

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.J., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

A.D.,

Defendant and Appellant.

E056079

(Super.Ct.No. J230912)

OPINION

APPEAL from the Superior Court of San Bernardino County. Christopher B. Marshall, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Megan Turkat Schirn, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, and Jamila Bayati, Deputy County Counsel, for Plaintiff and Respondent.

A.D. (mother) appeals from an order terminating parental rights to her son, D.J. She contends that there was insufficient evidence that he was adoptable. Because we conclude that there was sufficient evidence, we will affirm.

I

PROCEDURAL BACKGROUND

In January 2010, the Department detained D.J., who was four years old, and filed a dependency petition concerning him. At the same time, it also detained and filed dependency petitions regarding five of the mother's other children.

The initial impetus of the dependency was a broken arm suffered by the mother's then-youngest child, E.S. Soon, however, when it appeared that the broken arm was not due to any abuse or neglect by the mother, the focus of the dependency shifted to the mother's marijuana abuse, unstable housing situation, and neglect of the children's needs.

In April 2010, at the jurisdictional/dispositional hearing, the juvenile court found jurisdiction over D.J. based on failure to protect (Welf. & Inst. Code, § 300, subd. (b)) and, solely with respect to the alleged father,¹ failure to support (*id.*, subd. (g)).

In September 2011, at the 12-month review hearing, the juvenile court terminated reunification services and set a hearing pursuant to Welfare and Institutions Code section 366.26 (section 366.26).

¹ Later, a paternity test showed that the alleged father was not the biological father. No other potential biological father was ever identified.

In April 2012, at the section 366.26 hearing, the juvenile court found that D.J. was adoptable and that there was no applicable exception to termination. Accordingly, it terminated parental rights.

II

THE SUFFICIENCY OF THE EVIDENCE OF ADOPTABILITY

A. *Additional Factual and Procedural Background.*

The evidence before the juvenile court at the section 366.26 hearing consisted of six specified social worker's reports, plus the oral testimony of several social workers. We confine our review to this evidence (see § 366.26, subd. (c)(1)), which showed the following.

At the time of the section 366.26 hearing, D.J. was six years old. His height and weight were normal. A social worker described him as "lively," "a healthy and happy child who is playful, friendly, and creative," and "a talkative child with an engaging personality." Academically, he performed at or above grade level.

D.J. had been diagnosed as having attention deficit hyperactivity disorder (ADHD). As a result of this condition, he had a "history of negative behaviors," including screaming, cursing, fighting, hitting, and kicking. About six months before the section 366.26 hearing, however, he had started taking Adderall. Thereafter, his energy level was lower, and "[h]is play appear[ed] more focused." Nevertheless, the social worker was unwilling to let him visit his younger brother E.S., because the "behaviors

attributed to his diagnosis of ADHD . . . could be harmful for [E.S.] due to [E.S.’s] special care needs.”²

D.J. had been in seven different placements. The social worker testified that his placement had been changed so often because he “was either in a placement that could no longer continue to provide for him or there were a couple of times it was due to his behaviors.”

His next-to-last placement, with a Ms. F., was “stable.” He got along well with his foster brothers and sisters. However, Ms. F. was not interested in adoption.

About four months before the section 366.26 hearing, D.J. was placed with prospective adoptive parents, the C.’s. Mr. C. was 45 years old. As a result of a brain aneurysm, he had undergone brain surgery twice. After one of these operations, he had suffered a stroke. As a result, one of his shoulders was “frozen” and painful. He took pain medication; however, according to his doctor, “his need for medication is decreasing appropriately with his recovery.” He was on disability, but he expected at some point to receive his doctor’s approval to return to work.

Mrs. C. was 46 years old. She had type 2 diabetes and high blood pressure. She was employed as an environmental planner and had been for about 20 years.

² E.S., aged two, had difficulty breathing due to a softened larynx. He also had digestive difficulties, including reflux and a milk allergy; he was fed via a gastrostomy tube. He was taking four different medications.

D.J. called the C.'s "Mommy" and "Daddy." About a month after his placement, his therapist reported that he "appeared to feel secure and happy" with them. The C.'s had "work[ed] with [D.J.] a great deal on his behaviors, and his behaviors ha[d] been improving." He was "much calmer . . . , with much less acting out." Whereas Ms. F. had reported hyperactivity and inattention, the C.'s reported "normal six-year-old behavior."

While with Ms. F., D.J. had had "problems" with bed-wetting; once he was with the C.'s, his bed-wetting had "virtually stopped" There had been one incident in which he had soiled his pants. However, this occurred immediately after the social worker had a discussion with D.J. about the possibility of visitation with an older sister who had previously abused him physically, verbally, and sexually; the social worker attributed the soiling incident to stress engendered by this conversation.

The social worker had talked to D.J. about adoption. She told him "[t]hat his current caregivers want him to stay in their home with them and they want to care for him until he grows up and afterwards" She reported that "he is very happy about that. He wants to stay there."

