Filed 8/16/12 In re Matthew S. CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re MATTHEW S. et al., Persons Coming Under the Juvenile Court Law.	
CHRISTINE D., Petitioner, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; SAN FRANCISCO DEPARTMENT OF HUMAN SERVICES, Real Party in Interest.	A135705 (San Francisco City & County Super. Ct. Nos. JD103043 & JD103044)

Christine D. (mother),[1] the mother of Matthew S. and N.C., seeks extraordinary writ review pursuant to California Rules of Court, rule 8.452, of the juvenile court's order terminating reunification services and setting a Welfare and Institutions Code[2] section 366.26 hearing regarding N.C. She also challenges the permanency order regarding Matthew and requests a stay of the dependency proceedings pending a ruling on her petition. Mother contends that substantial evidence did not support the juvenile court's

[1] The children's father is not a party to this writ proceeding.

[2] All further unspecified code sections refer to the Welfare and Institutions Code.

findings that returning the children to her would create a substantial risk of detriment to the children. We conclude that substantial evidence supported the juvenile court's findings. Accordingly, we deny on the merits mother's petition for an extraordinary writ and deny her request for a stay as moot.

BACKGROUND

The Petitions

On February 18, 2010, the San Francisco Human Services Agency (the Agency) filed petitions for N.C. and her older brother, Matthew; both children were under the age of five at the time the petitions were filed. The petition alleged that both children were minors described under section 300, subdivisions (b) and (g).

According to the Agency's detention report, on January 19, 2010, the Agency received a report that mother was in the psychiatric ward of San Francisco General Hospital. She was brought there after ingesting sleeping pills. She had a black eye, which she reported was a result of a fight with her boyfriend, Andre C. (father).[3] The report added that mother was on crystal methamphetamine and that she smoked marijuana. Mother's primary doctor had prescribed marijuana for her as it assisted in calming the side effects of other medications she had to take. Mother, according to the report, had a life threatening medical disease and had not been current with treatment for two months. Father also admitted to using marijuana and methamphetamine.

The detention report stated that in addition to N.C. and Matthew, mother had two other older children. Both of the older children were in foster care after mother failed to reunify with them in an earlier dependency proceeding. These two children were under the age of 10 when removed from mother's care.

The agency did not request detention because father was caring for N.C. and Matthew. Mother was attending therapy twice a week and had ongoing support from a psychiatrist. The report noted that both mother and father were open and engaged in services to ameliorate the need for removal of the children.

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[3] Andre C. is the biological father of N.C. and the presumed father of Matthew.

The Agency held a team development meeting on February 10, 2010, with the parents. The parents agreed that mother would continue an intensive mental health treatment, and that father would enroll in supportive classes at Positive Directions to address relapse prevention, anger management/domestic violence, and parenting.

At a hearing at the beginning of March 2010, the juvenile court appointed counsel for mother and the children. A short time later, on March 18, 2010, the court set the matter for a settlement conference on jurisdiction and disposition.

The First Amended Petition and Detention

Prior to the settlement conference, the Agency filed first amended petitions for N.C. and Matthew seeking detention. The petitions added allegations under section 300, subdivision (j) related to mother's failure to reunify with two other children removed because of mother's mental health and substance abuse. Both of these children became dependents of the court and were residing together in long-term placement.

The Agency filed its detention report on April 7, 2010. The Agency now recommended that N.C. and Matthew be detained in foster care. The Agency had removed the children from the parents' home on April 5, 2010, because both parents had continued to use drugs, mother's psychiatric symptoms had continued to be extremely unstable and she had not sought appropriate treatment in the last month, and neither parent had demonstrated an ability or willingness to participate consistently in the safety plan to which they had agreed at the team development meeting on February 10, 2010.

The report stated that protective services workers Briana Lewis and Lee Schuster went to the parents' home on March 5, 2010, to discuss father's failure to start at Positive Directions. The parents claimed that they no longer were having problems since mother was now taking her medications. Father reported that he did not want to attend a treatment group and that he did not have a drug problem. He claimed he used drugs only when he experienced extreme stress. Mother stated that she did not intend to stop smoking marijuana.

