Filed 8/27/12 In re A.B. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re A.B., a Person Coming Under the Juvenile Court Law.	B238886
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MIKE B., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK81222)

APPEAL from an order of the Superior Court of Los Angeles County. Veronica S. McBeth, Judge. Affirmed.

Roland Koncan, under appointment by the Court of Appeal, for Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Stephen D. Watson, Deputy County Counsel, for Respondent.

Appellant Mike B. (father) appeals from the January 9, 2012 order terminating his parental rights to his daughter A.B.[1] Father contends: (1) there was insufficient evidence that A.B. was adoptable and (2) it was error to find the Welfare and Institutions Code section 366.26, subd. (c)(1)(B)(i) exception to the statutory preference for adoption not applicable.[2] We affirm.

FACTUAL AND PROCEDURAL HISTORY

Beginning in April 2005, mother was the legal guardian for her sister's son, A.N. Mother and father married in January 2007 and A.B. was born in August 2008. Mother and father separated in May 2009, but father sometimes visited overnight. In October 2009, four-year-old A.N., one-year-old A.B. and A.B.'s 15 year-old half-sister A.M. were living with mother when the family came to the attention of the Department of Child and Family Services (DCFS) as the result of a general neglect referral. DCFS made multiple contacts with the family over the next several months. In January 2010, A.B. was bitten by a German Shepherd that belonged to someone living in the home. Following a Team Decision Making meeting, A.B. and A.N. were detained on February 10, 2010, and placed together in the first of several foster homes.[3] A section 300 petition was filed which, as later sustained, alleged that mother had a history of drug use and currently used methamphetamines (b-1), mother inappropriately disciplined A.M. (b-2, j-1), mother left A.M. and A.B. with an unrelated male known to abuse drugs (b-3), mother allowed a male she knew to be a registered sex-offender to live with the family (b-4), and

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[1] Parental rights were also terminated for mother, but mother is not a party to this appeal.

[2] All future undesignated statutory references are to the Welfare and Institutions Code.

[3] Meanwhile, A.M. had already gone to live with her biological father (not appellant) and jurisdiction as to A.M. was terminated with a family law custody order. A.M. is not the subject of this appeal.

father had a history of illicit drug use, convictions for drug-related offenses and a recent positive drug test (b-5).[4]

Not long after the children were detained, father was given unmonitored visits with A.B. and A.N., which went well. Father was living with his brother, sister-in-law and their children in March 2010 when DCFS told father that A.B. could be released to him, but that A.N. could not be placed with father until father was assessed as a non-relative extended family member foster parent. Father declined to take A.B. because he did not want A.N. to feel abandoned.

On May 3, 2010, father tested positive for amphetamines and methamphetamines. Father told the social worker that he had been taking cold medications. Nevertheless, his visits were changed to monitored.

Following the jurisdictional hearing in June 2010, father was ordered to attend a parent education program, fatherhood group, individual counseling and to drug and alcohol test "clean" six times. It was ordered that if father missed a test or tested "dirty," he was to do a drug-alcohol program with random testing. On June 15, 2010, a social worker met with father and gave him referrals to programs that would satisfy the court order. In September 2010, father was arrested for possession of drug paraphernalia. By October 2010, father had completed 14 out of 52 weeks of a parenting education program. But the social worker could not confirm father's participation in the court-ordered drug counseling program because father would not sign a release; the program would not confirm or deny whether father was attending. After one negative drug test on June 14, father was a "no show" for the next 10 drug tests between June 29 and November 1, 2010. Father did not respond to the social worker's numerous letters.

Meanwhile, A.B. thrived in her first foster home and the foster parents expressed an interest in adopting her. But in November 2010, A.B. was removed because of an abuse allegation and placed in a second foster home. Also in November 2010, a maternal cousin expressed interest in adopting A.B. Father had been regularly visiting A.B. and

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[4] A separate petition was filed as to A.N. and he is not the subject of this appeal.

the visits generally went well. But there had been no visits in November 2010 because father had not called to confirm any. In December 2010, A.B. was referred to the Department of Mental Health for play therapy.

By January 2011, A.B. continued to do well in her second foster home. Father was still not in compliance with the case plan. He had some successful visits, but did not always follow through on scheduling future visits. The trial court ordered DCFS to conduct a home assessment of the maternal relatives who had expressed interest in adopting A.B., and to place A.B. with them if it was determined their home was safe. In February 2011, father told the social worker that he wanted to be reunified with A.B. eventually, but at that time his job situation was unstable, there was no room for her in his current living situation, and he believed that she was placed in a good home.