B. *Analysis.*

The juvenile court cannot terminate parental rights unless it finds, "by a clear and convincing standard, that it is likely the child will be adopted" (§ 366.26, subd. (c)(1).)

"The issue of 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. [Citations.]’ [Citation.]” (*In re Zeth S.* (2003) 31 Cal.4th 396, 406.)

““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.*” [Citation.]’ [Citation.]” (*In re I.I.* (2008) 168 Cal.App.4th 857, 870 [Fourth Dist., Div. Two].) “If the child is considered generally adoptable, we do not examine the suitability of the prospective adoptive home. [Citation.]” (*In re Michael G.* (2012) 203 Cal.App.4th 580, 589.)

On the other hand, “[i]n some cases, a minor ‘who ordinarily might be considered unadoptable due to age, poor physical health, physical disability, or emotional instability is nonetheless likely to be adopted because a prospective adoptive family has been identified as willing to adopt the child.’ [Citation.]” (*In re Jose C.* (2010) 188 Cal.App.4th 147, 158.) ““When a child is deemed adoptable *only* because a particular caretaker is willing to adopt, the analysis shifts from evaluating the characteristics of the child to whether there is any legal impediment to the prospective adoptive parent’s adoption and whether he or she is able to meet the needs of the child.’ [Citations.]” (*In re R.C.* (2008) 169 Cal.App.4th 486, 494.)

“The clear and convincing standard was adopted to guide the trial court; it is not a standard for appellate review. [Citation.] The substantial evidence rule applies no matter

what the standard of proof at trial.” (*In re E.B.* (2010) 184 Cal.App.4th 568, 578.) “We review th[e adoptability] finding only to determine whether there is evidence, contested or uncontested, from which a reasonable court could reach that conclusion. It is irrelevant that there may be evidence which would support a contrary conclusion. [Citation.]” (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292 [Fourth Dist., Div. Two].)

Here, the C.’s had expressed interest in adopting D.J. Nothing about his age or mental or physical condition made him unadoptable as a matter of law. He was healthy, academically average or above average, and “engaging.” Although he had ADHD, the juvenile court did not have to find that this was a barrier to adoption. Whether due to Adderall, the C.’s efforts, or both, his behavior had improved. Indeed, the C.’s reported that his behavior was that of a normal six-year-old.

Admittedly, the social worker did not want D.J. to visit E.S. “at this time,” due to D.J.’s kicking, screaming, and “at times destructive behaviors” However, the record shows that she was referring to D.J.’s behavior *before* he was placed with the C.’s (and possibly even before he started taking Adderall). Moreover, she was concerned about the possible effect on E.S. “due to [E.S.’s] special care needs.” The juvenile court did not have to conclude that D.J.’s behavior would be a problem for an ordinary family.

D.J. had also had incidents of bed-wetting and pants-soiling. Since he had been placed with the C.’s, however, the bed-wetting had “virtually stopped” Moreover, the single incident of pants-soiling was evidently due to stress induced by the prospect of visitation with his abusive older sister. The juvenile court could reasonably find that

these episodes were likely to stop, or, at least, to be no worse than what one would expect from an ordinary six-year-old.

The mother emphasizes the fact that D.J. had been in seven placements. The social worker explained that “a couple of times,” the change of placement was due to D.J.’s “behaviors.”³ Once again, however, his behavior had evidently improved over time; his placement with Ms. F. had been “stable,” and he had improved still further while placed with the C.’s. The bottom line is that even if D.J.’s “behaviors” were the reason for every single change of placement, and even if these “behaviors” continued, the C.’s were willing to adopt him, and this was substantial evidence of adoptability.

In re I.W. (2009) 180 Cal.App.4th 1517 upheld a finding that a child was adoptable, even though he had not only had ADHD, but also posttraumatic stress disorder, a learning disorder, and “severe behavior problems” (*id.* at p. 1525), including running away and threatening to commit suicide. (*Id.* at pp. 1525-1527.) Similarly, *In re Jeremy S.* (2001) 89 Cal.App.4th 514, 525, disapproved on other grounds in *In re Zeth S.*, *supra*, 31 Cal.4th at pp. 413-414, upheld an adoptability finding, even though the child had a seizure disorder (*Jeremy S.*, at p. 523), “intermittent elimination problems,” and behavioral problems including “tantrums, slamming doors, using bad language, hitting, and scratching” (*id.* at p. 524). D.J. was no less adoptable than these children.

³ The Department claims that the social worker was mistaken, and actually, only one placement change had been due to D.J.’s behavior. This fact, however, was shown only by earlier social worker’s reports that were not introduced at the section 366.26 hearing. Hence, we do not consider it.

Moreover, the juvenile court's finding of adoptability did not rest solely on the C.'s willingness to adopt. Although Ms. F. had not been interested in adoption, D.J.'s placement with her had been stable. This is true even though his ADHD and his bed-wetting had been worse when he was with her. This was additional evidence that some other family, which *was* interested in adoption, would be willing to adopt D.J.

