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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re V.R., III.,
A Minor Coming Under the Juvenile Court
Law.

LAKE COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

S.S.,

Defendant and Appellant.

A133847

(Lake County
Super. Ct. No. JV320229)

S.S. (mother) appeals the juvenile court's orders, entered pursuant to Welfare and Institutions Code, section 366.26, terminating her parental rights with respect to the youngest of her three children, her son V.R., III (the minor). Mother contends the trial court's determination that the minor is adoptable is not supported by substantial evidence. Having carefully examined the record, we reach a contrary conclusion. Accordingly, the juvenile court's orders must be affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

This case¹ involves an original petition filed pursuant to section 300 of the Welfare and Institutions Code² in June 2009 by respondent Lake County Department of Social Services (Agency) in regard to mother's three children, her son V.R., daughter S.R. and son V.R. III. At the time the original petition was filed, V.R. was 8 years old, S.R. was 4 years old, and V.R. III was 15 months old. "After mother successfully completed six months of reunification services addressing the problems identified in the original petition (principally abuse of controlled substances and unsanitary living conditions),^[3] but before the 12-month review on the section 300 petition, respondent filed a subsequent petition pursuant to section 342, alleging an incident of sexual abuse by mother on S.R. during an unsupervised visit." (*S.R.*, *supra*, at pp. 1-2) "The petition alleged mother inserted a pencil into S.R.'s vagina." (*Id.* at p. 2, fn. 3.) "In August 2010, the juvenile court sustained jurisdictional findings on the section 342 petition and terminated mother's visitation with all three children. Following the jurisdictional hearing on the section 342 petition, mother filed a notice of appeal (NOA). After mother filed her NOA, the juvenile court held a joint dispositional/12 month review hearing (joint hearing).⁴ After the joint hearing, the juvenile court issued an order setting a section 366.26 hearing and dispositional orders on the section 342 petition." (*Id.* at pp. *1-2.)

¹ We have issued three prior decisions in the case, *In re V.R.* (Nov. 29, 2011, A129712, 2011 Cal.App. Unpub. LEXIS 9177 (*V.R. 1*), *In re S.R.* (Jan. 4, 2012, A131611, 2012 Cal.App. Unpub. LEXIS 34 (*S.R.*), and most recently, *In re V.R.* (April 26, 2012, A132565, 2012 Cal.App. Unpub. LEXIS 3168 (*V.R. 2*).

² Further statutory references are to the Welfare and Institutions Code unless otherwise noted.

³ The section 300 petition also alleged father sexually abused V.R. The petition did not implicate mother in that sexual abuse and father was subsequently by-passed for services pursuant to section 361.5, subdivision (b)(6).

⁴ The hearing combined a 12-month review hearing on an original petition filed pursuant to Welfare and Institutions Code section 300 with a disposition hearing on a subsequent petition filed pursuant to section 342.

“In *V.R.[1]*, *supra*, we dismissed mother’s appeal challenging orders made when the juvenile court set the section 366.26 hearing on the grounds mother failed to file a writ petition. (See § 366.26, subd. (1)(2).) Also, construing mother’s NOA from the August 2010 jurisdictional hearing as a premature appeal from the later disposition order on the section 342 petition, we determined substantial evidence supported the juvenile court’s jurisdictional findings and its order terminating visitation.” (*S.R.*, *supra*, at pp. *2-3.) In *S.R.*, *supra*, mother appealed the juvenile court’s denial of her section 388 modification petitions filed in January 2011.⁵ We concluded the juvenile court abused its discretion by summarily denying mother’s section 388 petitions on the two younger siblings without holding an evidentiary hearing. (See *S.R.*, *supra*, at p. *3.) The remand order did not apply to *V.R.* because the juvenile court set a section 388 hearing regarding *V.R.* in April 2011. (*Ibid.*)

