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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re NICOHALAS C., a Person Coming  
Under the Juvenile Court Law.

B242829  
(Los Angeles County  
Super. Ct. No. CK83817)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

NANCY C.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Marilyn K. Martinez, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.). Affirmed.

Jonathan B. Steiner and Anne E. Fragasso, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

## I. INTRODUCTION

Nancy C. (mother) appeals from an order terminating her parental rights to her son under Welfare and Institution Code section 366.26.<sup>1</sup> Mother contends the juvenile court's finding that the child was adoptable was not supported by substantial evidence and that the juvenile court erred when it failed to grant a continuance in order to determine if the child is adoptable. We find no error and affirm.

## II. BACKGROUND

On September 14, 2011, a petition was filed concerning Nicoles<sup>2</sup> C. whose date of birth is in September 2011. It is alleged, pursuant to Section 300, subdivision (b), that mother had mental and emotional problems, including delusions, that rendered her unable to provide regular care of her son, and that her condition endangered him and placed him at risk of harm. It further alleged, pursuant to both section (b) and (g) that mother had endangered Nichohalas when she left him, as a newborn, at the hospital without making a plan for his ongoing care and supervision, and thereby placed him at risk of harm.

Nichohalas came to the attention of the juvenile court on September 9, 2011 after a referral was generated alleging mother had given birth to Nichohalas in September 2011 and was discharged from the hospital on September 7, 2011. Nichohalas remained in the hospital and mother was not responding to messages the hospital had left for her attempting to arrange for his discharge. A woman who identified herself as mother's sister contacted the hospital and requested discharge information for the child and reported mother had been arrested for drug use.

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

<sup>2</sup> The child is referred to initially as Nicoles C., and is referred to variously as Nicoles, Nicholas and Nichohalas throughout the record. Since the spelling of the child's first name on his birth certificate is Nichohalas, he is herein referred to as Nichohalas.

Mother was assessed by the Department of Children and Family Services (DCFS) as a high risk because she did not return for her baby, had a history of drug and alcohol abuse, had three other children for whom she could not provide care, and was demonstrating mental instability.

Tammy F. contacted the social worker and told the social worker that her brother, Thomas R., might be Nicholas's father. Tammy F. said she was interested in caring for Nicholas. Mother agreed that Nicholas should be placed with Tammy F.

On September 14, 2011, the juvenile court conducted the detention hearing. The juvenile court made detention findings and orders, ordered paternity testing with respect to Thomas R., and detained the child with Tammy F.

On October 12, 2011, DCFS filed a second amended petition.<sup>3</sup> The petition added a count alleging mother had a history of substance abuse and was a current abuser of alcohol. The court also alleged mother had been convicted of driving while under the influence of a controlled substance. DCFS provided the juvenile court with a jurisdiction/disposition report dated October 12, 2011 and authored by a Dependency Investigator ("D.I.").

Mother submitted to on-demand drug tests on September 12, 2011, September 29, 2011, and October 4, 2011. The September drug tests were negative; however, mother tested positive for methamphetamine and alcohol on October 4, 2011. Tammy F. reported mother had a severe alcohol problem and smelled of alcohol during a visit with Nicholas on September 21, 2011.

On October 12, 2011, the juvenile court adjudicated the section 300 petition as to mother.<sup>4</sup> Mother pled no contest to an amended petition. The juvenile court sustained a count documenting mother had an unresolved history of substance abuse that included alcohol and methamphetamine use. The court declared Nicholas a dependent of the

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<sup>3</sup> DCFS filed a first amended section 300 petition on October 7, 2011, that was subsequently dismissed.

<sup>4</sup> The juvenile court continued the jurisdictional and dispositional hearing as to Thomas R. for receipt of the results of paternity testing. The testing revealed Thomas R. was not Nicholas's biological father.

court, removed him from mother's custody, and ordered DCFS to provide mother with reunification services.

The juvenile court conducted a status review hearing pursuant to section 366.21 subdivision (e) on April 10, 2012. Nicholas continued to reside with Tammy F. DCFS reported Nicholas, who was now six months old was a healthy baby boy and was developmentally on target. The Regional Center evaluated Nicholas on January 10, 2012 and found him ineligible for services. The letter from the Regional Center informing DCFS that Nicholas was not eligible for services included the statement "Mild delays in grasp but skill[s] are emerging."

DCFS reported that Nicholas presents as a happy baby. He does not cry easily. He cries when he is hungry, bored or wet. He appears comfortable in the arms of his caregivers. He does not need mental health services at this time.

