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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

J.F.,

Petitioner,

v.

THE SUPERIOR COURT OF ALAMEDA
COUNTY,

Respondent;

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY, et al.,

Real Parties in Interest.

A139557

(Alameda County
Super. Ct. No. OJ11016842)

MEMORANDUM OPINION¹

Petitioner J.F. (Father) was living with S.T. (Mother) in April 2011, when dependency petitions were filed in connection with Mother's two children, alleging neglect due to her drug abuse. (Welf. & Inst. Code,² § 300, subds. (b) & (g).) Both children were found to be dependents of the court. Father was declared to be the presumed father of the older child, K., although Father was determined not to be K.'s biological father, and he was granted reunification services. In an order entered 20 months later, the juvenile court found that reasonable services had been provided,

¹ We resolve this case by a memorandum opinion pursuant to California Standards of Judicial Administration, section 8.1(1), (3).

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

terminated reunification services to Mother and Father, and found by clear and convincing evidence that return of K. to the parents would be detrimental. The court scheduled a permanency planning hearing pursuant to section 366.26.

On August 22, 2013, Father filed a notice of intent to file a petition for an extraordinary writ in this matter, but the petition was not filed until November because of delay in assembling the record. Father seeks an order directing the juvenile court to vacate its orders terminating reunification services and scheduling a section 366.26 hearing and to issue a new order providing for placement of K. with Father or Father's mother (Ms. C.). Father contends the juvenile court's finding of detriment was not supported by substantial evidence and the court abused its discretion in placing K. with nonrelative foster parents rather than with Ms. C. By order of November 6, 2013, we stayed the section 366.26 hearing pending resolution of this writ proceeding.

The factual circumstances underlying Father's claims of error are known to the parties and are summarized in "Father's Petition for Extraordinary Writ [Rule 8.452], Memorandum of Points and Authorities."

A. Detriment

At the 12-month hearing, "[a]fter 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 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." (§ 366.21, subd. (f).) "Though usually the case, a parent's compliance with the case plan is not a guarantee the child will be returned to the parent." (*In re Jacob P.* (2007) 157 Cal.App.4th 819, 830.) In determining detriment, the juvenile court "can consider, among other things: . . . properly supported psychological evaluations which indicate return to a parent would be detrimental to a minor [citations]; whether the natural parent maintains relationships with persons whose presence will be detrimental to the ward [citation]; instability in terms of management of a home [citation]; . . . limited awareness by a parent of the emotional and physical needs of a child [citation]; failure of a minor to

have lived with the natural parent for long periods of time [citation]; and the manner in which the parent has conducted himself or herself in relation to a minor in the past.” (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 704–705.) We review a juvenile court’s finding of detriment for substantial evidence. (*In re B.S.* (2012) 209 Cal.App.4th 246, 252.)

At the final hearing on August 20, 2013, the juvenile court explained its conclusion that return of K. to Father would create a substantial risk of detriment, finding (1) Father’s bond with K. had not progressed to the degree K. could safely be placed with Father; (2) Father, who was sleeping on his sister’s couch at the time, had been unable or unwilling to obtain permanent housing, despite his claim to be able to afford it; (3) there were “legitimate questions” about Father’s source of income, and he had not provided any documentation to support his claim of lawful self-employment; (4) although Father seemed genuinely to be trying to break his emotional attachment to Mother, who presented a continued threat to K. through her drug abuse and other behavior, there were indications he had not yet terminated the relationship; and (5) it was “questionable” whether Father, who had diligently participated in various services, had “truly learned the lessons from those services [and] incorporated them into [his] lifestyle,” since he remained a “very angry” person who had difficulty dealing with the child welfare agency. Each of the factual findings was supported by substantial evidence in the extensive record of proceedings. Together, the findings demonstrate a substantial risk of detriment, in that placement with Father could return K. to an unstable and neglectful living situation.

Father argues that several of the court’s grounds, such as poverty or lack of housing and failure to benefit fully from reunification services, do not support a finding of substantial detriment. (See *In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1401; *David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 789.) While that may be true when these factors are present in isolation, here they were part of a larger, more comprehensive finding that Father had not demonstrated himself to be a capable parent, independent of the negative influence of Mother. That larger finding certainly supports the juvenile court’s detriment finding. Father also points out he was diligent in

participating in the case plan, as the juvenile court acknowledged, but that alone does not preclude a finding of substantial detriment. (*In re Jacob P.*, *supra*, 157 Cal.App.4th at p. 830.) The purpose of reunification services is to place the parent in a position to gain custody of the child. (*In re Karla C.* (2010) 186 Cal.App.4th 1236, 1244.) As the court observed, while Father went through the motions of his case plan, he did not appear to benefit from the services.

As to the other factors cited by the juvenile court, Father contends there was no “direct” evidence to support some of the court’s conclusions and points to his own contrary testimony. The court was not, however, limited to direct evidence, and it was not required to accept Father’s testimony at face value. We have reviewed the record and, as noted, we have found substantial, admissible evidence to support the juvenile court’s factual conclusions. This is what our standard of review requires. (*In re B.S.*, *supra*, 209 Cal.App.4th at p. 252.) Finally, Father contends the responsible social worker was biased against him, but we decline to find the social worker to have been biased merely because he did not agree with Father’s views.

