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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re S.Y. et al., Persons Coming Under the
Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

T.Y.,

Defendant and Appellant.

F070471

(Super. Ct. Nos. 09CEJ300200-5 &
09CEJ300200-6)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Fresno County. Brian M. Arax,
Judge.

Carol A. Koenig, under appointment by the Court of Appeal, for Defendant and
Appellant.

Daniel C. Cederborg, County Counsel, Amy K. Cobb and David F. Rodriguez,
Deputy County Counsel, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Kane, J. and Franson, J.

T.Y. (father) appeals from an order terminating parental rights (Welf. & Inst. Code, § 366.26)¹ to his daughter, S.Y. (born Aug. 2011) and son, D.Y. (born Oct. 2012) (collectively, the children). Father's sole contention on appeal is that there was insufficient evidence to support the juvenile court's finding that the children were generally adoptable. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2013, the children were taken into protective custody because father and the children's mother, V.M. (collectively, the parents), exposed the children to ongoing domestic violence in the parents' relationship. In addition, the children's three siblings and one half-sibling had previously been removed from the parents' custody due to severe physical abuse and neglect issues and the parents had subsequently failed to reunify with them. These circumstances led the juvenile court, in March 2014, to exercise its dependency jurisdiction over the children (§ 300, subs. (b) & (j)), remove them from parental custody, and deny the parents' reunification services (§ 361.5, subd. (b)(7) & (11)). The court in turn set a section 366.26 hearing to select and implement a permanent plan for the children.

The section 366.26 hearing was originally set for July 7, 2014. In the original report for the hearing, the social worker noted she was seeking a 90-day continuance in order to locate a permanent adoptive home for the children because the current foster parents were not willing to provide a permanent plan of adoption.

The report also reflected that a prior attempt had been made to place the children with prospective adoptive parents on June 6, 2014, but the placement fell through on June 23. The social worker reported: "The risk-adopt parents stated that there was a conflict between their only daughter, age 8, and [S.Y.], age 2. The risk-adopt parents also expressed that they were not able to meet the challenges presented with [D.Y.] and

¹ Further statutory references are to the Welfare and Institutions Code.

[S.Y.] hitting and throwing things. The [Fresno County] Department [of Social Services] had previously made the disclosure of the children's hitting during the risk-adopt matching.”

Despite the failed placement in June 2014, and the current foster parents' unwillingness to adopt the children, the social worker opined that the children—who appeared happy and well cared for by the foster parents—were generally adoptable. In support of her opinion, the social worker noted that the children were physically attractive and healthy and had no identified developmental issues. Although D.Y. had been diagnosed with asthma and allergies, for which he took medication when necessary, he was otherwise physically healthy. Both children were easily able to form attachments and had been attached to their previous long-term foster parents. The social worker described S.Y. as a “beautiful” and “easygoing child” and D.Y. as an “adorable” and “fun loving child.”

In an addendum report filed on November 17, 2014, the same day as the section 366.26 hearing, the social worker reported that the children still resided with the same foster parents as before and that the foster parents were still uncommitted to providing a permanent plan of adoption. The social worker reiterated her opinion that the children were generally adoptable for reasons similar to those stated in her original report and recommended that the juvenile court order adoption as the permanent plan for the children and terminate parental rights.

At the section 366.26 hearing, the social worker was called to testify regarding the contested issue of adoptability. According to the social worker's testimony, since the children's detention, they had been in a total of six placements with five families. The first and longest placement (August 2013 to March 2014) was with a foster family who wanted to adopt the children. Unfortunately, the foster mother became “very ill, critically ill” and the children had to be removed from the placement.

The next three placements were respite placements, including the current foster parents, who were the children's fourth placement until June 2014, when the children were briefly placed in the prospective adoptive home described above. The fifth placement only lasted 17 days. The social worker testified that the prospective adoptive parents reported they had made a "mistake" and the placement was terminated because S.Y. did not get along with the foster mother's eight-year-old child and the foster parents were concerned about D.Y. hitting.

After the fifth placement terminated, the children were returned to their current foster parents, who had also served as the fourth placement for the children. The social worker explained: "The [current] foster mother just fell in love with the kids. It was just going to be respite placement originally, but when the kids came back in June from the risk-adopt home she felt like she was getting a second chance at keeping the kids. So it was her hope she was going to talk her husband into adopting the children but that did not happen."

The social worker acknowledged that the foster father had expressed concerns about the children's hitting behaviors. However, the children's behaviors had improved and the more recent reason the foster father had given for not wanting to adopt the children concerned his age. The social worker testified: "He said by the [time] the children are 18 he'll be in his sixties and he feels like at this point in his life he doesn't want any children this young."

