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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re T.B. et al., Persons Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. LEONARD B., Defendant and Appellant.	D061757 (Super. Ct. No. J517839A-B)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald F. Frazier, Judge. Affirmed.

Leonard B. appeals the judgment terminating his parental rights to his son, T.B. Leonard contends the juvenile court erred by finding T.B. adoptable and by declining to

apply the beneficial relationship exception (Welf. & Inst. Code,[1] § 366.26, subd. (c)(1)(B)(i)) to termination of parental rights.[2] We affirm.

BACKGROUND

Leonard and the children's mother, Tamara H. (together, the parents), have a history of domestic violence dating from December 2008. That history includes: Leonard body slamming Tamara to the ground; Tamara hitting Leonard in the face, blackening his eye; Leonard hitting Tamara on the cheek; and Tamara dropping T.B. on the ground during a confrontation. T.B. was present during several of these altercations. In January 2010, the San Diego County Health and Human Services Agency (the Agency) opened a voluntary services case. The parents minimized their domestic violence and continued to have contact with each other. The Agency determined the voluntary case had failed and closed the case in June.

In June 2010, the Agency filed dependency petitions for three-year-old T.B. and two-month-old B.B. The petitions, as later amended, alleged the children were exposed to the parents' violent confrontations. In January, while Tamara was pregnant and in

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1 All further statutory references are to the Welfare and Institutions Code.

2 The court also terminated Leonard's parental rights to his daughter, B.B., and his notice of appeal refers to her. Although the heading in the opening brief for the beneficial relationship argument, and the brief's conclusion, refer only to T.B., there are a few references in that argument to B.B. and "the children." Even if Leonard is claiming a beneficial relationship with B.B., the claim would fail for many of the same reasons that the claim regarding T.B. fails.

We refer to T.B. and B.B. together as the children.

T.B.'s presence, Leonard smeared a plate of spaghetti on Tamara and punched her. In June, during a verbal altercation, Tamara socked Leonard in the head while he was holding B.B. As a result, B.B.'s face was scratched and T.B. was "hit against a wall."

The children were detained in a foster home. In August 2010, the court entered true findings on the amended petitions, ordered the children placed in foster care and granted the parents reunification services. A few days later, the children were moved to the home of a relative.[3]

In March 2011, at the six-month review hearing, the court terminated Leonard's services and continued Tamara's. On June 8, T.B. was moved to a foster home.[4] On June 14, after a complaint of abuse in the foster home, T.B. was moved to a new foster home. In August, the court issued a one-year restraining order protecting Tamara from Leonard. In October, at the 12-month review hearing, the court terminated Tamara's services and set a section 366.26 hearing. Two weeks later, the court limited the parents' right to make educational decisions for T.B., and appointed an educational representative for him.

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[3] In September 2010, B.B. was moved to the home of a different relative. In April 2011, B.B. was moved to a foster home where she remained. A strong bond developed, and the foster parents wish to adopt her.

[4] The relative caretaker requested T.B.'s removal because she was starting a new job and was unable to care for both her own daughter and T.B. The relative caretaker "was unable to handle [T.B.'s] anxiety issues."

On January 25, 2012, T.B. was moved to a new foster home.[5] On February 28, he was moved to his sixth placement, a prospective adoptive home where he remained at the time of the section 366.26 hearing.[6] On March 21, at the request of the children's counsel, the court temporarily suspended the parents' visits with T.B. The section 366.26 hearing took place on April 5.

ADOPTABILITY

The court found T.B., who was nearly five years old, generally and specifically adoptable.

A finding of general 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." (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649, italics omitted.) This does not require "that the minor already be in a potential adoptive home or that there

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5 The move occurred because the previous foster parent "was not able to handle [T.B.]'s anxiety," and "expressed concerns regarding [T.B.]'s behaviors of cursing, hitting, fighting other children, throwing and breaking items, breaking toys and hyperactivity." T.B. suffered from insomnia, and his "emotional and behavioral concerns escalate[d] following visits or telephone contact with [Leonard]." T.B. was aggressive and defiant, and "often spoke about witnessing fights" between the parents.

