Filed 2/28/11 In re L.W. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re L.W., a Person Coming Under the Juvenile Court Law.	
SAN FRANCISCO HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. L.W., Defendant and Appellant.	A128617, A130108 (City & County of San Francisco County Super. Ct. No. JD093216)

L.W. (Father) appeals from juvenile court orders denying his request for presumed father status and terminating his parental rights. Because the order terminating parental rights is supported by substantial evidence that the minor, L.W., is likely to be adopted within a reasonable time, we affirm it. Our affirmance renders moot Father's appeal from the order denying presumed father status, which is therefore dismissed.

BACKGROUND

Four-and-a-half-year-old L.W. first came to the attention of the San Francisco Human Services Agency (the Agency) on July 21, 2009, when a woman who was caring for him contacted child welfare authorities.[1] She reported that Father had given L.W. to a

[1] Although only the Agency has filed briefs on appeal, the minor's attorney joins in the Agency's arguments and urges affirmance of both orders.

friend in Oakland who was to care for L.W. while Father was incarcerated, and that L.W. had been passed between that friend and the woman for the past three or four months. When neither of them could continue to care for the child, the woman brought him to the Agency. L.W. was thin and dirty, and was suffering from scabies. The whereabouts of his parents were unknown.

L.W. was detained and placed in a foster home. On September 10, 2009, the Agency filed a disposition report. Father was located in jail awaiting sentencing and expected to receive a three-year prison term. He reported that he and L.W.'s mother, S.I., had raised L.W. together until both were incarcerated. Although S.I. had been incarcerated since L.W. was two years old, she could not be located within the prison system. She had previously failed to reunify with at least two children. Father had a long history of drug abuse and intermittent incarceration extending back to his high school years.

The report described L.W. as "adorable" and "overall a very sweet little boy" who demonstrated significant language delays and was somewhat difficult to understand, although in his foster home his language skills were developing quickly. He had occasional fits of anger and sometimes told his foster parents that he would not tell them his real name. The social worker had referred L.W. to individual therapy and he was doing well in preschool. While much of L.W.'s background was unknown, the social worker wrote "it is clear that he has had many different caretakers and his basic needs have been neglected over the years. [L.W.] is thriving in his current placement where he is bonding with his caregivers and receiving much love and attention. [¶] [L.W.] is in need of a permanent home where he can continue to develop in a secure and nurturing environment. As his parents are unavailable to care for him and there are no adequate family members who have come forward to care for [L.W.], adoption is the recommended permanent plan." The Agency recommended against providing reunification services to either parent.

The jurisdiction and disposition hearing did not take place for several months while the Agency searched for S.I. On January 21, 2010, Father filed a motion for presumed father status that was opposed by both the Agency and L.W. The court denied Father's motion without prejudice and ordered him to undergo a paternity test.

The Agency filed an amended petition on February 16, 2010. It alleged that Father's numerous prison commitments, parole and probation violations, and modifications caused him to be incarcerated and unavailable to parent; that he had numerous felony convictions, including a 2009 violent felony conviction and three-year prison sentence for robbery; and that he failed to protect L.W. from the consequences of the caretakers' abuse and neglect during his periods of incarceration. The petition alleged that L.W. had untreated scabies and multiple dental cavities when he was brought to the Agency. It was also alleged that S.I. had been convicted in 2007 of second degree robbery involving a firearm, a serious felony, was incarcerated on an immigration hold facing deportation, and had failed to reunify with two other children.

In an addendum disposition report filed March 18, 2010, the Agency wrote that S.I. was located in ICE custody in Arizona, where she had been transferred upon her release from prison the previous summer. Father was then in state prison, with an expected release date in April 2011. L.W. remained in foster care. He had improved since he was placed with his foster parents, but still had difficulty interacting with adults and his peers. He had been diagnosed with post-traumatic stress disorder and exhibited sleep disturbance, developmental delays, and behavior and anger issues. He was in weekly individual therapy.

