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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re R.B., et al., Persons Coming Under the Juvenile Court Law.	2d Civ. No. B209268 (Super. Ct. Nos. J065971, J066790, J066076) (Ventura County)
VENTURA COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. L.B., Defendant and Appellant.	
In re K.B., A Person Coming Under the Juvenile Court Law.	2d Civ. No. B209269 (Super. Ct. No. J065979)
VENTURA COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. L.B., Defendant and Appellant.	

L.B. appeals an order of the juvenile court terminating parental rights and finding his children adoptable. (Welf. & Inst. Code, § 366.26.)[1] He contends his parental rights should not have been terminated because the beneficial parent relationship and sibling relationship exceptions apply. He also asserts the court erred in choosing adoption with foster parents rather than legal guardianship with the paternal grandmother and the children received ineffective assistance of counsel. We affirm.

FACTS AND PROCEDURAL HISTORY

Appellant L.B. is the father of four children: K.B., age eight; R.B., age four; R.T., age two; and M.B., 10 months. All four children were placed in protective custody upon petitions filed by respondent Ventura County Human Services Agency (Agency).

In September 2005, R.B., then 15 months old, was detained after her mother abandoned her in a department store when she was caught shoplifting. K.B., then five years old, was placed in protective custody about 15 days later after L.B. was arrested on outstanding warrants. R.B. was born in January 2006 and M.B. was born in October 2007. Both children were born while mother was incarcerated. They were placed in foster homes at birth. Attorney Andrew Wolf was appointed to represent all four children.

The court ordered reunification for both parents. The Agency began assessments on a paternal uncle, a paternal aunt and a paternal grandmother who lived in Texas for possible placement.

In August 2006, the Agency reported that mother had made substantial progress in maintaining sobriety and complying with her case plan. The court ordered that K.B. and R.B. be placed with mother on an extended visit. In September 2006, the court ordered that R.B. be placed with mother on a plan of family maintenance. M.B. remained in the care of her foster parents.

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

L.B. was released from custody on July 26, 2006, and had not completed a parenting class or counseling. The court ordered reunification services for L.B. be continued. While K.B., R.B. and R.T. lived with their mother, L.B. visited them daily. The social worker who supervised the visits said L.B. was "very attentive" to the children and that they responded well to him.

In April 2007, mother was arrested for petty theft and incarcerated for probation violations and warrants. L.B. moved into mother's home and began caring for the children.[2] He was employed and his sister-in-law was providing day care. He had applied for child care and financial assistance. Except for one parenting class, he had complied with his case plan. On May 22, 2007, the court placed the children with L.B. on a program of family maintenance and terminated mother's reunification services.

Less than two weeks later, on May 31, L.B. was arrested and incarcerated for petty theft of children's clothing. The court removed the children from L.B. and placed them with their paternal uncle. L.B. was released from custody on June 12, 2007. He leased a home for himself and the children and applied for and received child care and financial assistance.

On July 11, 2007, he was arrested and incarcerated for possession of a controlled substance. He denied that he used drugs or that the drugs were his. He was released from custody two days later and no charges were filed. As the result of his incarceration, his financial assistance was terminated.

L.B. was arrested again on August 6, 2007, for probation violations, petty theft, and failure to pay bail. He was released on August 31, 2007. While out of custody, he visited with his children daily at the home of their paternal uncle.

At the jurisdiction hearing on October 9, 2007, the Agency recommended that reunification services be terminated and that the court adopt a plan of long-term

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[2] Hereafter, "the children" refers to K.B., R.B. and R.T. Throughout the proceedings, M.B. continued to live with the foster parents with whom she was placed at birth.

foster care pending a home evaluation of the paternal grandmother in Texas. The court adopted the Agency's recommendations and ordered that the permanent plan for the children be long-term foster care, with a goal of guardianship with the paternal grandmother. Attorney Wolf agreed with the plan.

The children moved to Texas to live with their grandmother on November 10, 2007. In January 2008, grandmother told a social worker that she could not afford the cost of child care for the children while she was at work, and asked the county to provide assistance. The social worker told grandmother there were no funds available to assist children placed out-of-state with a relative. Grandmother told both the California social worker and a Texas social worker she wanted to keep the children, but could not do so without financial assistance for child care costs. The Texas social worker reported that the children were well cared for by grandmother, but she was stressed by the lack of funding.

After grandmother requested that the children be returned to California, the Agency filed a section 387 petition requesting a different placement for the children and arranged for R.B. and R.T. to be returned to California. K.B. wanted to stay with grandmother and grandmother agreed to adopt her. R.B. and R.T. returned to California on February 23, 2008, and were placed with the foster family who was caring for M.B.

