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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re ZOEY H., a Person Coming Under the
Juvenile Court Law.

LOS ANGELES COUNTY DEPARTMENT
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

DARRIN H.,

Defendant and Appellant.

B236638

(Los Angeles County
Super. Ct. No. CK48039)

APPEAL from an order of the Superior Court of Los Angeles County,
S. Klaif, Referee. Affirmed.

Thomas S. Szakall, under appointment by the Court of Appeal, for Defendant and
Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County
Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Darrin H. (Father) appeals from a juvenile court order terminating parental rights to his child, Zoey H. Father failed to show good cause to continue the hearing, and therefore the juvenile court's denial of Father's request for a continuance was not an abuse of discretion. Although the Department of Children and Family Services (DCFS) failed to provide Father with its assessment 10 days before the hearing on the termination of Father's parental rights, as required by California Rules of Court, rule 5.725(c), Father's failure to object to this failure in juvenile court forfeits his claim of error on appeal. Because Father's offer of proof provided no evidence that Father could satisfy the requirements of the beneficial relationship exception to termination of parental rights in Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i),¹ we find no error in the juvenile court's denial of Father's request for a contested hearing. We affirm the order terminating parental rights.

FACTUAL AND PROCEDURAL HISTORY

Detention: Following a March 2, 2010, referral alleging general neglect of four-month-old Zoey H. by Father and Shannon B. (Mother), the DCFS attempted to locate the child over the next three months, during which time the parents admitted their drug use but refused to or failed to appear for drug and alcohol testing.

It was learned that Mother had failed to provide the basic necessities of life for her son Derek B. and because her whereabouts were unknown, Derek B. was placed with a Kin-Gap relative guardianship agreement. Mother had a history of substance abuse and tested positive for methamphetamines and marijuana on the date of birth of her son Dylan B., who was placed with a Kin-Gap relative guardianship agreement. Mother and Father's parental rights to Zoey H.'s siblings Ayla H. and Darrin H., Jr. were terminated on March 29, 2010. Zoey's half-sibling Devin H. was taken into protective custody from Father because of his use of and involvement with illegal controlled substances and

¹ Unless otherwise specified, statutes in this opinion will refer to the Welfare and Institutions Code.

because Father left Devin without any provision for support or was incarcerated or institutionalized and could not arrange care for Devin, with whom Father failed to reunify and who was placed with a Kin-Gap relative guardianship agreement. A dependency case was opened when Father's child Erin H. was born testing positive for amphetamines and marijuana, and that case remained open.

Father's history of methamphetamine use included arrests for possession and manufacture of controlled substances. In March 2003 Father was terminated from a rehabilitation program after testing positive for methamphetamine.

On June 1, 2010, the juvenile court ordered that Zoey be detained and the DCFS filed a section 300 petition. The parents had left California for Arizona, however, and the whereabouts of Zoey, Mother, and Father were unknown. The DCFS, the Palmdale Sheriff's Department, Arizona Child Protective Services, and law enforcement officials in Arizona and Nevada made extensive efforts to locate Zoey and the parents. Laughlin, Nevada police found Mother and Zoey, detained Zoey on a protective custody warrant, and released her to the DCFS on August 12, 2010.

Adjudication and Disposition: The DCFS attempted to schedule a visit with Zoey on August 17, 2010, but the parents failed to attend and reported that they had left Palmdale and were on their way to Arizona. Mother visited Zoey on August 27, 2010. Mother was appropriate during the visit, but Zoey fell asleep 30 minutes into the 90-minute visit and Mother left 10 minutes later, stating that she was leaving because Zoey was sleeping. Mother cancelled a visit scheduled for August 31, 2010, when she called a CSW and stated that she leaving for Laughlin, Nevada.

On September 23, 2010, the parents reported that they lived with Father's adult son in Laughlin, Nevada, and were in California temporarily to attend the juvenile court hearing. During an hour-long visit September 24, 2010, the parents played with Zoey, fed her, and engaged with her.

Mother and Father did not appear for scheduled drug testing on October 5, 2010.

On October 6, 2010, Zoey was placed in the home of Mr. and Mrs. B. with her biological sibling. Mr. and Mrs. B. stated that they wanted Zoey placed in their home and wanted permanency with her should the parents fail to reunify.

On November 8, 2010, Mother and Father were not at home at the address they provided and did not respond to a letter mailed to that address. Mother and Father did not respond to messages left for them on October 5, 7, 20, 22, and 25, 2010, and on November 4 and 8, 2010.

After initially agreeing to drug test on December 6, 2010, Father called the CSW and stated that he and Mother refused to test, that drugs had never been the issue, and that DCFS had no right to remove Zoey from their care.

