Filed 8/16/12 In re P.H. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re P.H., a Person Coming Under the Juvenile Court Law.	B235961 (Los Angeles County Super. Ct. No. CK76402)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MICHAEL R. et al., Defendants and Appellants.	

APPEALS from an order of the Superior Court of Los Angeles County, David R. Fields, Judge. Affirmed.

Law Office of Lisa A. Raneri and Lisa A. Raneri, under appointment by the Court of Appeal, for Defendant and Appellant Michael R.

Matthew I. Thue, under appointment by the Court of Appeal, for Defendant and Appellant F.H.

Office of the County Counsel, John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Melinda White-Svec, Deputy County Counsel, for Plaintiff and Respondent.

Michael R. (Father) and F.H. (Mother) appeal the juvenile court order terminating their parental rights to their son P., pursuant to Welfare and Institutions Code section 366.26.[1] Father contends he did not receive notice of the August 31, 2011 continued section 366.26 hearing where his parental rights were terminated. Mother claims there was insufficient evidence to support the juvenile court's finding that P. was adoptable and that the juvenile court erred in its refusal to apply the section 366.26, subdivision (c)(1)(B)(i) parental benefit exception.[2] We affirm the juvenile court's order.

FACTUAL AND PROCEDURAL HISTORY

On February 13, 2009, the Department of Children and Family Services (DCFS) received a referral from the hospital where four-month-old P. was being treated for suspected nonaccidental trauma. P. suffered from a subdural hematoma, five fractured ribs, and a fractured tibia. Mother's and Father's explanations of the manner in which P. sustained these injuries were inconsistent with the nature of the child's injuries. From February 20 through February 24, a DCFS children's social worker (CSW) observed P. and conducted separate interviews with the treating physician, Mother, and Father, to determine whether parents demonstrated an imminent and credible threat to P.'s safety and well-being. Mother, after initially declaring that she had no idea how P. was injured, revealed to the CSW that P. had fallen off a bed approximately two months earlier.

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

[2] The parents join in each other's arguments.

Father professed to have no knowledge as to how his son was injured. He thought it was possible that P. was hurt by Mother, who sometimes swaddled P. too tightly. DCFS was troubled by Mother's changing stories and the lack of an explanation that was consistent with the child's injuries. Based on the parents' statements, the severity of P.'s injuries, and P.'s vulnerability due to his age, the CSW found that the child's injuries were consistent with nonaccidental trauma and recommended that he be detained from the parents and placed in the protective custody of DCFS.

On February 26, 2009, DCFS filed a juvenile dependency petition as to P. pursuant to section 300 subdivisions (a), (b), and (e). It also filed a "Last Minute Information for the Court" report which contained Mother's confession that on January 8, 2009, she shook P. "very hard" because he would not stop crying. Mother also admitted to dropping the child. She claimed that the incident on January 8 was the only time she had intentionally mistreated P. and that she had learned her lesson. At the detention hearing the court found a prima facie case for detaining P. and ordered family reunification services for the parents.

On March 17, 2009, Mother told another CSW that in early December she shook P. because he would not stop crying. According to Mother, "He cried for a while after I shook him and then fell asleep on his own. I didn't tell [Father]. I never noticed anything wrong with the baby." Father informed the same CSW that he "had no clue" P. had been injured.

At the May 27, 2009 jurisdictional and dispositional hearing, the court declared P. to be a dependent of the court under section 300, subdivisions (a), (b), and (e). The section 300, subdivision (e) finding was sustained only as to Mother. The court ordered both parents to participate in a DCFS-approved program of parenting education and to undergo individual counseling with a licensed therapist to address all case issues. In addition, Mother was ordered to receive anger management counseling. The court granted the parents monitored visitation and allowed DCFS to liberalize visitation.

In the report prepared for the August 17, 2009 six-month review hearing, DCFS reported that the parents were visiting P. consistently and the visits were going well. In

the DCFS report prepared for the November 24, 2009 hearing, the CSW indicated that the parents had yet to comply with the court order to enroll in individual counseling. The report included a July 15, 2009 medical report from P.'s physician diagnosing him with reactive airway disease (asthma), eczema, and macrocephaly (a large head). Despite these diagnoses, P. was reported to be healthy and developing age appropriately.

