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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re G.U., a Person Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

L.C.,

Defendant and Appellant.

G053037

(Super. Ct. No. DP025040)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary G. Bishoff, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Richard L. Knight, under appointment by the Court of Appeal, for
Defendant and Appellant.

Leon J. Page, County Counsel, Karen L. Christensen and Jeannie Su,
Deputies County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

* * *

This appeal from the termination of the parental rights of L.C. to her then nine-year-old daughter G.U. is based on just a few remarks by the trial judge at a permanency planning hearing (see Welf. & Inst. Code, § 366.26¹) on December 9, 2015. That hearing was short. Social workers had already recommended termination of L.C.’s rights and proposed a permanent plan of adoption for G.U. But L.C. did not show up to the hearing, leaving her counsel to argue termination would not be in G.U.’s best interest on the theory L.C. and G.U. “have a bond” and spoke regularly on the telephone. Minor’s counsel countered by saying G.U. was clearly adoptable and had not had face-to-face contact with her mother since the dependency began in August 2014, which was when G.U. was placed with her paternal grandparents in Pennsylvania. Minor’s counsel added that even L.C.’s phone calls back to Pennsylvania had “been very inconsistent.” The trial judge next observed that if L.C.’s counsel was making an argument based on “(c)(1)(B)(i)” – which is to say, the oft-litigated benefit exception in dependency law² – L.C. had not even met the “first prong” of that exception, namely “regular and consistent visitation.” L.C.’s counsel had nothing more to say, and made no attempt to disabuse the

¹ All statutory references are to the Welfare and Institutions Code. All references to any subdivision are to section 366.26.

² That’s the current statutory reference to the “benefit exception.” The abridged version of the benefit provision in section 366.26 is as follows: “(c)(1) 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. . . . Under these circumstances, the court shall terminate parental rights unless either of the following applies: [¶] . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and *the child would benefit from continuing* the relationship.” (Italics added.)

trial judge of any inaccuracy in his “first prong” comment, and he found that the benefit exception did not apply and terminated L.C.’s parental rights.

From that exchange, L.C.’s appellate counsel has fashioned an argument that the trial judge failed even to consider whether she had a “bond” with G.U. To support the argument, counsel asserts the trial court incorrectly found L.C. had not regularly visited G.U.

L.C.’s argument fails for two main reasons, the most obvious being that trial counsel effectively waived it. Nothing prevented L.C.’s counsel from arguing to the trial judge that, in point of fact, L.C. had indeed “regularly visited” with G.U. – at least by phone. The point of the appellate waiver doctrine is that it is not fair to the trial judge and the opposing party to keep mum on an issue which might have made a difference at the trial level. (*DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 177-178.) Here the trial judge never got the chance to consider L.C.’s argument that she *had* regularly visited with G.U.

But L.C.’s appellate argument fails substantively as well. There was indeed substantial evidence L.C. had *not* regularly visited with her daughter via phone, as shown by the general progress of this dependency, which we now detail:

In May 2014, there were (apparently anonymous) allegations of child neglect leveled at L.C. Then eight-year-old G.U. had been out of school for a month. On May 31, 2014, L.C. was arrested for, among other things, possession of illegal drugs and child abuse, and charged with child cruelty. G.U. was found in a home with animal feces from rabbits and cats. She herself was suffering from head lice. She was detained by social workers.

G.U.'s dependency moved quickly. There was a jurisdictional hearing in mid-August 2014. L.C. did not appear, and the trial court placed G.U. with her paternal grandparents in Pennsylvania. To accommodate the obvious geographical separation between L.C. and G.U., the court ordered L.C. was to have a "minimum" of two "visit[s]" per week, either by "Skype or telephone."

But by the time of the six-month review, scheduled for mid-February 2015, L.C. had had *no* contact at all with G.U. The six-month review was continued in several steps to the end of April 2015, which time G.U. was "flourish[ing]" in Pennsylvania (in the words of one social worker's evaluation). L.C. did manage more telephone visits in the months of March and April 2015, though, despite the grandparents' encouragement, most of the visits were short. At the six-month review hearing, L.C. was again not present and the trial court set the 12-month review for mid-July.

The 12-month review was also continued, to mid-August. A "contact log" kept by the grandparents for the period July 22, 2015 to August 5, 2015, noted four telephone contacts in that period, but also included one call to the grandparents in which L.C. did not ask to speak to G.U., and one day when L.C. did not call G.U. despite having previously agreed to. There was also one text from L.C. to the paternal grandmother – again no request to speak with the child.

Social workers also found L.C. hard to contact during this period. They tried to contact her by phone around August 6, but she didn't call them back. Neither did she show up for the 12-month review on August 19, 2015. At that review the trial court terminated reunification services and scheduled the permanency planning hearing that took place on December 9 and led here.

The benefit exception is, as the trial judge correctly noted, predicated on a parent's having *maintained* regular visitation and contact. But as we have just seen, L.C. did not have any visitation or contact for the first six-months of the dependency, and then sometimes missed calls after that. The court's observation about "prong one" was unassailable.

Further, beyond prong one, L.C. could not prevail on prong two, namely the need to show a parental relationship is *so* beneficial it will outweigh the benefits of the stability otherwise accruing from adoption. (E.g., *In re J.C.* (2014) 226 Cal.App.4th 503, 528-529.) L.C. did not even attempt to carry that burden at trial. We need only add that the record shows G.U. has positively thrived in Pennsylvania under her grandparents' care, so it is almost impossible to imagine that L.C. could carry the burden.³

Finally, L.C.'s appellate counsel argues that, somehow, adoption is an inferior result because it hinders a foster child's ability to deal with the loss of a natural parent. As support for this assertion, counsel cites Marsha Garrison, *Why Terminate Parental Rights?* (1983) 35 Stan. L.Rev. 423, 467, for the proposition that a child might blame himself or herself "for the loss of contact with his natural parent." The main point of Professor Garrison's 30-year-old article was to express a skepticism toward the movement, back in the early 1980's, in favor of permanency planning. (See *id.* at p. 425 ["I submit that termination of these rights is not only unnecessary to provide foster children with permanent homes, but it may indeed prove damaging for many children."].)

Whatever the validity of Professor Garrison's thesis, it is enough for us to note now that her ideas did not prevail. They run counter to the laws adopted by the California Legislature. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 405-406 [noting that the Legislature's "comprehensive juvenile dependency scheme" has, as its goal when parental

³ L.C.'s appellate counsel's assertion that L.C. and G.U. shared a "bond" is subject to some doubt. To avoid opening up further wounds between L.C. and G.U. we will not detail, even in this unpublished opinion, what the record shows about the L.C.-G.U. relationship as revealed to G.U.'s therapist. Suffice to say it could be viewed as substantial evidence of the *lack* of a bond.

rights are terminated, the expedition of “finality” and “permanency for the child”].) California law expresses a mandatory preference for adoption, even over guardianship, when reunification efforts have failed. (See *David L. v. Superior Court* (2008) 166 Cal.App.4th 387, 393.)

The judgment is, accordingly, affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.