Mother’s section 388 petition regarding *V.R.* was subsequently heard in conjunction with a section 366.26 hearing held on May 2, 2011, which pertained to all three siblings. At the May 2 hearing, the juvenile court denied mother’s section 388 petition regarding *V.R.* Also, pursuant to section 366.26, subdivision (c)(3), the juvenile found that the children have a probability of adoption and ordered that parental rights not be terminated at that time and that further efforts be made to locate adoptive families within 180 days. (*V.R. 2*, *supra*, at pp. 7-9.) In *V.R.2*, we rejected mother’s appeal of the findings and orders entered after the May 2 hearing. Specifically, we concluded that the juvenile court’s denial of mother’s section 388 petition, on the grounds that she failed to demonstrate changed circumstances in her psychological problems and conditions that led to dependency proceedings, was not an

⁵ “On January 6, 2011, mother filed three separate but identical section 388 petitions, one for each of her children, requesting that based upon changed circumstances the court permit mother to resume visitation, grant mother a further six months of reunification services, and vacate the upcoming section 366.26 hearing. Each petition stated that since mother’s visits and family reunification services were terminated, mother has enrolled in parenting courses, attended courses at Santa Rosa Junior College in pursuit of a nursing degree, graduated from Women’s Recovery Services 12-Step program, obtained employment and received counseling services. Mother provided documentary evidence in support of the changed circumstances.” (*S.R.*, *supra*, at p. *2.)

abuse of discretion. (*Id.* at pp. 7-8.) We also concluded that the juvenile court’s finding of probability of adoption, within the meaning of section 366.26, subdivision (c)(3), was supported by substantial evidence.⁶ (*Id.* at pp. 7-9.)

As noted above, the juvenile court’s section 366.26 orders of May 2, 2011, did not terminate parental rights and ordered that further efforts be made to locate adoptive families for the children within 180 days.⁷ On August 23, 2011, the trial court ordered that further efforts to locate adoptive families continue and that the Agency submit a report by the next hearing date of October 31, 2011. On October 21, the Agency filed a “Continued 366.26 WIC Report” (October 2011 report). In regard to the minor, V.R., III (age 3), the October 2011 report recommends a permanent plan of adoption.⁸ The October 2011 report states the minor is “delayed in areas of physical development, adaptive behavior, social-emotional development, and general development.” Further, the October 2011 report states prospective adoptive parents have not been identified for the minor, “but he appears to be stabilizing in his current placement. The care provider reported to State Adoptions Specialist Kim Costa [“Costa”] that she may be interested in providing permanence for [the minor], however because the placement is relatively new, she would like more time to get to know him in order to determine if it is a good fit. The Department respectfully recommends

⁶ On that point, we observed that “the showing for *probability* of adoption under subdivision (c)(3) is to be distinguished from the showing required for *likelihood* of adoption under subdivision (c)(1)[,]” as discussed by the appellate court in *In re Gabriel G.*, (2005) 134 Cal.App.4th 1428, 1438. (*V.R.2, supra*, at pp. 22-23.)

⁷ We incorporate by reference herein the factual and procedural background sections in *V.R. 1, S.R.* and *V.R. 2*, which together cover the history of the case in detail up to and including the hearing of May 2, 2011.

⁸ This appeal pertains only to V.R. III, the youngest of the three siblings. Briefly, in regard to V.R. and S.R., the Agency recommended a permanent plan of non-related, legal guardianship for the eldest child, V.R. (age 11), and a permanent plan of residential care, with the specific goal of a less restrictive foster care setting, for S.R. (age 7). The report noted V.R. told his social worker, “I want to enter into a legal guardianship with my care provider, because I am happiest when I am living in her home and I love her. I do not want to live anywhere else but at home with my care provider and our dogs.” The report states S.R. is currently placed in a “level-11 group home” and displays “aggressive and problematic behaviors” that make it difficult to maintain her in a family setting.

the termination of parental rights for [the minor] as it is likely that [Costa] will identify an appropriate adoptive family for this child.”

Exhibit A to the October 2011 report is Costa’s Adoption Assessment, dated October 19, 2011. In her assessment, Costa describes the minor as “an attractive, robust, and curious three-year-old boy with a big laugh,” in good health, with no serious or chronic medical conditions. Regarding his development, the assessment states: “[The minor’s] development was assessed . . . and he was found not to be in need of services, i.e., no *qualifying* delays were noted.” However, the assessment also notes, “[The minor] displays challenges in terms of mental/emotional functioning. He presents with behaviors consistent with his history of abuse and neglect in that he is highly oppositional, anxious, seeks to control his environment and those in it, is easily frustrated and can be difficult to console, and is prone to tantrum behavior.”

