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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.M. et al., Persons Coming Under
the Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

S.M.,

Defendant and Appellant.

E054090

(Super.Ct.Nos. J222180 & J222181)

OPINION

APPEAL from the Superior Court of San Bernardino County. Gregory S. Tavill,
Judge. Affirmed.

Liana Serobian, under appointment by the Court of Appeal, for Defendant and
Appellant.

Jean-Rene Basle, County Counsel, and Kristina M. Robb, Deputy County
Counsel, for Plaintiff and Respondent.

In this appeal, S.M., defendant and appellant (hereafter father), challenges the trial court's order under Welfare and Institutions Code section 366.26¹ terminating his parental rights to his two daughters, A.M. and D.M. Father contends we must reverse the order because (1) he did not receive proper notice of the date to which the trial court had continued the selection and implementation hearing, and (2) the trial court's findings that the girls are adoptable are not supported by substantial evidence because the social worker's report does not include information regarding the prognosis for and treatment of various purported medical and developmental issues.

We disagree with father on both issues and therefore we will affirm the order terminating his parental rights.

FACTUAL AND PROCEDURAL SUMMARY

Resolution of the issues father raises in this appeal does not depend on the facts and circumstances of the underlying dependency proceeding. For our purposes it is sufficient to note that San Bernardino County Department of Children and Family Services (CFS) filed section 300 petitions with respect to A.M., then four years old, and D.M., then two years old, in June 2008 after removing them from the home of their maternal grandmother. The girls' mother, who is not a party to this appeal, had voluntarily placed the girls with her mother at the recommendation of CFS.

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

The police initially went to the grandmother's home after receiving a report of suspected physical abuse as evidenced by bruises on the girls' bodies. After seeing the girls, the responding police officer determined the bruises most likely had been caused by another child who lived in the home. However, both A.M. and D.M. appeared to have physical and mental developmental delays that were of concern to a public health nurse and the social worker. As a result, CFS removed both girls from the grandmother's home and placed them with foster parents who would provide them with specialized care.

The original and amended section 300 petitions with respect to father included allegations under subdivisions (b) and (g) that he had failed due to his own developmental disability to provide appropriate care for the girls, and that he knew or should have known that mother was neglecting the girls due to her own developmental disability. Both A.M. and D.M. had developmental issues, including failure to thrive. D.M. also appeared to have suffered ongoing physical abuse. A.M. was eventually diagnosed with mild mental retardation, ADHD, and a learning disorder. She also had serious anger management issues. D.M. had a learning disorder. In addition to developmental issues, A.M. would need corrective surgery for crossed eyes and a lazy eye. D.M. had been diagnosed with "toe in gait" that required her to wear braces at night, and she also had internal hip rotation.

At the 18-month review hearing, CFS recommended that father's parental rights be terminated. In February 2011, the trial court set a "further" selection and implementation hearing for May 11, 2011. At the May 11 hearing, the court continued

the selection and implementation hearing to May 25, 2011. Although his attorney was present, father did not appear at either of the hearings in May. After finding both girls were adoptable, the trial court, in accordance with the social worker's recommendation, terminated father's parental rights to both girls and ordered adoption as the permanent plan at the hearing on May 25, 2011.

DISCUSSION

1.

NOTICE OF SECTION 366.26 HEARING

Father contends he did not receive the statutorily required notice of the May 25, 2011, hearing at which the trial court terminated his parental rights and, therefore, the trial court issued that order in violation of father's constitutional right to due process of law. We disagree.

A. Pertinent Additional Facts

Father was at the hearing on February 14, 2011, at which the trial court confirmed May 11, 2011, as the date for the section 366.26 hearing. When the trial court told father he had to come to court on May 11, 2011, father said, "Okay." At the trial court's request, father also filed a new JV-140, the Judicial Council form entitled "Notification of Mailing Address," because father apparently had moved since the prior hearing. Father not only was advised by the trial court of the May 11, 2011, section 366.26 hearing date, but CFS also served father with notice of that hearing at the mailing address listed in his recently filed JV-140.

Father was not in court for the section 366.26 hearing on May 11, 2011, but his attorney was present. Although she did not explain father's absence, she did ask the trial court to continue the hearing in order to set it as a contested matter. In accordance with that request, the trial court continued the section 366.26 hearing to May 25, 2011. Father did not appear in court on May 25, 2011, and again his attorney did not explain his absence. However, his attorney did ask and the trial court agreed to recall the matter in the afternoon to "see if [father] appears." When the trial court called the matter in the afternoon on May 25, 2011, father still was not in court. The trial court proceeded with the section 366.26 hearing at which father's attorney did not present evidence, but argued that the trial court should not terminate father's parental rights because "[h]e made extreme effort to fulfill the needs of his case plan. He was a faithful visitor with his children up until very recently. And I know that he objects to the termination of his parental rights." Nevertheless, the trial court terminated father's parental rights.

B. Analysis

Section 294 specifies the means by which the social worker (or probation officer) must give notice to specified interested parties, including the parents and their attorneys, of the original and continued dates set for a section 366.26 hearing. Father does not dispute that he had actual notice of the original date set for the section 366.26 hearing. Therefore, we will not discuss the pertinent statutory notice requirements. Father contends the record does not show that he received notice of the continued hearing dates.