On March 29, 2010, Father filed a renewed motion for presumed father status. The disposition and jurisdiction hearing was held on April 2, 2010. The juvenile court denied Father's motion for presumed status after hearing his testimony. S.I. submitted as to jurisdiction. The court sustained the amended petition, declared L.W. a dependent of

the court in the Agency's care and custody, and scheduled a selection and implementation hearing. Reunification services were denied as to both parents.

The Agency's report for the selection and implementation hearing recommended that the court terminate parental rights and free L.W. for adoption. The court-ordered paternity test showed that Father was L.W.'s biological father. He remained incarcerated, and had not had contact with L.W. since his arrest in November 2008. L.W. had been in the same foster home since he was first brought into the shelter in July 2009. The social worker wrote that "In this home, [L.W.] has made great progress in that he has gained much weight, and is making developmental and emotional strides. [¶] [L.W.] has been attending the John King Head Start Program full time since August of 2009. Initially, [L.W.] was not successful in this program. School staff reported that he was having difficulties with peers and adults, was tantruming often, was unable to follow simple instructions and was generally disruptive. However, over the past year, school staff report that [L.W.] has made considerable improvements. [¶] [L.W.] has been seen for therapy at Southeast Child and Family Therapy Center for the past nine months. . . . He has also received a developmental assessment through the UCSF Early Childhood Development Clinic. This assessment diagnosed [L.W.] with the Axis I disorders of Post Traumatic Stress Disorder, chronic (309.81); Expressive Language Disorder (315.31); Parent Child Relationship (V61.20); and Neglect of Child (V61.21). His current therapist, Dr. Lisa Inman, has been working with [L.W.] and sees improvement in [L.W.'s] ability to cope and process his emotions." Although L.W. was initially very underweight, he was then in the 50th percentile for height and weight for his age group, in good health, and had been given extensive dental care. He had no special educational or developmental needs that would require an individualized education or family service plan.

The social worker wrote that L.W. "is an adoptable little boy who deserves the most permanent of permanent plans." A prospective adoptive couple had met with L.W.

twice and expressed a deep commitment to adopting him. The couple had been together for 12 years and married for seven. Both have advanced degrees. The prospective adoptive mother is an administrator at a local nonprofit agency and her husband is a psychotherapist. They have completed home study and set aside a bedroom for L.W. in their home. Their visits with L.W. were going very well, and they understood they would be fully financially responsible for L.W. after the adoption was finalized.

The selection and implementation hearing was held on September 29, 2010. S.I. submitted to the Agency's recommendation to terminate parental rights. The court found by clear and convincing evidence that L.W. was likely to be adopted, terminated parental rights, and ordered adoption as the permanent plan.

Father filed appeals from the juvenile court's orders denying his renewed request for presumptive father status (No. A128617) and terminating his parental rights (No. A130108).[2] We hereby consolidate the two appeals for disposition.

DISCUSSION

Father contends the order terminating parental rights must be reversed because the finding that L.W. is adoptable was not supported by substantial evidence. Specifically, he maintains the Agency failed to demonstrate L.W. was generally adoptable in light of his emotional handicaps, developmental delays, age, and mixed ethnic background. He also contends the Agency presented inadequate information about the proposed adoptive parents to show any real likelihood that they were truly committed to adopting L.W. and qualified to meet his needs. His contentions are unpersuasive.

[2] Ordinarily, any dependency order made contemporaneously with an order setting a selection and implementation hearing may only be challenged by a writ petition. (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1022; Welf. & Inst. Code, § 366.26, subd. (l)(2).) Here, however, we address Father's appeal because the trial court failed to advise Father of the writ requirement. (*In re Athena P.* (2002) 103 Cal.App.4th 617, 625; Welf. & Inst. Code, § 366.26, subd. (*l*)(3)(A); Cal. Rules of Court, rule 5.590(b).)

