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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

M.S.,

Petitioner,

v.

THE SUPERIOR COURT OF SONOMA
COUNTY,

Respondent;

SONOMA COUNTY HUMAN
SERVICES DEPARTMENT et al.,
Real Parties in Interest.

A139035

(Sonoma County
Super. Ct. No. 3845-DEP)

INTRODUCTION

A.S. was removed from her mother’s custody based primarily on mother’s substance abuse and domestic violence issues. A.S. was placed in foster care, and both parents were provided with services. Only her father, M.S. (Father), substantially completed his reunification plan. He also successfully reunified, in separate proceedings, with A.S.’s half brother. The court nevertheless terminated services to Father on the basis that A.S. had a “frail emotional condition” and thus could not be safely returned to Father within the 18-month time limit. Father filed this petition seeking a writ compelling the court to vacate its order, claiming the Sonoma County Human Services Department (Department) did not provide adequate services and no substantial evidence

supported the trial court's finding of substantial risk of detriment to A.S.'s emotional well-being. We agree that the Department did not meet its burden of proving substantial risk of detriment if A.S. is returned to Father, and that there is no substantial evidence adequate services were provided to Father. We grant the petition.

FACTUAL AND PROCEDURAL BACKGROUND

On January 19, 2012, the Department filed an initial juvenile dependency petition regarding A.S. The petition alleged A.S.'s mother left A.S., then four years old, home alone in 2010, had a substance abuse problem, failed to ensure A.S. attended school regularly, had a history of domestic violence with her then-boyfriend, and A.S.'s infant half brother died of asphyxia in 2010 while in mother's care. A.S. informed a social worker she and Mother had been sleeping in a car. Mother also had allowed her boyfriend to spend the night in the home with A.S., in violation of a written plan made with the Department to guarantee A.S.'s safety.

As to Father, the petition alleged he had a history of domestic violence resulting in a dependency petition being filed on behalf of A.S.'s half brother M.S. III in November 2010. An amended petition filed on February 22, 2012, alleged Father "has been involved in approximately six domestic violence related incident[s] resulting in approximately four arrests and one conviction."¹ Father and Mother had another child, J.S., who was living with his maternal grandparents, although the paternal grandmother was his legal guardian. The amended petition also indicated Father's "DMV records indicate[] that his license is currently expired."

A.S. was initially placed at the Valley of the Moon Children's Home. The social worker interviewed her in January and February 2012, reporting "[t]he minor appeared very small and petite for her age and continually cried throughout the interview" "[T]he minor appears sad and withdrawn and continually reports that she misses her mother. Staff at Valley of the Moon [Children's Home] related that it took the minor a

¹ Father denied he was ever convicted, and at least one of the incidents was the result of Mother battering Father.

few days to adjust to her new environment and slowly began to socialize The Undersigned will refer the minor to a therapist soon.”

The jurisdiction/disposition report filed on February 22, 2012, indicated Father was currently employed full-time in a tile business. In the dependency proceeding regarding A.S.’s half brother, M.S. III was declared a dependent, and was placed “with the father under a trial home visit.” Father was receiving reunification services and was “working diligently on their case plan.” The report concluded “father is complying with services [in the case involving M.S. III] but had a difficult time at the beginning of the year complying with his case plan. The Undersigned assesses that the father needs more time in order to fully transition . . . [M.S. III], to their home and ensure that all his needs are being met. The father is in agreement and hopes to be able to reunify with [A.S.] in the near future.”

Father’s case plan in A.S.’s case required that he complete an approved domestic violence treatment program, participate in counseling with a social worker approved therapist, complete a social worker approved series of in-home or in-community parenting sessions and demonstrate successful integration of the parenting skills taught, continue to attend an outpatient substance abuse program and randomly drug test.

In a March 2012 addendum report, the social worker indicated “it would be in the minor’s best interest for the father to receive services given that he has complied with services on behalf of his other child, [M.S. III], and the minor is currently placed under his care in a trial home visit. The father has been receptive to Family Reunification Services on behalf of his son and continues to work diligently with the in-home parent educator.” The social worker also reported A.S. was “very close to her half-sibling” and wants to “see her ‘brother and spend more time with him.’ ”

In the status review report for the six-month hearing in August 2012, the social worker reported A.S.’s placement had been changed to a “non-relative concurrent home” after the relatives with whom she had been placed could no longer care for her. The social worker recommended therapy for A.S. because she “has been acting out as

demanding, clingy and has been making up stories.” A.S. was about to begin first grade after having repeated kindergarten due to poor attendance while living with Mother.

