy” and “daddy” and went to them for affection and comfort. Child 4 was transitioning from her former foster parents and was becoming closer to the new caregivers and the other children.

The prospective adoptive parents stated the children “regress[ed]” somewhat after mother’s visits. Child 3 became defiant. Child 4 was more clingy with the foster mother. Child 3 and child 4 cried for a few nights and child 4 had nightmares. Child 1 became quiet. Child 2 was happy when she returns but has sometimes urinated on herself.

At the dependency hearing that began in April 2014, Leon testified she had monitored between 15-to-20 visits. The parents had regularly visited with the children, with the visits generally starting with hugs and kisses. Except for child 4, the children went to mother when she arrived. Parents and children were affectionate with each other. The children called mother “mom” or “mommy.” Parents brought activities and food. Although food choices had improved after advice from SSA, mother sometimes continued to bring unhealthy food.

Leon stated that in recent visits, since reduction to one hour per month, mother was more patient with the children and was “engaging with them more positively.” The children looked to mother for guidance and mother disciplined them appropriately. In Leon’s opinion, visits were better because the children felt secure in their current placement.

As to adoption, Leon’s testimony was consistent with her reports. She had spoken to child 1 and child 2. She had not told either child adoption meant they would never see their natural parents again. Child 1 asked about visits with his mother. As to child 2, she was sorry she would not live with mother but also said she would be upset if she were not placed with the prospective adoptive mother. She did not understand if she were adopted she would not see mother. But both children wanted the prospective adoptive parents to raise them. Child 2 calls them “mommy and daddy.” She understood

that if she were adopted she would live with the prospective adoptive parents who would take care of her.

Leon testified the three oldest children were bonded to the prospective adoptive parents and to each other. The three played together and displayed affection toward each other. She stated they had made “such amazing progress” since living in that home. Leon believed they would suffer emotional harm if they were removed.

In addition to Leon, four other social workers testified. Three had monitored between three and fifteen visits, with the fourth monitoring visits over eight months. Their testimony was fairly consistent. The visits were generally positive. The children were happy to see the parents and were affectionate. Mother brought materials for activities and appropriately disciplined the children. Some said the food choices were inappropriate; others did not report a problem. One said mother favored child 3; another did not see that.

After the testimony of the first two of those social workers, mother asked to have the two oldest children testify. In addition to SSA opposing the request, the children’s counsel and father opposed it. The court denied the request, ruling that, although it had the duty to consider the children’s wishes to the extent possible, their testimony was not required if not in their best interest. The court found that based on their young ages requiring the children to testify was inappropriate. It could traumatize them, even if they testified in chambers. Moreover, the children had made clear their feelings to the social worker, and mother was able to present evidence of her relationship with them without their testimony.

After the last two social workers testified, mother took the stand. She testified she was learning and getting to know the children. She was teaching them rules and respect. And the children were using the lessons she taught. Having each other’s back, as Leon had testified, was something she had taught them. She wanted the

children to avoid her mistakes, and to focus on school; she had selected careers for them. She could take care of all four children.

She testified the visits were beneficial; she acted as a “mom.”

All the children sought her affection. Child 1 wanted to be with her. He sent letters saying he loves her and wants to go home. Once their daily phone calls decreased, he began to lash out and perform poorly in school. He asked her why the visits had decreased and wanted her to adopt him.

Child 2 is attached to her and wants all of her attention. Child 3 is also attached and always wants to be next to her. Child 4 knows she is her mother.

Mother testified if she had to give up the children because she was unstable, she would do it because she wanted what was best for them. She just did not want to lose all contact with them. Their “bond [was] too strong.” It would benefit the children if they could continue to see her because “[w]e’re way too close.” Finally, mother stated she was not asking for the children to be returned. She just wanted to be part of their lives, even if only once a month.

