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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re B.B., a Person Coming Under the  
Juvenile Court Law.

J.B.,

Petitioner,

v.

THE SUPERIOR COURT OF THE  
COUNTY OF CONTRA COSTA,

Respondent;

CONTRA COSTA COUNTY CHILDREN  
AND FAMILY SERVICES BUREAU,

Real Party in Interest.

A138796

(Contra Costa County  
Super. Ct. No. J11-01149)

Petitioner J.B. is the mother of B.B., a two-year-old dependent child of the juvenile court. Petitioner (Mother) seeks writ relief (Cal. Rules of Court, rule 8.452) to set aside the juvenile court’s order terminating reunification services and setting a permanency planning hearing (Welf. & Inst. Code, § 366.26).<sup>1</sup> The juvenile court found that returning B.B. to Mother would create a substantial risk of harm to the child. Mother

<sup>1</sup> Subsequent statutory references are to the Welfare and Institutions Code. The section 366.26 hearing will be referred to as a “.26 hearing.”

contends this finding is not supported by substantial evidence and that the juvenile court improperly shifted the burden of proof. We disagree with Mother and deny the petition on the merits.

### **I. PROCEDURAL BACKGROUND & FACTS**

Mother has mental health issues and her performance in reunification services is characterized as having “ups and downs.” We review the pertinent facts.

On October 20, 2011, the juvenile court sustained a dependency petition filed by respondent Contra Costa County Children and Family Services Bureau (Bureau). The Bureau alleged Mother had failed to protect B.B. (§ 300, subd. (b)), who was then seven months old, because Mother “has mental health issues that interfere with her ability to provide adequate care, support, and supervision for the child, placing the child at substantial risk of harm . . . .”

Specifically, the court sustained allegations that Mother had been the subject of a mental health hold (§ 5150) on August 13, 2011, when she claimed her other daughter, a two-year old, had been raped by boys aged nine and 13.<sup>2</sup> Mother also claimed she heard voices telling her to stop taking her medications and that she should assemble people to save the world as it was going to end in 48 hours. Mother was the subject of a second section 5150 hold two days later, after she reported that both her children had been kidnapped by their maternal grandparents. Mother’s behavior on that occasion was described as “erratic,” and she “was unable to maintain a cohesive, rational conversation.”

The juvenile court also sustained allegations Mother had been diagnosed with depression and anxiety, had been hospitalized at least three times in the three months prior to the filing of the petition, and admitted she stopped taking her medication on August 13, 2011—the date of the first section 5150 hold.

The Bureau’s dispositional report, dated November 17, 2011, states Mother “has a long established history of bipolar disorder and other mental health issues that require

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<sup>2</sup> Mother’s other daughter is not a subject of this appeal.

intervention for [M]other to adequately parent her children.” She has been diagnosed with “major depression, social anxiety disorder, and dysthymia,” and has a history of “cutting, binge eating and purging,” as well as bulimia.<sup>3</sup> She reported she has been depressed all her life and has suicidal thoughts, which include “plans of cutting, drug overdose, and an intentional car accident.” She was “inconsistent in taking her psychotropic medications . . . [and] has used alcohol, marijuana and ecstasy which exacerbate her mental health issues.”

Mother prided herself on “being a good mom” and wanted to reunite with B.B. She had been in individual therapy with Contra Costa County Mental Health since June 2010, although that therapy did not prevent the two section 5150 holds in August 2011. She acknowledged her mental health needs and was taking four prescribed medications. She reported she had not used alcohol since July 2011, but continues to use marijuana because “it keeps me sane.” She “has not taken any responsibility [for] the reasons her family came to the attention of the Bureau.” She also had not provided any proof she had enrolled in any of the services requested by the Bureau, and had admitted she had not attended individual therapy since at least November 4, 2011.

The Bureau concluded B.B., who had been placed with her maternal grandparents, “would not be safe living with her mother.” The Bureau recommended reunification services for Mother. On December 12, 2011, the juvenile court accepted that recommendation and ordered reunification services.

