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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re R.J. et al., Persons Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

MICHAEL S., SR., et al.,

Defendants and Appellants.

D067637

(Super. Ct. No. J518573 A, B, D, E)

APPEALS from a judgment of the Superior Court of San Diego County, Donal B. Donnelly, Judge. Affirmed.

Jamie A. Moran, under appointment by the Court of Appeal, for Defendant and Appellant Michael S., Sr.

Sharon S. Rollo, under appointment by the Court of Appeal, for Defendant and Appellant C.S.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Patrice Plattner-Grainger, Deputy County Counsel, for Plaintiff and Respondent.

Valerie N. Lankford, under appointment by the Court of Appeal, for Minors.

This juvenile dependency case concerns four children: 14-year-old R.J.; 12-year-old Ricky J.; three-year-old Michael S., Jr., (Michael); and one-year-old M.S.¹ Mother C.S. appeals the judgment terminating her parental rights to all four children. Michael S., Sr. (Michael Sr.), the father of Michael and M.S., appeals the judgment terminating his parental rights to those two children. Michael Sr. and C.S. (together, the parents) contend that there is not substantial evidence to support the finding that the children are adoptable. We affirm.

I

BACKGROUND

A

Prior Dependency Cases

R.J. was born in 2000. In 2002, 18-month-old R.J. and C.S. were passengers in a car being driven by R.J.'s father, R.S.J., Sr.² C.S. kicked R.S.J., Sr., in the back of the head, causing him to lose control of the car. As a result, R.J. suffered traumatic brain

¹ We refer to the children singly by name; in groups of two, three or four we sometimes refer to them as the children.

² R.S.J., Sr., is also Ricky's father. R.S.J., Sr., died in June 2014.

injury and other severe injuries and developed cerebral palsy. C.S. and R.S.J., Sr., were criminally charged. A dependency case was opened in San Bernardino County. Ricky was born in 2002. The case was closed in 2004.

In the summer of 2005, while C.S. was living in Florida and was nine months pregnant with the children's half-sibling, P.O.,³ P.O.'s father, Michael O., pushed C.S. Michael O. was arrested for aggravated battery. In early October, C.S. and Michael O. violated a domestic violence injunction and another incident of domestic violence occurred. They were arrested and Ricky and R.J. were taken into protective custody by Florida authorities. C.S. was eventually convicted of domestic battery and obstructing an officer with violence. Meanwhile, in late October, after Ricky and R.J. had been returned to C.S., C.S. threw nine-year-old Ricky outside because he was crying. Ricky suffered a broken elbow and underwent surgery. Ricky and R.J. were removed from the home. C.S. was convicted of child neglect and cruelty toward a child with great bodily harm. Ricky and R.J. were returned to C.S. In January 2009, there was a substantiated report that the children were unsupervised. C.S. was arrested for probation violations and Ricky and R.J. were again taken into custody. C.S. completed a reunification plan and the case was closed in October.

³ P.O. is not a subject of this case.

B

P.O.'s Dependency Case and the Instant Dependency Case

Michael was born in 2011. In 2012, seven-year-old P.O. was found to have nonaccidental injuries, including an eye that was bruised and swollen shut, a cut under his eye, numerous scars and marks on his neck and several abrasions on his back. The San Diego County Health and Human Services Agency (the Agency) opened a dependency case for P.O. The day after P.O. was detained, C.S. fled to Mexico with R.J., Ricky and Michael. C.S. did not feed the children. She hit R.J. with a belt and a hanger and hit Ricky with a belt. Michael Sr., who was also in Mexico, physically abused R.J. and Ricky. The parents engaged in domestic violence in Ricky's presence. In February 2013, R.J., Ricky and Michael were taken into protective custody in Mexico. After a few weeks, they were returned to the United States and detained in Polinsky Children's Center. Michael Sr. was incarcerated in Mexico.

