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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ROBERT M., a Person Coming Under the  
Juvenile Court Law.

TULARE COUNTY HEALTH AND HUMAN  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

TERESA N.,

Defendant and Appellant.

F064414

(Super. Ct. No. JJV065245)

**OPINION**

APPEAL from an order of the Superior Court of Tulare County. Charlotte A. Wittig, Commissioner.

Nicole Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Bales-Lange, County Counsel, John A. Rozum and Abel C. Martinez, Deputy County Counsel, for Plaintiff and Respondent.

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In this juvenile dependency case, twin boys were removed from the custody of their mother, Teresa N. (mother), and father, Robert M. (father). After reunification

efforts failed, the juvenile court found the twins likely to be adopted and entered an order terminating parental rights. (Welf. & Inst. Code, §§ 300, 366.26.)<sup>1</sup> Mother appeals, challenging the termination of her parental rights as to one twin only, Robert. Mother asserts insufficient evidence supported the juvenile court's finding that Robert was likely to be adopted. We agree, reverse the juvenile court's order, and remand for the juvenile court to hold a new hearing under section 366.26 to select and implement a permanent plan for Robert.

### **FACTUAL AND PROCEDURAL BACKGROUND**

As the sole issue on this appeal is whether there was substantial evidence of Robert's adoptability as of the date mother's parental rights were terminated, we recite only briefly the facts regarding the removal of Robert and his twin, Adrian, from their parents' home and the unsuccessful reunification process that ensued.

The twins were born prematurely in January 2009. When Robert was three weeks old, he developed necrotizing enterocolitis and underwent a bowel resection. This resulted in Short Gut Syndrome, which causes chronic diarrhea and nutrition absorption problems, and renders Robert dependent on Total Parenteral Nutrition (TPN). To meet his nutritional needs, Robert has both a surgically placed Broviac catheter and a gastrostomy tube (G-tube). TPN is provided directly to the bloodstream through the Broviac catheter via sterile intravenous tubing; a machine slow drips nutrients over a 12 hour period each day. The G-tube delivers nutrients directly to Robert's digestive system; he is feed infant formula 12 hours per day through the G-tube. The parents were trained at Children's Hospital Central California (CHCC) and UCLA on Broviac care and management, and mother provided gastrostomy site care, which requires application of a special cream around the gastrostomy opening. Adrian has no health problems.

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<sup>1</sup>All undesignated statutory references are to the Welfare and Institutions Code.

Over the next two years, the Tulare County Health and Human Services Agency (Agency) received six referrals relating to Robert's medical care, including the parents' failure to take Robert to important medical appointments and to visit him during one of his hospitalizations at CHCC. A voluntary family maintenance case was opened in January 2011. Robert was a Central Valley Regional Center (CVRC) client and had an Individualized Family Service Plan (IFSP), through which he received weekly in-home early intervention services as well as monthly physical and occupational therapy. Robert also had access to services for deaf and hard of hearing children, and had completed an initial hearing consultation.

In February 2011, the parents took Robert to CHCC because he pulled out his Broviac line. While there, CHCC personnel discovered that Robert had a second degree burn on his arm. Robert was transferred to UCLA medical center to surgically replace the Broviac tube, and to receive treatment for the burn on his arm and an infection at the site of the Broviac catheter. A skeletal survey taken at UCLA showed no fractures, but did show soft tissue swelling of the right arm and generalized osteopenia with growth arrest lines and dense metaphyseal lines, which may represent a variety of etiologies, including a normal variant, healing rickets, scurvy or leukemia, or heavy metal poisoning, which needed to be correlated with Robert's clinical history.

The Agency initiated dependency proceedings. Dependency jurisdiction was taken over the twins after the juvenile court found true allegations under section 300, subdivision (b) that mother and father failed to provide Robert with adequate medical care, which placed both Robert and Adrian at substantial risk of suffering serious physical harm or illness. The court ordered reunification services for both mother and father, and set a six-month review hearing for August 2011. Adrian was placed in a foster home in Tulare County, while Robert remained hospitalized at UCLA.

Robert continued to receive treatment at UCLA. In a March 2011 developmental studies evaluation at UCLA, it was noted that Robert previously had four Broviac

placements and recurrent line infections requiring antibiotics, as well as a history of hepatic failure and splenomegally. In November 2009, Robert was evaluated by audiology and found to have bilateral auditory neuropathy with no response at 90db to multiple frequencies in each ear. In October 2010, audiology recommended intervention for hearing loss without further delay, including hearing aids and sign language, and further evaluation including a repeat “ABR with sedation” and a behavioral audiological evaluation.