Father continued to work full time and live with his girlfriend. Their son, M.S. III, was living with them “under Family Maintenance Services.” Father had successfully graduated from a domestic violence treatment program. Father reported attending therapy, but not regularly due to his work schedule. Father had been working with an in-home parenting instructor and was “about to finish” the program. He had missed two drug treatment group sessions, one in April and one in May, and thus had not graduated from the program because it required consecutive attendance at meetings. The report noted when Father attends “he fully participates and contributes to the group’s discussions.” Father had been participating in random drug tests, and had one positive test in June for alcohol. He had initially had unsupervised visits, but because both parents tested positive for alcohol, “visits began to be supervised at California Parenting Institute.” The social worker recommended six more months of services for both parents.

In November 2012, Father attended a meeting with the social worker, lawyers, foster mother, and “two ladies . . . from the adoption agency.” Father was concerned that the foster mother had introduced A.S. to another foster family, and did not wish to continue being a foster parent. There was a discussion about Father having unsupervised visits in the community, and Father was “asked to do the driving because it was becoming a burden on the foster mother.” Father testified the social worker knew his license was suspended around that time because in a different meeting she told him “not to mention it.” The social worker denied that asking him to drive was for the benefit of the foster mother.

On January 24, 2013, the social worker prepared a report in M.S. III’s case in which she stated “ ‘[T]his family has displayed resiliency in not only being able to endure the struggles they have faced throughout the past two years, but to accept responsibility for the part they played and take the steps required to mitigate future risks.’ ”

In the February 2013 status review report in A.S.’s case, the social worker reported A.S. was placed in “a foster home that would consider adoption.” A.S. was in

generally good health, albeit with numerous dental issues, and was attending first grade where she was performing “above grade level.” She had been seeing a therapist who reported to the social worker A.S. initially “had many walls up to protect herself from unwanted feeling,” but is now “more in touch with her feelings of distress.” The report indicated “It is clear that [A.S.] has been traumatized by the accidental death of her baby brother. This is evidenced by [her] recurring thoughts that her mom’s unborn baby is going to die.” A.S. stated “ ‘it’s a good thing I don’t live with my parents . . . because they don’t take care of me.’ ” She clarified “her dad did take care of her when she was a baby and that although he had a house, she and her mom lived in the car . . . because her mom didn’t like her dad.”

In the same report, the social worker described recent “traumatic” experiences for A.S. Her mother told her she would see her on Christmas but did not, causing A.S. to cry “throughout the day saying that her mother lied.” “Over the holiday season, [A.S.] presented as sad. She said to her foster mother that this was the best Christmas because Santa never came when she lived with her mom.”

Another incident involved Father taking A.S. to a cemetery. The social worker stated A.S. “likes to put on a brave front, but when she returned from the visit she could not sleep in her room because she thought that zombies were going to get her” and was afraid to sleep alone. The social worker concluded A.S. “is a sensitive and emotionally frail child. The undersigned suspects that the parents are not completely aware of [A.S.’s] emotional and mental health needs. She has been very anxious about where she is going to ultimately live and has stated . . . she wants to live in one place, where she feels safe, and taken care of.”

The social worker recommended termination of services to Mother, but continued services to Father. She noted Father’s attendance at drug treatment services during the review period “has been inconsistent, but he has been participating in drug treatment services at DAAC since 2010,” estimating he has “attended around 30 group sessions” but “has never managed to complete 12 sessions in a row to get a certificate.” Father had been participating in individual therapy with Dr. Rodriguez. He had, “quite recently,”

successfully reunified with his youngest son, A.S.'s half brother. Father had unsupervised visits with A.S. once a week, but on "several occasions" "has arrived and returned [A.S.] late." However, the social worker recommended the court make the finding that "[Father] has consistently and regularly contacted and visited the child."