In March 2013, the Agency filed dependency petitions for 12-year-old R.J., 10-year-old Ricky and one-year-old Michael. The petitions alleged that Michael Sr. had physically abused R.J. and Ricky. R.J. and Ricky reported that C.S. was aware of the abuse. The petition also noted that R.J. had cerebral palsy and some paralysis in her right side because C.S. had engaged in domestic violence while in a moving vehicle with R.J. C.S. had an open dependency case for physical abuse of P.O. and had not participated in reunification services.

A few months later, M.S. was born, and the Agency filed a dependency petition for her with the same allegations as the petitions for R.J., Ricky and Michael. M.S. was

detained in the hospital and then in a foster home. Michael was moved to M.S.'s foster home and R.J. and Ricky were moved to the foster home where P.O. was placed. The children remained in those foster homes for the remainder of the case.

In June 2013, the court entered true findings on the petitions and ordered out-of-home placement for the children and reunification services for the parents. In August, Michael Sr. was released from jail in Mexico. C.S. obtained a temporary restraining order against Michael Sr. but continued to have contact with him.⁴

At the 12-month review hearing in August 2014, the court terminated services, including C.S.'s visitation with R.J. and Ricky, and set a Welfare and Institutions Code section 366.26⁵ hearing. In October, Michael Sr. was arrested and jailed for felony domestic battery on C.S.

In February 2015, the court suspended C.S.'s visitation with Michael and M.S. The section 366.26 hearing took place three days later. The court found by clear and convincing evidence that the children were generally and specifically adoptable and terminated parental rights.

⁴ In July 2014, C.S. gave birth to her sixth child. Michael Sr. is the baby's father. The baby was placed separately from the children and is not a subject of this case.

⁵ Further statutory references are to the Welfare and Institutions Code.

II

DISCUSSION

A

Contentions and Legal Principles

Michael Sr. contends that there is not substantial evidence to support the finding that Michael and M.S. are adoptable. Specifically, Michael Sr. notes that Michael has significant emotional and behavioral problems and that M.S. has serious medical problems, and that the Agency failed to address the challenges that these problems presented for a potential adoptive family. C.S. joins in that contention. C.S. also contends that there is not substantial evidence to support a finding by clear and convincing evidence that Ricky is adoptable "because his mercurial behavior over the lengthy period he has been in his foster home has led his foster parents to express reservations about adopting him." C.S. does not discuss R.J. individually; C.S. names the four children and asserts that "substantial evidence did not support the finding that these children were generally, or even 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.) While psychological, behavioral, and possible developmental problems may make it more difficult to find adoptive homes, they do not necessarily preclude an adoptability finding. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154; *In re Jennilee T.* (1992) 3 Cal.App.4th 212, 224-225.) Nor "is certainty of a child's future medical condition

required before a court can find adoptability." (*In re Helen W.* (2007) 150 Cal.App.4th 71, 79.) A finding of general adoptability does not require "that the minor already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.' [Citations.]" (*In re Sarah M., supra*, at p. 1649.) 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.*) "If the child is considered generally adoptable, we do not examine the suitability of the prospective adoptive home. [Citation.]" (*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1061.)

The Agency had the burden of proving that the children are 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.)

B

Michael and M.S.

By the time of the section 366.26 hearing, Michael and M.S. had been living in their foster home for approximately one year nine months. For three-year-old Michael, this represented more than half of his life; one-year-old M.S. had been in the foster home since infancy. Michael and M.S. were thriving. They called the foster parents "mommy" and "daddy" and responded to them lovingly. The foster parents loved Michael and M.S., wanted to adopt them and had never wavered in that commitment. The foster parents were familiar with Michael's and M.S.'s needs and met those needs.