As of November 15, 2010, Mother and Father had three visits with Zoey since she was detained on August 12, 2010. The parents had a successful visit with Zoey on December 10, 2010, and during a December 17, 2010, visit, Mother was observed engaged in playing with Zoey, while Father minimally engaged with Zoey during the visit, and instead complained about the DCFS case and other issues. On December 23, 2010, a three-hour visit was scheduled, but it lasted only one hour because Father complained he was not feeling well. During the visit, Father did not interact much with Zoey, but instead complained about the case and was upset because his dependency court attorney did not return phone calls.

On January 11, 2011, the juvenile court ordered the DCFS to provide referrals to the parents for drug testing. After the hearing, Father again refused to submit to an on-demand drug test. On January 14, 2011, the parents were told to report for on-demand drug testing. On January 18, 2011, a CSW informed the parents that they were enrolled in a random on-demand drug testing program. A CSW contacted the parents on January 18, 19, and 25 and on February 8 and 24, 2011, to explain that they were ordered to submit to drug testing and provide instructions for testing. Both parents stated that they understood testing requirements. As of February 11, 2011, Mother and Father had not submitted to random drug testing.

On February 16, 2011, the DCFS filed a first amended section 300 petition alleging that Zoey was a person described by section 300, subdivision (b) [child suffered, or substantial risk child would suffer, serious physical harm or illness resulting from parent's failure or inability to supervise, protect, or provide regular care due to substance abuse]. Count 1 alleged that Mother's seven-year history of abuse of methamphetamine and marijuana periodically rendered her incapable of providing regular care and supervision, and that Zoey's siblings Dylan B., Ayla H., and Darrin H., Jr. received permanent placement services due to Mother's drug abuse. Count 2 alleged that Father's unresolved history of substance abuse rendered him incapable of providing regular care and supervision, and that Zoey's siblings Ayla H. and Darrin H., Jr. received permanent placement services due to Father's drug abuse. Zoey was also alleged to be a person described by section 300, subdivision (j) [child's sibling has been abused or neglected and there is a substantial risk the child will be abused or neglected as defined in subdivision (a), (b), (d), (e), or (i)]. Counts 1 and 2 contained the same allegations as were found in counts 1 and 2 of the section 300, subdivision (b).

The parents did not appear for mediation on February 28, 2011. Father stated that he and Mother were no longer together and he was traveling back to Laughlin, Nevada.

At the March 8, 2011, adjudication, the juvenile court sustained the allegations of the petition, found Zoey was a person described by section 300, subdivisions (b) and (j), and set the matter for a contested dispositional hearing.

For the dispositional hearing, the DCFS reported that when Father enrolled in a drug rehabilitation center in Lancaster on March 3, 2011, he refused to drug test, stating that if he tested he would test "dirty." Father's attendance was sporadic, he last attended treatment on March 18, 2011, he had attended no 12-Step meetings, and failed to drug test on March 3 and 18, 2011.

By March 14, 2011, Father stated that he was again living in the Lancaster area and was in a relationship with Mother, although they did not have a stable home and continually moved between family and friends.

When asked to sign a regional center consent forms for a “swallow evaluation” for Zoey, Father became upset, stated that Zoey was fine, and accused the foster parent of not allowing her to develop. Assessments revealed that Zoey functioned at a nine-month-old level in some areas. Zoey would receive Regional Center services including physical therapy, early intervention, and swallow therapy. Sixteen-month-old Zoey was not walking, although she could pull herself up on furniture and had taken a few steps. Zoey could grasp and hold toys and say words such as “night, night” and “no.”

The juvenile court had ordered monitored visits for the parents of at least three hours per week. Since January 2011, the parents should have had 14 visits by April 13, 2011, but they had only one visit with Zoey on February 16, 2011, which was their first visit since December 23, 2010. The parents had not contacted the DCFS to discuss additional visits with Zoey.

At the April 14, 2011, dispositional hearing, the juvenile court ordered no reunification services for the parents pursuant to section 361.5, subdivision (b)(10) and (11). The juvenile court declared Zoey to be a dependent child of the court under section 300, subdivisions (b) and (j), ordered custody taken from the parents and placed with the DCFS, and set the matter for a section 366.26 hearing on August 11, 2011.

Section 366.26 hearing: On April 14, 2011, Father was personally served with a notice of the section 366.26 hearing to be held on August 11, 2011, and that the juvenile court would consider the social worker’s recommendation to terminate parental rights and implement a plan of adoption. The social worker’s assessment report was not attached.

