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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re K.W. and M.F., Persons Coming
Under the Juvenile Court Law.

C.S.,

Petitioner,

v.

THE SUPERIOR COURT OF
HUMBOLDT COUNTY,

Respondent;

HUMBOLDT COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES,
et al.,

Real Parties in Interest.

A134967

(Humboldt County
Super. Ct. Nos. JV100101, JV100102)

I. INTRODUCTION

Petitioner C.S., the mother of half-siblings K.W. and M.F., seeks extraordinary writ review of juvenile court orders following a contested 18-month review hearing on family reunification. The court terminated reunification services, ordered that visitation return to being supervised, and set a hearing pursuant to Welfare and Institutions Code section 366.26¹ for permanency planning.² Mother contends the court erred in failing to

¹ All further unspecified statutory references are to the Welfare and Institutions Code.

² The alleged fathers of the two children are not parties to this proceeding.

return the children to her custody and in finding that unsupervised visits were detrimental to the children. We will deny the petition.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Detention and Custody

On July 14, 2010, Humboldt County Child Welfare Services (the Department) took six-year-old K.W. and three-year-old M.F. into protective custody due to inappropriate housing conditions and mother's inability to recognize the severity of those conditions. The Department filed a section 300, subdivision (b), petition as to each minor, alleging substantial risk of physical harm or illness due to mother's willful or negligent failure to provide them with adequate food and shelter and mother's substance abuse or mental illness, which rendered her unable to care for the children.³

According to the detention report, the minors were placed into protective custody when officers of the Fortuna Police Department responded to a call about a fight between mother and another person at mother's home in Fortuna. Officer Elebreck reported that the home had no running water and the children were using the bathtub as a toilet. The home had no edible food, no working stove, and was rat-infested. Social worker Marta Perez responded to the residence and observed that the bathtub and toilet were both filled with garbage and feces, and the kitchen sink was overflowing with dishes and garbage. The refrigerator contained moldy food, there were a few frozen items in the freezer, and the pantry cupboards were empty. There were piles of clothing throughout the house, and a strong smell of urine in the children's bedrooms.

Perez went to the police station to pick up the children. She also met with mother, who presented as "agitated and distressed," and did not understand why she was being arrested. When Perez tried to explain the concerns about the family's housing, mother interrupted, stating that it was not her fault and that her roommate had "trashed" the house after they got into a fight. Mother stated that limited resources made it hard for her

³ Identical petitions were filed on behalf of each minor.

to maintain the house to proper standards and reported that she was unable to pay her \$1,700 water bill.

The Department had received nine referrals regarding mother since August 2005. Five of the nine referrals were assigned for investigation. All five alleged neglect of one or more of mother's four children.⁴

Mother contested detention; after the hearing, the court entered findings and orders as to both minors.

B. *Jurisdiction and Disposition*

Mother contested jurisdiction. After a hearing on August 10, 2010, the court sustained the petition.

At the disposition hearing, the court considered disposition reports filed in each of the minors' cases.

The disposition report⁵ stated that mother appeared to be in denial about the circumstances that brought the matter before the court in that she described conditions at the home as not that bad and consistently shifted blame onto others. Mother had agreed to take a drug test but had not yet done so. Mother's mental health assessment had been conducted, but because mother had not signed a release, the only information the Department could obtain was that she showed up for the assessment. Mother reported that the assessment yielded no recommendations and stated that she would contact the clinician so that information could be released to the social worker. At the time the report was written, mother had not yet done so.

The report stated that "mother loves all of her children deeply and has previously successfully parented her children without the intervention of Child Welfare Services." By way of explanation, the report noted that mother's eldest child was born in 1995 and

⁴ K.W. and M.F. have two older half-siblings who are not parties to this proceeding.

⁵ Although separate petitions and reports were filed for each minor by the Department, they are largely identical except for information specific to each child. Because the issues in this case concern identical facts as to each child, in the interest of clarity, we will refer to documents filed by the Department as singular.

CWS did not investigate referrals against mother until 2005. Mother had secured employment and was working.