The combined hearing on termination of parental rights and removal of R.B. and R.T. from grandmother was held in May 2008. Grandmother testified that she agreed to take the children because the social worker told her she would receive financial assistance for child care expenses. Grandmother said that without financial assistance, she cannot afford to pay for child care and clothing for the children. Grandmother applied for financial assistance from the State of Texas, but received only $162 per month. She was using her savings to pay for child care. L.B.'s siblings were willing to provide money to support the children, but grandmother refused to accept it. Grandmother said she would be willing to adopt all four children if she were to get financial assistance from the state.

Grandmother testified that the three older children loved each other and that K.B. asked about R.B. and R.T. all the time after they were returned to California. K.B. told her father she missed R.B. and R.T. but that she wanted to stay with grandmother and not be in foster care.

The social worker contradicted much of grandmother's testimony. She testified she told grandmother before she agreed to take the children that the state would not provide financial assistance unless grandmother agreed to adopt the children. Then, the county would provide funds for child care expenses for six months until an adoption could be finalized. The social worker said grandmother told her she could not care for R.B. and R.T. even if financial assistance were available.

The paternal uncle testified that the three older children had been placed with him for five months before they went to Texas. If the grandmother had not volunteered to take the children, he would have kept them with him, permanently if necessary. The social worker did not ask him if he wanted to be considered for placement after the children returned from Texas.

The social worker and paternal uncle testified that L.B. visited the children regularly when he was not in custody. The paternal uncle characterized the relationship between L.B. and the children as "love" and testified that L.B. acted appropriately when he was with the children.

The social worker testified that she noticed that when R.B. and R.T. returned from Texas the bond between L.B. and the children had weakened. R.B. called her father "uncle" and referred to her foster parents as "mommy" and "daddy." The social worker who transported R.B. and R.T. testified they were occasionally resistant to visiting L.B. They responded to L.B.'s hugs and kisses but were happy to return to their foster parents.

After the hearing, the court found that it would not be in the children's best interests to return them to Texas or to be placed with their paternal uncle. The court found the children to be adoptable and terminated parental rights. The court ordered that

K.B. remain with grandmother who was willing to adopt her, and that R.B., R.T. and M.B. remain with their current foster parents who wished to adopt them. The court found that neither the beneficial parent relationship nor sibling relationship exception applied.

DISCUSSION

Termination of Parental Rights

The court reviews the findings of the juvenile court under the substantial evidence test. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) This standard does not permit the reviewing court to reweigh the evidence or substitute its judgment for that of the juvenile court. (*Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 241.)

The purpose of the section 366.26 hearing is to "provide stable, permanent homes for [dependent children]." (§ 366.26, subd. (b).) Adoption is the preferred permanent plan for dependent children. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1416.) "'Only if adoption is not possible, or if there are countervailing circumstances, or if it is not in the child's best interests are other, less permanent plans, such as guardianship or long-term foster care considered.'" (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 574.)

This rule is subject to five statutory exceptions. L.B. contends the beneficial parent relationship and sibling relationship exceptions apply.

1. Beneficial Parent Relationship Exception

*S*ection 366.26, subdivision (c)(1)(B)(i) states that parental rights shall not be terminated if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

The parent bears the burden of proving the exception. Only in the "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.* (2000) 78 Cal.App.4th 1339, 1350.) To meet his or her burden of proof, a parent must show more than frequent and loving contact or pleasant visits. (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) "Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises

from day-to-day interaction, companionship and shared experiences." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment from child to parent. (*Ibid.*; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) The juvenile court may reject a parent's assertion of the exception simply by finding that the relationship maintained during visitation does not benefit the child significantly enough to outweigh the strong preference for adoption. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

A 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, or that the parental relationship may be beneficial to the child only to some degree. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) The parent must also show that continuation of the parent-child relationship will promote "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.*, *supra*, 27 Cal.App.4th at p. 575.)

The juvenile court did not err in finding the beneficial parent relationship exception does not apply. The record shows that R.B., R.T. and M.B. are thriving in their foster home. L.B. visited R.B. and R.T. regularly when he was not incarcerated and the children were staying with his brother. However, after they returned from grandmother's house in Texas and began living with foster parents who want to adopt them, they resisted going on visits to L.B. and were overjoyed to return to the care of their foster parents. While resistance to visits with L.B. decreased over time, R.B. and R.T. continue to view their foster parents as "mommy" and "daddy" and feel insecure out of their custody. M.B. has lived with the foster parents since birth and nothing in the record demonstrates that L.B. plays a parental role in her life. Substantial evidence supports the juvenile court's finding that adoption by their foster parents is in the best interests of the children. (See, e.g., *In re Zachary G.* (1999) 77 Cal.App.4th 799, 811 ["When the benefits from a stable and permanent home provided by adoption outweigh the benefits from a continued parent/child relationship, the court should order adoption"].)