The mother argues that the C.'s had "serious medical conditions which could impact the long-term success of the placement." However, there was substantial evidence that D.J. was generally adoptable. Hence, whether the C.'s in particular would, in fact, be able to adopt was irrelevant.

Separately and alternatively, the juvenile court was not required to find that the C.'s health conditions were an impediment to adoption. Mrs. C. had diabetes and high blood pressure, but these are relatively common health conditions that plenty of natural parents have; they need not interfere with parenting. Mr. C. had had an aneurysm and a stroke, but they had occurred at least two years ago, he was getting better, and there was no evidence that they were likely to recur. While he was left with pain and restricted movement in one shoulder, this, too, was not incompatible with parenting.

The mother argues that there was insufficient evidence because of what the adoption assessment did *not* include — supposedly, it should have included (1) more information about the C.'s physical condition, (2) more recent information from D.J.'s therapist about his adjustment to his placement with the C.'s, and (3) more information about D.J.'s own wishes and feelings.

The Department argues that the mother forfeited any objection to the adoption assessment by failing to raise it below. We agree that she forfeited any contention that the assessment failed to comply with statutory requirements. (*In re Urayna L.* (1999) 75 Cal.App.4th 883, 886; *In re Aaron B.* (1996) 46 Cal.App.4th 843, 846; *In re Crystal J.* (1993) 12 Cal.App.4th 407, 411-412.)⁴ However, she appears to be contending that the adoption assessment contains insufficient evidence to support an adoptability finding. This contention can be raised for the first time on appeal. (*In re Erik P.* (2002) 104 Cal.App.4th 395, 399; *In re Brian P.* (2002) 99 Cal.App.4th 616, 623.)

“[E]ven if the assessment is incomplete in some respects, the court will look to the totality of the evidence; deficiencies will go to the weight of the evidence and may ultimately prove insignificant.” (*In re John F.* (1994) 27 Cal.App.4th 1365, 1378.)

For the reasons already discussed, the C.’s physical condition was irrelevant. Even if it was relevant, however, the adoption assessment included sufficient information about it for a reasonable trier of fact to conclude that it was not a problem. If the mother thought that additional evidence would have shown that the C.’s were not suitable to adopt, she should have introduced it. Likewise, the therapist’s report that D.J. was adjusting well after one month with the C.’s was substantial evidence. If the mother

⁴ In her reply brief, she asserts that the juvenile court “abused its discretion by not continuing the section 366.26 hearing” until there was a more complete assessment. She forfeited this contention, too, by failing to request a continuance below. (Welf. & Inst. Code, § 352, subd. (a); *People v. Riccardi* (2012) 54 Cal.4th 758, 810.)

thought that, after three more months, the therapist's opinion would have changed, she was free to subpoena him.

At a section 366.26 hearing, the juvenile court must “consider the wishes of the child” (§ 366.26, subd. (h)(1).) To that end, an adoption assessment is supposed to include “a statement from the child concerning placement and the adoption or legal guardianship” (Welf. & Inst. Code, § 366.22, subd. (c)(1)(E).) Here, the social worker testified that D.J. was “very happy” about being adopted by the C.'s, and that he “want[ed] to stay” with them. Based on her observations, he was “very comfortable and content in his current home and showing attachment with his caregivers.” By contrast, he was not asking to visit the mother. This was sufficient to satisfy the statutory requirements and to support the adoptability finding.

Finally, the mother raises a rather creative argument based on section 366.26, subdivision (c)(3), which allows the court to “identify adoption as the permanent placement goal . . . without terminating parental rights” if it finds (1) “that the child has a probability for adoption but is difficult to place for adoption” and (2) “there is no identified or available prospective adoptive parent.” This subdivision also provides, “For purposes of this section, a child may only be found to be difficult to place for adoption if there is no identified or available prospective adoptive parent for the child because of the child's membership in a sibling group, or the presence of a diagnosed medical, physical, or mental handicap, or the child is seven years of age or more.”

Noting that D.J. was “a few weeks away from his seventh birthday,”⁵ the mother argues that there was “substantial evidence” from which the juvenile court “could [have] found” that he was difficult to place under this subdivision. There are at least three problems with this argument. First, precisely because D.J. was “a few weeks away from his seventh birthday,” he was six, not seven. Second, he had “identified and available prospective adoptive parents.” For both of these reasons, he could not qualify as difficult to place within the meaning of section 366.26, subdivision (c)(3). And third, even assuming there was substantial evidence that he *was* difficult to place, that is not the standard of review; rather, it is whether there was substantial evidence to support the implied finding that he was *not* difficult to place. As already discussed, there was.

III

DISPOSITION

The order appealed from is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.

⁵ On the date of the section 366.26 hearing, D.J.’s seventh birthday was six and a half weeks away.