Filed 1/27/17 In re Oscar U. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 OSCAR U., Jr., a Person Coming Under the Juvenile Court Law.	
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. C.C. et al., Defendants and Appellants.	B275281 (Los Angeles County Super. Ct. No. DK10997)

APPEAL from an order of the Superior Court of Los Angeles County, Rudolph Diaz, Judge. Affirmed.

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

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant Oscar U.

Mary Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel and Stephen D. Watson, Deputy County Counsel, for Plaintiff and Respondent.

Appellants C.C. (Mother) and Oscar U., Sr. (Father), parents of Oscar U., Jr. (Oscar) appeal the order terminating parental rights. Appellants both contend the court erred or abused its discretion in refusing to apply the exception to termination found in Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i).[1] Mother further contends the court's finding that Oscar was adoptable was not supported by substantial evidence. Finding no error or abuse of discretion, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Oscar was born more than two months premature in December 2014, and spent the first four months of his life in the neonatal intensive care unit (NICU). In April 2015, hospital personnel contacted the Department of Children and Family Services (DCFS) because Oscar was about to be discharged, needing extensive medical services. Father had never visited Oscar in the NICU to learn how to address his

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

medical needs, and Mother's visits were becoming sporadic.[2] Although Mother and Oscar tested negative for drugs at the time of his birth, she admitted using drugs early in the pregnancy and resuming use after Oscar's birth, while he was hospitalized.[3] She also admitted being a regular user of methamphetamine and marijuana for some time, and having been hospitalized for drug use two years earlier. In addition, she reported that in March 2015, Father had resumed using drugs after a period of sobriety.

Oscar was discharged in mid-April 2015.[4] He and Mother moved in with her maternal aunt, Maria C.[5] On

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[2] Oscar had a number of problems at birth that the hospital attributed to his prematurity and Mother's admitted drug use, including respiratory dysfunction, GERD (gastroesophageal reflux disease), and retinopathy (abnormal development of retinal blood vessels).

[3] Mother tested positive for amphetamine, methamphetamine and cannabinoids on April 9, 2015.

[4] No long-term vision or hearing problems were noted at Oscar's April and October 2015 examinations. He was drinking formula normally. The regional center's May 2015 evaluation concluded his cognitive and physical development were somewhat behind his age, but did not recommend occupational therapy. It recommended instead that he receive weekly infant stimulation services. A medical examination from the same period indicated Oscar was developing normally when his age was corrected to reflect his prematurity.

[5] After Mother and Oscar moved into her home, the caseworker conducted a home assessment and a background investigation of Maria and her family and found no evidence of

(Fn. continued on next page.)

April 22, DCFS detained Oscar from Mother.[6] The caseworker provided Mother referrals, but Mother claimed to need no treatment to maintain sobriety. Father initially refused to cooperate with the caseworker. Just prior to the jurisdictional hearing, Father agreed to be interviewed. He informed the caseworker he had first used methamphetamine a decade earlier when he was 15, and that in 2012, he had used it nearly every day. In January 2014, after a brief period of sobriety, he began using again, sometimes daily. A visitation schedule for Oscar and his parents was set up in May 2015. Mother and Father signed the schedule.

At the June 1, 2015 jurisdictional hearing, Mother and Father pled no contest to the allegations of the petition, and the court found true that: (1) Mother had an unresolved history of illicit drug use and was a recent user of methamphetamine and marijuana, and (2) Father had an unresolved history of substance abuse, which included alcohol and methamphetamine, and was a recent user of methamphetamine. The court ordered Mother and Father to participate in a parenting class, counseling, a substance abuse program, a 12-step program and drug testing, and to

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criminal activity or any other impediment to Oscar's residing with her.

[6] Mother agreed to move out of the aunt's home and the baby was placed with the aunt. Mother moved back with Father.

complete any medical training needed to attend to Oscar's medical needs.

Mother missed six drug tests between May and October 2015, and tested negative twice, on October 30 and November 7. Father missed five drug tests between August and October 2015, and tested negative twice in November. Apart from drug testing, Father did not comply with any part of the reunification program between June and December 2015. Mother provided the caseworker proof of enrollment in a substance abuse program on October 17, 2015, but the caseworker was unable to obtain information concerning her progress. Mother had been visiting Oscar on the weekends since May, and had attended his medical appointments. Father only began visiting in November, claiming to have been unaware of the visitation schedule put in place in May.