The doctor who conducted the developmental evaluation noted Robert was a cute boy who was challenging to evaluate. Tests given during the evaluation showed Robert to have gross motor skills of a nine-month-old, fine motor skills of a six-month-old, visual reception and expressive language of a five-month-old, receptive language of a two-month-old, and an overall cognitive score that was equivalent to a four-month-old. The doctor concluded Robert had severe global developmental delay, which was complicated by significant uncorrected hearing impairment and likely visual impairment. The doctor recommended that Robert receive immediate intervention for hearing impairment while waiting to complete further audiological evaluation, including hearing aids and sign language, as well as instruction through his local school district from a teacher of the deaf and hard of hearing. The doctor further recommended that Robert receive an ophthalmologic assessment of his functional vision and intervention to maximize his visual perception. Other recommended services included physical and occupational therapy for motor delays, and a laboratory evaluation for other potential causes of the developmental delays.

A March 2011 audiology evaluation confirmed the previous diagnosis of auditory neuropathy. In a June 2011 behavioral audiological evaluation, Robert showed minimum response levels to sound. However, hearing aids would not be considered until Robert’s responses to sound were more reliable. Robert was to be evaluated again in a couple months.

On June 2, 2011, Robert had eye surgery at UCLA to correct strabismus. He did well in the surgery and had no problems. Robert did not need a follow-up examination until December 2011. By the end of August, Robert was clinically stable and ready to be released from the hospital. Audiology no longer recommended further follow-up. On discharge, however, Robert would need physical and occupational therapy.

In an August 2011 report, the Court Appointed Special Advocates (CASA) worker assigned to the twins noted that while Robert could barely crawl when he was admitted to UCLA, during his hospitalization he had made tremendous strides in his mobility, as he had mastered crawling, and could pull himself up and walk with assistance. The CASA worker noted Robert had long-term medical issues and would require constant monitoring, but stated he was a “happy, energetic child,” with a “very playful and caring demeanor,” who loved to play and laugh. The CASA worker was concerned that Robert’s hearing and visual impairments had not been addressed.

An adoption assessment was completed on August 17, 2011. The adoption social worker recommended adoption as the twins’ permanent plan as they “appeared to be adoptable.” The social worker noted that the twins, who had not seen each other since they were detained, were not bonded, although she believed ongoing contact would be in their best interests. The adoption social worker stated that Robert was medically fragile, noting he had a G-tube and TPN for feeding, and was also developmentally delayed and a CVRC client. Adrian was with a prospective adoptive family who had taken great care of his emotional and physical needs and was willing to adopt him. The family, however, was not willing to adopt Robert, although they were not opposed to sibling visits. The adoption social worker opined removing Adrian from his family would be detrimental to his emotional well-being. Robert’s medical needs were being met at UCLA and he was to be placed in a licensed foster home in the Los Angeles area where his medical needs could be met. The adoption social worker believed the twins would not suffer significant emotional detriment if parental rights were terminated, as the parents had been

inconsistent with their visits and the twins were not very attached to them. The adoption social worker recommended the current social worker attempt to locate an adoptive home for Robert that was open to post-finalization contact with Adrian.

Robert was discharged from UCLA on August 28, 2011. While at UCLA, Robert had become more active, pulling out his G-tube a few times. He had physical therapy a few times per week and was provided a 24 hour one-on-one person to assist with his needs. Robert was able to pull himself up to stand and would be provided with a front wheel walker to help him learn to walk. Robert had learned to wave “hi” and “bye.” Due to the acute nature of Robert’s medical condition and at the recommendation of UCLA pediatric medical specialists, he was placed into the temporary care of a licensed registered nurse/foster parent who specializes in the care of foster children with acute gastrointestinal issues. The foster home was located in Riverside County. The Agency placed Robert in Riverside County because it had difficulty finding a home in or near Tulare County due to Robert’s medical needs. On August 30, the foster parent reported Robert was doing well and was a pleasure to have in her home. She told the Agency she was interested in legal guardianship or adoption should the parents fail to reunify, as she liked to care for children long term and did not want them moved from place to place.

On September 9, 2011, the juvenile court terminated reunification services and set a section 366.26 hearing, identifying adoption as Adrian’s anticipated permanent plan, and adoption or legal guardianship as Robert’s anticipated permanent plan.

In its report prepared for the section 366.26 hearing, the Agency identified adoption of the twins together as the plan that was in their best interests. Since his discharge from the hospital, Robert was showing slow but steady improvement. Two aunts, one maternal and one paternal, each had asked to be considered for placement of the twins. The Agency requested the court find termination of parental rights would be detrimental so it could have time to assess the possibility of placing the twins together in a prospective adoptive home. The social worker believed the twins had a probability of,

but were difficult to place for, adoption due to their membership in a sibling group and the presence of diagnosed mental, physical or mental handicaps, noting at that time the twins did not have an approved prospective adoptive parent.