DCFS attached a copy of Nicholas's health and education passport ("passport") to the April 10, 2012 status review report. The passport included an entry dated December 23, 2011 stating the child had a "history of tremors." The treatment plan was "Receive physical therapy next week. Advised caregiver to make a log of when tremors occur." The passport documented the child had a well-child exam on December 23, 2011, and noted that "[g]rowth [and] development appropriate at this time[;] [p]hysical exam normal."

Mother was not in compliance with her case plan. Although she had completed a parenting program, she was not enrolled in a substance abuse rehabilitation program or individual counseling. Between September 12, 2011 and March 12, 2012, mother's random drug test results including three with negative results, five no shows, and six positive for alcohol, one of which was also positive for methamphetamine.

Tammy F. told the social worker that if mother did not reunify with Nicholas, she wanted to adopt him. On April 10, 2012, the juvenile court terminated Mother's reunification services and scheduled a hearing to select and implement a permanent out of home plan for Nicholas. The hearing was set for July 20, 2012.

On July 20, 2012, DCFS filed a section 366.26 report with the court. It also provided the court with a last-minute information for the court report informing the court that Nicholas had been removed from Tammy F.'s home on April 17, 2012, due to Tammy F. not being honest about her living situation and who was primarily caring for the child. On this same day, Nicholas was moved to a new home located through the placement and recruitment unit. Tammy F. told DCFS on April 26, 2012, she was in agreement with Nicholas being replaced and she wanted DCFS to place him in a two parent home that was already approved to adopt him.

In its section 366.26 report, DCFS noted that Nicholas was evaluated by Regional Center of Orange County ("RCOC") on January 10, 2012 and was found to not meet RCOC eligibility criteria for early start services. On June 25, 2012, the social worker referred Nicholas again to the Regional Center after speaking with his current foster parents about his development. Nicholas was not able to turn onto his back from his tummy. Because the original evaluation was done in Orange County, the transfer to the Regional Center in the current foster parents' service area could take up to thirty days.

Nicholas continued to present as a happy baby. He smiled and made eye contact with his caregivers. He appeared to be comfortable in the arms of his caregivers. DCFS reported it was "highly likely that Nicholas would be adopted" and that the current foster parents wished to adopt him and had an approved home study. DCFS noted that Nicholas had only been in the home since April 27, 2012. DCFS wrote, "[t]he child was placed with the couple on 4/27/12. [The foster parents] have developed an instant connection with him. They state they 'adore' him. Nicholas made an easy transition to their home and he is loved and well cared for." The foster parents previously cared for other foster children. The foster parents were committed to adopting Nicholas.

DCFS reported that Nicholas's current caretakers had an approved home study, and wished to adopt him. DCFS could not recommend terminating parental rights as Nicholas had been living in his new placement for less than three months. It had been explained to the prospective adoptive parents that the child has to reside in their home for at least six months before adoptive placement papers are signed. DCFS reported that

Tammy F.'s 21 year old daughter was interested in adopting Nicholas. However, when DCFS learned she was planning to reside with Tammy F., she was told that the plan was not viable because Nicholas was previously removed from Tammy F.'s home. Shortly thereafter Tammy F. called the social worker and said that if her home was not good enough for Nicholas she would "buy" her daughter an apartment so Nicholas could be placed with her.

DCFS attached a Concurrent Planning Assessment ("CPA") to its 366.26 report. The cover sheet of the CPA indicated it was an update or reassessment and identified adoption with a non-relative as the recommended plan. The CPA completion date was listed as May 16, 2012. DCFS wrote that Nicholas has resided with current caretakers since 4/27/12 when he was removed from his non-related extended family member who was in the process of adopting him and that current foster parents who were matched with Nicholas via placement recruitment unit already had an approved adoption homestudy. DCFS checked the box on the CPA indicating "[c]hild is likely to be adopted."

The CPA document that the foster parents, who also were the prospective adoptive parents, "adored[e]d" Nicholas. It also documented that Nicholas would need to reside in their home for at least six months before adoptive placement papers could be signed. The prospective adoptive parents indicated that they understood.

The juvenile court conducted the section 366.26 hearing on July 20, 2012. Mother was not present at the hearing. Mother's counsel informed the court that mother was present in the courthouse. The court repeated its tentative decision to terminate parental rights today, even though DCFS was recommending a continuance. Mother's counsel responded that she was objecting to the juvenile court's indicated ruling and requested that the case be continued so they could "be assured that the child will have some kind of adoptive family situation if that is the plan." Mother's counsel also requested a contested hearing because her client was regularly visiting with the child and wanted the opportunity to demonstrate that the child would benefit from continuing his relationship with mother. The court stated that it would accept the statements of mother's

counsel as an offer of proof. Counsel for DCFS noted that DCFS had recommended a continuance but they would submit the matter.