In early February, but apparently after the February 6 report, the social worker learned Father did not have a valid drivers' license. She suspended his visitation with A.S. until "he was able to give me the information of who was going to drive around with [A.S.]" When he could not find anyone to drive, she offered him bus passes in early March. Father then attempted to correct the suspended license issue by self-surrendering at traffic court on March 29, 2013. The juvenile court took judicial notice of the docket in that case, which indicated Father pleaded no contest to violation of Vehicle Code section 14601.1, subdivision (a), (driving while license suspended for a reason other than driving under the influence or reckless driving) and of Vehicle Code section 4000, subdivision (a)(1) (unregistered vehicle) on January 23, 2013. The court suspended imposition of sentence, imposed conditional probation, and ordered him to serve 45 days in jail to be stayed until March 13, 2013 or enrolled in a work release program. Because he failed to timely contact the program or report on the jail commitment, a warrant had been issued for his arrest. On March 29, 2013, he admitted his probation violation and was remanded into custody to serve 45 days in jail. Father actually served 22 days. Father's girlfriend contacted the social worker to inform her he was in jail.

The 12-month review hearing was continued at the request of Father for one week, until April 17, because Father was in county jail. The hearing was continued again, until May 14, 2013, because Father had not been transported from county jail to the hearing despite an order. Father was no longer in jail on May 14.

On May 6, 2013, the Department filed an addendum report in which it changed its recommendation to termination of services for Father based on his incarceration, "seeing just how affected [A.S.] is by the current circumstances," and A.S.'s expressed desire to continue living with her foster mother rather than her parents. The social worker reported "[t]he biggest concern . . . revolves around [A.S.'s] behaviors and emotional state of

mind.” The social worker relayed that “On February 20, 2013 [A.S.] was reluctant to talk to her therapist She was worried that her therapist will tell her parents that she wants to live with the foster parent and be adopted. She also stated that sometimes it would be easier if her parents would die so she wouldn’t have to hurt their feelings. [A.S.] wants to please her parents but she often cries because she does not want to be put in the middle of things.” Her bedwetting had “increased again to nightly” and she has “little accidents here and there during the day.” A.S. told the social worker she wants to stay with her foster mother and not live with either parent. If she could wish for what she really wanted, it would be “ ‘to live with [foster mother] and . . . a purple pony for my imaginary friend.’ ” A.S. has an imaginary friend who is a girl her age who is staying with her because her parents do not take good care of her.

The social worker concluded the report with the following “evaluation.” “After the undersigned learned that [father] was recently rearrested and seeing just how affected [A.S.] is by the current circumstances the undersigned believes that it would be in the best interest of the child to remain in the care of her foster mother, and for family reunification services to the parents to be terminated at this time. [A.S.] does not want to live with either parent and she is happy and secure under the care of her foster-adopt mother.”

At the May 14, 2013 hearing, the social worker testified she had changed her February 2013 recommendation to continue reunification services to Father, and now recommended termination based on A.S.’s “special needs” in terms of her emotional health. In the 60 days prior to the hearing, A.S. found out her father was in jail because she “overheard the foster mom talking.” She told the social worker she was upset because “her daddy lied to her” about being in jail, and she was worried that he was “in the dungeon, with chains and all that.” Additionally, A.S.’s mother had given birth to another baby, and A.S. “constantly talks about that baby dying.” The baby was hospitalized and had some medical concerns, but the Department was “trying not to discuss that with [A.S.]”

There had been no formal psychological evaluation of A.S., but A.S.'s therapist informed the social worker she had posttraumatic stress disorder. Her past traumas are "past things that happened when she was in the care of the mother," including the death of her half sibling while in mother's care, being homeless and living in a car, her mother being involved with "scary guys," witnessing domestic violence between her mother and boyfriend, her mother's stealing things, and never having a "real Christmas and a real tree."

The social worker testified regarding a traumatic incident in December 2012 when Mother promised A.S. she would visit on Christmas but the "Department did not recommend that visit to occur. So the child was waiting by the phone during the entire Christmas day waiting for her mother And the child was really, really devastated . . . crying, inconsolable."

On cross-examination, the social worker testified Father had requested that A.S. celebrate Christmas day with him and her siblings, but "the foster mom had already made plans, and they were not gonna be in town. So it wasn't gonna work for the foster mom because it wasn't on one of the days that was his regular visitation days." The social worker explained "I cannot force the foster parent to change their holiday plans with their family to accommodate a father."