In the section 366.26 report, the Agency stated that Michael had met all goals at the Regional Center, no longer needed those services and received therapy for a slight speech delay. In her report, Michael's court-appointed special advocate (CASA) stated the following:⁶ Michael's cognitive, language and motor development were normal and his gross motor skills were advanced. He had difficulty focusing his attention and engaged in impulsive behavior. Due to the trauma he had experienced, he had a high risk of a future developmental or learning problem. KidSTART had evaluated Michael and had recommended occupational and speech therapy. Michael demonstrated behavioral problems in the foster home; the CASA suggested that if the behavior worsened, the

⁶ We are troubled by discrepancies between the Agency's section 366.26 report and the CASAs' reports in their discussions of factors pertaining to the adoptability of Michael, M.S., R.J. and Ricky. In Michael's, M.S.'s and R.J.'s cases, the discrepancies consist of relatively minor omissions from the former report and warrant no further discussion.

foster family might consider behavioral therapy. Michael had made great developmental progress, due to the foster parents' care and due to the services he had received.

In the section 366.26 report, the Agency discussed M.S.'s serious medical problems. Those problems had surfaced when she was approximately three months old. She had a kidney disorder that had required surgery and would require further surgery and specialized care. She had numerous medical appointments, sometimes several in one week, and required close monitoring for signs of infection. In her report, M.S.'s CASA described M.S.'s kidney and related problems in greater detail and noted that M.S. would undergo multiple surgeries in 2015. The CASA reported that M.S. had food allergies, including an allergy to peanuts that required the foster parents to have an EpiPen available at all times. The foster parents' attentiveness to M.S. had been critical in affording her the care and treatment she needed.

By all accounts, Michael and M.S. were adorable children. The social worker believed that they were adoptable due to their young ages, sociability, personalities and developmental characteristics and, in Michael's case, his good general health. As of December 2014, in addition to the foster parents, there were 42 families with approved home studies that would be willing to adopt a child with Michael's characteristics and 50 such families that would be willing to adopt a child with M.S.'s characteristics and controllable medical condition.⁷

⁷ There were frequent visits among Michael, M.S., R.J., Ricky and P.O. There were no families with approved home studies who were willing to adopt a sibling group of four or more with the children's characteristics.

Construing the record in the light most favorable to the judgment, substantial evidence supports the findings that Michael and M.S. were specifically and generally adoptable.

C

R.J. and Ricky

Fourteen-year-old R.J. and 12-year-old Ricky had been living in their foster home for approximately one year nine months. According to the Agency's section 366.26 report, and the report of R.J.'s CASA, the foster parents wished to adopt R.J., Ricky and P.O. R.J. and Ricky were very attached to the foster parents, returned their affection and wished to be adopted by them. The foster parents were familiar with R.J.'s and Ricky's needs and met those needs.

1. *R.J.*

In the section 366.26 report, the Agency stated that R.J. had cerebral palsy and lacked full range of motion on her right side. She wore a brace on her arm and attended occupational therapy twice a week and psychotherapy once a month. In her report, R.J.'s CASA also noted that R.J. had undergone surgery on her right arm. R.J. had an individualized educational program due to her orthopedic impairment and cerebral palsy, traumatic brain injury and vision problems. She attended an after school homework club and received math tutoring.

R.J.'s CASA described her as well-mannered and "quick to smile and laugh." The social worker described R.J. as "pretty, shy and sweet," with "a sunny disposition," "a contagious smile . . . almost always on her face" and "a strong sense of right and wrong."

The social worker believed that R.J. was generally "adoptable due to her personality, sociability and developmental characteristics." As of December 2014, in addition to the foster parents, there was one family with an approved home study that would be willing to adopt a child with R.J.'s characteristics. Construing the record in the light most favorable to the judgment, substantial evidence supports the finding that R.J. is specifically and generally adoptable.

2. *Ricky*

In its respondent's brief, the Agency contends that C.S.'s appeal as to Ricky should be dismissed because in her opening brief, C.S. failed to assert any error with regard to Ricky. The children's appellate counsel correctly points out that the Agency has conflated Ricky and R.J. and that C.S.'s opening brief does make an adoptability argument as to Ricky. In her reply brief, C.S. concurs with the statement of the children's appellate counsel. Although the Agency has thus been put on notice of its error, the Agency has neither acknowledged it nor sought to correct it. We deny the Agency's dismissal motion.