Section 294, subdivision (d) governs notice of continued section 366.26 hearings and provides, in pertinent part, as follows: “Regardless of the type of notice required, or the manner in which it is served, once the court has made the initial finding that notice has properly been given to the parent, . . . subsequent notice for any continuation of a Section 366.26 hearing may be by first-class mail to any last known address, by an order made pursuant to Section 296,^[2] or by any other means that the court determines is reasonably calculated, under any circumstance, to provide notice of the continued hearing.”³

The record on appeal does not include proofs of service to show DCS gave written notice to father by first class mail of the continued section 366.26 hearing dates. Because he was not in court either of the times the hearing was continued, the trial court could not have ordered father to return to court on the new dates. However, father’s attorney was in court when the trial court granted each of the two continuances. Father’s contrary view notwithstanding, notice to him from his attorney constitutes notice by a means reasonably calculated under the circumstances to provide notice of the continued hearing

² Section 296 provides, at any hearing, that the court may order the parent to reappear.

³ Although father frames the issue as a due process violation, section 294, subdivision (d) incorporates the due process standard which requires “that the parent receive notice ““reasonably calculated, under all the circumstances, to apprise interested parties of the [continued] pendency of the action and afford them an opportunity to present their objections.”” [Citation.]” (*In re Phillip F.* (2000) 78 Cal.App.4th 250, 258.)

date. The issue therefore is whether the record supports an inference that father's attorney gave him notice of the continued section 366.26 hearing dates.

We begin with the presumption that father's attorney complied with the duty to provide competent representation (see § 317.5) and therefore notified father of pending hearing dates, in general, and the dates of the selection and implementation hearing, in particular. The inference that father's attorney advised him of the May 25, 2011, date for the selection and implementation hearing is supported by counsel's request to set the matter for a contested selection and implementation hearing, a proceeding that would require father's participation and therefore necessitate that counsel notify him of the hearing date. The inference that he received notice from his attorney is further supported by trial counsel's request, when father was not in court in the morning on May 25, 2011, that the trial court continue the matter to the afternoon calendar to "see if [father] appears." Father's attorney would have no reason to expect that father might appear in court later in the day if the attorney had not told father the date of the hearing. Father's attorney also did not object when the trial court made the finding that notice had been given as required by law. Each of the noted facts supports the trial court's implied finding that father received notice of the May 25, 2011, continued date of the section 366.26 hearing, by a means reasonably calculated to advise him of the hearing date. (See *In re Desiree M.* (2010) 181 Cal.App.4th 329, 335.)

Accordingly, we must reject father's claim that he did not receive notice of the May 25, 2011, selection and implementation hearing.

2.

ADOPTIBILITY FINDING

Father contends the trial court's adoptability finding is not supported by substantial evidence because the record on appeal does not include information about their prognosis or treatment needs. Again, we disagree.

In order to terminate parental rights under section 366.26, a trial court must find that the child is likely to be adopted within a reasonable period of time. (§ 366.26, subd. (c)(1). "The issue of adoptability posed in a section 366.26 hearing 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. [Citations.]" (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649, emphasis omitted.) "Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family." (*Id.* at pp. 1649-1650.)

In this case, the foster parents with whom CFS had placed A.M. and D.M. in 2008 at the outset of the dependency process wanted to adopt both girls. That fact is sufficient

to support the trial court's finding that the girls are adoptable.⁴ In arguing otherwise, father claims a diagnosis and prognosis of each girl were necessary, presumably in order to determine whether the prospective adoptive parents were able to meet the children's purported special needs.

The only authority father cites to support his claim is *In re Valerie W.* (2008) 162 Cal.App.4th 1, which holds that if there is evidence in the record to suggest the child has or will be tested for a serious genetic or neurological disorder, the absence of evidence regarding the child's condition, prognosis, and treatment needs, if any, undermines the basis for the determination that the prospective adoptive parents can meet the child's needs. (*Id.* at p. 14.)

In the cited case, a public health nurse had recommended that one of the children undergo genetic testing because the child was small for his age, had speech problems possibly related to a small lower jaw, suffered a seizure the source of which had not been identified, and had gastrointestinal problems. (*In re Valerie W.*, *supra*, 162 Cal.App.4th at p. 6.) In this case, there is no similar recommendation. Father cites the social worker's assessment for the May 11, 2011, selection and implementation hearing which includes

⁴ Father claims the prospective adoptive parents had wavered in their commitment to adopt the children. Father supports this assertion with a citation to the social worker's report for the six-month review hearing in 2009. That report states that the foster mother "has vacillated between a desire to adopt and willingness to be a permanent foster home for the children, [A.M.] and [D.M.] This has probably been due to the extraordinary efforts that [the foster parents] have undergone to provide to [*sic*] the children's special needs." We must assume that during the intervening two years, the foster parents made up their minds and decided in favor of adoption.

the statement that “[A.M.]’s last medical exam was completed on February 22, 2011 by Loma Linda Pediatric Neurology,” and that “[D.M.] is also being monitored by the neurology department at Loma Linda Pediatrics with her sister [A.M.]” Although the social worker’s previous reports apparently had not mentioned that the girls were seen in pediatric neurology, those reports set out in detail each girl’s medical and developmental issues. The cited facts do not support an inference that either child suffered from a previously unknown genetic or serious neurological disorder.

From the fact that the prospective adoptive parents had been caring for A.M. and D.M. for three years, the trial court could find the foster parents were aware of the girls’ medical and developmental needs and were able to meet those needs. We reject father’s contrary claim.

DISPOSITION

The order terminating father’s parental rights is affirmed.

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MCKINSTER
J.

We concur:

HOLLENHORST
Acting P.J.
RICHLI
J.