I. *The Law*

The juvenile court may terminate parental rights only if it determines by clear and convincing evidence that it is likely the child will be adopted within a reasonable time. (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1204.) 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." (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) While it is not necessary that the child already be in a prospective adoptive home or that there be a proposed adoptive parent "waiting in the wings," "[u]sually, 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 re Asia L.* (2003) 107 Cal.App.4th 498, 510.)

"We review the factual basis of a termination order to determine whether the record contains substantial evidence from which a reasonable trier of fact could find a factual basis for termination by clear and convincing evidence." (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.) In making this determination we resolve all conflicts in favor of the prevailing party and draw all legitimate inferences to uphold the verdict. If more than one inference can reasonably be deduced from the facts, we are without power to substitute our deductions for those of the trier of fact. (*Jason L., supra,* at p. 1214.)

II. *Analysis*

We have no difficulty concluding the evidence of L.W.'s adoptability meets this standard. Father concedes that L.W. has no special educational or developmental needs, and argues instead that only his "psychological/emotional condition . . . creates the basis

for [Father's] claim." But our review of the record shows evidence of continual progress in L.W.'s ability to cope and process his emotions. Although L.W. was initially diagnosed with post-traumatic stress and other disorders related to his difficult early years and he has some developmental delays and emotional challenges, he has made great strides developmentally, emotionally, and, specifically, in his ability to cope with and process his emotions. Thus, while L.W.'s social worker recognized his special needs, she nonetheless concluded that he "is an adoptable little boy who deserves the most permanent of permanent plans." Moreover, the prospective adoptive parents have substantial experience with children, and their backgrounds in psychology and social work indicate their suitability to understand and meet the challenges of parenting a child with L.W.'s needs.

We do not minimize the particular challenges that will face L.W.'s adoptive parents, but there is no indication in this record that those challenges pose an impediment to likely adoption. As the Agency observes, many children in dependency have special needs, come from diverse racial backgrounds, and suffer developmental delays. These factors do not necessarily "militate[] against a finding of adoptability," as Father suggests, particularly since L.W. has made significant advances after his removal from a neglectful and chaotic environment. (See, e.g., *In re Jennilee T.* (1992) 3 Cal.App.4th 212, 224 [prospect that the minor might have some continuing neurological problems did not foreclose a finding of adoptability].) We are satisfied that the juvenile court appropriately found by clear and convincing evidence that L.W. is likely to be adopted within a reasonable amount of time. (See *In re A.A.* (2008) 167 Cal.App.4th 1292, 1313-1316; *In re Zeth S.* (2003) 31 Cal.4th 396, 406.)

Father's observation that there is no evidence that *other* approved families are willing to adopt L.W. does not undermine the juvenile court's ruling. The law "does not require evidence of additional approved families who are available and willing to adopt the children." (*In re A.A.*, *supra*, 167 Cal.App.4th at p. 1313.) Here, there are

prospective adoptive parents who appear deeply committed to adopting L.W., have an approved home study, and, by virtue of their professions, seem to be uniquely well-suited to understand and care for him. "[T]he 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*." (*In re Sarah M., supra,* 22 Cal.App.4th at pp. 1649-1650.) While Father contends that the prospective adoptive couple has not spent sufficient time with L.W. for their interest in adopting him to support a general inference of adoptability, the trial court could reasonably disagree.

Father also suggests the court paid inadequate attention to the fact that L.W. demonstrates characteristics of a "special needs" child as defined by Family Code section 8545.[3] This argument, too, is unpersuasive. Section 8545 defines "special-needs child" as a child whose adoption without financial assistance would be unlikely because of adverse parental background, ethnic background, race, color, language, membership in a sibling group that should remain intact, mental, physical, medical or emotional handicaps, or age of three years or more. As we have discussed, there is substantial evidence here that L.W. is likely to be adopted by the couple identified in the Agency's report regardless of the factors—his race, age, psychological condition and family history—Father claims to be "barriers to adoption." Moreover, the report states that the prospective adoptive parents "understand that they will be fully financial[ly] responsible

[3] To be clear, Father does not claim that Family Code section 8545 applies in this case. Nor does he argue that special needs children are generally unadoptable as a matter of law, although that might be one possible, if erroneous, implication of his argument.

for [L.W.] once adoption is finalized," and there is no evidence to suggest they lack the financial resources to properly attend to L.W.'s needs.