The social worker indicated that mother needed to actively participate in her case plan and secure permanent housing. Despite mother's having reported that she paid monthly rent and could stay in her residence, the social worker learned that mother had not paid rent in approximately two years and was to vacate the residence as soon as possible. The social worker visited the residence in late August 2010, and found a mound of toilet paper and tissue on the side of the house, a bedroom blocked off by clutter and garbage, still no running water in the house, and still four broken windows with glass in them. Mother stated she was unaware of broken glass or feces until the social worker pointed out the conditions. Mother had begun to engage in some services but felt they were not necessary to remedy the issues that led to intervention by the Department. Based on the foregoing, the social worker recommended that the minors be made dependents of the court and mother be offered family reunification services. The court so ordered. Visitation was set at a minimum of four hours per week, supervised.

Mother's case plan required her to: (1) obtain a mental health assessment and follow any recommendations; (2) access counseling services to assist with housing; (3) attend a parenting program; (4) attend budgeting workshops to learn how to manage resources; and (5) periodically submit to random drug testing.

C. *Six-Month Status Review*

The six-month status review hearing took place on April 19, 2011. The court considered the Department's Status Review Report, received March 3, 2011, and an April 14, 2011, report submitted by the Court Appointed Special Advocate (CASA).

Both reports recommended that mother receive six more months of services. According to the Department's report, mother had not yet found safe and stable housing. She agreed to attend counseling at Hum Works for housing assistance, but did not want to participate in transitional housing services. Mother had not addressed her mental health issues or attended counseling sessions as recommended by her mental health assessment. She completed a parenting class. Between January and March, she telephoned the

children “practically every night,” and visited them regularly, but visits had to be moved from the foster parents’ home to Family Connections Center because, according to the foster parents, mother was unable to follow their house rules. This included refusing to leave by 8:00 p.m. and, on one occasion, bringing her boyfriend whom she had repeatedly accused of molesting the girls on several occasions and who had been arrested in 2008 based on those allegations.

The children were reported to be doing well in a non-related extended family member foster home in Eureka after having been removed from their first placement with an aunt when police found them at mother’s residence in violation of a court order. Each child had expressed that she missed her mother and would like to be returned to her care.

The court adopted the recommended findings and orders, including that reasonable services had been provided and that mother’s progress on her case plan was minimal.

At an interim review hearing on June 7, 2011, counsel for the Department informed the court that mother tested positive for methamphetamines on April 15, 2011. The court ordered a substance abuse (AOD) assessment.

D. *12-Month Status Review*

The Department’s 12-month status review report, dated August 9, 2011, indicated that mother had made significant progress in completing her case plan objectives in the past six weeks and had started to take responsibility for her actions that led to court intervention, but that she was currently homeless and living with friends and family in the Eureka and Fortuna areas.

When confronted about the positive drug test in April 2011, mother blamed her diet pills but could not identify what they were. On April 21, 2011, mother refused to drug test even though the social worker drove her to the testing site. Mother said she took a diet pill that day and was afraid a drug test would come back positive. On May 3, 2011, the social worker gave mother a letter instructing her to drug test before her next visit on May 5. Mother failed to drug test before that date; she said she did not open the letter and so was unaware that she was supposed to drug test.

On approximately June 10, 2011, mother met with a social worker at the Multiple Assistance Center (MAC) to do an intake for the residence. The social worker reported that mother appeared to be under the influence of methamphetamines because she was jittery, talking very fast, and her speech made no sense. Mother denied any drug use and said she only took diet pills. The social worker told her that to continue the intake process, she would have to show three weeks of clean drug tests and to complete an AOD assessment. Mother agreed.

Mother completed her AOD assessment on June 30, 2011, and was found not to meet the criteria for treatment. She was drug tested on June 20 and 28, 2011, and the tests were negative. Mother said she had stopped taking diet pills. At a supervised visit on July 5, mother appeared more coherent and relaxed than in the past.

Mother completed a mental health assessment at HumWorks on June 23, 2011. The clinician stated that mother did not meet the medical necessity for mental health services standard, but referred mother for case management services to help with her housing search. Mother was homeless and willing to go into the MAC if no other housing option was available.

Mother consistently attended visits with the children twice a week for two hours at the Family Connection Center. The Department stated that she was “very compliant with visitation,” and that she was “very appropriate and loving with the children.” In turn, the children were “very affectionate and appear bonded with their mother.” The Department recommended that visits be unsupervised.