A.S. told the social worker when she visited Father's home, "there's a lot of people in that home and . . . '[e]verybody was mean to each other. Everybody was yelling.' And her heart would go 'boom, boom, boom.'" The social worker opined A.S.'s past traumatic experiences changed the significance to her of hearing people yelling during visits to her father's house. "[S]he has been exposed to domestic violence and physical altercations with adults. . . . She is afraid that, you know, whoever is yelling—and she calls it 'being mean' . . . that something really bad is going to happen."

The social worker also testified that Father's taking A.S. on a visit with the other children to a cemetery to visit family graves demonstrated Father did not understand A.S.'s emotional needs. Father testified about the cemetery visit. He brought four of the children, including A.S., to a cemetery where Father's grandmother and brother were

buried to visit their graves. Father's brother had passed away when he was eight years old. The children were "really interested in [his] brother because they've seen a lot of pictures." When they arrived, the cemetery was closed, so they visited the next-door "Rural Cemetery, which is also a historical park . . . [with] cannonballs and everything out front." The children saw it and were interested, including A.S., so they "went to go check it out, and there was no mention of zombies or ghosts or anything like that. . . . [¶] And . . . it seemed like it was a good day. . . I didn't see that she was scared at all. I don't—I don't really know where that came from."

The Department also offered evidence regarding another incident it maintained demonstrated Father's failure to recognize A.S.'s trauma. In one, A.S. told social worker about "yelling" and people being "mean" during an unsupervised visit to Father's home. Father explained he picked up A.S. after getting off work. They had planned an outing, but Father was tired after working 60 hours a week, and suggested they rent some movies and have a "movie day" with the other children. Father fell asleep while watching the children's movie with A.S. and the other four children, including his 15-year-old stepdaughter. When he woke up the "kids were running around, popcorn was everywhere, they were jumping on the furniture, and [he] kinda freaked out. . . . [¶] [He] was kinda barkin' orders around, you know, for [J.S.] to get the popcorn off the floor, . . . and for [A.S.] to help pick up the garbage, or whatever was goin' on, because mom was on her way home. . . . [¶] So during the time that I was doing this, [A.S.] did start to cry, and she felt singled out. I had to reassure her that—you know, that I wasn't mad at her, that I was just—you know, had to be stern and instruct everybody [¶] And she did mention that, you know, she doesn't really experience any yelling in the house, and I apologized to her for—for doing that, and you know, I let her know that—that it wouldn't happen again. [¶] And, you know, I just comforted her and hugged her and let her know that it was okay, that I wasn't mad at her"

Father also spoke with his other children about the incident. They talked about "us yelling and how [A.S.] was, you know . . . emotionally different, that we needed to, you know, think about that because, as a family of five, you know, we can get pretty—

things could get pretty loud. The kids can argue. [¶] And they—they all came to me and said that, you know, they would make whatever adjustments that we had to make and that they would change their behavior, do anything that they had to do to get her back.”

The social worker testified she did not recommend family therapy for Father and A.S. because “we’re [not] going to have enough time to get her to trust that she’s going to be fine with Dad. . . . I’m not sure we have enough time for that. She really has a lot of trauma. You know, more than I realized she has.”

Father testified he had recently moved to a bigger home with three bedrooms to make a place for A.S. Father had prepared a bedroom for A.S. to share with his stepdaughter. He bought bunk beds and dressers, and put their television and A.S.’s personal things in the room “to make her feel at home.” Father described her as generally happy when she visited him, not troubled or sad. He felt she had a “great bond” with her brother. In addition to Father’s reunification with A.S.’s half brother, M.S. III, her full brother J.S. had been placed with Father.

The juvenile court “adopted the findings and orders” prepared by the Department, which stated “The extent of progress made by the father toward alleviating or mitigating the causes necessitating placement has been minimal.” At the hearing, however, the court stated Father had done “everything with the case plan.” The court terminated family reunification services and found “there is not a substantial probability that, with the continuation of services to parents, the child would be safely returned to [Father’s] custody during the extended service period.” The court explained “You have been an outstanding example of how one embraces services. You are a good Dad, but [A.S.] has needs that you can’t provide in terms of emotional safety right now, and that’s what the law dictates. . . . So I don’t want you to feel bad about—feeling like ‘Oh gosh if I had only had my license’ or . . . if I hadn’t gone to the cemetery.’ No. Those aren’t the things. But those are the things to look at for understanding [A.S.] and where she is at and why this is the way it is.”