At the January 2016 contested six-month review hearing, Father presented evidence of having enrolled in a substance abuse program a few days earlier. Mother presented evidence of having enrolled in a new substance abuse program in December 2015 and having attended four sessions. Both DCFS and Oscar's counsel asked the court to terminate reunification services. Observing that the parents had had close to eight months to comply with the reunification plan and had made very little progress, the court found no substantial probability they would complete their programs by the 12-month review date and terminated reunification services.

In February 2016, DCFS submitted an adoption planning assessment, indicating that Oscar appeared physically healthy and had no detectable health, developmental or behavioral issues despite the circumstances of his birth. It identified Maria and her husband as prospective adoptive parents but provided no detailed information about them or their relationship with Oscar. At the end of February, an adoption caseworker was assigned. The April 2016 section 366.26 report stated that Oscar was very likely to be adopted, that Maria and her husband had been identified as the prospective adoptive parents, that Maria had been ensuring all Oscar's needs were met, and that he was thriving in her home. The report also stated that Mother and Father had been visiting Oscar regularly. The report indicated that a separate report would be forthcoming from the adoption caseworker.

The April 15, 2016 section 366.26 hearing was continued after Father filed a section 388 petition. The petition stated Father had completed six parenting classes and 10 individual and 10 group counseling sessions, and was visiting Oscar six days a week. The court set the petition for hearing and set the continued section 366.26 hearing for the same date. It directed DCFS to prepare a report addressing the petition. DCFS's report recommended denying the petition and continuing the section 366.26 hearing for completion of a home study.

At the May 9, 2016 hearing, the court denied the section 388 petition, finding Father's circumstances

insufficiently changed. Turning to the section 366.26 issues, the court heard testimony from Father and Mother. Father testified he was visiting Oscar six days a week, staying almost all day on the weekends. Oscar was excited when he saw Father and called him "Daddy" or "Pop." He cried when Father left. Father did not attend medical or regional center appointments, and explained he had not visited when Oscar was in the hospital because he thought Oscar might not survive, and he did not want to get attached to the child. Father did not attend N.A. or A.A. meetings regularly and did not have a sponsor. He had not begun the 12 steps. Mother testified she visited Oscar every day for four or five hours and attended all his medical appointments. She fed him and cared for him under the supervision of Maria. Oscar called Mother "Ma."

Counsel for DCFS argued in favor of termination of parental rights, stressing that Mother and Father were not his caretakers and had let their reunification services terminate. Counsel for Oscar agreed that parental rights should be terminated, observing that although Mother and Father visited frequently, the visits were monitored, and that neither had demonstrated the capacity to be the child's caretaker. She contended that the evidence did not support that termination of the relationship would cause a substantial detriment to Oscar.

The court ordered parental rights terminated. The court preliminarily found that conditions justifying the court's assertion of jurisdiction continued to exist, and that it

would be detrimental to Oscar to be returned to his parents. The court found Oscar adoptable by clear and convincing evidence. The court found evidence of a bond between Oscar and his parents, but stated that the bond with his primary caregiver Maria was greater. The court further stated that although Mother and Father had maintained regular contact with the child, their late start in addressing their drug problems indicated they did not have a serious commitment to Oscar. Mother and Father appealed.

DISCUSSION

At the section 366.26 hearing, the court selects the permanent plan for the dependent child. The court has several options, including terminating parental rights and ordering the child placed for adoption, appointing a long-term legal guardian and ordering long-term foster care. (§ 366.26, subd. (b); *In re Celine R.* (2003) 31 Cal.4th 45, 53.) "'Adoption is the Legislature's first choice.'" (*In re Celine R.*, *supra*, at p. 53.) If the court determines by clear and convincing evidence that it is likely the child will be adopted, the court "shall terminate parental rights and order the child placed for adoption" (§ 366.26, subd. (c)(1)), unless one of the statutory exceptions applies and "provides a compelling reason for finding that termination of parental rights would be detrimental to the child." (*In re Celine R.*, *supra*, at p. 53.) A frequently invoked exception is found in section 366.26, subdivision (c)(1)(B)(i): "The parents have maintained regular visitation and contact with the child and

the child would benefit from continuing the relationship." The parent seeking the benefit of the exception must establish: (1) "the existence of a beneficial parental . . . relationship" and (2) that "the existence of that relationship constitutes a 'compelling reason for determining that termination would be detrimental.'" (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315, quoting § 366.26, subd. (c)(1)(B), italics omitted; accord, *In re K.P.* (2012) 203 Cal.App.4th 614, 622.)