A little less than one week later, on March 11, 2010, Lewis met with the parents at their home. She reviewed the case plan with the parents. Lewis asked to see mother's

medical marijuana card. Mother provided the card but it had an expiration date of 2006. Mother claimed the card was still valid. Lewis told her that her medical provider, Nurse Practitioner Cynthia Feakins, said that she was no longer recommending marijuana for mother. Mother became defensive and repeated that she was not going to stop using marijuana. Mother stated that she missed her therapy appointment that week because she was suffering with a migraine; she asserted that she would go the next week. Father acknowledged that he had not gone to Positive Directions. Lewis provided both parents with referral information to start weekly drug testing.

Lewis spoke to Feakins on March 17, 2010, to determine the children's medical status. Feakins reported that both children were significantly delayed with behavioral issues. Matthew had not seen a doctor in more than one year, and was significantly behind in fine motor skills and language. The parents had failed to keep an appointment for vaccines for the children.

On this same date, March 17, 2010, Lewis received a voicemail from Matthew's teacher. She indicated that mother had not provided the required well-child medical forms, despite requests for them for over a year. The teacher was concerned that Matthew was not growing, was not potty trained, and spoke very few words except "fuck you." Matthew's behavior improved when he attended school regularly but, when home for a few days, he would yell and bite when he returned to school.

The report revealed that mother had continued to miss her therapy appointments and father had not gone to Positive Directions. The Agency had received the parents' first drug test on April 5, 2010, and both parents tested positive for marijuana and methamphetamines.

The court held a detention hearing on April 8, 2010. At the end of the hearing, the court detained the children and placed them together in a foster home. The court ordered supervised visitation between both parents and the two children.

Jurisdiction and Detention

The Agency filed its jurisdictional/dispositional report on April 30, 2010. The Agency recommended that no reunification services be provided to mother because she

had failed to reunify with two older children. It did recommend reunification services for father.

The report stated that both parents were participating in drug outpatient treatment services. Father had completed a substance abuse assessment at Positive Directions. Mother was trying to complete the orientation program at Iris Outpatient Center. Both parents had been participating in drug testing for the past few weeks. The parents had tested positive for marijuana and methamphetamine on April 1, 2010, and both had missed a test the following week. They again tested positive for both drugs on April 12, 2010, and mother also tested positive for benzodiazepines. Mother, according to the report, had probably been prescribed benzodiazepines. The parents again tested positive for these same drugs on April 23, 2010, and missed a test on April 28, 2010.

The parents' visitation with their children had, according to the report, been sporadic. The parents missed visits, were so late for one visit that it had to be cancelled, and requested to end a visit early.

The Agency filed an addendum report on June 28, 2010. It amended its previous recommendation that mother not receive reunifications services to offering her six months of services. The Agency noted that in recent weeks mother had taken several significant steps to address her mental health and substance abuse and she had shown "a marked improvement." On May 17, 2010, mother had entered a two-week detoxification and crisis program and then transitioned to a two-week stabilization program. Lewis expressed concern that the likelihood of reunification for the family was low given the "very high level of the children's needs, combined with the long-standing substance abuse and mental health issues of the mother and the lack of follow through by" father. She cautioned, however, that mother was "currently actively engaged in several services, [was] more receptive to intensive treatment than she [had] been in the past, and her presentation and overall functioning [had] been better than it [had] been since the Agency got involved with the family in January."

On June 28, 2010, the parties submitted to jurisdiction and disposition on the amended petition. The court ordered that reunification would occur only, if among other things, the parents visited the children regularly and did not abuse substances.

Request to Change Visitation Order

On August 2, 2010, the Agency filed a request to change the court's visitation order. The Agency stated that there was a standing order of visitation, which had been two supervised visits per week for a total of approximately six hours per week. The parents had failed to confirm their visits on June 16 and July 21, 2010, and the visits were cancelled. The parents confirmed therapeutic visits for June 18 and July 9, 2010, but failed to attend. They also missed a therapeutic visit on July 16, 2010, and did not meet with the visitation supervisor as scheduled on July 15, 2010. The parents also did not appear for a scheduled visit on June 25, 2010. The parents confirmed a visit for June 30, 2010, but then arrived so late it had to be cancelled. The report noted that father was currently incarcerated.

