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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re M.L. et al., Persons Coming Under the Juvenile Court Law.	C062777
SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, Plaintiff and Respondent, v. K.F. et al., Defendants and Appellants.	(Super. Ct. Nos. JD229094, JD229095)

K.F. (Mother) and J.L. (Father), the parents of four-year-old J.L., Jr., and three-year-old M.L., appeal from an order of the Sacramento County Juvenile Court terminating their parental rights. (Welf. & Inst. Code, §§ 366.26, 395.)[1]

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

On appeal, Mother contends there was insufficient evidence that the children were adoptable, and the adoptions should have been delayed for 180 days. Father contends his parental rights cannot constitutionally be terminated because it was never alleged or proved that he had abused or neglected the children. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Originating Circumstances

At the time of the January 2009 petitions, the parents were divorced from one another and both were incarcerated. Father, a Norteño gang member, was in county jail on a pending charge of felony murder and was ineligible for bail. If convicted, he faced a prison term much longer than the reunification period. Mother had married Michael W. shortly before she was imprisoned for extortion and kidnapping. She expected to be released in 2014.

The children resided with stepfather Michael and John S., who regarded himself as their stepuncle because his mother and the maternal grandmother were partners.

On January 22, 2009, child protective services received a referral alleging general neglect. A “reporter” conducting a “home evaluation” noted that the apartment was tidy but contained minimal food. The children had little affect; they barely looked up at the reporter and were unresponsive to questions. M.L. had extreme eczema, and J.L., Jr., had ringworm on his left arm.

The reporter observed that the children interacted primarily with John rather than Michael. John prepared food for the children and gave them a bag of chips before leaving the table to watch a movie. Appearing to be upset, John hollered at J.L., Jr., to finish his food. When the child refused to eat, John picked him up and screamed in his face. Michael never said a word, and the reporter never saw him cuddle or touch the children. The reporter had to leave the apartment because "things got out of control."

The next day, Michael allowed a social worker and two police officers to enter the apartment. The "smell of marijuana smoke was present and in a large amount." The children had no food other than milk. Within the children's reach were several items that raised safety concerns: cocaine, marijuana, open alcohol bottles, and a firearm with bullets beside it. A radio scanner was on the kitchen counter.

Also present were several adults, including a female who was arrested on an outstanding warrant. John and Michael admitted current illicit drug use. Michael was arrested for possession of a controlled substance and other charges. The children were placed into protective custody.

Petitions

On January 27, 2009, the Sacramento County Department of Health and Human Services (DHHS) filed petitions pursuant to section 300, subdivision (b), alleging that Mother had failed to protect the children in that she had left them "with an inappropriate care provider, the children's step father,"

Michael W., who had a propensity for violence. The home had insufficient food, smelled of marijuana, and had several dangerous items within the children's reach. Mother knew or should have known that the children would be at substantial risk of physical harm, abuse, and/or neglect while in the care of Michael W. The petitions did not contain allegations against Father.

Jurisdiction and Disposition

The report for the jurisdiction and disposition hearings noted that the children had been placed in a licensed foster home. On February 11, 2009, the social worker observed the children and opined that they appeared to be comfortable in the home with their foster mother, foster grandmother, and foster sister. The foster mother reported that the children had adjusted well to the placement and that there were no concerns regarding the children's behaviors. The foster mother was willing to provide care until a permanent plan was established.

The report opined that reunification services need not be offered to Mother because she had been convicted of robbery, a violent felony, in September 2008. (Welf. & Inst. Code, § 361.5, subd. (b)(12); Pen. Code, § 211.) Moreover, reunification services were prohibited because they were not in the children's best interest. (§ 361.5, subds. (b)(12), (c).) The report noted that Mother's "prison sentence clearly exceeds the length of reunification services that could be provided to her based on the ages of the children and, therefore, it does

not appear that it would benefit the children to attempt to provide reunification services" to Mother.

The report opined that reunification services need not be offered to Father because the children would not benefit from the services. (§ 361.5, subd. (a).) The report noted that, if convicted, father faced a prison sentence that would exceed the length of the reunification services.

Jurisdiction and disposition hearings were conducted in March 2009. Counsel for DHHS cited an additional statutory ground (§ 361.5, subd. (e)) for the agency's recommendation that neither parent receive reunification services.

Counsel for Father submitted on the issue of jurisdiction, because "there are no current allegations against the father." Regarding disposition, counsel requested that Father receive "Robert L. status." (*Robert L. v. Superior Court* (1996) 45 Cal.App.4th 619 (*Robert L.*) [a noncustodial parent who does not seek custody is not entitled to reunification services].) Counsel requested that the paternal grandmother be reevaluated for placement and objected to the setting of a section 366.26 hearing.

Mother signed a written waiver of rights and submitted on the basis of the social worker's report.