Costa concludes her assessment with the opinion the minor “is likely to be adopted if parental rights are terminated. He is becoming stable in his current placement and responding very well to the consistent presence and parenting of his current caretaker. While the current foster parent has expressed an interest in adoption, no prospective adoptive parent is being specifically identified at this time. The current foster parent needs more time working with [the minor] to feel she fully understands his needs and to assess her own ability to meet those needs over time. Meanwhile, the progress [the minor] is making is essential to any adoptive match or future transition move. . . . CDSS proposes to 1) support the current caretaker in her work with [the minor] and in decision making as to adoption, 2) support all ongoing efforts to assess and address [the minor’s] needs, and 3) search for an appropriate alternative adoptive family should the current caretaker ultimately chose not to adopt. CDSS proposes to focus on therapeutic efforts to stabilize and treat the minor for approximately three months before selecting a specific adoptive family (i.e., evaluating the availability of the current caretaker or conducting a focused search for an alternative family). Thus, CDSS anticipates that a specific adoptive family will be identified in February or March 2012.”

At the continued section 366.26 hearing on November 7, 2011, mother appeared by telephone and her counsel was present in person. Costa, an adoptions specialist with the California Department of Social Services for 12 years after 10 years as a social worker in child protective services, testified without cross-examination regarding the minor's adoptability. At the conclusion of Costa's testimony, and after further comment from counsel, the court adopted the proposed findings and orders set forth in the Agency's report, finding by clear and convincing evidence it is likely the minor will be adopted and terminating mother's parental rights. Mother filed a timely notice of appeal on November 16, 2011.

DISCUSSION

Under California's dependency scheme, a juvenile court must find it is likely a minor will be adopted before terminating parental rights to the minor. (§ 366.26, subd. (c)(1).) 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.) The question of adoptability usually focuses on whether the child's age, physical condition and emotional health make it difficult to find a person willing to adopt that child. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.)

In determining whether a child is adoptable, the court is required to consider the assessment report and receive other evidence the parties may present. (§ 366.26, subd. (b); *In re Valerie W.* (2008) 162 Cal.App.4th 1, 11-12; see §§ 361.5, subd. (g), 366.21, subd. (i), § 366.25, subd. (b); see also § 366.26, subd. (c)(1).) In its assessment report, the Agency is required to address certain factors, including the child's medical, developmental, scholastic, mental and emotional status. (§ 366.21, subd. (i)(1)(C).) In addition, the assessment report must include an analysis of the likelihood the child will be adopted if parental rights are terminated. (§ 366.21, subd. (i)(1)(G); *In re Crystal J.* (1993) 12 Cal.App.4th 407, 411.) The assessment report is "a cornerstone of the evidentiary structure" upon which the court, the parents and the child are entitled to rely in determining a child's likelihood of adoption. (*In re Crystal J., supra*, 12 Cal.App.4th at p. 413; accord *In re Valerie W., supra*, 162 Cal.App.4th at p. 11.)

“On review, we determine whether the record contains substantial evidence from which the court could find clear and convincing evidence that the child was likely to be adopted within a reasonable time. (Citations.) The evidence must be sufficiently strong to command the unhesitating assent of every reasonable mind. (Citation.) We give the court’s adoptability finding the benefit of every reasonable inference and resolve any evidentiary conflicts in favor of the judgment of the trial court. (Citation.)” (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1232.)

Mother asserts the record cannot support a finding the minor was likely to be adopted.⁹ In essence, mother contends that the minor’s emotional and behavioral problems were impediments to adoption. In support of her contention, mother relies on the original disposition report (filed in August 2009), which, in describing the minor’s development, stated he had developmental delays, demonstrated no communication skills, and screamed until he is able to figure out what he wants. Mother also relies on a section in the October 2011 report assessing the minor’s development, which states the minor is “delayed in terms of physical development, adaptive behavior, social-emotional development, and general development [and] scored below average in the areas of cognitive development and communication.” Additionally, mother points to Costa’s assessment report, which states in part that the minor is highly oppositional, anxious, easily frustrated, sometimes difficult to console, prone to tantrum behavior, and displays an insecure conflicted attachment to his caregivers, as well as to Costa’s testimony that the minor displays more of these problematic behaviors than the average foster child. Mother also notes that throughout most of the dependency proceedings, the agency deemed the minor difficult to adopt.