The Agency requested that the court order visits between mother and the children to be two to three hours once a week. It also requested that the court provide it with the discretion to increase the frequency of the visits as appropriate. The Agency wrote that it hoped that reducing the required hours of visitation per week would result in more stability and consistency for the children because the inconsistent visits had resulted in emotional harm to the children

On August 9, 2010, the court granted the reduced visitation between mother and the children as requested by the Agency.

Six-Month Status Review

On December 10, 2010, Mabel Chan, a protective services worker, prepared the Agency's six-month status review report. She wrote that mother was enrolled in a residential substance-abuse treatment program and had been residing in Ferguson Place, a substance-abuse residential treatment facility. She graduated from the program on October 17, 2010, and had moved back into her apartment. Mother had recently started

to participate in an outpatient substance abuse program at Iris Outpatient Center. Father was still incarcerated and was scheduled to be released on November 15, 2010.

The report indicated that mother had been learning to apply parenting skills while visiting with her children. It was still unclear to Chan, however, whether mother had the ability to manage her children's behavioral issues or work with school personnel to address her children's behavioral issues. One of mother's diagnoses was "being Psychotic Disorder NOS, which according to the DSM IV 'includes psychotic symptomatology (i.e.[,] delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior) about which there is inadequate information to make a specific diagnosis or about which there is contradictory information . . . ." The report stated that mother had support and was participating regularly in individual therapy. Chan, however, cautioned that mother was easily overwhelmed by the demands of her schedule of services. Chan also was apprehensive about mother's ability to handle children with behavioral issues.

The Agency recommended an additional six months of services. On December 29, 2010, the court ordered an additional six months of services.

12-Month Status Review

The Agency filed its 12-month status review report on May 23, 2011. The Agency recommended continuing services for another six months. Chan noted that the parents had completed their parenting class on March 2, 2011, and that they had been making use of the parenting skills they acquired at the therapeutic visitation sessions. When not tired, mother was attuned to the children's needs. Both parents were working as a team in parenting and were affectionate towards the children. Furthermore, mother was meeting regularly with her therapist, psychiatrist, and case manager. The report indicated that mother was coping adequately at that time, her affect was appropriate, and she was functioning adequately with some support.

With regard to mother's service plan, the report noted that mother had completed her residential treatment program at Ferguson Place, that she had been participating in random drug testing, and that she had completed her parenting class. Mother missed at

least two drug tests in February 2011 because she was sick. Mother has tested positive for marijuana for every test. Mother was seeing a new therapist as of March 2011, and had consistently attended her therapy sessions.

On June 8, 2011, the court ordered an additional six months of services be provided. The court provided the Agency with the discretion to include overnight visitation.

18-Month Review Reports

The Agency filed its 18-month review status report on September 26, 2011. Chan observed that mother seemed more attuned to her children's needs and was better able to engage with her children at play and was setting limits for them. Mother had been consistently attending her therapy sessions and had been taking her medication. Mother had refrained from using drugs but relapsed and tested positive for methamphetamine in the middle of August 2011, when father and she had difficulties in their relationship. Mother, however, took responsibility for her actions and was remorseful.

The report stated that the parents had made significant progress since the beginning of their case and were interacting with the children appropriately. The parents were to receive continued support through services from Seneca Wraparound (Seneca). The Agency recommended that Matthew be returned to the parents, and recommended that long-term placement be approved for N.C. until Matthew had transitioned home.

On October 12, 2011, the Agency filed its addendum report. The report stated that the children were continuing to have unsupervised visits with the parents two times a week and that the visits continued to be positive. The report explained that an administrative review had occurred and that the Agency had changed its recommendation and was now asking the court to terminate the parents' services and to have the children remain in foster care because of the parents' high level of tetrahydrocannabinol (THC) when drug testing.

At a hearing the next day, the court set the matter for a settlement conference in November, and ordered overnight visits to begin within the parameters made by the

Agency. The parties did not settle the matter in November, and the matter was set for a contested 18-month status review hearing.