6 In requesting T.B.'s removal from their home, the previous foster parents did not express any concerns with his behavior or emotional problems. They said "they cared deeply for [T.B.] but could no longer care for him." T.B. had begun to develop a bond with these foster parents; his behavior had improved in their home; and he suffered from insomnia only one night, after a visit with Tamara. These foster parents later said that after visits with the parents, T.B. "would appear visibly upset, not his usual cheerful self, and he would isolate himself in his room." His behavior would escalate and he would throw and try to break things, hit a glass table and curse and scream. When the foster mother tried to calm him, he became verbally aggressive and hit her.

be a proposed adoptive parent 'waiting in the wings.' [Citations.]" (*Ibid.*) A specific family's willingness to adopt a child, however, "generally indicates [he] is likely to be adopted within a reasonable time either by [that family] or by some other family." (*Id.* at p. 1650, italics omitted.) A child who is not generally adoptable may be specifically adoptable, that is, adoptable "because a prospective adoptive family has been identified as willing to adopt the child." (*Ibid.*) A child's psychological or behavioral problems may make it more difficult to find adoptive homes, but do not necessarily prevent an adoptability finding. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154; *In re Helen W.* (2007) 150 Cal.App.4th 71, 75, 79.)

The Agency had the burden of proving T.B. was adoptable. (*In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1557, 1559-1561.) "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. [Citations.]" (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292.) On appeal, we apply the substantial evidence test (*In re Lukas B.*, *supra*, 79 Cal.App.4th at p. 1154) and construe the record in the light most favorable to the judgment (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732). "We do not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) " ' "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." [Citations.]' [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.]" (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881, quoted in *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581.)

T.B. was traumatized by the parents' domestic violence and by Leonard's physical abuse.[7] T.B. had received a diagnosis of adjustment disorder with anxiety and depression, and his "mental health issues [had] greatly impact[ed] the stability of [his] placement[s]." In February 2012, before his move to the prospective adoptive home, he began participating in the Comprehensive Assessment and Stabilization Services (CASS) program. In his CASS sessions, T.B. related the violence he had witnessed between the parents, and was able to describe his resulting feelings of fear, sadness, anger, hurt and confusion. After his move to the prospective adoptive home, T.B. had no further visits with the parents.

At the time of the hearing, T.B. had lived with his prospective adoptive parents for about five weeks. They loved him and wished to adopt him. In addition to having a foster care license, the prospective adoptive parents had an approved home study. They

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[7] T.B. reported that Leonard had whipped him with a belt. T.B. had a scar on his back where the belt buckle had hit him.

had taken classes on adoption and parenting, including one on attachment parenting, geared toward providing "potential adoptive parents with an understanding and tools needed to accommodate [the] unique life experiences" of foster children, such as T.B., who had "experienced disruptions in attachment formation due to child abuse or multiple placements." The prospective adoptive parents had "a clear understanding of [T.B.]'s needs."[8] They worked to create a sense of safety for him and reassured him they would protect him. They were able to manage his behavior and distress effectively, and while he sometimes challenged them, he was calmer and his behavior did not escalate as much as it had in the past.[9] T.B. was bonded to the prospective adoptive parents, looked to them for comfort and called them "mom" and "dad." His insomnia and enuresis had improved; his emotional health was stabilizing; and he said "he was fine, no worries." The CASS worker reported T.B. was doing very well. In March, T.B. began individual counseling, in addition to the CASS in-home therapy he was receiving. The CASS

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8 For the first time in his reply brief, Leonard asserts there was no assessment of the prospective adoptive parents' ability to meet T.B.'s needs. We need not consider contentions raised for the first time in a reply brief. (*In re Tiffany Y.* (1990) 223 Cal.App.3d 298, 302.) Furthermore, the record demonstrates this assertion lacks merit.

9 Two examples of the prospective adoptive parents' dedication to T.B. stand out. First, T.B. asked them for a gun. When they asked why, he said, "so I can sho[o]t the people that are always trying to hurt me." This disturbing statement did not lessen the prospective adoptive parents' commitment to T.B. Second, when T.B. said he did not like the mirrors in the home, the prospective adoptive mother asked him what he saw when he looked in the mirror. T.B. replied, "I see a kill[]er." The prospective adoptive mother responded, "I see a beautiful child with beautiful long eye lashes." She told T.B. he was loving and a good boy. T.B. smiled.

worker planned to close the CASS case after three more visits because T.B. was stable in his placement. The foregoing constitutes substantial evidence T.B. was specifically adoptable.