Preliminarily, we reject mother’s suggestion that the minor’s developmental problems were *so* severe that he was *per se* not generally adoptable. On this point, mother relies on *In re Carl R.* (2005) 128 Cal.App.4th 1051 (*Carl R.*) There, the appellate court

⁹ As a preliminary matter, we reject the Agency’s contention that mother forfeited this issue by failing to raise it on appeal from the findings entered on May 2, 2011. At the May 2 hearing, the court did not make a finding the minor was likely to be adopted, pursuant to section 366.26, subdivision (c)(1)—the court made a finding there was a *probability* for adoption, pursuant to section 366.26, subdivision (c)(3).

noted, “Carl has cerebral palsy, severe quadriparesis, a seizure disorder, and an uncontrolled and severe psychomotor delay. Because of his disabilities, he will always require total care. He has lived at the Children's Convalescent Hospital in San Diego since 1996, when he was four months old. At the time of the July 2004 section 366.26 hearing, he was almost eight years old, but had the emotional maturity of an eight-month-old child.” (*In re Carl R.*, *supra*, 128 Cal.App.4th at p. 1058.) There was never any suggestion Carl was generally adoptable; indeed, all parties agreed Carl was adoptable only because a specific family was willing to adopt him, and the issue for the appellate court was whether the trial court had properly determined there was no legal impediment to adoption by the specific family. (See *id.* at p. 1061.) Here, we address the general adoptability of a physically healthy, three-year old with none of the severe disabilities afflicting the unfortunate child in *Carl R.* Thus, *Carl R.* has no application here.

Nevertheless, mother’s review of the record, albeit selective, indicates that the minor, who was only 15-months old when he was detained in June 2009 and still four months shy of his fourth birthday at the continued section 366.26 hearing in November 2011, had developmental problems presenting challenges for any caregiver. However, when assessed under the appropriate standards of review set forth above, the record provides substantial evidence to support a finding that despite the minor’s problems, he was generally adoptable.

State Adoptions Services Bureau first assessed the minor for adoption in a report authored by Kim Costa, Adoptions Specialist, dated March 1, 2011. In that report, Costa states the minor “displays challenges in terms of mental/emotional functioning” and “presents with behaviors consistent with his history of abuse and neglect,” such as those already noted above. In assessing the minor’s likelihood of adoption in conjunction with his sister S.R., Costa was hopeful at best, noting somewhat equivocally that both “will be difficult to place.”

However, based upon a marked improvement in the minor’s observed behaviors between March 2011 and her next adoptability assessment report in October 2011, Costa’s view on the likelihood of the minor’s adoptability changed for the positive, and she recommended unequivocally that the “minor is likely to be adopted if parental rights are

terminated.”¹⁰ In this regard, whereas Costa acknowledged the minor continues to display the same challenges previously catalogued, such as highly oppositional behavior, anxiety, and a tendency to tantrum behavior, she states that the minor “has responded positively and made notable progress in his most recent placement.” Specifically, the current caretaker addressed the minor’s fear of closing his eyes at night and going to sleep; this intervention “has resulted in [the minor’s] increased ability to go to sleep at night, and to remain asleep throughout the night.” Also, as a result of the style of parenting the minor now receives, involving the communication of “clear rules” in a positive and nurturing manner, and the individual attention he is now afforded, the minor “presents as notably more calm and responsive.” Additionally, the minor demonstrates “an overall increase in willingness to interact with caregivers in a positive manner, an increased desire to please his caretaker, an overall increase in cooperative and reciprocal exchanges, and an increase in spontaneous displays of affection.”

At the continued section 366.26 hearing, Costa testified how the improvements observed in the minor’s behavior were crucial to her assessment that he is currently adoptable. Costa acknowledged the minor continues to display negative behaviors consistent with a history of abuse and neglect, as described in her report. However, Costa testified that such behaviors are not unique to the minor; in fact, they are not uncommon in the children she deals with who are placed for adoption following a history of abuse. Costa opined that on a continuum of children displaying these behaviors, the minor is above average but is not at the highest end of the continuum.

