Filed 10/23/18 In re R.K. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re R.K., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B288625 (Super. Ct. No. 17JD-00055) (San Luis Obispo County)
SAN LUIS OBISPO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. J.K., Defendant and Appellant.	

J.K. (father) appeals the juvenile court's order terminating his parental rights to his minor child R.K. and selecting adoption as the permanent plan. (Welf. & Inst. Code, § 366.26.)[1] Father

[1] All further statutory references are to this section of the Welfare and Institutions Code.

contends the evidence is insufficient to support the court's finding that R.K. is likely to be adopted. We affirm.

FACTS AND PROCEDURAL HISTORY

Father and K.S. (mother)[2] are the parents of R.K., who was born in March 2011. In March 2017, the San Luis Obispo County Department of Social Services (DSS) filed a dependency petition as to R.K. and her two half-siblings alleging that the children were at risk due to mother's drug abuse and her failure to protect them from criminal activity committed by others living in their home.

The petition further alleged that father "has a minimal relationship with [R.K.] and has failed to protect her from [mother's] neglect, substance abuse and associated criminal activity. [Father] also has a long history of substance misuse and was not successful in reunifying with [R.K.] in a previous Juvenile Court case [in 2014], due to his refusal to participate in treatment." When contacted by the social worker, father had also refused to submit to a drug test and did not show up for a scheduled team decision meeting.

R.K. was taken into custody and placed in a foster home. She was subsequently ordered detained following a hearing that neither parent attended.

Both parents appeared at the combined jurisdictional and dispositional hearing. At the conclusion of the hearing, reunification services for mother were bypassed pursuant to section 361.5, subdivisions (b)(10), (b)(11), (b)(13), and (b)(15). Pursuant to DSS's recommendation, father was granted three months of reunification services. Father's case plan required him

---

[2] Mother is not a party to this appeal.

to participate in a drug and alcohol treatment program and maintain contact with DSS.

In its report for the October 2017 three-month interim review hearing, DSS recommended that father's reunification services be terminated. DSS reported that father has tested positive for methamphetamine in August 2017, subsequently produced a compromised urine sample, and thereafter declined to submit to further drug testing. At the conclusion of the October 2017 hearing, the court terminated services as to father and set the matter for a section 366.26 hearing.

The matter was set for a contested hearing on February 23, 2018. In its section 366.26 report, which was completed on January 18, 2018, DSS recommended that the court find that R.K. was adoptable and that adoption be selected as her permanent plan. The assigned social worker, Lori Hunstad, reported that R.K. "is definitely considered adoptable. She is a sweet, adorable, intelligent child. She wants to belong to a family who can care for her and keep her safe. She has suffered trauma and neglect while living with her parents, but is resilient and has many strengths. She has the capacity to move forward, connect with, and attach to a new family. [DSS] has several prospective families who would be interested in adopting a six-year old child like [R.K.]."

Hunstad also reported that R.K. "appears to be developmentally on target" and that "[t]here are no educational concerns at this time." Hunstad described R.K. as "a relatively happy and joyful child. [R.K.] often has a hard time expressing her emotions/feelings, but that would be expected in this situation. [R.K.] also lies frequently and makes high demands for attention." Hunstad added that R.K. was "working on expressing

her emotions better and learning how to communicate better" through weekly therapy sessions and that her therapist was "happy about [her] progression."

Hunstad went on to report "[t]here is a prospective adoptive family that [I have] met with, and shared some background information on the child, and assessed their potential for being a good match to [R.K.] The family has yet to visit with the child, but those visits will be arranged to begin within the next few weeks." Hunstad added that prospective adoptive parents, who had been married for 16 years and had a nine-year-old son, had participated in the required training and fully met the qualifications for R.K.'s adoption. Hunstad opined that the prospective adoptive parents "have the skill set to parent [R.K.] and, if they need additional help or resources, they will not hesitate to seek out the help."

At the February 23 hearing, counsel for DSS sought a stipulation that Hunstad was an expert in the area of adoptions and permanency planning and "ask[ed] the court to take judicial notice of the file and submitting on the [section 366.26] report, making [Hunstad] available for cross-examination and reserving for rebuttal." Father's attorney joined in the stipulation and request for judicial notice, then stated "I don't have any questions for the social worker, and I don't have any evidence to offer." Counsel for mother and R.K. also joined in the stipulation and submitted without offering any additional evidence.

The court went on to find that R.K. "is adoptable, and there are families available for adoption." Based on R.K.'s best interests, the court terminated parental rights and ordered adoption as the child's permanent plan. Counsel for DSS subsequently added that "Ms. Hunstad did want the court and

counsel to know that since the writing of the report the prospective adoptive parents have met with [R.K.] and are looking forward to moving forward with the adoption."

DISCUSSION

Father contends the evidence is insufficient to support the finding that R.K. is adoptable. DSS urges us to conclude that father waived his contention by failing to offer any evidence challenging the finding of adoptability or object to that finding. DSS alternatively asserts that father's contention fails on the merits.

Father's contention is not waived. "When the merits of an adoptability finding are contested, 'a parent is not required to object to the social service agency's failure to carry its burden of proof on the question of adoptability. [Citations.] "Generally, points not urged in the trial court cannot be raised on appeal. [Citation.] The contention that a judgment is not supported by substantial evidence, however, is an obvious exception to the rule." [Citations.]' [Citation.] Therefore, 'while a parent may waive the objection that an adoption assessment does not comply with the requirements provided in section 366.21, subdivision (i), a claim that there was insufficient evidence of the child's adoptability at a contested hearing is not waived by failure to argue the issue in the juvenile court.' [Citation.]" (*In re Erik P.* (2002) 104 Cal.App.4th 395, 399 (*Erik P.*).)