In the interim review report prepared on April 29, 2010, DCFS reported that the parents had finally begun to participate in individual counseling. The parents continued to regularly visit with P. Most of the visits went well, but the CSW reported that during a visit on March 29, Mother and Father were arguing during the entire visit. Mother repeatedly stormed out of the room, then returned violently swinging the door each time. Neither parent was paying attention to P., and when Mother almost hit him with the door, the CSW was forced to end the visit. Mother stayed to talk with the CSW afterwards and confessed that, "the argument that CSW witnessed was nothing and that it happens almost everyday and is worse." The CSW recommended that parents' visits continue to be monitored because of the threat to P.'s safety should the visits with his parents be unmonitored. The court allowed DCFS to liberalize the monitored visits at its discretion and set a 12-month review hearing, pursuant to section 366.21, subdivision (f), for July 29, 2010.

The July 29, 2010 section 366.21, subdivision (f) hearing was continued to August 13 for a contested hearing. At the hearing, the court found the parents were only in partial compliance with the case plan because they had yet to complete individual counseling. A review hearing pursuant to section 366.22 was scheduled for September 24, 2010.

In its September 24, 2010 status review report, DCFS reported two troubling incidents that indicated the parents were having issues with anger management. On September 6, Father called P.'s foster mother's home and asked the foster mother's daughter if he could come over and pick up P. The daughter said no because her mother was not home, at which point Father began yelling and cursing at the daughter and then hung up the phone. This incident upset the foster mother, and she threatened to have P.

removed from her home. Eventually she reconsidered, but reiterated that she and her family would not tolerate any more disrespect from Mother or Father.

On September 16, the CSW received a tearful message from Mother asking for referrals to women's shelters because she needed to move out of the apartment she shared with Father. She told the CSW to call back immediately because it was "really an emergency." When the CSW was unable to reach Mother by telephone, she went to the foster home where a visit was scheduled. She waited for the parents. When they arrived, she spoke to Mother, who said that she, Father, and Father's adult son had gotten into an argument the previous night. Mother claimed the situation was resolved. The CSW asked Mother how often she and Father fought. Mother acknowledged that they argued often; however, she denied their disputes ever got physical. Mother said she wanted to move out of the home.

In its September 24, 2010 evaluation, DCFS reported that the parents "have not asked or kept track of [P.'s] progress in therapy, his doctor's appointments or progress in the foster home. It appears that even after completing parenting education classes they have not been able to grasp the dedication, commitment and responsibility [necessary] to raise a child of [P.'s] age." Thus, due to the parents' lack of progress during the 18-month reunification period, their partial compliance with court orders, their missed visits, their unstable and unpredictable relationship, and their frequent frustrations with P., DCFS recommended terminating family reunification services and urged the court to set a selection of a permanent plan hearing pursuant to section 366.26.

Following DCFS's recommendation, at the October 26, 2010 continued section 366.22 hearing, the court terminated family reunification services, set a section 366.26 hearing for February 22, 2011, and a review of permanent plan hearing for April 26, 2011. During the hearing, Father interrupted the proceedings twice, accused DCFS and the court of being the cause of his losing custody of P., and stormed out of the courtroom.

In its February 22, 2011 section 366.26 report, DCFS reported that P. continued to develop age appropriately and that he had monitored visits with Mother and Father twice a week. The visits reportedly went well, but the parents failed to attend all the scheduled

visits. The report identified P.'s paternal aunt as a potential adoptive parent for P. DCFS requested a home study to assess the aunt's viability as an adoptive parent. P.'s foster mother stated that she was willing and able to continue to care for P. until his adoption.

The parents were not present at the February 22, 2011 section 366.26 hearing. The court found that notice of the proceedings had been properly given to both parents. The court ordered a home study for the aunt and continued the section 366.26 hearing to May 24, 2011.

At the April 26, 2011 review of permanent plan hearing, the court ruled that DCFS had taken the necessary steps to make and finalize P.'s permanent plan of adoption.

Mother and Father were present at the May 24, 2011 continued section 366.26 hearing. The court found that notice of the proceedings had been given to all parties as required by law. The court ordered DCFS to submit a supplemental report, including updates regarding P.'s placement and the status of the home study of the aunt. The section 366.26 hearing was continued to July 25, 2011.

The DCFS supplemental report submitted on July 25, 2011, noted that the State of New Jersey, where the aunt lived, would not conduct an adoption home study until parental rights were terminated. Nevertheless, DCFS concluded that adoption by the aunt should be the permanent plan for P. based on telephone conversations between the CSW and the aunt confirming her commitment to providing a permanent home for P. through adoption. Concluding that P. was likely to be adopted by the aunt, DCFS recommended that Mother's and Father's parental rights be terminated.

