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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

R.D.,

Petitioner,

v.

SOLANO COUNTY SUPERIOR COURT,

Respondent;

SOLANO COUNTY DEPARTMENT OF
HEALTH AND SOCIAL SERVICES et al.

Real Parties in Interest.

A135704

(Solano County Super.
Ct. No. J40587)

This matter concerns one-year-old R.J.D. (the child) and the father's failure to fulfill his reunification plan. R.D. (Father) seeks extraordinary relief from an order of the Solano County Superior Court, Juvenile Division, entered June 14, 2012, terminating Father's reunification services after a six-month status review hearing, and setting a hearing under Welfare and Institutions Code section 366.26¹ to select a permanent plan for the child. Father contends the juvenile court erred in continuing the child in out-of-home custody, and also in terminating his reunification services. We conclude

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

substantial evidence supports the findings necessary to these orders, and deny Father's petition for an extraordinary writ on the merits.²

BACKGROUND

The Solano County Department of Health and Human Services (Department) initially filed a petition under section 300 on January 11, 2011, at which time the child was not detained. The precipitating event was that the child had tested positive for methamphetamine at birth some days earlier.³

On March 2, 2011, the juvenile court sustained jurisdictional allegations under section 300, subdivision (b): several concerned Mother's substance abuse and another found Father "should reasonably have been aware of [Mother's] substance abuse, yet continued to allow [R.J.D.] to remain in her care [placing him] at risk of abuse and/or neglect."⁴ The court's dispositional order, signed two weeks later, left the child in the care of Mother and Father and directed the Department to provide them with services under a family maintenance plan.

The Department filed a supplemental petition under section 387 on July 22, 2011, alleging that both parents were not complying with the family maintenance plan, and had failed to provide R.J.D. with routine medical care. The juvenile court ordered detention on July 25, and the Department initially removed the child from his parents' physical custody on August 3, at the age of eight months. The court sustained the foregoing jurisdictional allegations on September 6, and on October 21 entered dispositional orders

² An aggrieved party is required to challenge an order setting a hearing under section 366.26 by way of a timely petition for extraordinary writ, and reviewing courts are encouraged to determine such petitions on their merits. (§ 366.26, subd. (1)(1), (4)(B).)

³ J.J. (Mother) also has two older children, who at the time were in the care of family members and were not included in the section 300 petition. One of these siblings also tested positive for methamphetamine at his birth in 2009.

⁴ Although not included in the jurisdictional findings, it appears Father tested positive for amphetamines in late January 2011.

that continued the child in out-of-home care and custody and directed the Department to provide both parents with reunification services.

Both parents appealed, challenging the dispositional order removing the child from their custody. (See § 361, subd. (c)(1).) This court affirmed the order in an unpublished opinion that sets out, in much greater detail, the facts and procedural history up to the time of the dispositional order on October 21, 2011. (*In re R.J.D.* (June 19, 2012, A133546 [nonpub. opn.].)

On June 14, 2012, at the conclusion of the six-month status review hearing (six-month hearing), the juvenile court terminated reunification services and set the matter for a hearing under section 366.26 to select a permanent plan for the child.⁵ Father's petition followed. (§ 366.26, subd. (l).)

DISCUSSION

A. *Substantial Risk of Detriment*

At the six-month hearing, the juvenile court must order the return of the child to the physical custody of his or her parent unless it finds, by a preponderance of the evidence, that the return of the child to the parent would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. (§ 366.21, subd. (e), 1st par.) The social services agency has the burden to establish such “substantial risk of detriment.” (*Ibid.*)

Here, the court did not return the child to his parents' custody, finding that to do so would create a substantial risk of detriment to the child. Father contends this finding is not supported by the evidence. Specifically, he urges the assigned social worker's opinion, regarding his inability to care for the child safely, was based on speculation and conjecture rather than evidence.

A prima facie showing of detriment may be made by proof of the parent's “failure . . . to participate regularly and make substantive progress in court-ordered treatment

⁵ The juvenile court's orders after hearing were initially entered on May 23, 2012, but were set aside as to Father in order to receive additional evidence from him following his showing of good cause for his failure to appear on May 23.

programs.” (§ 366.21, subd. (e), 1st par.) With this in mind, we review the juvenile court’s “substantial risk of detriment” finding to determine whether it is supported by substantial evidence. (*In re Kristin W.* (1990) 222 Cal.App.3d 234, 251.)

We conclude the Department offered substantial evidence permitting a reasonable trier of fact to find, under the clear and convincing evidence standard of proof, that Father failed to participate regularly and make substantive progress in his court-ordered treatment plan. It necessarily follows that the same substantial evidence, discussed below, is sufficient to make a prima facie showing of detriment under the preponderance of evidence standard of proof. We, therefore, conclude substantial evidence supports the juvenile court’s “substantial risk of detriment” finding.

B. Termination of Reunification Services

As we have noted, the juvenile court did not order the return of the child to his parents’ physical custody, and the child was under three years of age at the time of his initial removal from their custody. Under such circumstances, a juvenile court has the discretion to schedule a hearing pursuant to section 366.26 at the six-month hearing, if it finds “by clear and convincing evidence that the parent failed to participate regularly and make substantive progress in a court-ordered treatment plan.” (§ 366.26, subd. (e), 3d par.; see *M.V. v. Superior Court* (2008) 167 Cal.App.4th 166, 175–176.) On the other hand, the court must continue the matter to the 12-month permanency hearing if it finds either that there is a “substantial probability that the child . . . may be returned to his or her parent . . . within six months,” or that “reasonable services have not been provided.” (§ 366.26, subd. (e), 3d par.)