After completion of testimony and argument, the court found parents had not proven the benefit exception. Although they had regularly visited with the children, they had not shown the benefit of maintaining the parental relationship outweighed the benefits of adoption. This was despite the finding the parents loved the children and the children cared for parents. Even though visits had generally been positive, they were supervised and it was “not altogether surprising that the visits would be appropriate.” And considering the limited visitation, mother’s extensive history of drug abuse, and father’s incarceration, parents had not “occupied a parental role” for almost two years.

On the other hand, the children’s placement with prospective adoptive parents was positive. The children would live in a stable, safe home. Child 2 and child 3 were “attached” to to the adoptive parents, child 1 was “becoming attached,” and although child 4 had some difficulty, it was not surprising given that she had spent most

of her short life with another caregiver. In addition, child 1 and child 2 expressed that if they could not live with their parents, they would want to live with the prospective adoptive parents.

Even though the children would be hurt to some extent, given mother's drug problems and father's repeat prison stays, the stability and permanency of the prospective adoptive home outweighed the benefits of maintaining parental rights.

DISCUSSION

1. Denial of Mother's Request to Have the Two Oldest Children Testify Was Not Error.

At a permanency hearing pursuant to section 366.26, "the court shall consider the wishes of the child and shall act in the best interests of the child." (§ 366.26, subd. (h)(1).) Mother relies on this as the basis for her claim the court abused its discretion when it did not allow child 1 and child 2 to testify. She claims there was insufficient consideration of the children's wishes. We are not persuaded.

There was substantial evidence in the record of the children's wishes. Leon had asked the two older children about being adopted and they had expressed their opinions that they wanted to stay with the prospective adoptive parents if they could not return home. Child 1 stated he wanted to be adopted. Child 2 had mixed feelings. The court ruled that not only was this clear evidence of the children's feelings, mother could testify as to her relationship with them.

And she did. Mother notes a request by the two older children that she adopt them. She points to evidence that the children were happy to see her when she arrived at visits and there were hugs and kisses all around. When on a visit if the children needed something they would turn to mother. Moreover, there was ample evidence as to the children's relationship with mother as detailed in the SSA reports.

The fact that the children were conflicted to a certain extent about adoption does not mean the court had insufficient evidence of their wishes. *In re Leo M.* (1993) 19 Cal.App.4th 1583 confirmed that section 366.26, subdivision (h)(1) did not demand

direct testimony or even “that the child be aware that the proceeding is a termination action for purposes of assessing the child’s preferences.” (*In re Leo M.*, at p. 1592.) “[I]t is not required that the child specifically understand the proceeding is in the nature of a termination of parental rights.” (*Id.* at p. 1593.)

In addition, the court found it would not be appropriate or in their best interest to require the children to testify, given their young ages, eight and six. The court was concerned about the trauma it could cause them. Under section 366.26, subdivision (h)(1) this was a proper consideration and within the trial court’s discretion.

In re Leo M. explained that children could “be permanently and severely traumatized if asked to grapple with the possibility of severing all ties to their biological parents.” (*In re Leo M.*, *supra*, 19 Cal.App.4th at p. 1592.) “[I]n honoring [children’s] human dignity we must be mindful that we should not carelessly impose upon them decisions which are heavy burdens even for those given the ultimate responsibility to decide. To ask a child with whom they prefer to live or to ascertain what they wish through other evidence is one thing. To ask those children to choose whether they ever see their natural parent again or to give voice to approving that termination is a significantly different prospect. We must have regard for the possible and readily conceivable anguish that such confrontational choices could create in a short lifetime already filled with trauma.” (*Id.* at p. 1593.)

Contrary to mother’s argument, there was no requirement expert testimony be presented to support the court’s concern about trauma to the children. Again, there was evidence in the record. Child 2 had been traumatized by mother’s threat to fight the foster parent or call the police to take back custody. Child 2 was often anxious both during and around the time of the visits. She feared mother’s anger and refused to play so she did not make mother mad. The two children were also stressed after visits.

In addition, when those children spoke to Leon, whom they had known for two years, they were somewhat conflicted about their preferences. It is reasonable to

infer that having to answer those questions posed by lawyers unknown to them in a courthouse, even if in chambers, would be stressful and traumatic.