The children were still doing well in their placement. Mother felt that the main barrier preventing her from reunifying was poverty. She was looking for a job and safe and adequate housing, but expressed that she needed more time. The Department and CASA both recommended six more months of services.

The court found that mother had made adequate progress on her case plan and that she had demonstrated the capacity and ability to complete the case plan objectives. The court ordered six more months of services and modified the case plan to provide mother with unsupervised visits. An interim review was set for November 14, 2011.

At interim review hearings, the court considered the foster parents' request for de facto parent status. Mother and the Department both objected to the request; counsel for the minors supported the request. Following the contested hearing, the court took the matter under submission on December 7, 2011. On December 21, 2011, the court filed orders granting the foster parents' requests for de facto parent status of both children.

At a hearing to set the contested 18-month review, counsel for the minors requested that mother submit to a hair follicle drug test prior to the hearing date and that the test results be reported to the court. Mother indicated through counsel that she had no objection.

E. *18-Month Status Review*

The court received the Department's original 18-month status review report on December 21, 2011. According to the report, mother was still homeless. She drug tested regularly in September, October, and November 2011: nine tests were negative; two were positive for methamphetamines. Mother adamantly denied any substance abuse and stated that the positive test results were due to her allergy medication and/or diet pills, but she did not provide the social worker with proof of a prescription for diet pills or allergy medication.

The social worker stated that "[b]ut for lack of housing, [mother] does not pose significant risk of harm to the children. Unfortunately, [mother] has exhausted the amount of time she may receive family reunification services and a permanent plan for the children needs to be made." The social worker also stated that mother and the children were bonded and that it would be detrimental to sever that bond by putting the children up for adoption. The Department recommended a permanent plan of guardianship with a relative.

Mother contested the recommendation and the court set a trial date of February 1, 2012.

On January 24, 2012, the court received from the Department an addendum to its 18-month status review report. In the addendum, the social worker stated that mother had moved to a two-bedroom apartment in Carlotta which she was sharing with a roommate.

Mother wanted the minors to live in one of the bedrooms with her, and the roommate would have the other bedroom. The roommate was planning to move out in a few months at which time mother and the minors would have the apartment to themselves. Mother's rent was \$350 per month which was being paid by her mother. Mother was confident she could pay rent herself when the children were returned to her and she qualified for cash aid assistance. Mother stated that she wanted the minors to remain at their current school and would arrange daily transportation with help from her family.

The report stated that mother had found safe and stable housing and had mitigated the issues that brought her before the court. Mother completed case plan activities which included a mental health evaluation, an alcohol and drug assessment, and had completed random drug screenings. The Department recommended that the minors be reunited with their mother and that family maintenance services be provided.

A second addendum report by the Department was provided to the court on February 1, 2012. According to the report, a Team Decision Making meeting was held in late January to create a transition plan for the minors in the event that they are reunified with mother. Due to unspecified difficulties with creating the plan, it was decided that the Department would create the plan if they are returned to mother.

At a pre-trial hearing on February 21, 2012, counsel for the minors stated that mother still had not submitted to the hair follicle testing. Counsel for the Department stated that the test was scheduled for February 22, with the results due on March 1, 2012. Counsel for the minors also filed an at-issue memorandum/pretrial statement, taking issue with the Department's recommendation of reunification. Counsel noted a number of unanswered questions, including issues pertaining to drug testing and positive drug tests, mother's driver's license, her living at the uninhabitable home until very recently and still storing her belongings there, rent and utilities for the new apartment, the roommate's background, mother's leaving the children at a motel with a man alleged to be involved with illegal drugs, and a recent charge against mother for possession of a controlled substance.

F. *Contested 18-Month Review Hearing*

The court heard testimony on March 7 and 8, 2012, and received into evidence the status review report and two addenda from the Department.⁶

Social worker Alyssa Bowles-Martinez testified that she had been assigned to this case since July 2010. She authored the reports and recommendations for return of the minors to mother. She testified that, in her professional opinion, returning the minors to mother would not place them at significant risk of harm. Even if mother had submitted to the hair follicle test and assuming it had come back positive, it would not change Bowles-Martinez's recommendation that the children be returned to mother because the Department had been "very successful in working with families with AOD issues," and services could be provided to mother in the family maintenance plan.