Here, the juvenile court found, by clear and convincing evidence, that both parents had failed to participate regularly and make substantial progress in their case plans. Based on its perception of Father’s attitude during his testimony at the hearing, the court found there was not a substantial probability the child could be safely returned to him

within six months.⁶ Further, it found the Department had offered or provided reasonable services to both parents. The court, accordingly, exercised its discretion to set a hearing under section 366.26.

Father argues the juvenile court abused its discretion in terminating his reunification services because there was evidence indicating he made substantial progress with his case plan: for example, he had maintained stable housing, complied with regular visitation, tested negative whenever he submitted to urinalysis testing, and completed an early intervention program at Kaiser Permanente Hospital (Kaiser).

When the juvenile court exercised its discretion to set a hearing under section 366.26, it was required to terminate the parents' reunification services. (§ 366.21, subd. (h).) Thus, the issue is whether the court properly found, by clear and convincing evidence, that Father failed to participate regularly and make substantial progress in his court-ordered treatment plan. In reviewing this finding, we examine the record in the light most favorable to the court's ruling, and affirm it when there is substantial evidence such that a reasonable trier of fact could make the finding under the clear and convincing evidence standard of proof. (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 694–695; see also *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880–881.)

The case plan adopted by the juvenile court, attached to the Department's dispositional report filed September 13, 2011, called for Father to maintain stable housing

⁶ As to this finding, we observe a juvenile court lacks the authority to order a continuation of services beyond the next review hearing. (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 845.) The 12-month permanency hearing is required to be held no later than 12 months after the dependent child "entered foster care." (§ 366.21, subd. (f).) Here, the child was initially removed on August 3, 2011, and the juvenile court was required to hold the 12-month hearing no later than October 2, 2012. (See § 361.49.) Thus, at the conclusion of the six-month hearing, the question was actually whether there was a substantial probability that the child could be returned safely to Father within a period of less than four months. In view of the evidence of Father's ongoing noncompliance with the substance abuse component of his case plan discussed below, we conclude substantial evidence supports the finding there was no substantial probability of the child's safe return within this period. (See *Kevin R. v. Superior Court* (2010) 191 Cal.App.4th 676, 688–690.)

for the child, and demonstrate he was free and sober from all illegal drugs by complying with random drug tests. Father was to comply with three random drug tests within a three-month period, and if he tested positive for any one of them, or missed any one of them, he was required to participate in a substance abuse assessment and follow its treatment recommendations. In an addendum report, filed October 17, the assigned social worker reported Father tested positive for methamphetamine and amphetamine use, based on a hair follicle test the Department had requested he submit on August 31 or September 1. When the social worker confronted Father with this test result on September 15, Father denied any recent drug use and insisted it was due to drug use six months to a year earlier. The social worker advised him at that time that, because he had tested positive, he was nevertheless required to undergo a substance abuse assessment, and gave him a referral to schedule one.

The social worker's report for the six-month hearing stated Father had not consistently drug tested as requested. He failed to test when requested to do so on October 11, 2011, October 31, November 2, and December 2. On January 30, 2012 and March 1 Father submitted to urinalysis tests, which were negative, but twice refused to submit to a hair follicle test. At the hearing, the social worker testified hair follicle testing was "an important piece" of the drug testing component of Father's case plan. She also testified the Department had requested that Father submit to a random drug test on three occasions between the completion of her report and the hearing date, but Father had failed to do so. She also stated Father never completed a substance abuse evaluation, despite being asked to do so on September 15, 2011, after his hair follicle test produced a positive result for methamphetamine and amphetamine use.

In her report, the social worker acknowledged Father had completed, in December 2011, an eight-session "Early Intervention Program" at Kaiser. It appears this was not requested by the Department as part of Father's case plan; but was rather something he informed the social worker "he would be starting" in October 2011. The social worker stated she investigated the program and learned it was not substance abuse treatment, but

rather a “pre-treatment” program that provided education about addiction for persons who were “still using,” or for interested family members.

The social worker reported Father’s case plan requirements were “similar, if not identical” to those set out in the family maintenance plan, in which Father had failed to engage for some six months (between March 16, 2011, when the plan was adopted, and September 6, when the court sustained the jurisdictional allegations of the supplemental petition). She concluded his continuing failure to participate consistently in his substance abuse testing requirement suggested that the circumstances resulting in the juvenile court’s initial intervention and its subsequent removal of the child had not changed or improved, and that in her opinion it was unlikely he would successfully comply with his case plan if services were continued.

The foregoing evidence, viewed in the light most favorable to the juvenile court’s ruling, shows considerable noncompliance on Father’s part with what is perhaps the primary component of his case plan. Father failed on numerous occasions to submit to urinalysis drug testing, twice refused to submit to hair follicle drug testing when asked, and failed to complete a substance abuse evaluation and follow its recommendations, as the case plan required him to do, not only after he tested positive in September 2011, but whenever he subsequently missed or refused a requested test. We conclude this record contains substantial evidence that would permit a reasonable trier of fact to find, under the clear and convincing evidence standard of proof, Father failed to participate regularly and make substantive progress in his court-ordered case plan. The court was accordingly within its discretion to terminate Father’s reunification services and schedule the section 366.26 hearing.

DISPOSITION

The petition for extraordinary writ is denied on the merits. (See Cal. Const., art. VI, § 14; *Kowis v. Howard* (1992) 3 Cal.4th 888, 894; *Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1024.) The decision is final in this court immediately. (Cal. Rules of Ct., rules 8.452(i), 8.490(b)(3).)

Marchiano, P.J.

We concur:

Dondero, J.

Banke, J.