From April 14 to August 11, 2011, the parents had one visit with Zoey in July 2011. The prospective adoptive parent reported that the parents had not regularly visited Zoey since January 2011 and had no phone contact with Zoey. It was very likely that the prospective adoptive parents would adopt Zoey.

At the August 11, 2011, hearing, Father’s attorney stated that Father was present earlier, “but given the recommendation he was concerned. He didn’t feel like he, if the court followed the Department’s recommendation, that he wanted to be in the courtroom

for that.” Father’s attorney requested a continuance, based on an appeal pending in this case, and if the juvenile court were not inclined to grant a continuance, Father’s attorney requested a contested hearing. Father’s attorney made an offer of proof, which was that Father “does have a strong bond and the child has a strong bond to him. Although there has not been recent visitation, he indicates [there] was a problem of unreturned phone calls and inability to schedule those visits. [¶] He indicates to me that the child was in his custody for eight months, that the child was very bonded to [him] and the mother. At the visit in April, the child was very happy and excited to see them, that she was very upset when they had to leave, that they have pictures and video demonstrating the very close bonded relationship that this child has to her parents, and therefore we request to set a contested .26.”

The juvenile court denied the request for a continuance and found that the offer of proof was inadequate and denied the request for a contested section 366.26 hearing. The juvenile court then found that Zoey was adoptable and that it would be detrimental to Zoey to return her to the parents, ordered the parental rights of Mother and Father to Zoey terminated, declared Zoey free from their custody and control, and ordered Zoey’s care, custody, and control transferred to the DCFS for adoptive planning and placement.

Appeal: Father filed a timely notice of appeal.

ISSUE

Father claims on appeal that the juvenile court abused its discretion by refusing to continue the section 366.26 hearing to allow Father to contest the beneficial parent-child relationship exception to termination of parental rights, and erroneously denied Father’s request for a contested hearing on the beneficial parent-child relationship exception.

DISCUSSION

1. *Father Did Not Show Good Cause for a Continuance, and His Failure to Object to the Untimely Filing of the Assessment in Juvenile Court Forfeits His Claim of Error on Appeal*

Father claims that the juvenile court erroneously denied his counsel's request to continue the section 366.26 to allow him to present evidence of the beneficial parent-child exception to termination of parental rights.

A. *The Law of Continuances and the Standard of Review*

Section 352, subdivision (a) states: "Upon request of counsel for the parent, . . . the court may continue any hearing under this chapter beyond the time limit within which the hearing is otherwise required to be held, provided that no continuance shall be granted that is contrary to the interest of the minor. In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements.

"Continuances shall be granted only upon a showing of good cause and only for that period of time shown to be necessary by the evidence presented at the hearing on the motion for the continuance. Neither a stipulation between counsel nor the convenience of the parties is in and of itself a good cause. Further, neither a pending criminal prosecution nor family law matter shall be considered in and of itself as good cause. Whenever any continuance is granted, the facts proven which require the continuance shall be entered upon the minutes of the court."

The requirement that a juvenile court may continue a dependency hearing at a parent's request for good cause and only for the time shown to be necessary reflects a policy discouraging continuances. Denial of a request to continue a dependency hearing will not be overturned on appeal absent an abuse of discretion. (*In re Giovanni F.* (2010) 184 Cal.App.4th 594, 604–605.)

B. Father's Counsel Did Not Show Good Cause for a Continuance

Father's counsel requested a continuance of the August 11, 2011, hearing because there was an appeal pending. During the pendency of an appeal from an order that awards, changes, or otherwise affects the custody of a dependent child, however, the juvenile court retains jurisdiction to make subsequent orders in the dependency proceeding. (Code Civ. Proc., § 917.7; *In re Anna S.* (2010) 180 Cal.App.4th 1489, 1493.) The existence of a pending appeal was not a ground for a continuance.

Father's counsel also stated that the case file showed that Zoey had special needs and issues and if something were to happen to the prospective adoptive parents, that might leave Zoey without legal permanence. As the juvenile court stated, that is always the case. The possibility of future absence of the prospective adoptive parents was not a valid ground for a continuance.

Father's counsel did not show good cause for a continuance and the denial of the request for a continuance was not an abuse of discretion.