The juvenile court found the petitions true by a preponderance of the evidence. The children were adjudged dependents of the court. Reunification services for Mother were denied pursuant to section 361.5, subdivisions (b)(12) and (e).

Reunification services for Father were denied pursuant to *Robert L.*

The trial court scheduled a selection and implementation hearing and advised the parents of the writ review process. Neither parent filed a writ petition.

Selection and Implementation

The June 2009 report for the selection and implementation hearing stated that the children had been in their placement since January 2009. Their aggressive and hyperactive behaviors had been a challenge to the foster mother, but she had been firm in setting limits and the behaviors had improved. Both children had become less aggressive toward their foster sister.

The report noted that M.L. was very active and “always on the move.” J.L., Jr., previously had been unable to dress himself independently, had often asked M.L. for help in locating items such as shoes, and had been inarticulate in his speech. However, he later learned to dress independently and had become more articulate.

A psychologist reported that J.L., Jr.’s, ability to comprehend oral language had been significantly impaired. His “pre-academic readiness skills” had been delayed in developing, and his academic achievement would be at risk unless he received systematic opportunities and interventions to acquire those skills. Participation in a preschool program for children with mild developmental and communication delays might be appropriate.

The foster mother reported that J.L., Jr., periodically wet his bed, but that behavior was decreasing. She also reported that he would stuff his mouth with food and opined that he would overeat if not monitored.

The selection and implementation report opined that J.L., Jr., was “active, talkative, happy, and friendly.” The report opined that M.L. was happy, loving, friendly, outgoing, and content in his foster home.

The report noted that the social worker was in the process of finding an adoptive home for the minors. The social worker had received six home studies and expected to receive many more because of the children’s (young) ages. The home studies were being reviewed and it was expected that a home study-approved family would be identified in the following two weeks.

The report concluded that the children were “generally adoptable” because of their ages, health, developmental status, and behavioral status. The report opined that the children’s hyperactivity and J.L., Jr.’s, speech delays were not so severe as to preclude a finding of general adoptability.

The August 4, 2009, addendum to the selection and implementation report noted that the social worker had identified an adoptive family for the children, that a “disclosure meeting” had been scheduled, and that preplacement visitation would commence if the social worker felt the family was suitable for placement.

At the hearing on August 7, 2009, both parents objected to the termination of parental rights and expressed a desire that the children be placed with relatives.

Counsel for DHHS called Father to testify and made an offer of proof that she would ask him whether the jury in his murder trial had convicted him. The court sustained Father's hearsay objection to that question. No witness testified at the hearing.

Counsel for DHHS noted that a potential adoptive family had been identified and that a disclosure meeting was scheduled for that day. If the family was interested, preplacement visits would commence.

Counsel for the children opined that his clients were adoptable. Counsel for Father objected to a finding that the children were generally adoptable.

The juvenile court found by clear and convincing evidence that the children were likely to be adopted. Now ages two and four, they were making improvements in the areas where there had been behavior issues or delays. Although they were not yet in an adoptive home, the children were benefiting from a structured environment and their problematic behaviors were decreasing. Nothing about those behaviors caused the court to suspect that the children were not adoptable.

Noting that no evidence had been presented to support an exception to adoption, the court terminated parental rights.

DISCUSSION

I

Mother contends the finding that the children were adoptable is not supported by substantial evidence. She argues the court should have applied section 366.26, subdivision (c)(3), which would have provided 180 days to locate an adoptive home for the children, whom she describes as "difficult to place." The contention has no merit.

In order to terminate parental rights, "the [juvenile] court must find by clear and convincing evidence that it is likely that the child will be adopted." (*In re Asia L*. (2003) 107 Cal.App.4th 498, 509; § 366.26, subd. (c)(1).) There must be "convincing evidence of the likelihood that adoption will take place within a reasonable time." (*In re Brian P.* (2002) 99 Cal.App.4th 616, 624.)

On appeal, we must uphold the finding of adoptability and termination of parental rights if they are supported by substantial evidence. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.) We "presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) "In selecting a permanent plan for an adoptable child, there is a strong preference for adoption over nonpermanent forms of placement. [Citation.]" (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.)

The issue of adoptability "focuses on the *minor*, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. [Citations.] Hence, it is not necessary that the minor already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.' [Citations.]" (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649; see *In re Zeth S.* (2003) 31 Cal.4th 396, 406; *In re A.A*. (2008) 167 Cal.App.4th 1292, 1312.)

The record amply supports the juvenile court's findings that, in the structured environment of the nonadoptive foster home, the children were making improvements in the areas where there had been behavior issues or delay issues; the problematic behaviors were decreasing. Indeed, Mother concedes as much in her argument. However, she reasons "that was all about to change" when the children were moved to an adoptive home. Because the children's behavior in the new setting could not be known, Mother claims the adoptability finding "was premature."