¹⁰ It is not surprising that an improvement in the minor’s behaviors and emotional affect shifted Costa’s opinion towards adoptability because in other respects, such as age, appearance and personality, the child was a strong candidate for adoption. For example, Costa notes in her October assessment that the minor “is an attractive, robust and curious three-year-old boy with a big laugh,” who loves to dance and play outside. Such attractive characteristics in a child strongly favor adoptability. (See *In re Helen W.* (2007) 150 Cal.App.4th 71, 80 [noting that the children’s appealing characteristics, such as their young ages, affectionate personality traits, and attractive physical appearances, made adoption more likely].)

Furthermore, Costa testified that the progress she had witnessed in the minor over time was key to her final determination he is likely to be adopted if parental rights are terminated. In this regard, Costa stated that an important factor to adoptability is “the child’s ability to respond to parenting and to make a connection and have a reciprocal relationship with a primary caregiver. To do that you need an effective caregiver and a child who isn’t so damaged that they cannot respond. [¶] Vernon is responding very well in his current environment. This environment seems very well-suited to him. I do not believe it would be the only environment to be well-suited to him, but because it is well-suited we’ve been able to see him respond to the kinds of parenting that’s going on there. [¶] . . . He’s able to enter into positive interaction far more now than he has in the past. In the past it was virtually 100 percent oppositional kind of behaviors. That’s making a very notable difference. [¶] He’s becoming affectionate. He seems to be able to receive affection in a positive manner now. These key indicators are all taking a turn for the positive.” (Cf. *In re Gregory A.*, *supra*, 126 Cal.App.4th at p. 1562 [child’s young age and “ability to develop interpersonal relationships” are important attributes indicating adoptability].)¹¹

In sum, we cannot say the record compels a conclusion that at the time of the continued section 366.26 hearing, developmental and behavioral problems precluded an

¹¹ Mother’s reliance on our decision in *In re Brian P.* (2002) 99 Cal.App.4th 616, is unpersuasive. In that case, although we reversed the juvenile court’s finding that a four-and-a-half-year-old child with a history of developmental difficulties was generally adoptable, we noted the “juvenile court did not have the benefit of an adoption assessment report, which would have presented the kind of facts needed to support a finding of adoptability.” (*Id.* at p. 624.) We also noted that “[w]hile the section 366.26 report did include a bare statement that the chances of adoption were ‘very good,’ this hardly amounts to clear and convincing evidence.” (*Ibid.* [“A social workers opinion, by itself, is not sufficient to support a finding of adoptability. (Citation.)”].) In contrast to *In re Brian P.*, the juvenile court in this case had the benefit of a full adoption assessment report prepared by an experienced state adoptions specialist of the California Department of Social Services. The assessment contained information about the child’s developmental, emotional, medical, mental and scholastic status and we have concluded that in conjunction with related testimony it supports the juvenile court’s adoptability finding. (Cf. *In re Valerie W.* (2008) 162 Cal.App.4th 1, 14 [only if an assessment report is cursory or incomplete . . . may [it] call into question the adequacy of the evidence supporting an adoptability finding].)

adoptability finding in favor of this three-year old minor. Rather, giving “the court’s finding of adoptability the benefit of every reasonable inference and resolv[ing] any evidentiary conflicts in favor of affirming,” we conclude the record contains “substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that [the minor] was likely to be adopted within a reasonable time.” (*In re Gregory A., supra*, 126 Cal.App.4th at p. 1562 [citations omitted].)¹²

DISPOSITION

The juvenile court’s section 366.26 findings and orders terminating mother’s parental rights to her minor son, V.R., III, are hereby affirmed.

Jenkins, J.

We concur:

Pollak, Acting P. J.

Siggins, J.

¹² Mother also contends the minor is not specifically adoptable because no specific family was identified to adopt him. However, having affirmed on the basis the minor is considered generally adoptable, we need not address this issue. (See *In re Scott M.* (1993) 13 Cal.App.4th 839, 844.)