2. *Sibling Relationship Exception*

A parent may avoid termination of parental rights by showing that a significant sibling relationship existed or exists, and that continued sibling contact may be of greater long-term emotional interest to the child than adoption. (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 998.) The sibling relationship exception applies only when 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; even 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 Naomi P.* (2005) 132 Cal.App.4th 808, 823.)

The court may reject adoption as the permanent plan under the sibling relationship exception only if it finds adoption would be detrimental to the child whose welfare is being considered; the court may not prevent a child from being adopted solely because of the effect the adoption may have on a sibling. (*In re Hector A.* (2005) 125 Cal.App.4th 783.)

L.B. argues that K.B. will miss R.B. and R.T. if they do not live with her. The evidence supporting this argument is slight—K.B. says she misses R.B. and R.T. There is no evidence that R.B. and R.T. have any emotional attachment to K.B. The court did not err in finding the exception did not apply. (See, e.g., *In re Celine R.* (2003) 31 Cal.4th 45, 54 [sibling relationship exception to termination of parental rights permitted court to consider possible detriment to children who were being considered for adoption, but not detriment to their older half-sibling].)

The Trial Court Did Not Err in Choosing Adoption
Rather Than Legal Guardianship for the Three Younger Children

L.B. asserts that the juvenile court erred in placing R.B., R.T. and M.B. for adoption because legal guardianship with grandmother was entitled to preference under section 361.3.

Under section 361.3, "preferential consideration shall be given" to relatives seeking placement of dependent children. (§ 361.3, subd. (a).) "'Preferential consideration' means that the relative seeking placement shall be the first placement to be considered and investigated." (*Id.*, subd. (c)(1).) The statute puts the relative "at the head of the line when the court is determining which placement is in the child's best interests." (*In re Sarah S.* (1996) 43 Cal.App.4th 274, 285-286.) It assures that an interested relative will be considered before a stranger in placing the child. (*Alicia B. v. Superior* Court (2004) 116 Cal.App.4th 856, 863.) However, the statute does not create an evidentiary presumption in favor of placement with a relative. (*Sarah S.*, at p. 286.)

The policy underlying the relative preference at the disposition stage is to find a temporary caretaker who will meet the child's physical and psychological needs while cooperating in reunification efforts. "A relative, who presumably has a broader interest in family unity, is more likely than a stranger to be supportive of the parent-child relationship and less likely to develop a conflicting emotional bond with the child." (*In re Baby Girl D.* (1989) 208 Cal.App.3d 1489, 1493; accord, *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1064.)

Where, as here, the court has determined that reunification is no longer possible and that the child should be freed for adoption, the reason for the preference disappears. (*In re Baby Girl D., supra,* 208 Cal.App.3d at p. 1493.) At that point in the dependency proceeding, the overriding concern is to provide a stable, permanent home where the child can develop a lasting emotional attachment to his caretakers. (*Id.,* at pp. 1493-1494.) Our Supreme Court has observed: "Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) It is important to accord relatives a "fair chance" to obtain custody, but the fundamental duty of the juvenile court is to assure the best interests of the child. (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1033; *Alicia B. v. Superior Court, supra,* 116 Cal.App.4th at p. 863.)

Here, the relative placement preference was applied when K.B., R.B. and R.T. were placed with grandmother prior to L.B.'s reunification services being terminated. Substantial evidence shows that within two months after the children were placed with her, grandmother found that caring for the two younger children was too burdensome and asked the Agency to return them to California. Thus grandmother was given a "fair chance" to obtain custody.

L.B.'s assertion that the only reason that grandmother returned R.B. and R.T. was that she could not obtain child care funding is contrary to the testimony of the social worker. The juvenile court found in favor of the Agency on this disputed factual issue and substantial evidence supports that finding. On appeal, "[w]e review the record to determine whether there is any substantial evidence, contradicted or not, which supports the court's conclusions." (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1649.) On this record, we conclude grandmother was accorded preferential consideration at the dispositional phase, as required by statute.