By the 12 month section 366.21, subdivision (f) hearing in May 2011, A.B. had been placed with the maternal cousins and she was doing well in this, her third placement. Father was still not in compliance with the case plan, having failed to complete any of the court-ordered programs. Father had been a "no show" for all scheduled drug tests. But he was still visiting A.B. relatively consistently and the visits went well. DCFS recommended termination of family reunification services and the setting of a section 366.26 hearing to select a permanent placement plan (.26 hearing). The court continued the matter to July and ordered supplemental reports.

According to the report for the July 2011 hearing, father consistently visited A.B., but had not enrolled in any of the court-ordered programs and had not submitted to random drug testing. A.B. had been doing well with the maternal relatives but they were unable to give her the individualized care she needed. However, a new adoptive foster family had already been located. On July 11, 2011, the trial court terminated family reunification services for both parents and continued the matter to November 7, 2011, for a .26 hearing.

On July 14, 2011, A.B. was placed with a new prospective adoptive foster family. Although she was doing well in this, her fourth placement, A.B. showed signs of separation anxiety and was therefore referred for individual therapy. Father was allowed

weekly two-hour monitored visits with A.B., but between June 10 and August 8, 2011, father did not visit her at all. Because of A.B.'s emotional state after visits with both parent's, DCFS requested that visits be reduced to monthly. Following a hearing on maternal grandmother's section 388 petition seeking increased visitation, the trial court denied the petition and reduced all relative visits to once a month.

On October 26, 2011, father was arrested for possession of a controlled substance.

According to the report for the November .26 hearing, A.B.'s current caregivers wanted to adopt her and already had an approved adoption home study.[5] Another family was also interested in adopting A.B., but did not yet have a home study. Father had become less consistent in his visits and had neglected to cancel visits before A.B. was brought to DCFS office for the visit. The trial court continued the matter to January 9, 2012, for a contested .26 hearing.

According to the report for the contested .26 hearing, A.B. was thriving in her prospective adoptive family. In a letter, A.B.'s therapist stated that she had observed an increased attachment between A.B. and her foster mother since the two had been consistently attending a program to help children who have experienced disrupted attachments bond to their caregiver. A.B. was becoming more independent and showing a more secure attachment to her foster mother. As A.B. became more verbal, she was having fewer tantrums and acting out behaviors. Father had consistently attended his monthly visits, which went well. But after these visits (and also after visits with mother and maternal grandmother) A.B. had tantrums, nightmares and cried constantly. DCFS reiterated its recommendation of adoption as the permanent placement plan.

There was no testimony at the .26 hearing. Father's counsel argued: "[Father] is very upset by this process and even the court knows in reviewing the file that he had done both a lot of good work with regard to the case plan and subsequently that changed and just note his objection for the record . . . ." Regarding father's inconsistent visitation, counsel argued that father wanted more visits, but his visits had been reduced over his

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5 A.N. had also been placed with A.B., but the foster parents could only commit to adopting A.B.

objection. The trial court found by clear and convincing evidence that A.B. was adoptable and that it would be detrimental to return her to her parents. Finding none of the exceptions to the statutory preference for adoption applied (no one had argued that any of the exceptions applied), the trial court terminated all parental rights to A.B.

Father timely appealed.

DISCUSSION

A. Substantial Evidence Supported the Finding That A.B. Was Adoptable

We begin with the standard of review of a claim of insufficient evidence. It is DCFS's burden to prove by clear and convincing evidence at the .26 hearing that the child is adoptable. (§ 366.26, subd.(c)(1); *In re Thomas R.* (2006) 145 Cal.App.4th 726, 730.) On appeal, " '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.' [Citation.]" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1525) " ' "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." ' [Citation.] Thus, on appeal from a judgment required to be based upon clear and convincing evidence, the clear and convincing test disappears . . . [and] 'the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.' [Citation.]" (*Id.* at pp. 1525-1526.)

"In making the determination of adoptability, the juvenile court 'must focus on the child, and whether the child's age, physical condition, and emotional state may make it difficult to find an adoptive family.' (*In re Erik P.* (2002) 104 Cal.App.4th 395, 400.) 'A child's young age, good physical and emotional health, intellectual growth and ability to develop interpersonal relationships are all attributes indicating adoptability.'