Mother's argument requires us to speculate that the children will fare less well in an adoptive home than they have fared in their foster placement. The appellate record contains no factual basis for such speculation. We cannot deduce from the silent record that the children will fare so poorly as to become unadoptable. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

Moreover, an adoptability finding does not require that the children be in a potential adoptive home or that there be a

proposed adoptive parent "'waiting in the wings.' [Citations.]" (*In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 1649.) Mother's argument that the finding was premature, because "all" was "about to change" when the children were moved, stands *In re Sarah M.* on its head and effectively precludes an adoptability finding until the adoptive parent emerges from the wings and takes center stage in the children's lives.

Mother contends the children "fall within the purview" of section 366.26, subdivision (c)(3) because of their behavioral difficulties and their membership in a sibling group. The contention has no merit.

Section 366.26, subdivision (c)(3) states, in relevant part: "If the court finds that termination of parental rights would not be detrimental to the child . . . and that the child has a probability for adoption but *is difficult to place for adoption* and *there is no identified or available prospective adoptive parent*, the court may identify adoption as the permanent placement goal and without terminating parental rights, order that efforts be made to locate an appropriate adoptive family for the child . . . within a period not to exceed 180 days. . . . For purposes of this section, a child may *only* be found to be difficult to place for adoption *if* there is no identified or available prospective adoptive parent for the child *because of* the child's membership in a sibling group, or the presence of a diagnosed medical, physical, or mental handicap, or the child is seven years of age or more." (Italics added.)

In this case, the August 4, 2009, addendum to the selection and implementation report noted that the social worker had identified an adoptive family for the children, that a "disclosure meeting" had been scheduled, and that preplacement visitation would commence if the worker felt the family was a suitable placement. Pursuant to this addendum, there *was* an identified prospective adoptive family for the children, so section 366.26, subdivision (c)(3) did not apply.

Even prior to the addendum, section 366.26, subdivision (c)(3) would not have applied. The social worker had received six home studies and expected to receive many more because of the children's young ages. The home studies were being reviewed and the social worker expected that a home study-approved family would be identified in the following weeks. The then-lack of an "identified or available prospective adoptive parent for the child[ren]" (§ 366.26, subd. (c)(3)) had been *because* the home-finding process had not been completed. No evidence suggested, in turn, that the process had not been completed *because* the children were members of a sibling group or *because* one child had a diagnosed medical, physical, or mental handicap (developmental delays); moreover, neither child was seven years of age or older. Thus, even before the August 2009 addendum, the section 366.26, subdivision (c)(3) exception would not have applied.

In sum, the finding that the children were adoptable is supported by substantial evidence and the exception to adoption

did not apply. (*In re Lukas B.*, *supra*, 79 Cal.App.4th at p. 1154.)

II

Father contends the termination of his parental rights was error because the section 300 petitions contained no allegation that he ever abused or neglected the children. Absent such an allegation, he claims it was "constitutionally impossible" for the court to find him an "'unfit' parent." We are not persuaded.

Background

At the hearing on March 6, 2009, Father was present in court with his counsel. Counsel noted that there were no current allegations against Father, and he submitted the issue of jurisdiction to the court. No objection was made as to any matter related to jurisdiction. The court found that the children are persons described by section 300, subdivision (b).

As to disposition, Father requested *Robert L.* status, which would result in his receiving no reunification services and the children's placement out of his home. Father never objected that the court could not find him an "unfit" parent or that it could not make a finding of "detriment" against him. The court found by clear and convincing evidence that "[t]here is a substantial danger to the children['s] . . . physical health/safety, protection or emotional well-being or would be if the children were returned home and there are no reasonable means by which the children's well-being can be protected

without removing the children from the parents' . . . physical custody."

Analysis

Father claims principles of due process require an order terminating parental rights to be supported by clear and convincing evidence demonstrating that he "was an 'unfit['] parent." He argues it was "constitutionally impossible" for the juvenile court to find him unfit because the section 300 petitions contained no allegations that he had abused or neglected the children.

Before considering Father's argument at length, we shall restate it in somewhat more current juvenile dependency language.

"California's dependency scheme no longer uses the term 'parental unfitness,' but instead requires the juvenile court make a finding that awarding custody of a dependent child to a parent would be detrimental to the child." (*In re P.A.* (2007) 155 Cal.App.4th 1197, 1211, quoting *In re Dakota H.* (2005) 132 Cal.App.4th 212, 224, fn. 3.)

A finding that "awarding custody of a dependent child to a parent would be detrimental to the child" may itself be stated in slightly different terms. In *In re P.A.*, a "finding[] that the return of P.A. to her parents would be detrimental to the child" was stated as a finding "by 'clear and convincing evidence there exists a substantial danger to the children and there's no reasonable means to protect them without removal from

the parents' custody.' (Italics added.)" (*In re P.A.*, *supra*, 155 Cal.App.4th at p. 1212.)