On November 21, 2011, the Agency moved ex parte to terminate overnight visits and return to supervised visitation. The Agency stated that the parents continued to have "alarmingly high positive THC tests." The Agency asserted that Rachel Wilson, the Seneca Support Counselor, told her that when she arrived at the parents' home on October 29, 2011, to work with Matthew and the parents, the house was smoky and filled with the smell of marijuana. Mother said that she smoked once a day before the children woke up. Mother had not been consistent in attending her substance abuse program or in her drug testing. On November 22, 2011, the court denied the Agency's request to suspend overnight visits.

The Agency filed an addendum report on January 9, 2012. The report stated that Matthew continued to display aggression towards objects and people and he was breaking things and kicking at the walls. He was also hitting, biting, kicking, and spitting at other people. He was exhibiting increased sexualized behaviors after he returned from unsupervised visitation with the parents. His sexualized behaviors included touching another child in the genital area, pulling down his pants to show others his genitals, and asking another child to give him oral fellatio. The caretaker reported that Matthew had put his penis in the ear of another foster child in the placement.

N.C. also was exhibiting aggressive behaviors, but these behaviors decreased after spending less time with Matthew. The caretaker reported that N.C. was exhibiting sexualized behaviors upon her return from the overnight visits with the parents. According to the caretaker, N.C. was "humping" another foster child. The father told the caretaker that N.C. might have seen something during the overnight visits, but refused to elaborate.

Jessica Potter, the Therapeutic Behavioral Services clinician, was working with Matthew and the parents. Potter reported that mother participated in all of her sessions with Matthew but father was not present for some of the sessions.

Chan expressed concern that the parents had not been actively participating in their reunification services during the past weeks. She wrote: "[T]hey appeared to have lost motivation to reunify with their children. Neither of the parents thinks that [his or her] marijuana use impacts [his or her] parenting ability, and [the parents] dislike discussions regarding their marijuana use. Both parents continue to deny any impacts that marijuana use has on their ability to parent, supervise and care for the minors." The parents were also experiencing difficulties in their relationship with each other.

Mother, according to the report, had participated in random drug testing only three times during the months of November and December 2011. She tested positively for THC.

The Agency concluded that the parents' lack of consistent progress in their reunification services after 18 months made it unlikely that they would be able to reunify if offered an additional six months of services. Thus, the Agency requested the court to terminate the parents' reunification services with Matthew and N.C. The parents also did not express concern about their children's sexualized behaviors. The Agency also asked the court to change overnight visits to supervised visits because of the sexualized behaviors of Matthew and N.C.

On January 25, 2012, the Agency filed an ex parte application seeking to terminate overnight visits for the children after N.C. disclosed to her pediatrician that Matthew had inserted his fingers into her vagina while the children were together at an overnight visit with the parents between January 13 and January 14, 2012. On January 22, 2012, Matthew independently told his foster parent that he had touched N.C. as she described. Chan and her supervisor met with the parents and the parents refused to believe that Matthew put his fingers in N.C.'s vagina. The parents maintained that they closely supervised Matthew. When asked what changes the parents would make to protect the children from each other during future visits, they responded that the had "done everything . . . ."

On January 26, 2012, the court ordered overnight visits to continue, but that the children had to participate in these visits separately.

On February 16, 2012, the Agency filed an addendum report. The report indicated that the parents' progress toward their case plan since January 12, 2012, had been "minimal." Mother had not been attending and participating in her counseling services. Mother had not had any random drug testing since December 2011.

On March 19, 2012, the court granted the Agency's request to place Matthew with a non-related extended family member.

The Contested 18-Month Review Hearing

More than 24 months after Matthew and N.C. had been detained, on April 27, 2012, the contested 18-month hearing began. Van Luong, the supervisor for the family support services unit at the Agency, testified He confirmed that he knew that mother used marijuana for her life-threatening illness. He acknowledged that mother had completed her program at Ferguson House, had attended individual therapy session, had taken a parenting class, had adequate housing, and had cooperated with the Regional Center of the East Bay and Matthew's school.