The social worker remembered meeting with mother and the minors' counsel at mother's new apartment and discussing mother's driver's license situation, but did not remember whether mother had a valid license at that time. She did not know whether mother currently had a valid license. Bowles-Martinez did not conduct a criminal background check of mother's new roommate because parents have the right to live with whom they choose and it is "their job as parents to . . . make good choices in that regard." Bowles-Martinez testified that she was aware that, in December 2011, mother had left the minors alone in a hotel room with a man named Al Machado who had been on probation five times for violations of the Health and Safety Code. When Bowles-Martinez asked mother about this, mother said Machado was a friend and it was only for 15 minutes. At the time she spoke with mother about this, Bowles-Martinez was unaware of mother's arrest for possession of Xanax pills. Bowles-Martinez asked mother to continue to drug test before visits with the minors to show that she continued to be clean and sober. From late November until the end of the year, although mother stated that she drug tested in Fortuna "a few times," the social worker received no results from any tests. The social

⁶ The court also received into evidence a CASA report received on January 5, 2012, and a CASA Addendum Report received on March 5, 2012. Neither of these reports was included in the record on appeal.

worker had a conversation with mother about needing to verify the tests, but mother provided no way for the social worker to follow up. The social worker acknowledged that mother tested positive for methamphetamines three times in 2011, explained it as being caused by diet pills, but stated that she did not know what the diet pills were. The social worker was also aware that mother refused to drug test on September 9, 2011, because she used alcohol the previous night.

Bowles-Martinez testified that the last time she spoke with mother about the hair follicle testing was the previous day. Mother stated that she had not submitted to the test because she could not get time off from the job she started in January 2012. The social worker testified that this was “a reasonable reason to not get the hair follicle test.”

The social worker believed she had asked mother if mother was on a lease agreement for the new apartment, but she did not remember what mother said. She also did not know whether mother was paying any of the rent or utilities herself. Mother told Bowles-Martinez that she recently pled guilty to a criminal offense, but Bowles-Martinez did not know whether she was facing any jail time. Bowles-Martinez stated that in February 2012 she learned of mother’s arrest in January 2011 for possessing 208 Xanax pills, and that mother told her she got them at a garage sale. Regarding mother’s explanation that her inhaler caused her drug test results to be positive for methamphetamines, Bowles-Martinez testified that she investigated mother’s claim and concluded that the medication would not cause a positive drug test.

Mother’s counsel questioned Bowles-Martinez about mother’s employment and the hair follicle testing. Bowles-Martinez testified that the Department offered mother transportation to and from the testing and arranged for the testing site to make special accommodations for mother’s work schedule.

Mother took the stand and testified that her rent and utilities were paid and she had no reason to think she would be unable to pay her rent for the next month. She was unsure whether she intended to stay in the apartment, stating that it depended on the minors’ school. She currently worked for two employers: one since January 2012 performing in-home care and housecleaning duties; the other had been off and on since

September 2011 and involved housecleaning. Mother stated that she did not refuse to submit to a hair follicle test; rather, she was unable to get the time off work.

Minor's counsel asked mother about the Xanax pills. She testified that the pills came from a storage unit sale, but that she did not know what kind of pills they were. She acknowledged that there was a warrant for her arrest in February 2012 for the case involving the Xanax pills, but stated that she was not aware that she was supposed to go to court. She denied having been arrested in January 2011. Regarding a snort straw with white powdery residue and two containers of marijuana that police found in her residence when they found the Xanax pills, mother said she did not know the items were in the house and she believed they were "from a previous roommate." She conceded having left the minors alone with Machado in the motel room, but stated that it was "[f]or less than five minutes." Machado was her roommate at the time. Mother said she was not aware at the time that Machado had been on probation for drug violations, but she knew he had been on probation and was receiving AOD services.