While Adrian's foster parents wanted to adopt him, they did not want to take Robert. Both CASA and the social worker had interviewed the two aunts who requested placement. While the social worker acknowledged the twins had been placed apart for some time, he believed the Agency had a responsibility to determine if the twins could be reunited and adopted together. Although Robert would always require significant services and his progress was guarded, it looked more hopeful. The social worker requested six months to fully evaluate and implement a plan to reunite the twins into a prospective adoptive home.

The social worker provided updated information about Robert's health and services. Robert had a physical examination in October 2011, with a pediatrician who agreed to coordinate his care and monitoring with UCLA. The UCLA TPN team was providing services related to Robert's gastrointestinal care, and, in conjunction with Robert's pediatrician, had coordinated related evaluations of hearing, sight, and neurology. Robert continued to receive services coordinated by CVRC, and was also receiving educational services from the local school district. The social worker noted that despite his acute developmental and physical challenges, Robert presented as a happy and inquisitive toddler.

According to CVRC's quarterly review, an August 2011 assessment of Robert's developmental levels at his adjusted age of 29 months indicated he had global delay, with all levels between six and 10.5 months. Robert's pediatrician referred him for audiology testing because UCLA's testing was inconclusive and Robert was responding to his name and environmental sounds. The UCLA TPN team monitored Robert monthly. Robert received TPN feedings four days per week, and was fed through the G-tube the other three days. The foster mother hoped she could get Robert off TPN within a year and

transition him to G-tube feeding only. Robert had gained two pounds over the two months he had been with the foster mother. CVRC had evaluated Robert as part of transition planning and found eligibility under the mental retardation category based on his history of global delay in previous IFSPs and the levels completed in August 2011 by UCLA staff.

The foster mother took Robert out with her when she could; he did not have any behavioral problems that prevented him from going into the community. Robert did well when the foster family took him with them on a several-day trip to Disneyland. According to the foster mother, Robert could hear the foster family talking to him, as well as sounds in his environment. During a home visit by the CVRC counselor, the counselor was able to interact well with Robert; he came right up to her, and was social and curious. The foster mother believed Robert had a sensory perception disorder, as he still rocked himself at times, seemed to “zone out,” and did not always respond to his name being called.

In an October 2011 IFSP, Robert’s foster mother stated she was happy with Robert’s rapid progress. He could walk around the living room by himself, interacted more with people, engaged in some purposeful play, would laugh, had begun waving, understood the word “no,” and vocalized some. The foster mother expressed concerns in the areas of gross motor skills, expressive language and cognition; she wanted Robert to learn to walk independently outside the living room, and to learn to say “hi” and know what that means. The IFSP included a report of Robert’s health status. With respect to vision, it was noted he had passed “per report” and that he had esotropia, especially when tired, and was tracking and following a point. With respect to hearing, it was noted that while he failed a hearing test at UCLA, he would wake with someone whispering and respond to environmental sounds.

Two weeks after filing its initial section 366.26 report, the Agency filed an addendum in which it now recommended termination of parental rights. The two

immediate relatives wanted the twins placed with them, as allowed by Robert's medical condition, with the intention of adopting both boys. The Agency explained the relatives had a "growing awareness" of each twin's "special needs" and their ability to successfully address those needs. The adoptions social worker believed the twins deserved a permanent and secure home together. Accordingly, the social worker recommended termination of mother's and father's parental rights and identification of adoption as the plan that was in the twins' best interests, with adoption projected by December 31, 2013.

At the January 6, 2012 section 366.26 hearing, the juvenile court admitted the reports and supporting documents, and took judicial notice of the file. The parties submitted on the reports without argument or objection. The juvenile court found by clear and convincing evidence it was likely the twins would be adopted, terminated mother's and father's parental rights, and selected adoption as the twins' permanent plan.

### **DISCUSSION**

As already noted, mother's appeal challenges the termination of her parental rights as to Robert only, on the ground the juvenile court's finding of adoptability is not supported by sufficient evidence. Both the evidentiary standard that applies to this issue in the juvenile court and our standard of review on appeal are well settled. At a section 366.26 hearing, the court must determine by clear and convincing evidence whether it is likely the minor will be adopted. (§ 366.26, subd. (c)(1).) If the court finds a likelihood of adoption, the court *must* terminate parental rights, in the absence of statutory exceptions that mother does not argue are applicable here. (*In re Celine R.* (2003) 31 Cal.4th 45, 53 [if evidence at section 366.26 hearing shows child is likely to be adopted, juvenile court "must order adoption and its necessary consequence, termination of parental rights, unless one of the [statutorily] specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to the child."]; *In re A.A.* (2008) 167 Cal.App.4th 1292, 1320 (A.A.).)