DISCUSSION

We are faced with the unusual situation where Father has substantially completed the elements of his reunification plan (earning significant praise from the court) and successfully reunified with another child, but the juvenile court nevertheless found returning A.S. would create a substantial risk of detriment and there is no substantial probability that with continued reunification services, A.S. could be safely returned before the end of the 18-month period.

We look first to the statutory mandate. Welfare and Institutions Code² section 366.21 provides in part: “The permanency hearing shall be held no later than 12 months after the date the child entered foster care. . . . At the permanency hearing, the court shall determine the permanent plan for the child, which shall include a determination of whether the child will be returned to the child’s home. . . . After considering the relevant and admissible evidence, 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 . . . 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.” (§ 366.21, subd. (f), italics added.)

“The court shall also determine whether reasonable services that were designed to aid the parent or legal guardian to overcome the problems that led to the initial removal *and continued custody of the child* have been provided or offered to the parent. . . . In making its determination, the court shall review and consider the social worker’s report and recommendations . . . shall consider the efforts or progress, or both, demonstrated by the parent or legal guardian and the extent to which he or she availed himself or herself of services provided, taking into account the particular barriers to an incarcerated . . . parent’s or legal guardian’s access to those court-mandate services and ability to maintain contact with his or her child” (§ 366.21, subd. (f), italics added.) “The court may

² All further statutory references are to the Welfare and Institutions Code.

not order that a hearing pursuant to Section 366.26 be held unless there is *clear and convincing evidence* that reasonable services have been provided or offered to the parent” (§ 366.21, subd. (g)(1)(C).)

Similarly, California Rules of Court, rule 5.715 provides at the 12-month hearing, the court “must order the child returned to the custody of the parent or legal guardian unless the court finds the petitioner has established, by a preponderance of the evidence, that return would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. . . . [¶] . . . [¶] (4) If the court does not order return of the child to the parent . . . the court must specify the factual basis for its finding of risk of detriment to the child” (Cal. Rules of Court, rule 5.715(b)(1), (4).) “If the child is not returned to the custody of the parent or legal guardian, the court must consider whether reasonable services have been offered or provided.” (Cal. Rules of Court, rule 5.708(e)(1).)

Substantial Risk of Detriment

Until services are terminated, “reunification is the goal and [Father] is entitled to every presumption in favor of having [A.S.] released to his custody.” (*David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 788 (*David. B.*)). The Department has the burden of demonstrating substantial risk of detriment to the child if returned to the physical custody of the parent. (§ 366.21, subd. (f).) “[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 (*Dustin R.*)).³

³ As the Department correctly notes, the dependency statutory scheme does not require “that the detriment which justifies continued removal of the minor from parental custody must be akin to the detriment which necessitated juvenile court jurisdiction.” (*In re Joseph B.* (1996) 42 Cal.App.4th 890, 899 (*Joseph B.*)).

The evidence demonstrated Father had successfully completed the domestic violence program, and had refrained from domestic violence with his current live-in girlfriend. Father also successfully completed the parenting class, as well as “coaching sessions” at some of his supervised visits with M.S. III. The social worker agreed Father had substantially addressed his domestic violence issues. She testified in the two and one half years she had been working with Father (due to the multiple dependency cases) she had ordered random chemical testing, and he had only tested positive once, for alcohol on June 29, 2012, “at the very beginning of the case . . . a long, long time ago.” She acknowledged the case plan did not require him to totally abstain from alcohol. The social worker also testified Father was referred to DAAC, a substance abuse program, which required an individual to complete 12 consecutive classes. If a class was missed, the individual had to start over. Although Father had not attended 12 consecutive classes, he had completed over 30 classes by December 2012. Father was also attending substance abuse classes at Indian Services.⁴

The social worker testified she told Father that she and her supervisor “had great concerns about what the foster mom might do if, in fact, reunification services were order[ed] continued for the father.” She claimed, however, those concerns had no influence on her changing her recommendation to terminate services to Father. The social worker indicated she changed her recommendation to continue services because she received “new information that just came about, you know, that I found out. . . . So while I was hearing all these things that [A.S.] was talking to me about, Dad was in jail, so I had no opportunity to talk to him about it. And the time that we met . . . I didn’t even touch on that, because I had already recommended to terminate services. [¶] [T]he 18 months is in July. So whether or not we’re going to have enough time to get her to trust that she’s going to be fine with Dad and family therapy, I’m not sure we have enough time for that. She really has a lot of trauma. You know, more than I realized she has.”