Regarding the status of her driver's license, mother testified that she was not sure whether she had a valid license or not. Usually someone else would drive her places, but she acknowledged also driving herself. She did not have a license in her possession because a police officer had taken it away, telling her that her license had been "terminated." If her children were returned, she would have friends or family get them to school and she would probably live with them during the school week at her sister's house.

Mother testified that the last time she drug tested was in January at the hospital in Fortuna, but when she went back to get the results, "they said they couldn't locate them." Mother stated that she always signed a release so the Department could access the results.

Regarding water bills, mother testified that she had paid the two bills for which she was responsible. A third water bill had not been paid; that account was not in her name. It was mother's understanding that if her current roommate moved out, the water and electric bills could be listed in her name.

Mother testified that her father is a car dealer. The car she was driving belonged to him and was insured by the dealership. Mother did not know if her father's policy covered her driving without a license, but she believed she was covered.

Regarding visits with the minors since January 2012, mother stated that she had missed one visit and was late "pretty much every time."

The de facto/foster mother, Gretchen R., was called on behalf of the minors. She testified that she and her husband had been foster parents for the minors since December 2010. She testified regarding difficulties with visitation because of mother's habitual lateness.

In closing, counsel for the Department reiterated its recommendation that the minors be returned to mother. Mother had made "tremendous strides," as could be seen by comparing the photographs of her new apartment with those of the house from which the children had been removed. Counsel acknowledged that mother was not perfect, but cited the social worker's testimony regarding family maintenance services and AOD services that would be available to mother with the Department's continued monitoring. The Department did not believe there was significant risk of harm to the children or that there were any safety issues. Counsel commended mother for remaining employed, renting a nice apartment, and making plans for the minors.

Mother's counsel argued that no evidence had been presented to rebut the Department's assessment of the appropriateness of the new apartment and mother's living situation. The Department concluded it was in the children's best interests to be returned to mother. There was no evidence that any concerns "rise to the level to establish substantial risk of detriment required to overcome the mandate of return under 366.22." Mother was employed, had maintained her employment and housing for about two months. The children were bonded to mother, and the Department believed it would be detrimental to sever that bond. Counsel opined that the social worker had worked hard on this case, knew mother and the family, and had considered all the concerns and had made plans to account for them.

Counsel for the minors opposed reunification. He argued that the “elephant in the room” that was being ignored was “the drug problem.” Despite mother’s being in possession of 208 Xanax pills in January 2011 and having just pled guilty to some form of substance abuse charge, the social worker testified that she did not know what the possible sentence was, including whether mother might have to go to jail, and stated that it was not of concern to her. Counsel pointed out that mother had not drug tested in the last three months despite being told to do it before every visit with the minors, that mother had agreed to the hair follicle test but had not done it, and that she continued to deny the positive tests for methamphetamines. Counsel questioned why visits with the minors were unsupervised when mother had been told that refusing to test would be treated as a positive result. Counsel also expressed concern that the Department had not conducted a criminal background check of mother’s new roommate and apparently was not concerned that mother was driving without a license. Counsel questioned how the minors would even get to school on time when mother had no license, was in denial of any drug problem, and was chronically unable to get to visits on time. He pointed out that the Department had been recommending termination of services until, “all of a sudden,” mother found this housing situation and now “everything is fine. And that’s just completely ignoring a whole body of evidence and concern that’s out there.”

Counsel for the de facto parents joined the arguments of minors’ counsel. She argued that the Department appeared to have narrowed the case down to simply an issue of mother’s housing, but that that was not the only issue that brought this matter to court. She expressed concern that the social worker did not look into the driver’s license issue or check on the background of mother’s new roommate, and was not concerned about the drug issue. Counsel stated her opinion that “the drug issue is a major concern.” She also joined minors’ counsel’s questioning why visitation was now unsupervised in light of the various concerns. She pointed out that the minors had been living with the R.’s since December 2010, and the R.’s were willing to become their legal guardians and provide a permanent home.