Mother and Father were not present at the July 25, 2011 continued section 366.26 hearing. Both parents' attorneys were present, and the court found notice of the proceedings had been given to all parties as required by law. At the request of both parents' attorneys, the court set the matter for a contested hearing for August 31, 2011. The court ordered Mother and Father to appear on August 31, 2011.

In its August 29, 2011 interim review report, DCFS reported that P. was continuing to grow and develop age appropriately. DCFS also reported that the aunt continued to be interested in adopting P., but the CSW had yet to receive any updated

information regarding the status of the home study because parental rights had not been terminated. The CSW submitted information regarding the aunt's marital status, living situation, and contact information.

Mother and Father were not present at the August 31, 2011 continued section 366.26 hearing. Mother's counsel asked the court to apply the section 366.26, subdivision (c)(1)(B)(i) parental benefit exception to avoid terminating her parental rights. Mother's counsel noted that because Mother was not present at the proceedings, Mother could not attempt to persuade the court to apply the section 366.26, subdivision (c)(1)(B)(i) exception through testimony. Mother's counsel closed by informing the court that Mother would object to the termination of her parental rights. Father's counsel informed the court, "my client has been pushing me hard for this relative placement. He wants the placement with his sister. He is aware of the nature of this hearing. He was properly noticed. . . . I don't believe that my client falls under any of the exceptions. So we're submitting."

Based on Mother's and Father's counsel's statements that their clients had been properly noticed, the court found notice to be properly given as required by law.[3] After reviewing the DCFS reports and considering counsel's arguments, the court ruled that the section 366.26, subdivision (c)(1)(B)(i) exception was not applicable to Mother because the parental bond was outweighed by the benefit P. would receive from the permanence that could be provided by adoption. The court found by clear and convincing evidence that P. was adoptable and that return to his parents would be detrimental to him. The court terminated Mother's and Father's parental rights and set a review of permanent plan hearing for October 25, 2011, at which time DCFS was to update the court on the home study and the status of adoption planning.

Mother and Father filed separate timely appeals.

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[3] On May 15, 2012, we granted Father's motion to take as additional postjudgment evidence Father's trial attorney's declaration stating that she believed mistakenly that DCFS had provided Father with proper notice of the August 31, 2011 hearing. She informed the court that notice was proper based solely upon her mistaken belief.

DISCUSSION

I. Father's Appeal

Father contends his due process rights were violated when he did not receive notice of the August 31, 2011 continued section 366.26 hearing. Father argues that lack of notice for a continued hearing is structural constitutional error and requires a reversal of the juvenile court's decision to terminate his parental rights.

The court concluded Father received notice of the August 31 hearing based on his attorney's statement that Father was properly noticed. Counsel now contends she was mistaken when she so advised the court. Although nothing in the record indicates that DCFS gave Father notice of the August 31 hearing, his counsel's statement could be interpreted to mean that Father received actual notice. We need not determine whether counsel's representation to the court bars Father from claiming lack of notice. We will assume he did not receive notice of the continued section 366.26 hearing and address the issue of prejudice.

Generally, in dependency matters, a reviewing court will set aside an order if it finds there is a reasonable probability that the outcome would have been different but for the error. (See *In re Celine R.* (2003) 31 Cal.4th 45, 60.) Father urges the lack of notice violated his right to procedural due process and reversal is mandated. We disagree.

We find the harmless trial error analysis used by the court in *In re Angela C.* (2002) 99 Cal.App.4th 389 (*Angela C.*) instructive. There, the court found the appellant's lack of notice of a continued section 366.26 hearing to be in the nature of a trial error, not structural error. (*Id.* at p. 395 ["To the extent structural error implicates the fundamental fairness of judicial proceedings, we reason the error in this case is not structural"], citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 310.) The court found the lack of notice to be trial error because appellant had received proper "notice of these dependency proceedings from the outset, as well as the opportunity to be heard." (*Angela C.*, *supra*, at p. 395.) Additionally, the appellant received proper notice of the originally scheduled

section 366.26 hearing date, and, "given [her] prior participation in the proceedings, as well as her election not to attend the originally scheduled termination hearing, we can quantitatively assess the error in the context of other evidence presented in order to determine whether the error was harmless beyond a reasonable doubt." (*Ibid.*)

Accordingly, the court reviewed the record to determine if there was a chance that the appellant, had she been present at the hearing, would have been able to offer proof that the section 366.26, subdivision (c)(1)(B)(i) parental benefit exception should have applied. (*Angela C.*, *supra*, 99 Cal.App.4th at p. 396.) The court determined that although appellant loved her child, her prior conduct demonstrated that she could not establish that terminating parental rights would be detrimental to her child's best interests. (*Ibid.*) As the child had been deemed adoptable, the appellant had failed to establish that an exception to adoption applied. As a result, the panel concluded that the lack of notice was harmless beyond a reasonable doubt and affirmed the juvenile court's order to terminate parental rights. (*Ibid.*)