In making its ruling the juvenile court stated: “I’m inclined to terminate parental rights. I find that the offer [of] proof to set the matter or a contested .26 is insufficient to persuade the court that if the court did set the matter for a contested hearing, there’s a reasonable likelihood that the court would be persuaded that there would be an exception to terminating parental rights.”

The juvenile court proceeded to terminate parental rights while making its findings and orders, it stated: “This child is well-cared for by his caretakers who do desire to adopt him. They have completed the home study, which has been approved. Clearly this child is generally adoptable and specifically adoptable by the current caretakers. And, therefore, I order parental rights over this child be permanently terminated.”

After the juvenile court made its findings and orders terminating parental rights, it further stated: “And perhaps I should have stated that this child does not have any special needs which would pose a barrier to his becoming adopted. He has been assessed by Regional Center and found not to be eligible. I believe there may be a reassessment. [¶] Nonetheless, whatever are his needs, they are well-known to his caretakers who have been meeting all of his needs on a daily basis [f]or substantially all of his life.”

### III. DISCUSSION

Mother contends that there was not substantial evidence to support the juvenile court’s findings that Nicholas was adoptable and therefore the court’s order terminating paternal rights should be reversed.

At section 366.26, the court may select one of three alternative permanency plans for the dependent child — adoption, guardianship or long term foster care. (*In re Taya C.* (1991) 2 Cal.App.4th 1, 7, disapproved on another point in *In re Candace P.* 24 Cal.App.4th 1128, 1130, fn.3.) If the child is adoptable, there is a strong preference for adoption over alternative permanency plans. (*San Diego County Department of Social Services v. Superior Court* (1996) 13 Cal.4th 882, 888.)

A finding of adoptability requires clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time. (*In re Zeth S.* (2003) 31 Cal.4th 396, 406.) On review, the question is whether the record contains substantial evidence from which the juvenile court could find clear and convincing evidence that the child will be adopted within a reasonable time period. We give the court's finding of adoptability the benefit of every reasonable inference and resolve any evidentiary conflicts in favor of affirming. (*In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1562.)

“The issue of adoptability posed in a section 366.26 hearing 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.” (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) “Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, 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.” (*Id.* at pp. 1649-1650.) The trial court had a report from DCFS that it was “highly likely that Nicholalas would be adopted” and that the current foster parents wished to adopt him and had an approved home study. The foster parents were committed to adopting Nicholalas.

Mother cites to the case of *In re Michael G.* (2012) 203 Cal.App.4th 580 in support of her argument. *In re Michael G.* was a case in which a mother appealed from a juvenile court's order terminating her parental rights, arguing that the juvenile court erred by not continuing the case in order to receive updated psychological information



regarding the child, and that as a result, the child's adoption assessment report was inadequate. The child in that case was seven years old, born with a positive toxicology screen for methamphetamine, was neglected and ignored by his mother, who reported he had tried to harm his younger brother and his mother and other relatives had been unable to manage his active and defiant behavior. When the juvenile court ordered the psychological evaluation that had not been received at the time of the section 366.26 hearing, the child had only been in a stable placement for three months. (*Id.* at pp. 590-591.) The reviewing court held that the juvenile court abused its discretion when it did not continue the section 366.26 hearing to receive an updated assessment of the child's adoptability. (*Id.* at 591.) However, the court held that any error was harmless because the child was happy, healthy, attractive, affectionate with his caregiver, did well in school, and there were no concerns about his development. (*Id.* at pp. 591-592.)

Nicohalas was ten months old at the time of the section 366.26 hearing. The foster parents had raised Nicohalas for just under three months. They adored him. They were aware of his developmental abilities, had bonded with him, and had an approved adoption home study. They understood that Nicohalas had to reside in their home for at least six months before adoptive placement papers could be signed but were committed to adopting him.

There was nothing presented to the juvenile court that the results of Nicohalas's Regional Center evaluation would dissuade the foster parents from going forward with the adoption or undermine their commitment to him.

We conclude that the juvenile court's finding of adoptability is supported by substantial evidence.

#### IV. DISPOSITION

The orders are affirmed.

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FERNS, J.\*

We concur:

ARMSTRONG, ACTING P.J.

KRIEGLER, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.