⁴ Father is a member of a non-federally recognized tribe.

The social worker indicated she changed her recommendation based on A.S.'s newly expressed desire to stay with her foster mother rather than live with Father or Mother, her anxiety and mental distress about changing homes and the "yelling" at her father's house, and that Father was in custody in county jail for 22 days after going "to traffic court to resolve issues regarding his driver's license." She also testified that Father's taking A.S. on a visit with the other children to a cemetery to visit family graves demonstrated Father did not understand A.S.'s emotional needs.

The factors to which the social worker testified are, taken together, insufficient to meet the Department's burden of establishing "a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (§ 366.21 , subd. (f).) First, "a child's preference is not the deciding factor in a placement decision, even when that child is a teenager." (*In re Patrick S. III* (2013) 218 Cal.App.4th 1254, 1265.) "The liberty interest of a minor is not coextensive with that of an adult." (*Ibid.*) As the court noted with regard to the minor's wish to remain with his foster parent, "We understand . . . [he] quickly became attached to the first stable parental figure in the first stable home he ever had. Nevertheless, foster care is not a preferred placement." (*Ibid.*) Similarly here, A.S.'s newly expressed wish to remain with her foster mother is understandable, but it does not establish substantial risk of detriment.

The Department also maintained the evidence showed Father did not truly understand A.S.'s sensitivity. The social worker testified she had concerns about choices Father made during visits with A.S., referring, however, only to taking A.S., along with her siblings, to a cemetery to visit the graves of relatives. The social worker acknowledged A.S. did not act traumatized while there, but later, apparently at the home of foster mother, was worried about "zombies," would not sleep alone and was wetting the bed. The social worker explained A.S. "likes to please people. So if everybody says, 'Let's go,' she'll go. . . . [¶] So you have to get to know the child really well, to actually figure out whether she really wants to do something or if she feels she has to be pleasing the adults." The social worker concluded "the father needs to get to know [A.S.] really

well, to kind of see the clues that maybe body language, or maybe she's saying 'yes,' but she really doesn't mean yes."

The other incident about which the social worker testified involved Father yelling at A.S. and her siblings to clean up popcorn they had spilled during a movie at his home. When A.S. began to cry, the evidence showed Father immediately consoled her, and testified it would not happen again. His testimony evidenced awareness of A.S.'s sensitivity: "I had to reassure her that . . . I wasn't mad at her. . . . [¶] . . . I apologized for [yelling and] . . . I let her know that—that it wouldn't happen again." Father also testified he had talked with his other children about yelling and A.S.'s sensitivity. Other than this single incident of a hard-working parent falling asleep while watching an appropriate movie with his family, and waking up to a tumble of children and popcorn, prompting Father to bark at them to cut it out and clean up the mess, the social worker identified no other interchange of concern.

As the court in *David B.* explained, substantial risk of detriment "cannot mean merely that the parent in question is less than ideal, did not benefit from reunification services as much as we might have hoped for, or seems less capable than an available foster parent or other family member." (*David B.*, *supra*, 123 Cal.App.3d at p. 789.) We simply cannot agree that A.S.'s stated desire to remain with her foster mother, the family outing to the local cemetery where relatives were buried (which was also a historical park), and a tired Father "barking" at his rambunctious children to clean up (and also paying special attention to A.S. when she reacted with tears) is evidence of detriment sufficient to overcome the presumption in favor of custody with Father. There was not substantial evidence from which the juvenile court could conclude there was a "substantial risk of detriment" to A.S.'s emotional well-being if she were returned to Father's custody.