L.B. also argues grandmother is entitled to preference under section 366.26, subdivision (b)(2). That section states that at the hearing terminating parental rights, the court may "[a]ppoint a relative or relatives with whom the child is currently residing as legal guardian or guardians for the child . . . ." This section does not apply here for two reasons. As the Agency points out, the statute applies only to a relative with whom the child is *currently* residing. At the time of the hearing, R.B., R.T. and M.B. were residing with their foster parents. In addition, relative placement is not given preference over adoption. (§ 366.26, subd. (b)(1); see *In re Cody W.* (1994) 31 Cal.App.4th 221, 230 [juvenile court not required to adopt less drastic alternative of guardianship when deciding to terminate parental rights where court found child probably would be adopted]; and see *In re Carrie W.* (2003) 110 Cal.App.4th 746 [juvenile court properly terminated grandmother's guardianship of minor grandchildren after grandmother became

incapable of providing custody for grandchildren and after there was change of custody to new party].)[3]

The court, after considering testimony and the Agency's reports, found the children were adoptable and their best interests would not be served by placing them with grandmother. We cannot reweigh the evidence or substitute our judgment for that of the trial court. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) We conclude that the juvenile court fulfilled its fundamental duty to assure the children's best interests when it denied the request to remove the children from foster care and return them to grandmother. (See *In re Lauren R., supra,* 148 Cal.App.4th at p. 855 [regardless of the relative placement preference, the fundamental duty of the court in dependency proceedings is to assure the best interests of the child whose bond with a foster parent may require that placement with a relative be rejected].)[4]

The Ineffective Assistance of Counsel Claim Is Without Merit

L.B. contends the children were provided ineffective assistance of counsel because Mr. Wolf was appointed to represent all four children and he only appeared on the first day of the termination hearing. Thereafter, a different attorney from his office appeared on behalf of the children. Prior to the termination hearing, Mr. Wolf said he believed legal guardianship with grandmother was the best placement for the children. At the conclusion of the termination hearing, Mr. Wolf's replacement said she believed adoption with the children's foster parents was the best placement.

A parent has standing to raise ineffective assistance of counsel on behalf of his children. (*In re Cliffton B.* (2000) 81 Cal.App.4th 415, 427-428, fn. 6.) "The test for

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[3] The only statute which could apply at this stage of the proceedings is the relative caretaker provision in section 366.26, subdivision (k). (*In re Lauren R.* (2007) 148 Cal.App.4th 841, 856-858; *In re Sarah S., supra,* 43 Cal.App.4th at pp. 285-286.) L.B. has not argued that this statute applies and, thus, we do not discuss its application here.

[4] We note the Agency's argument that a parent does not have standing to assert the relative preference, but exercise our authority to decide the issue on the merits.

ineffective counsel is twofold: (1) counsel's representation falls below an objective standard of reasonableness and (2) the deficiency subjects defendant to demonstrable prejudice. [Citations.] A court need not evaluate whether counsel's performance was deficient before examining prejudice suffered by defendant. [Citation.] Thus, a court may reject a claim if the party fails to demonstrate that but for trial counsel's failings, the result would have been more favorable . . . ." (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1180.)

Here, there is no evidence of prejudice as a result of alleged ineffective assistance of counsel. The children were thriving in their foster parents' care and likely will be adopted by them. Thus, the statutory goal of the dependency statutes has been met and was the most favorable outcome for the children. As such, they suffered no prejudice. Moreover, L.B.'s attorney advanced the argument throughout the proceedings that legal guardianship with grandmother was the best option for the children. The court was well aware of this contention and discussed it at length in the oral findings.

Appellant also asserts a conflict existed because a single attorney represented all four children. Appellant argues that substitute counsel's advocacy against returning R.T. and R.B. to the grandmother reflected an actual conflict of interest. Appellant cites *In re Barbara R.* (2006) 137 Cal.App.4th 941, 953, and *Carroll v. Superior Court* (2002) 101 Cal.App.4th 1423, 1430, for the proposition that an actual conflict "arises where minors' counsel seeks a course of action for one child with adverse consequences to the other" or when the best interest of one minor conflicts with the best interest of one or more siblings. These principles have no application here. R.B., R.T. and M.B. are together in the care of foster parents who want to adopt them. At the time R.B. and R.T. returned to California, K.B. requested that she be allowed to stay with grandmother and her wish was granted. There is no evidence that grandmother's legal

guardianship of K.B. will have adverse consequences on K.B. or the three younger children.

The orders are affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Tari L. Cody, Judge

Superior Court County of Ventura

Darlene Azevedo Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Noel A. Klebaum, County Counsel, Joseph J. Randazzo, Assistant County Counsel, for Plaintiff and Respondent.