Although father's claim of insufficient evidence is not waived, it lacks merit. "The juvenile court may terminate parental rights only if it determines by clear and convincing evidence that it is likely the child will be adopted within a reasonable time. [Citations.] In making this determination, the juvenile court must focus on the child, and whether the child's

age, physical condition, and emotional state may make it difficult to find an adoptive family. [Citations.] In reviewing the juvenile court's order, we determine whether the record contains substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that [R.K.] was likely to be adopted within a reasonable time. [Citations.]" (*Erik P.*, *supra*, 104 Cal.App.4th at p. 400.) In reviewing for substantial evidence, every reasonable inference and evidentiary conflict must be resolved in favor of the challenged order. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.)

Substantial evidence supports the finding that R.K. is likely to be adopted. Father's arguments to the contrary "ignore the evidence supporting the likelihood of the child[]'s adoption. [He] would have us rather reweigh other evidence . . . and draw unreasonable inferences against the judgment and in [his] favor. This we cannot and will not do. [Citation.]" (*In re G.M.* (2010) 181 Cal.App.4th 552, 564.)

Father attempts to parse the issue as whether the court found that R.K. was *generally* adoptable—i.e., that she was likely to be adopted regardless of whether a prospective adoptive family was available to adopt her—or *specifically* adoptable—i.e., that she is adoptable only because a prospective adoptive family has been identified. (See *In re G.M.*, *supra*, 181 Cal.App.4th at p. 562.) Although the section 366.26 report included an assessment of R.K.'s prospective adoptive parents and noted that several other families would be interested in adopting her, "this [is] not a case in which the social worker opined the child[] [was] likely to be adopted based solely on the existence of a prospective adoptive parent who [is] willing to adopt." (*Id.* at p. 564.)

In any event, the record of the section 366.26 hearing reflects that the prospective adoptive parents had met with R.K. and were moving forward with their plans to adopt her. This constitutes substantial evidence of R.K.'s adoptability. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1526-1527; see also *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1650 ["[A] prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family*"].)

To the extent father complains that the section 366.26 report fails to adequately address the prospective adoptive parents' ability to meet R.K.'s needs, "[a] prospective 'family's suitability to adopt is irrelevant to the issue whether the minor[][is] likely to be adopted,' which is the *only* issue at the selection and implementation hearing. [Citation.] 'The sole issue at the selection and implementation hearing is whether there is clear and convincing evidence that the child is adoptable. [Citations.] In resolving this issue, the court focuses on *the child*—whether his age, physical condition and emotional state make it difficult to find a person willing to adopt him. [Citations.]' [Citation.]" (*In re Josue G.* (2003) 106 Cal.App.4th 725, 733.)

Contrary to father's claim, neither R.K.'s age nor her behavioral and emotional issues were an impediment to a finding that she is generally adoptable. (See *In re Michael G.* (2012) 203 Cal.App.4th 580, 585, 589–593 [seven-year-old found generally adoptable despite history of aggressive and defiant behavior, severe tantrums, and numerous placements, who experienced nightmares and bed-wetting after visits from mother suspected of physically abusing him]; *In re I.W.*, *supra*, 180 Cal.App.4th at pp.

1524, 1525–1527 [ten-year-old with PTSD, ADHD, a learning disorder and a history of severe behavioral problems found adoptable]; *In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1558, 1563 [seven-year-old diagnosed with ADHD who was in therapy and for whom psychotropic medication had been recommended found adoptable].)

In re Brian P. (2002) 99 Cal.App.4th 616 (*Brian P.*), which father cites in support of his claim, is inapposite. In that case, the court held that the evidence was insufficient to support the adoptability finding because there was no adoption assessment. (*Id.* at p. 624.) The record was also devoid of any evidence concerning the likelihood that the child would be adopted; there was merely the social worker's unsupported opinion that the child was "'a proper subject for adoption.'" (*Ibid.*) Accordingly, there were many unanswered questions concerning the adoptability of the child who, among other things, was four and one-half years old but had only recently learned to dress himself. (*Id.* at p. 625.) The child also had speech delays, which required the social worker to rely on his facial expressions and gestures to infer that he was happy in his placement. (*Ibid.*) Because the record was devoid of any evaluation of the child's adoptability, the court of appeal concluded that the evidence was too "fragmentary and ambiguous" to support the juvenile court's adoptability finding. (*Ibid.*)

Here, the section 366.26 report included an assessment of R.K.'s adoptability. According to that assessment, the child has no medical, developmental, or educational problems. Although she has some ongoing behavioral issues, DSS reported that she sees a therapist every week and that the therapist is "happy" with the progress R.K. is making. Hunstad also described R.K.

as "resilient" and "ha[ving] many strengths." Moreover, a prospective adoptive family is moving forward with its plans to adopt her. The evidence of her adoptability is not only sufficient, but overwhelming.

DISPOSITION

The judgment (order terminating parental rights) is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Linda D. Hurst, Judge
Michael L. Duffy, Judge*
Superior Court County of San Luis Obispo

Elizabeth Klippi, under appointment by the Court of Appeal, for Defendant and Appellant.

Rita L. Neal, County Counsel, Leslie H. Kraut, Deputy County Counsel, for Petitioner and Respondent.

---

* Retired Judge of the San Luis Obispo Superior Court assigned by the Chief Justice pursuant to art. VI, §6 of the California Constitution.