Luong opined that the visits between the parents and the children were not going well. He explained that Matthew always threw a temper tantrum when he visited and N.C. would sometimes behave aggressively after the visits and revert to behavior she had displayed prior to her removal from the parents' home. After observing some of the visits between the parents and the children, he was concerned about mother's ability to supervise both children. Additionally, mother needed prompting to engage them.

Luong stated that he was Chan's supervisor and he had some concerns about Chan's initial recommendation to return Matthew to his parents' care. At that point, he decided to become more involved because there were discrepancies between the statements in Chan's reports and the information he received from the children's doctors and foster parents. The pediatrician told him about the sexual contact between the children; Matthew also admitted to his foster parent that he put his fingers inside his sister's vagina. Additionally, Matthew's foster mother at that time told the agency that Matthew was found engaged in sexual conduct with other foster children. When he spoke to the parents about his concerns, they did not believe it and declared that the

children were lying. The father walked out of Luong's office when he raised the issue of Matthew's sexual conduct. Luong did acknowledge that after being told about the sexualized behavior of the children, mother obtained books from Seneca about "body parts" and sexuality to read to the children.

N.C.'s foster mother also testified. She had been the foster parent for both Matthew and N.C. but, in August 2011, she asked to have Matthew removed from her care. She testified that "the final straw" was when he took $100 from her purse and flushed it down the toilet; he also had a $20 bill in his diaper. She added that he was very aggressive. He would hit people, beat up his sister and other children in the house, and cuss. She stated that the parents had been unable recently to maintain a consistent visitation schedule with N.C.

Mother testified that she had relapsed twice on methamphetamine since the beginning of the case. The first time was when she tested positively in August 2011, and the second time was just a week earlier. She acknowledged that she had missed six overnight visits with N.C. in the two to three months before this hearing. When asked what she would do if Matthew and N.C. came to live with her to make sure Matthew did not touch N.C. inappropriately, she stated that she would make sure the children played in the front, not in the back, and that she would have them sleep in separate rooms.

When asked whether she believed that Matthew had sexually touched N.C., mother responded: "Not exactly." She explained, "I believe that maybe something could have happened, but I don't believe it happened exactly like everybody says it happened." Subsequently, when asked whether her testimony was that she did not believe that N.C. was at risk from Matthew for sexual abuse, mother answered: "I never said that. I said that I didn't believe exactly, it didn't go down exactly the way everybody is telling me that it went down. I mean you have got these two little kids and little kids talk a lot. And I know that you have to be really on them to get them to speak something again for the second time, you know what I'm saying. You have to talk it into them. [¶] So I don't believe exactly that Matthew had touched [N.C.]. I believe that maybe something could have went down, but we don't know what went down."

At the conclusion of the hearing on May 23, 2012, the court found that returning Matthew and N.C. to the parents would create a substantial risk of detriment to the children's safety, protection, and emotional or physical well-being because the conditions giving rise to the need for detention still existed, despite more than 24 months of reunification services. The court explained that mother had been doing well until the 18-month status review report. The court specified that it understood mother's argument that she did not believe she should have to drug test anymore and that she was "suffering from service exhaustion." However, the court observed that the evidence showed that mother had relapsed and was "continuing to significantly struggle with mental health issues." The court recognized that mother was now attempting to get into a residential program but stressed that 25 months had passed. It also expressed concerns about the visits and "the fact that there have been so few, the overnights haven't been terminated and yet so few have occurred in the last six weeks." Given that the children had such high needs mother had to demonstrate that she could keep them safe and the court concluded that "there is a substantial risk to both children if they were returned." It concluded that the extent of progress made by the parents towards alleviating or mitigating the causes necessitating placement had been moderate.

The court terminated reunification services and found that the Agency provided reasonable reunification services to both parents. It set a section 366.26 hearing for N.C. for October 3, 2012. The court found that a section 366.26 hearing was not in Matthew's best interest nor was he a proper subject for adoption or guardianship. It set a post-permanency review hearing for Matthew for December 12, 2012, as Matthew had already been placed with a non-relative extended family member.