Mother and Father contend on appeal that the court erred in finding the section 366.26, subdivision (c)(1)(B)(i) exception did not apply. Mother further contends that substantial evidence did not support the court's finding that Oscar was adoptable. For the reasons discussed, we disagree.

A. *Standard of Review*

The standard applicable to review of the parental relationship exception is not settled. Some courts apply the substantial evidence standard of review. (See, e.g., *In re G.B.* (2014) 227 Cal.App.4th 1147, 1166; *In re S.B.* (2008) 164 Cal.App.4th 289, 297.) Other courts review for abuse of discretion. (See, e.g., *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) More recently, courts have adopted a hybrid standard, applying the substantial evidence test to whether a beneficial parental relationship exists and the abuse of discretion standard to the court's determination

whether termination of the relationship would be detrimental to the child. (*In re Bailey J.*, *supra*, 189 Cal.App.4th at pp. 1314-1315; accord, *In re K.P.*, *supra*, 203 Cal.App.4th at p. 622; *In re Anthony B.* (2015) 239 Cal.App.4th 389, 395; *In re J.C.* (2014) 226 Cal.App.4th 503, 530-531.) As a practical matter, the differences between the standards of review will rarely impact the outcome of an appeal. (See *In re G.B.*, *supra*, at p. 1166, fn. 7.) We believe, however, the hybrid standard best fits. To determine whether to apply the section 366.26, subdivision (c)(1)(B)(i) exception, the court must first decide whether the parents have visited regularly and established a beneficial relationship with the child, a factual question. It then must decide whether termination would be detrimental, a matter of judgment. In this case, the challenge is to the second prong only. Accordingly, we apply the abuse of discretion standard.

"A finding of adoptability requires 'clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time.'" (*In re Valerie W.* (2008) 162 Cal.App.4th 1, 13, quoting *In re Zeth S.* (2003) 31 Cal.4th 396, 406.) Clear and convincing evidence is evidence "sufficiently strong to command the unhesitating assent of every reasonable mind." (*In re Valerie W.*, *supra*, at p. 13.) We review a trial court's determination of adoptability for substantial evidence, keeping in mind the heightened standard of proof. (*In re R.C.* (2008) 169 Cal.App.4th 486, 491; see *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.)

B. *Beneficial Relationship Exception*

Here, the court found the evidence supported the first prong of the section 366.26, subdivision (c)(1)(B)(i) exception: the existence of a beneficial parental relationship. However, it found no compelling reason for determining that its termination would be detrimental to Oscar. Satisfying this prong of the exception "requires the parent to prove that 'severing the natural parent-child relationship would deprive the child of a substantial positive emotional attachment such that the child would be greatly harmed,'" and that the relationship "'promotes 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 Marcelo B.* (2012) 209 Cal.App.4th 635, 643, italics omitted; see *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 [in determining whether to apply the exception, the court "balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer"].) Evidence of "'"frequent and loving contact" is not sufficient.'" (*In re Marcello B.*, *supra*, at p. 643, quoting *In re Bailey J.*, *supra*, 189 Cal.App.4th at pp. 1315-1316.) "A biological 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." (*In re Angel B.*, *supra*, at p. 466.) In determining this prong, the court may consider such factors as "[t]he age of the child, the

portion of the child's life spent in the parent's custody, . . . and the child's particular needs . . . ." (*In re Autumn H.*, *supra*, at p. 576.)

The court did not abuse its discretion in determining that termination of parental rights would not be detrimental to the child. Oscar was very young, less than two years old, at the time of the section 366.26 hearing. He had spent virtually no time in his parents' custody, having gone from the NICU to Maria's home, where Mother lived for only a few days. Maria had cared for him his whole life, and he was thriving in her care. Father had failed to interact with Oscar at all during the early part of his life, not visiting until Oscar was nearly a year old, allegedly for fear of forming a bond with his fragile son. Mother had been more consistent with visitation and had at least attempted to assume a parental role by attending his medical appointments and therapy sessions. But the court could reasonably find that the benefits of having a permanent home with Maria outweighed the benefits of continuing the relationship with Mother, particularly in view of the possibility that Mother could again fall into the trap of substance abuse.