Father also asserts the court should have discredited the selection and implementation report because the social workers who authored and supervised it are not adoptions workers, i.e., staff members of a licensed adoption agency who are specifically trained and qualified to evaluate a child's needs and potential adoptability and assess potential adoptive parents. This contention is also meritless. He relies on Welfare and Institutions Code section 361.5, subdivision (g)(1), which requires the court, after setting a section 366.26 hearing, to "direct the agency supervising the child and the licensed county adoption agency, or the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency, to prepare an [adoption] assessment . . . ." L.W. admits that the Agency is a licensed state adoption agency as well as the agency charged with supervising dependent children, and there is no evidence in the record that the responsible social workers were not properly trained to perform adoptions assessments. Moreover, the Agency's report states that a "joint adoptability assessment" was completed on August 10, 2010. The solid inference to be drawn is that the assessment was prepared in compliance with the statutory requirements.

Finally, Father contends the court was misled by the report's references to the proposed adoptive parents as "prospective adoptive parents," because they had not yet filed an adoption petition. The statute he relies on says, "No petition may be filed to adopt a child . . . declared free from the custody and control of either or both birth parents and referred to the department or a licensed adoption agency for adoptive placement, except by the prospective adoptive parents with whom the child has been placed for adoption . . . ." (Fam. Code, § 8704, subd. (b).) Apparently Father believes that use of "prospective" rather than "proposed" to describe the couple who wish to adopt L.W. misled the court that L.W. had already been placed with them. There is no basis to

conclude the court was misled. The Welfare and Institutions Code section 366.26 report clearly stated that L.W. was still in the foster home he had been placed in since he was first brought into shelter in July 2009. Nothing in the record supports Father's claim that the alleged "mislabeling" of the potential adoptive parents "undermined the legal analysis by implying solid evidence that did not exist."

We are satisfied that substantial evidence supports the court's finding, by clear and convincing evidence, that L.W. is likely to be adopted within a reasonable time. We therefore will not address Father's additional contentions that (1) in the absence of sufficient evidence of adoptability, the court should have identified adoption as the permanent plan and continued the case for up to six months without terminating parental rights pursuant to Welfare and Institutions Code section 366.26, subdivision (b)(4); and (2) termination of parental rights without a finding by clear and convincing evidence of adoptability violated Father's due process rights. The Agency's motion to consider post-termination of parental rights evidence is denied as both unnecessary to the resolution of this appeal and inconsistent with *In re Zeth S.*, *supra*, 31 Cal.4th at pages 405-414. Although *Zeth S.* contemplates that the reviewing court may appropriately entertain postjudgment evidence if it "stands to completely undermine the legal underpinnings of the juvenile court's judgment" when all parties stipulate to reversal (*id.* at p. 414, fn. 11), this is not such a case; nor does this case warrant the creation of a new exception to the general rule of nonadmissibility of postjudgment evidence.

Our affirmance of the order terminating parental rights renders moot Father's appeal from the order denying presumed father status (No. A128617). Father does not contend the denial of presumed father status affected the outcome of the Welfare and Institutions Code section 366.26 hearing, and the record suggests no basis for such a claim. Accordingly, appeal no. A128617 is dismissed. (*In re Jody R.* (1990) 218 Cal.App.3d 1615, 1621.)

DISPOSITION

The orders denying Father's renewed request for presumed father status and terminating his parental rights are affirmed.

_____
Siggins, J.

We concur:

_____
Pollak, Acting P.J.

_____
Jenkins, J.