Upon submission by all parties, the court issued its ruling from the bench. During the time following the 12-month review on August 9, 2011, the court found that mother “really hasn’t engaged the process at all.” The court stressed that “[t]his is not a case of just a home.” The 18-month review should have taken place on January 12, 2012, which was also on or about the date mother moved into the new apartment. The court noted that, until mother found the new apartment, the Department was recommending discontinuing services for mother and moving to a permanent plan for the minors. The Department changed its recommendation, but it failed to address the factors that caused the deterioration of the family’s home in the first place. Mother still did not accept responsibility for the positive drug tests, and continued to minimize and to blame others. She denied making statements the social worker testified to, and blamed the judge for making her plead to the criminal case. She did not tell the social worker about being arrested for the Xanax pills, and the court would not know about it at all but for the fact that a bench warrant issued in February 2012. Nothing demonstrated to the court that returning the minors to mother would not constitute returning them to the same chaos from which they were removed. She chose a home “in rural Carlotta” although the children are attending school in Eureka; when asked how she would get the children to school, she talked about moving. “Even if she’s in a wonderful place now, we don’t know what her next plan is. That, frankly, isn’t substantial and does not provide for the safety and protection of the children.” The court also found it problematic that the Department did not check into mother’s new roommate, particularly with mother’s history of not protecting the children. The court found the Department’s sending mother for an AOD assessment without providing information to the clinician was a waste of time and did not produce anything meaningful to the court. Mother repeatedly failed to drug test, and then also failed to go in for the hair follicle test despite being told in court on February 21 that it was necessary and despite the social worker’s offer of assistance and the lab’s flexibility with timing. The court was concerned that the Department had accepted mother’s excuse without investigating further. The failures to test are deemed a series of positive tests, but there was no information on the extent of what mother’s drug

use may or may not be, mother was still in “complete denial,” and to assume that the situation could be handled via family maintenance services without affecting the safety of the children was “really concerning” to the court. The court noted that the Department had not explored how the children’s needs would be met on a day-to-day basis with the employment schedule mother outlined.

The court described the legal standard to be applied: The court “must return the children to the parent’s custody unless there is proof by preponderance of the evidence that return to the custody of the parents would create a substantial risk of detriment to the children’s safety, protection, physical or emotional well-being, and that failure to participate regularly and make substantial progress in the court ordered treatment program is prima facie evidence that return would be detrimental . . . [to] the children.” The court reviewed and considered the social worker’s reports and the reports of CASA. The court found that in the time since the 12-month review hearing in August 2011, mother did “little or nothing to be working on her service plan at all.” Specifically, the court noted mother’s unwillingness to drug test or to address the substance abuse issues, and her denial of the problem and failure to take responsibility. Mother failed to fully avail herself of the services that were offered, and the court believed that returning the children to mother “would be placing them back into the same chaos and harm [from] which they were removed.”

The court terminated family reunification services to mother and ordered that the minors remain dependents of the court. The court found, by a preponderance of the evidence, that return of the minors to mother would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the minors. The court set the section 366.26 permanency planning hearing for June 27, 2012. Pending an updated case plan and a hearing in two weeks, the court temporarily ordered visits to be supervised, finding unsupervised visits detrimental to the children.

Mother timely filed a petition for extraordinary writ (Cal. Rules of Court, rules 8.452, 8.456) challenging the orders issued by the court and requesting a stay of the

section 366.26 hearing. The Department did not file a response to the petition. We granted the stay request.

III. DISCUSSION

A. *Substantial Risk of Detriment*

Pursuant to section 366.22, subdivision (a), “. . . the permanency review hearing shall occur within 18 months after the date the child was originally removed from the physical custody of his or her parent or legal guardian. The court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment. . . .”

Mother challenges the sufficiency of the evidence supporting the juvenile court’s finding that return of the children to her care would create a substantial risk of detriment to their safety, protection, or physical or emotional well-being.

“The issue of sufficiency of the evidence in dependency cases is governed by the same rules that apply to other appeals. If there is substantial evidence to support the findings of the juvenile court, we uphold those findings. [Citation.] We do not evaluate the credibility of witnesses, reweigh the evidence, or resolve evidentiary conflicts. Rather, we draw all reasonable inferences in support of the findings, consider the record most favorably to the juvenile court’s order, and affirm the order if supported by substantial evidence even if other evidence supports a contrary conclusion. [Citation.] The appellant has the burden of showing the finding or order is not supported by substantial evidence. [Citation.]” (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

The court found that, from the time of the 12-month review in August 2011 to the 18-month review in March 2012, mother “really hasn’t engaged the process at all,” other than finding a place to live. The court emphasized that the case was about more than finding a home, and read from the section 300, subdivision (b)(2), allegations of the original petitions to the effect that mother’s substance abuse and/or mental health issues

rendered her unable to care for the children and may have contributed to her inability to recognize the severity of the unsanitary conditions in the home; she was in denial and blamed others for her problems. The court noted that the home must have been habitable at one time before its condition degraded, and that the issue of what caused the conditions of the home had never been addressed.