There is also substantial evidence T.B. was generally adoptable. The social worker described T.B. as healthy, adorable, charming, affectionate, inquisitive, introspective and highly resilient. T.B. was able to express his feelings and was developmentally on target. In addition to the prospective adoptive family, there were 20 approved families in San Diego County, and 73 out of the county, who were willing and able to adopt a child with characteristics similar to his.

In re Asia L. (2003) 107 Cal.App.4th 498 (*Asia L*.), on which Leonard relies, is distinguishable. There, the foster parents were not committed to adopting the children, all of whom had behavioral problems, some quite severe, and there was no evidence there were approved families willing to adopt children with similar problems. (*Id*. at p. 510-512.) Leonard's opening brief quotes *Asia L*. as saying, in part, "evidence that . . . 'there were approved families interested in adopting' a similar child " is insufficient. This quotation does not appear in *Asia L*., and furthermore is a misstatement of the holding. *Asia L*. states: "[T]he department failed to provide evidence of approved families willing to adopt children with the developmental problems faced by James and Asia. Moreover, . . . the foster parents' willingness to explore the option of adopting James and Asia is too vague to be considered evidence that some family, if not this foster family, would be willing to adopt these children. [Citations.] Likewise, the social worker's

conclusion alone is insufficient to support a finding of adoptability. [Citation.] This evidence simply fails to demonstrate clearly and convincingly that there is a likelihood that Asia and James will be adopted within a reasonable time. [¶] Regarding the likelihood of adoption, the report concludes that the department is confident that an adoptive home can be located for Joel. Again, however, the department failed to provide evidence that there were approved families interested in adopting a child similar to Joel. [The social worker] suggests that the department would consider re-placing Joel with his nonbiological paternal grandmother if she got 'back on her feet' financially, and alternatively, that the current caretakers for James and Asia have expressed an interest in having Joel placed in their care. These suggestions, however, are too vague and speculative to amount to clear and convincing evidence that Joel is likely to be adopted within a reasonable time." (*Id*. at p. 512.)

Substantial evidence supports the finding that T.B. was adoptable.

THE BENEFICIAL RELATIONSHIP EXCEPTION

If a dependent child is adoptable, the court must terminate parental rights at the section 366.26 hearing unless the parent proves the existence of a statutory exception. (§ 366.26, subd. (c)(1); *In re Helen W.*, *supra*, 150 Cal.App.4th at pp. 80-81.) One such exception exists if "[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).) A beneficial relationship is one that "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 Autumn H*. (1994) 27 Cal.App.4th 567, 575.) If terminating parental rights "would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome . . . ." (*Ibid*.) The existence of a beneficial 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 . . . ." (*Id*. at p. 576.) Examining the evidence in the light most favorable to the judgment (*ibid*.), we conclude substantial evidence supports the court's findings there was a parent-child bond, but it was outweighed by the benefits of adoption.

At the time of the hearing, T.B. was nearly five years old. He had been out of Leonard's care for nearly two years during this case, and earlier lived with Leonard only some of the time. During supervised visits, Leonard was loving and played a parental role, although he missed a few visits, notably in January 2012.[10] As a result of the missed visits in January, Leonard's services at a visitation center were cancelled. Visits resumed in February, now supervised by the social worker, but were suspended in March, after minors' counsel reported that visits caused T.B. to relive the severe trauma he had experienced in the parents' home. Although T.B. was affectionate with Leonard at visits, he displayed extreme anxiety afterward. T.B. had lived with his prospective adoptive parents for about five weeks and, as described above, was doing well in their care.

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10 Leonard was in jail in Bakersfield.

Substantial evidence supports the conclusion T.B.'s relationship with Leonard did not promote T.B.'s "well-being . . . to such a degree as to outweigh the well-being [T.B.] would gain" by being adopted. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Substantial evidence supports the court's decision not to apply the exception.

DISPOSITION

The judgment is affirmed.

HALLER, Acting P. J.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.