The social worker testified that 20 to 30 risk-adopt families had expressed an interest in adopting the children and that their hitting behaviors had been disclosed in the information provided to those families. Despite the large number of families interested in adopting, the social worker explained she had kept the children with their current foster family in the hope the foster father would change his mind and want to adopt the children. Despite his reluctance to adopt, the social worker still considered the children generally adoptable. The social worker explained:

“The children do not have any developmental issues whatsoever. The children are athletic. They’re—they don’t have any medical issues that prevent them from being adopted. They’re just beautiful children and energetic. Athletic, talkative, and they appear to be very bright and personable. Great personality. Nothing that would stand in their way of being accepted into a family.”

After listening to the testimony of the social worker and the parents, and the arguments of counsel, the juvenile court found the children generally adoptable and terminated parental rights. The court articulated its adoptability finding, in part, as follows:

“The question exclusively seems to be one of physical acting out [and] whether that demonstrates that the clear convincing evidence of general adoptability is not established. When we look at the whole picture these are very young children. They’re three and two so these early manifestations and problems from what they’ve been exposed to in the Court’s judgment the level of evidence does not arise to condemning them to never being adopted.

“When I look at present tense they are young and perfectly adoptable age. The report indicates they are able to form bonds.... They have no physical defects or deformities and described as beautiful children. They have no health issues except having asthma which is not deemed significant. So beautiful children with no distinct medical concerns who can form attachments who are young and perfectly adoptable age who have expressions of physical violence at early stage which are concerning.... I believe their age, physical emotional states, and ability ... to make connections supports that adoptability assessment [by] clear convincing evidence. [¶] ... [¶]

“The children are adoptable—generally adoptable by clear and convincing evidence. There’s some evidence of specific adoptability ... but we have not located successful adoptive placement so I do not make specific adoptability finding.

“Adoption is the appropriate permanent plan for the child or children.”

DISCUSSION

“The issue of adoptability ... focuses on the [child,] e.g., whether the [child’s] age, physical condition, and emotional state make it difficult to find a person willing to adopt.” (*In re Zeth S.* (2003) 31 Cal.4th 396, 406.) “All that is required is clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time.” (*Ibid.*) 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.” (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223, fn. 11.)

A child is either “generally” or “specifically” adoptable. A child is generally adoptable if the child’s traits, e.g., age, physical condition, mental state, and other relevant factors do not make it difficult to find a person who will adopt him or her. On the other hand, if a child is deemed adoptable only because of the caregiver’s willingness to adopt, the child is specifically adoptable. (See *In re R.C.* (2008) 169 Cal.App.4th 486, 492–494; *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1061.) If a child is generally adoptable, “the suitability or availability of the caregiver to adopt is not a relevant inquiry. [Citations.] Rather, a caregiver’s willingness to adopt serves as further evidence the minor is likely to be adopted within a reasonable time either by the caregiver ‘or by some other family.’” (*In re R.C.*, *supra*, at pp. 493–494, fn. omitted; see *In re Carl R.*, *supra*, at p. 1061.)

“[T]he 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.” (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1312; see *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649–1650.)

We apply the substantial evidence test to the juvenile court’s finding the children are adoptable. Our task is to determine whether there is substantial evidence from which

a reasonable trier of fact could find, by clear and convincing evidence, that the children are adoptable. “The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order.” (*In re R C.*, *supra*, 169 Cal.App.4th at p. 491.)

Here, as detailed above, there was substantial evidence the children were generally adoptable. They were very young, physically attractive and healthy, developmentally on target, had positive personalities, and were able to readily form attachments with their caregivers. In addition, 20 to 30 risk-adopt families had expressed an interest in adopting the children, notwithstanding their disclosed hitting behaviors, which were reportedly improving. Even the current foster mother expressed a willingness to adopt the children but was unable to convince her husband. The foster father, in explaining his reluctance to adopt, cited not simply his concerns about the children’s hitting behaviors (which father’s argument focuses on), but also his perception that he was too old to adopt such young children, which was not necessarily related to the children’s behaviors.

The record simply does not support father’s broad assertion that the children’s placement history demonstrates that “once their behavior problems are experienced, an adoptive home is not willing to make that commitment to them.” Indeed, this assertion is directly contradicted by evidence that the first family the children were placed with after their removal—when their behavior problems were presumably at their worst—and which constituted the children’s longest placement, were willing to adopt the children but were only prevented from continuing to care for them due to the foster mother’s serious health issues, which were unrelated to the children. Father’s emphasis on the number of placements the children underwent as evidence the children were not generally adoptable is also unpersuasive as the social worker’s testimony established the majority of those placements were respite placements, not prospective adoptive homes. For all these reasons, we reject father’s argument that the juvenile court’s finding of adoptability was unsupported by substantial evidence.

DISPOSITION

The order terminating parental rights is affirmed.