As noted, in this case the court found by clear and convincing evidence that "[t]here is a substantial danger to the children['s] . . . physical health/safety, protection or emotional well-being or would be if the children were returned home and there are no reasonable means by which the children's well-being can be protected without removing the children from the parents' . . . physical custody." This language is substantially similar to the detriment language used in *In re P.A.*, *supra*, 155 Cal.App.4th at p. 1212.

It thus appears that the juvenile court *made* (albeit in more current dependency jargon) the unfitness finding that due process principles purportedly require. The remaining question is whether the court lawfully could make that finding even though the section 300 petitions never alleged that Father had abused or neglected the children. The answer to this question is "yes."

In *In re Gladys L.* (2006) 141 Cal.App.4th 845, on which Father relies, "the section 300 allegations pertained only to the mother of the child. The child's presumed father appeared at the detention hearing and then disappeared for three years. When he reappeared at the section 366.26 hearing, the court denied his request to reestablish his relationship with his daughter. [Citation.] The reviewing court stated before parental rights may be terminated, constitutional standards of due process require the trial court to have made prior findings

of parental unfitness, and remanded the case to the trial court to ‘determine whether, based upon the facts as they currently exist, a petition under section 300 can be properly pleaded and proven’ [citation]. Thus *Gladys L.* suggested a sustained dependency petition alleging the unfitness of each parent was a necessary precedent to termination of parental rights. (See *In re P.A.*[, *supra*,] 155 Cal.App.4th [at p.] 1212 . . . (*P.A.*).)

“A division of the same court later considered the identical issue in *P.A., supra,* 155 Cal.App.4th at page 1197. The *P.A.* court respectfully disagreed with *Gladys L.* to the extent it suggested that a sustained section 300 petition as to each parent was a required precursor to termination of parental rights. [Citation.] We, too, respectfully disagree with *Gladys L.*, and adopt the reasoning of *P.A.*: ‘. . . a child may be declared a dependent if the actions of either parent bring the child within the statutory definitions of dependency. [Citations.] Additionally, a *jurisdictional* finding is not an adequate finding of parental unfitness because it is made by a preponderance of the evidence. [Citations.] Therefore, even if the dependency petition had alleged [the parent’s] unfitness, the order sustaining the petition would have been inadequate, by itself, to terminate [that parent’s] parental rights without a subsequent finding of detriment by clear and convincing evidence. Thus, the absence of a jurisdictional finding that related specifically to [that parent] does not prevent termination of parental rights.’ [Citations.]” (*In re A.S.* (2009) 180 Cal.App.4th 351, 360-361.)

We agree with the reasoning of *In re A.S.* and *In re P.A.*, and we reject the contrary analysis of *In re Gladys L.* As noted, the juvenile court *found* by clear and convincing evidence that return of the children to Father would pose a substantial danger to the children's physical health/safety, protection, or emotional well-being. The absence of a jurisdictional allegation of parental unfitness did not preclude the court from making the finding of substantial danger. (*In re A.S.*, *supra*, 180 Cal.App.4th at pp. 360-361.)

In re P.C. (2008) 165 Cal.App.4th 98, on which Father also relies, is distinguishable because in that case the dangers facing the children at the time of disposition had been remediated by the time parental rights were sought to be terminated. (*Id.* at p. 106.) The appellate court in *In re P.C.* distinguished a case, analogous to the present case, in which "the father was incarcerated, and would remain so for some time, and had unresolved problems with drugs, alcohol, and violence." (*Ibid*., citing *In re Amanda D.* (1997) 55 Cal.App.4th 813, 816-819.) In this case, Father appeared to be facing a lengthy state prison term and there was no suggestion that the danger to the children would be remediated.[2]

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[2] At the request of DHHS filed January 19, 2010, we take judicial notice of a Sacramento County Superior Court minute order (and related documents filed therewith) showing Father's conviction of second degree murder on August 6, 2009, the day prior to the hearing on the termination of his parental rights. (Evid. Code, §§ 452, subd. (d)(1), 453, 459, subd. (a).)

Father's lengthy incarceration for murder also distinguishes this case from *In re G.S.R*. (2008) 159 Cal.App.4th 1202, which held that parental unfitness cannot be based solely upon the parent's indigence (*id*. at p. 1212). In that case, the social service agency's responsibility was to help the father obtain affordable housing for the family, not to terminate services and seek severance of the parental relationship. (*Id.* at p. 1213.) Father does not identify any services that could have preserved or restored his parent-child relationship notwithstanding his lengthy incarceration. No error is shown.

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

NICHOLSON, Acting P. J.

CANTIL-SAKAUYE, J.