In its six-month status review report, prepared for a hearing on May 21, 2012, the Bureau noted Mother “has struggled to engage in services consistently.” She lost her bed in a shelter after she was taken to the emergency room on February 22, 2012 for what appeared to be a drug overdose. On February 24, 2012, a psychiatric evaluation revealed a diagnosis of “bipolar disorder versus schizoaffective disorder,” and an assessment Mother was “suicidal.” She was placed on another section 5150 hold, apparently, because she was not taking her medications. Mother “is currently homeless and couch

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<sup>3</sup> “Dysthymia” is despondency or depression.

surfing for shelter.” Mother showed some progress with services in February—apparently, before the events just described—and seemed to be doing well in services in April 2012.

The Bureau concluded Mother’s “engagement in services has been irregular” and she “has been unable to show insight into why her family has come to the attention of” the Bureau. She “has made excuses” for noncompliance with her case plan and with maintaining her medication, and her contact with the social worker “has been erratic,” with Mother “often presenting herself as subdued and confused or aggressive and irritated.” Mother claimed to be taking her medication as of April 2012, and was currently re-engaged in services including therapy, drug treatment, and testing.

The Bureau recommended six more months of reunification services. The juvenile court accepted that recommendation.

In its 12-month status review report, prepared for a hearing on October 25, 2012, the Bureau recommended reunification services be terminated and the court set a .26 hearing. The Bureau noted in the prior six months Mother “has struggled to find a stable and appropriate housing situation,” and her current “living situation is not conducive to regaining custody” of B.B. Her income was “sporadic.” She graduated from a drug treatment program in August 2012, and she reported having completed a parenting course and said she was attending weekly therapy—however, “[t]he Bureau has not received any treatment reports or certificates from [Mother] regarding [these] services.” Likewise, Mother claimed to be attending AA meetings, but provided no proof of attendance. Her Kaiser case manager did report to the Bureau that Mother “has been comp[liant] with weekly sessions and has been committed to regaining custody” of B.B.

“Within the last six months, [Mother] has continued to have many ups and downs.” The Bureau remained concerned that Mother “is unstable, inconsistent, and does not have the ability to plan for the future.” In the last year, Mother “has struggled to regulate her mood [and] emotions, and is often combative.” This fluctuation is related to whether she takes her medication. The Bureau social worker “has experienced [Mother’s] varying altered states, emotional variance, and inconsistent persona on nearly

a month to month basis. [Her] combative reactions have made it difficult for her to move forward with multiple referred services.” Mother continued to have housing issues and, while “[she] has shown her ability to engage in services,” the Bureau concluded Mother “has not stabilized herself to a level that would provide [B.B.] with a safe home.”

The Bureau did not foresee B.B.’s return to Mother within the next six months. Accordingly, the Bureau recommended the court set a .26 hearing with the aim of creating a legal guardianship with the maternal grandmother, with whom B.B. had been placed since her removal from Mother’s custody.

The matter was continued because Mother asked for a *Marsden* hearing. (*People v. Marsden* (1970) 2 Cal.3d 118.) On December 13, 2012, the Bureau changed its position and recommended reunification services be continued until the 18-month review hearing. Apparently, this recommendation was adopted by the juvenile court.

The Bureau reported Mother was in the process of entering a family shelter where she could eventually live with B.B. and where staff would help her find employment and supervise her medication. Furthermore, Mother’s Kaiser case manager had reported that she believed Mother “does not pose a threat to herself or [B.B.]” Nevertheless, the Bureau still was of the view that Mother continued to struggle with reunification services, although she was participating in most services, was more medication compliant, and was more stable—but, she had missed two drug tests in November. The Bureau “continues to have concerns with [Mother’s] stability and inconsistent nature . . . .”

On May 22, 2013, the Bureau reported Mother had taken a turn for the worse. She was out of compliance with her case plan, had not contacted her social worker to update her whereabouts, and had refused to speak with the social worker since March. She had missed drug tests in March and April and had tested positive for alcohol on May 2, 2013—apparently, at 3:00 in the afternoon. She had not provided information regarding her whereabouts, her living situation, and her employment situation. In February, Mother revoked the Bureau’s release of information privileges, making it impossible for the Bureau to assess Mother’s case plan activities. The Bureau had “grave concern” for Mother’s ability to care for B.B., who has multiple medical issues, and recommended the

juvenile court set a .26 hearing to impose a legal guardianship with the maternal grandmother.