The record supports the court's finding of detriment. One of the court's primary concerns was mother's failure to acknowledge or address the issue of substance abuse. The Department reported that mother drug tested 11 times between September 19 and November 18, 2011. Two of those tests were positive for methamphetamines; mother blamed her allergy medication and/or diet pills, but as of the date of the report (January 10, 2012), mother had not provided the social worker with a prescription for either allergy medication or diet pills. Despite being required to drug test before visiting with the children, mother did not drug test after November 18, 2011. Despite agreeing to a hair follicle test, and despite the social worker's offer of assistance and the lab's agreement to be flexible with scheduling, mother failed to submit to the test and blamed her work schedule. In sum, the court had no information on the extent of mother's drug use, and was understandably concerned about the Department's assumption that any problem could be dealt with in maintenance services without affecting the children's safety.

With respect to mother's housing, the record shows that she found the apartment at the very end of the 18-month period in January 2012. It was unclear whether mother had paid any of the rent herself, whether she would be able to afford to pay rent and utilities for the apartment if her roommate moved out, and whether she would be allowed to stay in the apartment if the roommate moved out. The court expressed concern that mother chose a home in "rural Carlotta" when the children were "successfully attending school here" [Eureka], and that, when asked how she would get the children to school, she talked about living elsewhere.

In addition, it appeared that mother did not have a valid driver's license although she admitted to driving. She left the children alone in a motel room for between 5 and 15

minutes with a man who had a history of being on probation for drug offenses. She did not tell the social worker when she was arrested, and the court would not have known about it at all if a bench warrant had not issued in February 2012. She blamed the judge for making her plead guilty to being in possession of a controlled substance without a prescription.

These circumstances reflect mother's inability or unwillingness to fully avail herself of services and do everything possible to meet her children's needs and provide a safe and stable home for them. The juvenile court did not err in finding that return of the children would create a substantial risk of detriment to their safety and well-being.

(§ 366.22, subd. (a).)

Mother raises a number of arguments, none of which alters our conclusion. First she contends that the court must consider her efforts and participation in services and her compliance with case plan requirements. As evidence of her participation in services and efforts to overcome the problem that led to removal of the children, she cites the Department's initial 18-month review report, which stated that, "but for lack of housing [mother] does not pose significant risk of harm to the children." Thereafter, mother found housing, and the Department recommended that the children be returned to her. The social worker testified that she was not concerned about mother's ability to maintain the new home or remain in it because she was working full-time, had a vehicle, and could make alternative arrangements for the children's transportation. In the social worker's opinion, mother completed all of her case plan requirements, which addressed any safety concerns about the children being back in her care. In addition, mother notes that she completed an AOD assessment and a mental health assessment, both of which determined that she did not meet the standard for treatment.

Mother is correct that the social worker and the Department concluded that return of the children would not pose a significant risk of detriment. However, the evidence favorable to mother's position does not assist her in meeting her burden on appeal.

Next, mother addresses the substance abuse issue. Regarding the request that she submit to a hair follicle test, mother objects that the request came from minor's counsel