“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.] We review that 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.” (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292.) Moreover, we review the record in the light most favorable to the juvenile court’s findings, and draw all inferences from the evidence that support the court’s determination. (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1177.)

“The adoptability issue at a section 366.26 hearing focuses on the dependent child, e.g., whether his or her age, physical condition, and emotional state make it difficult to find a person willing to adopt.” (*A.A.*, *supra*, 167 Cal.App.4th at p. 1311.) “It is not necessary that the child already be in a potential adoptive home or that there be a proposed adoptive parent ‘waiting in the wings.’ [Citation.] [¶] Conversely, the existence of a prospective adoptive parent, who has expressed interest in adopting a dependent child, constitutes evidence that the child’s age, physical condition, mental state, and other relevant factors are not likely to dissuade individuals from adopting the child. In other words, a prospective adoptive parent’s willingness to adopt generally indicates the child is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family.” (*A.A.*, *supra*, 167 Cal.App.4th at pp. 1311-1312.)

The Agency asserts mother forfeited or waived the right to challenge the order terminating her parental rights because she did not argue below that Robert was not adoptable due to his extensive medical issues. We disagree. Since it is the Agency’s burden to establish a dependent child’s adoptability, sufficiency of the evidence to support an adoptability finding may be raised for the first time on appeal. (*In re A.A.*, *supra*, 167 Cal.App.4th at p. 1316.) Since mother’s sole contention on appeal is that the

juvenile court's finding that Robert is likely to be adopted is not supported by substantial evidence, she has not waived or forfeited her challenge. Accordingly, we address her claim.

Here, the evidence showed that while Robert is a cute, happy, energetic and inquisitive child, with a playful and caring demeanor, he has significant medical issues that require daily care. He must be tube fed 12 hours per day, either through the Broviac catheter or G-tube. He has an unknown amount of hearing loss, and may require hearing aids and instruction from a teacher for the deaf and hard of hearing. Although he had surgery to correct strabismus, which reportedly went well, he needed follow-up with an ophthalmologist. He has significant cognitive and motor delays -- at an adjusted age of 29 months he was functioning between six to 10.5 months. Although his delays had improved during his six month stay at UCLA and while in his foster mother's care, his functioning remained at a very low level. Because of his gastrointestinal issues and developmental delays, he requires significant services.

While Robert's age and temperament weigh in favor of adoptability, his medical issues and developmental delays present a potential obstacle to adoption. Although he had been making progress in reducing his delays, the growth was slow and he still was functioning well below his adjusted age. The Agency recognized that Robert required specialized placement -- which at least initially was not available in or near Tulare County -- yet failed to provide evidence of approved families willing to adopt children with the medical and developmental problems Robert faces. While two separate relatives had expressed a desire to have Robert placed with them with the intention of adopting the twins together, there is no evidence the relatives understood Robert's needs or the demands that would be placed on them if they adopted him; at best, the evidence showed they had a "growing awareness" of his needs and their ability to address them. Accordingly, their desire is too vague to be considered evidence that some family, if not the relatives, would be willing to adopt Robert. (*In re Asia L.* (2003) 107 Cal.App.4th

498, 512 (*Asia L.*) [foster parents' willingness to explore adoption too vague to be considered evidence that another family would be willing to adopt the children]; see also *In re Amelia S.* (1991) 229 Cal.App.3d 1060, 1065 [permanency hearing report indicating that a few foster parents were *considering* adoption is a far cry from the clear and convincing evidence required to establish the *likelihood* of adoption].)

Apart from the relatives, there is no evidence that anyone else was interested in adopting Robert. Robert's foster mother did say she was interested in either legal guardianship or adoption when Robert was first placed with her. The record is silent, however, on whether the Agency later discussed adoption with her. Although this could have been a case where the foster mother was a good prospective adoptive parent, there is no evidence that she wished to adopt Robert.

The adoption assessment completed before Robert was placed with his foster mother does not address the likelihood that Robert would be adopted within a reasonable time. Given this, and the lack of such evidence in the Agency's reports, the adoption social worker's opinion that Robert "appeared to be adoptable" is insufficient to support a finding of adoptability. (*Asia L., supra*, 107 Cal.App.4th at p. 512; see also *In re Brian P.* (2002) 99 Cal.App.4th 616, 624.)

In sum, we conclude the juvenile court's finding that Robert was likely to be adopted is not supported by substantial evidence.

**DISPOSITION**

The order terminating mother's parental rights as to Robert is reversed.  
The juvenile court is directed to hold a new hearing under section 366.26 to select and implement a permanent plan for Robert.

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Gomes, J.

WE CONCUR:

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Levy, Acting P.J.

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Detjen, J.