[Citations.]" (*In re I.W., supra*, 180 Cal.App.4th at p. 1526.) The presence of a prospective adoptive home is not determinative, but it is a factor in determining whether a child is adoptable. (*Ibid.*)

Here, apart from whether father forfeited this issue by failing to argue it in the trial court, we conclude that substantial evidence supported the adoptability finding. That A.B. was doing well in her prospective adoptive home was just one such factor. Other factors included her young age (three-and-one-half-years-old at the time of the .26 hearing), her good physical health and intellectual growth. There was evidence that with therapy, A.B.'s emotional health, specifically her separation anxiety, was improving. Together, these factors constituted substantial evidence in support of the adoptability finding.

B. The Finding That No Exception Applied Was Supported By the Evidence and Was Not an Abuse of Discretion

Once again, we begin with the standard of review. Most appellate courts apply a substantial evidence standard of review to the trial court's determination of whether a section 366.26 statutory exception applies. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) Some courts have applied the abuse of discretion standard of review. (See e.g., *In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1512.) The practical differences between the two standards are not significant (*Jasmine D.* at p. 1351), and under either standard, we would affirm in this case.

If reunification does not occur within the statutorily prescribed period, the court must terminate reunification services and set the matter for a .26 hearing to select and implement a permanent placement plan. (§ 366.21, subd. (g); *In re Celine R.* (2003) 31 Cal.4th 45, 52.) At the .26 hearing, the court has four choices. In order of preference, those choices are: "(1) terminate parental rights and order that the child be placed for adoption (the choice the court made here); (2) identify adoption as the permanent placement goal and require efforts to locate an appropriate adoptive family; (3) appoint a legal guardian; or (4) order long-term foster care. (§ 366.26, subd. (b).) Whenever the

court finds '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).) . . . 'Adoption is the Legislature's first choice because it gives the child the best chance at [a full] emotional commitment from a responsible caretaker.' [Citation.]" (*Celine R.* at p. 53.)

While the Legislature has expressed a strong preference for adoption, adoption is not the appropriate plan in every case. (§ 366.26, subds. (b)(1) & (c)(1).) An exception exists when the child has a strong bond with the parent and severing that bond would be detrimental to the child. (See § 366.26, subd. (c)(1)(B)(i); *In re S.B.* (2008) 164 Cal.App.4th 289, 299.) The beneficial parental relationship exception applies when " '[t]he court finds a compelling reason for determining that termination would be detrimental to the child' (§ 366.26, subd. (c)(1)(B)) 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)(i).)' " (*In re K.P.* (2012) 203 Cal.App.4th 614, 621.) "The 'benefit' prong of the exception requires the parent to prove his or her relationship with the child '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.' [Citations.] No matter how loving and frequent the contact, and notwithstanding the existence of an 'emotional bond' with the child, 'the parents must show that they occupy "a parental role" in the child's life.' [Citations.] The relationship that gives rise to this exception to the statutory preference for adoption 'characteristically aris[es] from day-to-day interaction, companionship and shared experiences. Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship.' [Citation.] Moreover, '[b]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement.' [Citation.]" (*Id.* at p. 621.) A showing that the child would derive some benefit from continuing a relationship with the parent through visitation is not enough to derail an adoption. (*In re Jasmine D., supra,* 78 Cal.App.4th at p. 1348.) The exception is not "a mechanism for the parent to escape the consequences of having

failed to reunify." (*Ibid.*) The parents bear the burden of showing that termination of parental rights would be detrimental to the child. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.)

Here, apart from whether father forfeited this issue by failing to argue application of the exception in the trial court, on appeal he has not established that this is an extraordinary case in which termination of his parental rights would be detrimental to A.B. Notably, when father had the chance to be reunited with A.B. early in the dependency process, he forsook that opportunity. Since then, although father's contacts with A.B. were loving and relatively consistent, and A.B. was clearly fond of father and looked forward to his visits, father has not shown that he occupies a parental role in A.B.'s life, or that maintaining A.B.'s relationship with him outweighs the well-being A.B. would gain in a permanent home with adoptive parents. Under these circumstances, the trial court did not err in finding no exception to the preference for adoption applied.

DISPOSITION

The order terminating parental rights is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.