Father contends the court relied on what he terms "incorrect criteria" -- the parents' current inability to assume immediate custody, their history of never having served as Oscar's primary caretakers, and Oscar's superior attachment to Maria -- to support its finding. The court cited the couple's inability to assume custody in the context of explaining why continued jurisdiction over Oscar was

warranted, not to explain its ruling on the section 366.26 issues. It did not err in considering the fact that Oscar had never been under the care of his parents and his superior attachment to Maria in deciding whether to apply the section 366.26, subdivision (c)(1)(B)(i) exception to termination. Both considerations are reasonably related to determining whether any bond between the child and parent outweighs the benefits of adoption by the current caregiver. In sum, the court did not abuse its discretion or rely on inappropriate criteria. Accordingly, we find no basis to reverse its decision.

C. *Adoptability*

Mother contends the court's finding of adoptability was not supported by substantial evidence. She also contends that both the adoption assessment and the section 366.26 report were incomplete. (See § 366.21, subd. (i)(1)(D) [when court orders a hearing pursuant to section 366.26, "it shall direct the agency supervising the child and county adoption agency . . . to prepare an assessment" that shall include, among other things, "[a] preliminary assessment of the eligibility and commitment of any identified prospective adoptive parent or legal guardian" and "[t]he relationship of the child to an identified prospective adoptive parent or legal guardian, the duration and character of the relationship, the degree of attachment of the child to the prospective relative guardian or adoptive parent, the relative's or adoptive parent's strong commitment to caring permanently for the

child, [and] the motivation for seeking adoption or guardianship"].)

A parent who fails to challenge the sufficiency of an adoption assessment in the trial court, as Mother did here, forfeits the right to complain of its lack of compliance with specific statutory requirements on appeal. (*In re Urayna L.* (1999) 75 Cal.App.4th 883, 886; *In re Crystal J.* (1993) 12 Cal.App.4th 407, 411-412.) However, "while a parent may waive the objection that an adoption assessment does not comply with the requirements provided [by statute], . . . 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." (*In re Brian P.* (2002) 99 Cal.App.4th 616, 623; accord, *In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1560-1561.) We, therefore, address whether substantial evidence supported the court's finding of adoptability.

"'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.]'" (*In re Zeth S.*, *supra*, 31 Cal.4th at p. 406, quoting *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) "All that is required [to support the finding of adoptability] is clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time." (*In re Zeth S.*, *supra*, at p. 406.) "Although a finding of adoptability must be supported by clear and convincing evidence, it is nevertheless a low

threshold: The court must merely determine that it is 'likely' that the child will be adopted within a reasonable time." (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292, quoting § 366.26, subd. (c)(1).)

For a finding of general adoptability to be upheld, "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.'" (*In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 1649.) Nonetheless, "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.)

Here, the evidence supported a finding that Oscar was generally adoptable. He was very young. The problems resulting from his pre-natal exposure to drugs and his premature birth were resolving. (See *In re R.C.*, *supra*, 169 Cal.App.4th at pp. 490-492 [young child generally adoptable despite pre-natal drug exposure and speech delays].) He had exhibited no evidence of long-term vision or hearing problems. He had some lingering pulmonary issues, but

they did not appear to be serious.[7] His physical development was on track when his age was adjusted to reflect his premature birth. He had been found to be a bit behind developmentally and was provided weekly stimulation sessions at the regional center, but the evaluators saw no need for occupational therapy. Moreover, the fact that Maria, with whom he had lived virtually his entire life, was willing to adopt constituted strong evidence of general adoptability. (See *In re Marina S.* (2005) 132 Cal.App.4th 158, 165 [fact that grandparents were interested in adopting minor "by itself constitutes evidence that she was likely to be adopted"].)

Mother contends that the only evidence to support adoptability was the "incomplete" adoption assessment and section 366.26 report. That is not correct. The record contained numerous medical reports, as well as the regional center evaluation. Moreover, the original detention report stated that DCFS had conducted background checks of Maria and her husband and found no criminal activity or other faults that could impede an adoption. Mother also expresses concern that Oscar might become a "legal orphan" if Maria and her husband were later determined to be unsuitable. Her concern is misplaced. In 2005, section 366.26 was amended to add a section providing that a child

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[7] He was prescribed Albuterol in connection with a viral infection in November 2015. Earlier in 2015, he had been prescribed Pulmicort.

who is not adopted three years from the date the court terminates parental rights may petition the court to reinstate parental rights. (See 366.26, subd, (i)(3); *In re I.I.* (2008) 168 Cal.App.4th 857, 871.) "[U]nder the current statute, there is no danger of . . . children becoming legal orphans." (*In re I.I.*, *supra*, at p. 871.)

DISPOSITION

The order terminating parental rights is affirmed.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.