The analysis in *Angela C.* applies here. Like the appellant in that case, Father has had notice of these dependency proceedings from the outset and the opportunity to be heard. He received notice of the originally scheduled section 366.26 hearing and was present at one of the hearings conducted prior to the final August 31 proceeding. The lack of notice of the continued hearing did not affect the fundamental fairness of the hearing, as he was represented by counsel. Significantly, unlike the appellant in *Angela C.*, the juvenile court was informed of Father's position. Counsel stated clearly that Father "was pushing [her] hard for this relative placement. He wants the placement with [the aunt]." Counsel also conceded that no exception to adoption applied.[4] We can assess whether, based on an examination of the evidence presented, the lack of notice was harmless beyond a reasonable doubt.

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[4] We note that although counsel is retreating from her statement with respect to whether Father received notice, she did not repudiate her representation of Father's position at the time of the hearing.

Based on the information contained in the DCFS reports, the juvenile court found clear and convincing evidence that P. was adoptable. A finding of adoptability requires the juvenile court to terminate parental rights and order the child placed for adoption unless the parent establishes that termination of parental rights would be detrimental to the child's best interests. Thus, we examine whether Father presented any evidence that the section 366.26, subdivision (c)(1)(B)(i) parental benefit exception applies.

Ignoring his attorney's statement of his position at the hearing, Father claims that given the positive reports regarding his visits with P., "it is reasonably probable [his] testimony could have tipped the balance in favor of a finding the benefit exception to parental rights applied." We find Father's contention that his testimony at the August 31, 2011 hearing could have "tipped the balance" wholly unconvincing. Father cites only DCFS reports that mention his positive visits with P. as evidence that the parental benefit exception should apply. Father's offered evidence is insufficient. It is well established that to meet the burden of proving the section 366.26, subdivision (c)(1)(B)(i) exception applies, the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits—the parent must show that he or she occupies a parental role in the life of the child. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.)

Nothing in Father's offer of proof or the record suggests that he occupied a parental role in P.'s life or that P. would benefit from continuing his relationship with him. According to Mother, Father was verbally abusive. The record corroborates her accusation. Father's temper was displayed on several occasions. Father yelled at a CSW, argued with Mother during monitored visits with P., cursed at foster mother's daughter when he tried to schedule a visit, and disrupted the section 366.22 review hearing twice by accusing DCFS and the court of being the cause of his losing custody of P. and storming out of the courtroom. We can only conclude that Father has severe anger issues considering his inability to control his temper in a court of law. Two things are clear. Father's temper poses a barrier to his ability to provide a safe and peaceful environment for P., and P. would not benefit from continuing a relationship with Father.

There also is little doubt that Father lacks the skills and the awareness necessary to care for P. We find it disconcerting that despite the number and severity of the injuries P. suffered while he was in Father's home, Father had "no clue" his child was injured. In the 29 months prior to the August 31, 2011 hearing, Father never asked or kept track of P.'s progress in therapy, his doctor's appointments, or his progress in the foster home. Further, Father was unable to substantially comply with the case plan despite receiving almost a year of reunification services beyond the six months mandated by statute. (§ 361.5, subd. (a)(1)(B) [when the child who is removed from the parents' physical custody is under three years of age, services "shall be provided for a period of six months from the dispositional hearing . . . , but no longer than 12 months from the date the child entered foster care . . . unless the child is returned to the home of the parent"].) Father's lack of progress led the CSW to reach the conclusion that, despite Father's pleasant visits with P., "neither parent separately nor together [has] the capacity to properly care, supervise and provide [P.] with a stable and healthy home."

Due to his failure to present any evidence that demonstrates that P. would benefit from continuing his relationship with Father, we conclude that Father would not have been able to establish that the parental benefit exception applied had he been present to testify at the August 31, 2011 continued section 366.26 hearing. (See *In re Angela C.*, *supra*, 99 Cal.App.4th at p. 396; *In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) Therefore, we conclude beyond a reasonable doubt that the assumed error in notice was harmless trial error.

II. Mother's Appeal

Mother claims there was insufficient evidence to support the juvenile court's finding that P. was adoptable. Mother also claims that the juvenile court erred by refusing to apply the section 366.26 subdivision (c)(1)(B)(i) parental benefit exception. We disagree with both of Mother's contentions.