C. By Failing to Object in the Juvenile Court to the Untimely Filing of the Assessment, Father Forfeited His Claim of Error on Appeal

Father claims that because the DCFS filed the assessment required by section 366.21, subdivision (i)(1)² on August 11, 2011, instead of filing and providing copies of that assessment to Father 10 days before that hearing as required by California Rules of

² When a juvenile court orders a hearing pursuant to section 366.26, it is required to direct the agency supervising the child to prepare an assessment. (§ 366.21, sub.(i)(1).) The report is to include (1) current search efforts for an absent parent; (2) a review of the amount and nature of contact between the child and his parents and other extended family members since the time of placement; (3) an evaluation of the child's medical, developmental, scholastic, mental, and emotional status; (4) a preliminary assessment of the eligibility and commitment of any identified prospective adoptive parent; (5) the child's relationship to any identified prospective adoptive parent, the duration and character of the relationship, the degree of the child's attachment to the prospective adoptive parent, the adoptive parent's strong commitment to caring permanently for the child, and the motivation for seeking adoption; (6) a description of efforts to identify a prospective adoptive parent; and (7) an analysis of the likelihood the child will be adopted if parental rights are terminated. (*Id.*, at subd. (i)(1)(A) – (G).)

Court, rule 5.725(c),³ the juvenile court should have granted the request for a continuance. Father, however, did not object in juvenile court, and thus forfeited the claim of error on appeal. (*In re Dakota S.* (2000) 85 Cal.App.4th 494, 501-502.)

2. Father Has Not Shown Error in the Denial of His Request for a Contested Section 366.26 Hearing

Father also claims that the juvenile court erroneously denied his request for a contested section 366.26 hearing so that he could produce evidence of the beneficial relationship exception to termination of parental rights.

The parent has the burden of establishing predicate facts showing the beneficial relationship exception to termination of parental rights in section 366.26, subdivision (c)(1)(B)(i). (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1120.) “[I]t does not violate due process for a trial court to require an offer of proof before conducting a contested hearing on one of the statutory exceptions to termination of parental rights.” (*Id.* at 1122.) A party’s offer of proof must be specific and set forth actual evidence to be produced, not merely facts or issues to be addressed and argued. (*Id.* at p. 1124.) The juvenile court may properly reject a general or vague offer which does not precisely indicate evidence to be presented and witnesses who will give it. (*Semsch v. Henry Mayo Newhall Memorial Hospital* (1985) 171 Cal.App.3d 162, 167-168.)

The issue before the juvenile court was whether the court would find “a compelling reason for determining that termination would be detrimental to the child [because] [¶] [t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B).) The offer of proof was that Father had a strong bond with Zoey, and although there had not been recent visitation, Father indicated there was a problem of unreturned phone calls and inability to schedule those visits. Father indicated that Zoey was in his

³ Regarding a section 366.26 hearing, California Rules of Court, rule 5.725(c) states: “Before the hearing, petitioner must prepare an assessment under section 366.21(i). At least 10 calendar days before the hearing, the petitioner must file the assessment, provide copies to each parent . . . and all counsel of record[.]”

custody for eight months and was bonded to him and to Mother. During an April 2011 visit, Zoey was very happy and excited to see the parents and was upset when they had to leave, and the parents had pictures and video demonstrating the very close bonded relationship that Zoey had with her parents.

When contesting termination of parental rights based on the section 366.26, subdivision (c)(1)(B)(i) exception, the parent has the burden of showing that the termination of parental rights would be detrimental to the child under a statutory exception. (*In re C. B.* (2011) 190 Cal.App.4th 102, 122.) The first requirement of the beneficial relationship exception to termination of parental rights is that the parents have maintained regular visitation and contact with the child. Father's offer of proof conceded that there had not been recent visitation. The record shows that in the eight months prior to the August 11, 2011, hearing, Father visited Zoey only twice, on February 16, 2011, and in July 2011, and the prospective adoptive parents reported that Father had no phone contact with Zoey since January 2011. Thus Father's offer of proof contained no evidence that he maintained regular visitation and contact with Zoey.

The second requirement of the beneficial relationship exception is that the child would benefit from continuing the relationship. The "benefit of relationship" test has several factors. "A beneficial 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.' [Citation.] The existence of this relationship is determined by '[t]he age of the child, the portion of the child's life spent in the parent's custody, the "positive" or "negative" effect of interaction between parent and child, and the child's particular needs.' [Citation.]" (*In re Amber M.* (2002) 103 Cal.App.4th 681, 689.) Although the statute does not define the exact nature of the parent-child relationship which must exist to trigger application of the statutory exception to terminating parental rights, "the relationship must be such that the child would suffer detriment from its termination." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467.) Father's offer of proof contained no evidence of these factors.

We find no error, and no abuse of discretion, in the juvenile court's denial of Father's request for a contested section 366.26 hearing.

DISPOSITION

The order is affirmed.

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KITCHING , J.

We concur:

KLEIN, P. J.

CROSKEY, J.