In her reply brief, C.S. notes that the Agency's respondent's brief "incorrectly stated that no issue was raised as to Ricky" and failed to address the argument in C.S.'s opening brief that Ricky's behavior had caused the foster parents to vacillate in their desire to adopt him. C.S. requests that the Agency's brief be stricken "as to the issue of Ricky's adoptability." We deny the request but are troubled by the insufficiency of the Agency's briefing with respect to Ricky.

In the section 366.26 report, the Agency stated that Ricky had a history of lying and blaming his behavior on his siblings. He attended behavioral therapy three times a week and individual therapy twice a month and took two medications—one for anxiety and one for attention deficit hyperactivity disorder. Ricky's preference for being in charge of his siblings tended to cause discord, and the issue was being addressed in family counseling. Ricky was "working through a lot of anger towards [C.S.] over the abuse he said he and his siblings received from her, and from [Michael Sr]."

In his December 2014 report, Ricky's CASA stated that the foster parents described "Ricky's behavior in the home as a roller coaster going up and down: several months of good behavior and several months of chaos." Ricky's poor behavior included stealing from the family and lying about it to avoid punishment. His behavior had improved since October, consistent with the roller coaster pattern. He displayed less aggressiveness when confronted, but he continued to lie. He spoke to the foster parents in a condescending manner and used inappropriate language. At school, his academic performance was excellent, but he also spoke condescendingly and often used racial slurs. Ricky was prescribed a medication for impulse control and saw a psychiatrist once a week. Since June 2013, he had attended trauma therapy once a week. Although that therapy had been scheduled to end in April 2014, it was extended until 2015 because Ricky was making progress. Although the court had ordered a psychological evaluation for Ricky in August 2014, the evaluation had not taken place. The CASA intended to follow up on the evaluation with the social worker. The CASA was also concerned about the effectiveness of Ricky's medication and therapy. The CASA believed that separating

Ricky from his siblings would be devastating for all of them and that it was "imperative that proper behavioral assessments are conducted to determine the root cause of his behavior."

The Agency's section 366.26 report stated, in various ways, that the foster parents were committed to adopting Ricky. First, the section 366.26 report stated that the foster parents were interested in adopting and not interested in legal guardianship. Second, the section 366.26 report characterized the foster parents as "devoted to . . . making [Ricky] a permanent part of the family." Third, the section 366.26 report stated that the foster parents were "fully committed to adding . . . Ricky to their family on a permanent basis." The report of Ricky's CASA, however, evidences some ambivalence on the part of the foster parents concerning adoption. First, the CASA's report states that "[t]he foster parents appear to be committed to adopting Ricky and his siblings [R.J. and P.O.]; however, they are still weighing the option of having Ricky removed from the home if his behavior pattern continues." Second, the CASA's report states that the foster parents "appear to be warm and affectionate people and have mentioned on many occasions their willingness to adopt Ricky and his siblings." Third, the CASA's report states that "[t]he foster parents are willing to adopt Ricky, especially if his behavior continues to improve"

When we compare the Agency's section 366.26 report to the report of Ricky's CASA, it is evident that the section 366.26 report minimizes the extent of Ricky's behavioral problems and omits any mention of the foster parents' equivocation concerning their wish to adopt him. This divergence is not explained by timing; the

social worker signed the section 366.26 report on December 5, 2014, and the CASA dated his report December 17. Even more troubling is the Agency's failure to respond to the argument in C.S.'s opening brief concerning the extent of Ricky's behavioral problems and the foster parents' equivocation.

However, construing the record in the light most favorable to the judgment, as we must, we conclude that there is substantial evidence to support the finding that Ricky is adoptable. As of December 2014, in addition to the foster parents, there were nine families with approved home studies that would be willing to adopt a child with Ricky's characteristics. Ricky's CASA viewed him as smart, "full of wisdom uncommon for someone of his age," and "an excellent communicator with unlimited potential when placed in the right environment." The social worker described Ricky as "a handsome boy who can be very funny and engaging." The social worker believed that Ricky was "adoptable due to his good general health, sociability, personality, and developmental characteristics."

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

McINTYRE, J.