On May 31, 2012, mother filed a petition for extraordinary writ in this court, and challenged the court's orders terminating services and setting a section 366.26 hearing for N.C. and the permanency order for Matthew. She also requested an immediate stay of the section 366.26 hearing.

DISCUSSION

Mother contends that substantial evidence does not support the juvenile court's findings that returning the children to her would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the children. She asserts that she may challenge the permanency order for Matthew in this writ because this ruling was made at a hearing setting a section 366.26 hearing for N.C.

"All court orders, regardless of their nature, made at a hearing in which a section 366.26 permanency planning hearing is set must be challenged by a petition for extraordinary writ." (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 247.) Section 366.26, subdivision (*l*)(1) bars direct appeals from orders setting a section 366.26 hearing. (See *In re Charmice G.* (1998) 66 Cal.App.4th 659, 668.) Accordingly, we agree with mother that she can challenge in this writ the finding of detriment as it relates to both Matthew and N.C.

"When a child is removed from parental custody, certain legal safeguards are applied to prevent unwarranted or arbitrary continuation of out-of-home placement. [Citations.] Until reunification services are terminated, there is a statutory presumption that a dependent child will be returned to parental custody." (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1400.) Following the 18-month review hearing, the juvenile court must order the child returned to the 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." (§ 366.22, subd. (a).) "The failure of the parent or legal guardian to participate regularly and make substantial progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental." (*Ibid.*)

"The Agency has the burden of establishing detriment. [Citations.] The standard for showing detriment is 'a fairly high one. It cannot mean merely that the parent in question is less than ideal, did not benefit from the reunification services as much as we might have hoped, or seems less capable than an available foster parent or other family

member.' [Citation.] Rather, the risk of detriment must be *substantial*, such that returning a child to parental custody represents some danger to the child's physical or emotional well-being. [Citations.]" (*In re Yvonne W., supra,* 165 Cal.App.4th at p. 1400.)

"In determining whether it would be detrimental to return the child at the 18-month review, the court must consider whether the parent participated regularly in any treatment program set forth by the plan, the 'efforts or progress' of the parent, and the 'extent' to which the parent 'cooperated and availed himself or herself of services provided.' (§ 366.22, subd. (a).)" (*Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1748.) Ultimately, the court's decision hinges on whether the child would be safe in parental custody. (*In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1141-1142.) If the juvenile court does not return the child to parental custody, it must set a section 366.26 hearing unless it finds that the parent was not provided reasonable services. (§ 366.22, subd. (a).)

We review the juvenile court's finding of detriment for substantial evidence. (*In re Yvonne W., supra,* 165 Cal.App.4th at pp. 1400-1401.) "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." (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.) On appeal, the parent has the burden of showing that there is no evidence of a sufficiently substantial nature to support the court's findings or order. (*Ibid.*)

Here, the record supports the juvenile court's findings that it would create a substantial risk of detriment to the physical or emotional well-being of Matthew and N.C. to return them to mother's custody. While acknowledging mother's participation in services and her frustrations with the procedures required by the Agency, the court was not convinced mother had made sufficient progress to return Matthew or N.C. to her care.

The children were first removed from the parents' home because of mother's mental instability and her use of methamphetamine. The Agency recognized that mother was using marijuana for medical reasons, but told her that she would need to try to reduce her consumption. The parents submitted to the amended petitions at the jurisdictional/dispositional hearing, and the court ordered that reunification would occur only, if among other things, the parents visited the children regularly and did not abuse substances.

The parents continued to abuse drugs after the children were detained on April 8, 2010, and were still abusing drugs by the time of the 18-month hearing, which began more than 24 months later. On November 21, 2011, the Agency requested the court to terminate overnight visits with the parents because they continued to have "alarmingly high positive THC tests." Furthermore, there was evidence that the parents' house was filled with the smell of marijuana while the children were in the home, and mother, according to Chan, continued to deny "any impacts that marijuana use" had on her ability to parent, supervise, and care for the children. The record indicated that mother was not limiting her drug use to marijuana. Mother discontinued random drug testing after December 2011. Mother testified on May 21, 2012, at the 18-month hearing; she admitted using methamphetamine twice. She acknowledged that she tested positively in August 2011, which was 16 months after the children's removal from her home. She also admitted to using methamphetamine just about one week prior to her testimony at the hearing.