Reasonableness of Reunification Services

When a child is removed from a parent's home, the supervising agency is required to formulate a plan for reunification of the child and parent and to provide to the parent reasonable reunification services "that [a]re designed to aid the parent or legal guardian

in overcoming the problems that led to the initial removal and the continued custody of the child.” (§ 366.21, subd. (e).) The “ ‘record should show that the supervising agency identified the problems leading to the loss of custody, offered services designed to remedy those problems, maintained reasonable contact with the parents during the course of the service plan, and made reasonable efforts to assist the parents in areas where compliance proved difficult (such as helping to provide transportation and offering more intensive rehabilitation services where others have failed).’ [Citation.]” (*David B.*, *supra*, 123 Cal.App.4th at p. 794.) Reunification services must be tailored to the unique needs of the particular family. (*Id.* at p. 793.) The Legislature required the development and implementation of family reunification plans “ ‘[t]o achieve the goal of preserving the family whenever possible’ ” (*In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1787.)

“The juvenile court shall not refer a case to a permanency planning hearing unless it has been shown by clear and convincing evidence that reasonable services have been provided.” (*In re Mark L.* (2001) 94 Cal.App.4th 573, 585, § 366.21, subd. (g).) “The courts have defined clear and convincing evidence as evidence which is so clear as to leave no substantial doubt and as sufficiently strong to command the unhesitating assent of every reasonable mind. [Citations.] It has been said that a preponderance calls for probability, while clear and convincing proof demands a *high probability*.” (*In re Terry D.* (1978) 83 Cal.App.3d 890, 899.)

When a parent has completed the reunification plan but the Department still contends there is a substantial risk of detriment if the child is returned to the parent, the issue arises of whether reasonable services were provided to the parent. As the court in *Dustin R.* explained, we “have rules in place to address the situation where the juvenile court finds it detrimental to return the minors to the home despite the parents’ achieving the plan’s objectives. In the latter case, as long as the situation does not fall into the

narrow exception created by *In re Joseph B.* [, *supra*, 42 Cal.App.4th 890⁵], the reunification plan would probably not be reasonable and the parents could mount a challenge on that basis.” (*Dustin R.*, *supra*, 54 Cal.App.4th at p. 1143.)

The following evidence was adduced at the hearing about the reasonableness of the reunification services provided. Father’s reunification plan included completing a drug abuse program, a domestic violence program, and an in-home parenting class. He had already been referred to those programs in the dependency action involving M.S. III. Father was referred to individual therapy in A.S.’s case. Despite the social worker’s assessment of A.S. as an emotionally fragile child with unspecified special needs, the social worker testified she did not refer Father to more parenting classes in A.S.’s case because “[i]t was going to be a repeat of what he already completed [in M.S. III’s case].” The social worker agreed she “didn’t feel the need for [Father] to be re-referred for any other aspect of parenting or in-home parenting.” She also acknowledged the case plans in A.S.’s and J.S.’s cases “are the same.” In short, the Department appears to have made no effort to provide services to assist Father with the unique needs of A.S.

A.S.’s fragile emotional state was not a new condition coming to light only after the Department’s February 2013 recommendation to continue services. The Department acknowledges “[b]y the time of her removal [A.S.] was already in a fragile state.” Indeed, after the social worker’s initial interviews of A.S. in January and February 2012, the social worker reported “[t]he minor appeared very small and petite for her age and continually cried throughout the interview” “[T]he minor appears to be sad and withdrawn and continually reports that she misses her mother. Staff at Valley of the Moon [Children’s Home] related that it took the minor a few days to adjust to her new environment and slowly began to socialize The Undersigned will refer the minor to a therapist soon.”

⁵ In *In Joseph B.*, *supra*, 42 Cal.App.4th 890, the court held “[i]f returning the child will create a substantial risk of detriment to his or her physical or emotional well-being [citations], placement must continue regardless of whether the detriment mirrors the harm which had required the child’s removal from parental custody.” (*Id.* at p. 894.)

Over six months later, A.S. had not been referred to individual or family therapy. In August 2012, the social worker reported A.S. “has been acting out as demanding, clingy and has been making up stories. Therefore, the Department will be getting [A.S.] into therapy near her placement.” A.S. began seeing a therapist in September 2012.⁶

The Department was well aware of the substantial trauma suffered by A.S., and the fact it was due to Mother’s actions or inactions, not Father’s. Yet A.S. was not referred to therapy for nine months after being removed from Mother’s custody, and no services were offered to Father that specifically addressed dealing with A.S.’s trauma and posttraumatic stress. The social worker did not consider referring Father to any parenting program regarding emotionally fragile children, or, in fact, any parenting program. She testified any new parenting program would be a “repeat” of what Father had already completed in regard to M.S. III. There was no evidence, however, that A.S. had the same parenting needs as M.S. III—in fact, the court noted A.S. reacted differently than Father’s other children. At the hearing, the social worker acknowledged she could have referred father and A.S. to family therapy, but now it was too late.