during the contested 18-month review, not from the court or the Department. She also appears to argue that a hair follicle test was untimely or otherwise inappropriate, although we are not at all sure we understand the argument. She attempts to rely on *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322 (*Jennifer A.*) to support her contention that no substantial evidence supports a finding that returning the children to her would create a substantial risk of detriment, but that reliance is misplaced. In *Jennifer A.*, the children were removed from the mother because she left them alone in a motel room when she went to work. (*Id.* at p. 1326.) Substance abuse was not alleged in the petition as a reason for removal, but the mother admitted that she occasionally smoked marijuana, tested positive for marijuana twice, and missed approximately nine out of 95 drug tests. (*Id.* at p. 1326, 1343.) By the time of the 18-month review hearing, the mother's failure to protect her children had long been resolved, according to the appellate court. (*Id.* at p. 1327.) No evidence linked her use of marijuana with her lapse of judgment that led to the detention of her children. (*Id.* at p. 1327.) The court observed that the circumstances in *Jennifer A.* were "strikingly different" from the usual dependency case, and concluded the evidence did not support the finding that returning the children to their mother would create a substantial risk of detriment. (*Id.* at pp. 1326-1327, 1345-1346.) In contrast, here, suspected substance abuse has been an issue in this case from the beginning as a possible cause of the foul conditions of the home; mother's positive drug tests are for methamphetamines; she denies any drug use whatsoever; and she has refused to drug test and/or made excuses in order to avoid it since November 2011.

Mother also points out that the social worker testified that, in her opinion, returning the children to mother would not place them at significant risk of harm. She further testified that her recommendation would be unchanged even if mother had submitted to the hair follicle test and tested positive, and that any substance abuse concerns could be adequately addressed in a family maintenance plan under court supervision. Mother reiterates her explanation for failing to submit to the hair follicle

test. However, the trial court was not required to accept the social worker's recommendation⁷ or mother's explanations for positive tests and failing to test.

We find no error. The juvenile court's determination that return of the children to mother would create a substantial risk of detriment is supported by substantial evidence.

B. *Visitation*

At the conclusion of the 18-month review hearing, the court ordered an updated case plan from the Department and continued the matter for two weeks. The court also issued a temporary order that, in the interim two weeks, "visitation shall be four hours per week, supervised. The time, place and manner to be determined by the department. And, again, that will be reviewed without prejudice in two weeks." The court found that supervision was necessary "because unsupervised visitation would be detrimental for the children for the reasons I've stated on the record" for not returning the children to mother's custody.

Mother contends the juvenile court abused its discretion in reducing her visitation without evidence of detriment to the children. She argues there was no evidence that unsupervised visits were detrimental to the children, as found by the court, and that this sua sponte change in visitation was impermissible and unsupported by any evidence. On the contrary, according to mother, visitation is beneficial to the children. She has a "loving, affectionate, and appropriate relationship" with them, and she has "regularly and consistently visited" with them.

"There is no question but that the power to regulate visitation between minors determined to be dependent children (Welf. & Inst. Code, § 300 et seq.) and their parents rests in the judiciary. The judicial power in this state is vested in the courts. (Cal. Const., art. VI, § 1.) 'The judicial function is to 'declare the law and define the rights of the parties under it' [Citation.]' . . . and 'to make binding orders or judgments.' (*People v. Bird* (1931) 212 Cal. 632, 640-641.) . . . [¶] Thus, the court must define the rights of the

⁷ We feel compelled to express our concern with the social worker in this case. Her testimony at the 18-month review hearing revealed both a lack of follow-through and an apparent failure to recognize the seriousness of the issues being raised.

parties to visitation. The definition of such a right necessarily involves a balancing of the interests of the parent in visitation with the best interests of the child. In balancing these interests, the court in the exercise of its judicial discretion should determine whether there should be any right to visitation and, if so, the frequency and length of visitation. The court may, of course, impose any other conditions or requirements to further define the right to visitation in light of the particular circumstances of the case before it.” (*In re Jennifer G.* (1990) 221 Cal.App.3d 752, 756-757.) “No visitation order shall jeopardize the safety of the child. . . .” (§ 362.1, subd. (a)(1)(B).)

Mother clearly loves her children and has a close and loving relationship with them. However, the evidence detailed above, particularly (but not limited to) mother’s troubling refusal to drug test and to straighten out the status of her driver’s license, convinces us that requiring visits to be supervised, pending further review by the juvenile court, was reasonable and not an abuse of discretion.

IV. DISPOSITION

The petition is denied. The order to show cause is hereby discharged. Our decision is final as to this court immediately. (Cal. Rules of Court, rules 8.452(i), 8.490(b)(3).)

Haerle, Acting P.J.

We concur:

Lambden, J.

Richman, J.