Moreover, both father and the children's counsel opposed having the children testify. The court was entitled to consider their positions. (*In re Jesse B.* (1992) 8 Cal.App.4th 845, 853 [without contrary evidence, court may presume the children's counsel consulted with them about termination of parental rights].)

In sum, the court did not err in refusing to require the two oldest children to testify. Under section 366.26, subdivision (h)(1), not only does the court have to consider a children's wishes, it must balance that with acting in their best interests. The record reveals the court did just that.

2. Parents Did Not Prove the Benefit Exception.

Under section 366.26, subdivision (c)(1), parental rights may be terminated if there is clear and convincing evidence of adoptability. But an exception exists where a parent has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) Parents have the burden to prove these elements. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) We review the court's decision for substantial evidence. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.)

Here the court found the visitation prong was satisfied. We thus look at the second element. "A beneficial relationship is one that '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.' [Citation.]" (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206.)

Mother relies on evidence of the positive visits with the children to show the children would benefit from continuing the relationship. But even assuming all evidence of the visits was favorable, this was not enough to satisfy her burden. As the court noted, all the visits were supervised and they were limited.

Further, the visits did not always go well. There is evidence child 1 and child 2 were anxious and stressed about visiting. Their behavior changed for the worse before and after visits. And child 2 was often anxious during visits.

In addition, father is still incarcerated. And mother has a long history of drug abuse, which she is still in the early stages of treating, admirable as that is. Mother did not discuss this problem at all, thus failing to explain how maintaining a relationship with her under these circumstances would outweigh the benefit of adoption.

On the other hand, SSA reports showed the children did very well in the home of the prospective adoptive parents. The caretakers love the children and want to adopt all of them. They are meeting all of the children's needs, providing a stable and secure home. The children's behavior and outlook have substantially improved since they were placed with the current caretakers.

Contrary to mother's claim, "the weight of the evidence" does not show the children would be "seriously harmed" if parental rights were terminated. Based on their attachment to parents, it is not inconceivable the children will suffer some harm when parental rights are terminated. But it does not outweigh the substantial benefits of adoption. As the court stated, the "children's current placement underscores all the benefits that the children would enjoy if adoption were ordered."

"The parent must do more than demonstrate 'frequent and loving contact [,]' [citation] an emotional bond with the child, or that parent and child find their visits pleasant. [Citation.] Instead, the parent must show that he or she occupies a 'parental role' in the child's life. [Citations.]" (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) Mother did not make such a showing.

Mother cites *In re Casey D.* (1999) 70 Cal.App.4th 38 and *In re Brandon C.* (1999) 71 Cal.App.4th 1530 for the proposition that day-to-day contact with the children is not necessarily required to prove the benefit exception. While that may apply in some

cases, it has no bearing here. The limited visitation was not sufficient to show a parental relationship that would outweigh the benefits of adoption.

Mother also relies on *In re S.B.* (2008) 164 Cal.App.4th 289, where the court stated the parent did not have to “prove the child has a ‘primary attachment’ to the parent” or show day-to-day contact. (*Id.* at p. 299.) This was based on its finding that there was an actual parental relationship, even when the parent did not have custody. But that case has been limited to its “extraordinary facts” by the court that issued the opinion. (*In re C.F.* (2011) 198 Cal.App.4th 454, 459; see *In re Jason J.* (2009) 175 Cal.App.4th 922, 937.) Those extraordinary facts are not present here.

In sum, mother did not show her relationship with the children was so beneficial to them that it outweighed the benefits they would gain from being adopted. (*In re Jerome D.*, *supra*, 84 Cal.App.4th at p. 1206.) “A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent. [Citation.] A child who has been adjudged a dependent of the juvenile court should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree, but that does not meet the child’s need for a parent. [Citation.]” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466; see *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) The court did not err when it found the benefit exception did not apply.

DISPOSITION

The order is affirmed.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.