Furthermore, the Department’s efforts to facilitate visitation, a component of the reunification plan, were lacking. Notably, despite emphasizing the trauma caused to A.S. by her mother not visiting on Christmas as she had promised, the Department refused Father’s request to bring A.S. home to celebrate Christmas with her siblings. Unlike the situation with Mother, there is no evidence Father promised A.S. the visit would happen before it was approved. The Department did not deny the visit based on any concerns about Father or A.S.’s safety—it denied the visit because Christmas did not fall on Father’s regular visitation day, and the foster mother had other plans. Yet the social worker also indicated Father needed to get to know A.S. better—that requires enhanced visitation the Department did not facilitate or provide.

The social worker indicated Father’s suspended license and 22-day incarceration prevented him from visiting A.S. Father, however, had been required to visit A.S. by

⁶ The therapist did not testify at the hearing, nor did she submit a written report.

driving from his home in Santa Rosa to Novato, picking her up after school, and returning her to a shopping mall in the same town for pickup by the foster mother. Father testified, contrary to the social worker's testimony, that "he was asked to do the driving because it was becoming a burden on the foster mother," not for his convenience. The social worker acknowledged she had told Father she and her supervisor "had great concerns about what the foster mom might do if, in fact, reunification services were order[ed] continued for the father." Moreover, upon "being informed" Father had a suspended license on February 8, 2013, the Department's response was that he should tell them who could drive him and pick up A.S. for visitation. The social worker testified she did not offer Father bus passes until "early March," after he informed her he could not find anyone to drive him.

Father then attempted to correct the suspended license issue by self-surrendering at traffic court on March 29, 2013. The juvenile court took judicial notice of the docket in that case, which indicated Father pleaded no contest to violation of Vehicle Code section 14601.1, subdivision (a), (driving while license suspended for a reason other than driving under the influence or reckless driving) and of Vehicle Code section 4000, subdivision (a)(1) (unregistered vehicle) on January 23, 2013. The court suspended imposition of sentence, imposed conditional probation, and ordered him to serve 45 days in jail to be stayed until March 13, 2013, or enrolled in a work release program. Because he failed to timely contact the program or report on the jail commitment, a warrant was issued for his arrest. On March 29, 2013, he admitted his probation violation and was remanded into custody to serve 45 days in jail. Father actually served 22 days. Father's girlfriend contacted the social worker to inform her he was in jail.

Though Father did not visit A.S. during that time period or participate in services, the court was required to "tak[e] into account the particular barriers to an incarcerated . . . parent's or legal guardian's access to those court-mandated services and ability to maintain contact with his or her child." (§ 366.21, subd. (f), italics added.) Moreover, the fact Father was in custody for a short time was because of his effort to address and resolve his driving situation so he could maintain visitation with A.S.

The Department acknowledged it knew A.S. was emotionally fragile from the start of the proceedings, and knew she had suffered significant trauma while in Mother’s care. Nevertheless, A.S. was not referred to therapy for almost nine months, and Father was not referred to *any* parenting classes apart from the ones he had already completed in regard to M.S. III, much less a program designed to teach him how to parent a child with special emotional needs. Neither were Father and A.S. referred to family therapy, because the social worker testified that even she, a trained social worker, did not realize until “too late” in the proceedings that A.S. had “a lot of trauma.” The Department made only minimal efforts to assist Father in maintaining consistent visitation. Again, there is simply no substantial evidence supporting the trial court’s finding, required to be made by clear and convincing evidence, that reasonable services had been provided to enable Father to reunify with A.S.

DISPOSITION

Let a writ issue directing the superior court to vacate its order terminating reunification services for Father and setting a section 366.26 permanency planning hearing, and enter a new order providing him with six additional months of appropriate reunification services. This decision is final immediately as to this court. (Cal. Rules of Court, rules 8.452(i) & 8.490(b)(3).)

Banke, J.

We concur:

Dondero, Acting P. J.

Sepulveda, 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.