Additionally, the record supported a finding that mother could not deal with the children's behavioral issues. Mathew was aggressive and had exhibited sexualized behaviors. N.C. also showed aggressive behavior and told her pediatrician that Matthew had inserted his fingers in her vagina when they spent the night in the parents' home. The record indicated that mother did request books from Seneca to read to her children after learning about the sexual conduct of her young children but, even after receiving the report from N.C.'s pediatrician and learning that Matthew independently told his foster parent that he had touched N.C. as she described, mother refused to believed this had

happened and claimed that father and she closely supervised Matthew. At the 18-month hearing, mother confirmed that she initially refused to believe that Matthew had sexually touched N.C. When asked whether she now believed the sexual contact had occurred, she responded: "Not exactly." She explained, "I believe that maybe something could have happened, but I don't believe it happened exactly like everybody says it happened."

In addition to the sexual contact between the children that occurred during their overnight visits in the parents' home, Luong stated Matthew always threw a temper tantrum when visiting the parents and N.C.'s behavior regressed while in the parents' home. Luong did not believe that mother could supervise both children.

Mother's commitment also was not consistent, as the parents were unable to maintain a consistent visitation schedule for N.C. Mother admitted that she missed at least six overnight visits with N.C. during the three months prior to the 18-month hearing.

We therefore conclude that the evidence in the record established that mother had participated in the services provided but had failed to "make substantive progress in court-ordered treatment programs." (§ 366.22, subd. (a).) The record contained evidence that mother had stopped engaging in services, was still struggling with mental health issues, had stopped drug testing, had used methamphetamine, and had failed to visit N.C. consistently. The evidence showed that mother did not have the ability to keep the children safe.

Mother argues that she substantially complied with her case plan and, under *David B. v. Superior Court* (2004) 123 Cal.App.4th 768 (*David B.*), she did not have to be a perfect mother. She claims that the Agency was requiring her to be perfect. She then details her completion of inpatient services at Ferguson House, her partial compliance with the drug testing requirement, her working with her support team, her compliance with mental health treatment, her engagement in her children's educational needs, and her mostly consistent visitation with her children.

Mother's reliance on *David B., supra*, 123 Cal.App.4th 768, is unavailing. In *David B.*, the father was a *nonoffending* parent who sought to reunify with his two-year-old daughter after the mother's drug use and mental health issues brought the child into

the dependency system. (*Id.* at pp. 774-775.) The trial court in *David B.* refused to return the child after the father had received 18 months of family reunification even though he had done "virtually everything" requested of him. (*Id.* at p. 772.) The appellate court granted father's petition for extraordinary relief, as there was no evidence that father's shortcomings made it dangerous to return the children to his care. (*Id.* at p. 773.)

Here, in contrast to the father in *David B.*, mother's mental instability and drug use impair her ability to parent and her shortcomings place her children at risk if they were to be returned to her. "[S]imply complying with the reunification plan by attending the required therapy sessions and visiting the children is to be considered by the court; but it is not determinative. The court must also consider the parents' progress and their capacity to meet the objectives of the plan; otherwise the reasons for removing the children out-of-home will not have been ameliorated." (*In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1143.) Mother does not adequately address the issue of detriment and the finding that, unlike the father in *David B.*, here, the evidence supports a finding that her shortcomings made it dangerous to return Matthew and N.C. to her care.

We agree with mother that the record contains some evidence favorable to her. However, substantial evidence supported the juvenile court's findings that returning Matthew and N.C. to mother's care posed a significant risk of detriment and we therefore deny her writ petition and deny her request for a stay.

DISPOSITION

The petition for extraordinary writ is denied on the merits. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 894 [barring later challenge by appeal].) The request for stay is denied. Our decision is final as to this court immediately. (Cal. Rules of Court, rule 8.490(b)(3).)

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Lambden, J.

We concur:

_____
Kline, P.J.

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Haerle, J.