A. Adoptability

On review of the sufficiency of the evidence, 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 I.W.* (2009) 180 Cal.App.4th 1517, 1525, citing *In re Autumn H*. (1994) 27 Cal.App.4th 567, 576.) The appellate court must determine "whether there is substantial evidence from which a reasonable trier of fact could by clear and convincing evidence find a factual basis for the finding as to the child's adoptability." (*In re Marina S.* (2005) 132 Cal.App.4th 158, 165.) "'"The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal."'" (*In re I.W., supra*, 180 Cal.App.4th at pp. 1525-1526, quoting *Crail v. Blakely* (1973) 8 Cal.3d 744, 750.)

There is substantial evidence from which the juvenile court could find that P. was adoptable. We find no evidence to suggest that P. was difficult to place or unlikely to be adopted. Moreover, the juvenile court's finding of adoptability is further bolstered by the aunt's repeated interest in adopting P. and his foster mother's willingness to care for him until his adoption.

The issue of adoptability focuses on the minor, specifically whether the child's age, physical condition, and emotional state might make it difficult to find someone willing to adopt him or her. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) Under section 366.26, subdivision (c)(3), "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."

In the instant case, the aunt was identified as a prospective adoptive parent for P. P. is under seven years of age, he is not a member of a sibling group, and there is no suggestion from his physicians or the CSW that he has a medical, physical, or mental

handicap. In one of the reports, the CSW mentioned that P. had eczema, asthma, and macrocephaly (a large head). However, despite these diagnoses, the CSW and his foster mother consistently reported that he was healthy, intelligent, and developing age appropriately. These reports, coupled with the aunt's desire to adopt P., led the juvenile court to properly conclude that P. was adoptable.

Mother further contends that DCFS failed to present the juvenile court with evidence that P. was specifically adoptable by the aunt. However, with regard to determining whether the juvenile court based its finding of adoptability upon clear and convincing evidence, we view the aunt's repeated desire to adopt P. as substantial evidence that P. was generally adoptable. (See, e.g., *In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 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*"]; *In re Scott M.* (1993) 13 Cal.App.4th 839, 844 ["[T]he question of a family's suitability to adopt is an issue which is reserved for the subsequent adoption proceeding."].)

Mother asserts that the reports submitted regarding P.'s status pursuant to section 366.22, subdivision (c)(1)(C) were insufficient and lacked the detail necessary to allow the court to make an independent analysis as to P.'s adoptability. However, Mother forfeited the issue of the sufficiency of the adoption assessment on appeal by not objecting to it in juvenile court. (See *In re Urayna L.* (1999) 75 Cal.App.4th 883, 886 [failure to object to adequacy of adoption assessment waives issue on appeal].) Moreover, nothing in section 366.22 subdivision (c)(1)(C) requires the CSW to describe a child's status in exhaustive detail where such detail is not deemed necessary. The court used the DCFS reports to find that P. was likely to be adopted, and substantial evidence supports its conclusion.

B. The Parental Benefit Exception

Based on the evidence presented at the hearing, we conclude that the juvenile court did not err in failing to apply the section 366.26 subdivision (c)(1)(B)(i) parental

benefit exception, and therefore did not err in terminating Mother's parental rights. Mother bore the burden of proof to show that the parental benefit exception applies in this case. (See *In re L. Y. L.* (2002) 101 Cal.App.4th 942, 953.) If the issue on appeal turns on a failure of proof at trial, the question for the reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.) Furthermore, as we have discussed, to prove the section 366.26, subdivision (c)(1)(B)(i) parental benefit exception applies, the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits—the parent must show that he or she occupies a parental role in the life of the child. (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.)

At the August 31, 2011 continued section 366.26 hearing, Mother's attorney asked the court to apply the parental benefit exception. Mother was not present at the hearing to testify as to why the parental benefit should apply, and at the request of her attorney, the court looked solely to the DCFS reports to determine whether to apply the exception. The court ruled that there was no establishment of a parental bond that outweighed the benefit of permanence provided by adoption. On appeal, Mother claims that she maintained regular contact with P. and he would benefit from continuing that contact. Specifically, she cites DCFS reports as evidence that she was loving and kind with P. during her visits, that P. referred to her as "mommy," and that he was well aware that Mother and Father are his parents. This evidence is insufficient to meet the burden of proving the section 366.26, subdivision (c)(1)(B)(i) parental benefit exception applies, and thus the juvenile court did not err in refusing to apply it. (See, e.g., *In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.)

DISPOSITION

The juvenile court's order terminating parental rights is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.