In its report prepared for the 18-month status review hearing, dated February 6, 2013, the Bureau noted Mother had been denied entry into the family shelter, in part because of “her refusal to comply with mental health medication protocol.” Mother was in a different shelter, but was having trouble with her medication regimen. Furthermore, it would take up to six months for the shelter to allow B.B. to stay there with Mother.

The Bureau “continues to have concerns that [M]other is unstable, inconsistent, and does not have the ability to plan for the future.” While she has made “significant progress in her services, she has yet to show she is able to remain stable within employment and housing to provide a stable environment for [B.B.]” The Bureau “continues to have grave concern for [M]other’s ability to adequately and appropriately parent [B.B.]”

After a hearing, the juvenile court found that reasonable services had been provided to Mother, but that returning B.B. to Mother’s care and custody would create a substantial risk to B.B.’s well-being. Accordingly, the juvenile court set a .26 hearing.

## **II. DISCUSSION**

Mother contends the substantial risk finding is not supported by substantial evidence. We disagree.

Our task “begins and ends with a determination as to whether or not there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact.” (*In re Katrina C.* (1988) 201 Cal.App.3d 540, 547.) We must resolve all conflicts in the evidence in favor of the ruling and “indulge in all legitimate inferences to uphold the court’s order.” (*Elijah R. v. Superior Court* (1998) 66 Cal.App.4th 965, 969.) We cannot reweigh conflicting evidence to change a juvenile court’s determination in a dependency proceeding. (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 705.)

Mother points to favorable evidence showing her progress in services and her “proactive[]” measures to address her mental illness. She also notes she had successfully

completed a parenting course, had obtained a state license in cosmetology, and was having unsupervised overnight visitation with B.B. But we cannot parse through the record to consider only evidence favorable to the party who did not prevail. And progress alone is not necessarily enough. The juvenile court, viewing the entire history of the case and Mother's distinct pattern of inconsistency and instability, along with her current inability to provide housing for B.B., was entitled to conclude return of the child to Mother would result in a substantial risk of harm to B.B. That finding is supported by substantial evidence.

Mother also argues the juvenile court improperly shifted the burden of proof. She introduced two exhibits at the hearing: Exhibit A, consisting of two letters, one from Mother's vocational counselor showing her consistent participation in the program, and the other from Mother's Kaiser case manager stating she has been "making progress towards her treatment goals," and has been medication compliant; and Exhibit B, consisting of certificates showing completion of a parenting class and a family recovery program in August 2012.

At the conclusion of the hearing, the juvenile court noted the completion of the parenting class and the family recovery program "dated back all in 2012." "And since that time, [M]other has been unable to successfully complete a residential program for reasons relating to medical compliance with medication." The court noted the Kaiser letter was a "To Whom it May Concern" letter, and was not addressed to the issue whether B.B. would be safe with Mother. Furthermore, it was signed by a social worker not a treating psychiatrist.

The court concluded, "So I don't find that these items provided to the Court by [M]other really address the concerns here. So I don't find this to be substantial evidence that she no longer suffers from issues of mental health that would place her child at risk." The court found substantial risk "based on the state of the record before this Court," and "[there's] no evidence whatsoever . . . before this Court other than this to-whom-it-may-concern letter that you are at all seeking any sort of appropriate mental health care. This record is such that I simply cannot find that you are a safe custodial parent."

Mother claims this shows the juvenile court shifted the burden of proof. We do not so interpret the court's language. The juvenile court was simply evaluating Mother's evidence and concluding it was not probative on the issue at hand. There is no indication the court had shifted the burden of proof from the Bureau, where it lies (§ 366.22, subd. (a)), to Mother. The court reviewed the entire record and reached its conclusion based on a proper allocation of the burden of proof.

The writ petition is denied on the merits. The request for stay is denied. Because the .26 hearing is set for September 4, 2013, this opinion is final as to this court immediately. (Cal. Rules of Court, rule 8.490(b)(3).)

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Sepulveda, J.\*

We concur:

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Margulies, Acting P.J.

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Dondero, J.

\* Retired Associate Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.