B. K.’s Placement with Foster Parents

“The relative placement preference, codified in section 361.3, provides that whenever a new placement of a dependent child must be made, preferential consideration must be given to suitable relatives who request placement. [Citation.] ‘“Preferential consideration” means that the relative seeking placement shall be the first placement to be considered and investigated.’ [Citation.] Preferential consideration ‘does not create an evidentiary presumption in favor of a relative, but merely places the relative at the head of the line when the court is determining which placement is in the child’s best interests.’ ” (*In re Antonio G.* (2007) 159 Cal.App.4th 369, 376.)

Section 361.3, subdivision (a) contains a nonexclusive list of factors that the social services agency and the juvenile court must consider in determining whether placement with a particular relative who requests placement is appropriate, with the best interests of the child given first place. (*Id.*, subd. (a)(1).) Among the other factors to be considered are the nature of the relationship between the child and the relative and the ability of the

relative to care for the child, provide a safe and secure home, and protect the child from his or her parents.³ (§ 361.3, subd. (a)(6), (7).) A juvenile court’s placement decision under section 361.3, subdivision (a) is reviewed for abuse of discretion. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067, superseded on other grounds by statute, as stated in *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1032.)

The juvenile court elected to approve the Agency’s decision to place K. with his former foster parents rather than Ms. C. because “it was not clear to the Court that [K.] could be accommodated in [Ms. C.’s] home; also, whether or not [Ms. C.] could set boundaries with her son, [Father]; and also, whether or not she could protect [K.] from [Mother], which again, will be hard to do by any adult, but nevertheless, is a factor in the Court’s analysis. [¶] I also maintain my feelings about [Ms. C.] that . . . after observing her and listening to her, in that she just came over as a passive person, [which] in and of itself did not concern the Court, but does concern the Court whether she could maintain boundaries with the parents in this difficult case.” We find no abuse of discretion in the

³ The full list of factors is: “(1) The best interest of the child, including special physical, psychological, educational, medical, or emotional needs. [¶] (2) The wishes of the parent, the relative, and child, if appropriate. [¶] (3) The provisions of Part 6 (commencing with Section 7950) of Division 12 of the Family Code regarding relative placement. [¶] (4) Placement of siblings and half siblings in the same home, if that placement is found to be in the best interest of each of the children as provided in Section 16002. [¶] (5) The good moral character of the relative and any other adult living in the home, including whether any individual residing in the home has a prior history of violent criminal acts or has been responsible for acts of child abuse or neglect. [¶] (6) The nature and duration of the relationship between the child and the relative, and the relative’s desire to care for, and to provide legal permanency for, the child if reunification is unsuccessful. [¶] (7) The ability of the relative to do the following: [¶] (A) Provide a safe, secure, and stable environment for the child. [¶] (B) Exercise proper and effective care and control of the child. [¶] (C) Provide a home and the necessities of life for the child. [¶] (D) Protect the child from his or her parents. [¶] (E) Facilitate court-ordered reunification efforts with the parents. [¶] (F) Facilitate visitation with the child’s other relatives. [¶] (G) Facilitate implementation of all elements of the case plan. [¶] (H) Provide legal permanence for the child if reunification fails. [¶] . . . [¶] (I) Arrange for appropriate and safe child care, as necessary. [¶] (8) The safety of the relative’s home” (§ 361.3, subd. (a).)

juvenile court's conclusion that, as a result of the likely difficulty of Ms. C. in protecting K. from Father and Mother, placement with Ms. C. was not appropriate, notwithstanding the preference granted Ms. C. under section 361.3, subdivision (a).

In arguing for abuse of discretion, Father relies on *Cesar V. v. Superior Court*, *supra*, 91 Cal.App.4th 1023. While we agree the circumstances of the family members in *Cesar V.* were similar to those presented here, the case is of little help in resolving Father's claim. In *Cesar V.*, the court reversed for procedural rather than substantive reasons, concluding the Agency did little or no investigation of the relative prior to rejecting her and the juvenile court failed to exercise independent judgment regarding the Agency's decision. (*Id.* at p. 1033.) Here, the Agency did properly investigate Ms. C., and the juvenile court did not defer to the Agency's decision. As a result, *Cesar V.* provides no basis for reversing the court's order.

Father also contends the court's findings were based on speculation, but we do not agree. The court's concern about Ms. C.'s ability to protect K. from the parents was based on its own observations of her personality, Mother's past threatening conduct toward Ms. C., and Ms. C.'s conduct with respect to Father during the placement deliberations. These factors provide a foundation of substantial evidence for the juvenile court's findings.

Finally, Father argues the juvenile court erred in combining its decision on placement with Ms. C. with its dispositional decision, thereby delaying the placement decision past the time normally permitted. (§§ 352, subd. (b), 387, subd. (d).) We find no prejudice from the delay. (See *Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1078 [procedural errors in dependency proceedings subject to harmless error analysis].) Father contends the error was prejudicial because K. stayed longer in the foster placement, and "stability is a part of the placement evaluation." The foster placement, however, began before the section 387 petition was filed. Even if the juvenile court had acted within the six-month period argued by Father, K.'s stability would still have been affected by selection of Ms. C. In any event, the juvenile court did not rest its

decision on the issue of stability, and the reasons it articulated for denying the placement were not influenced by the delay.

Father's petition for an extraordinary writ is denied on the merits, and the stay of the juvenile court's section 366.26 hearing is lifted. (See *Kowis v. Howard* (1992) 3 Cal.4th 888, 894.) The decision is final in this court immediately. (Cal. Rules of Court, rules 8.452(i), 8.490(b)(2)(A).)

Margulies, Acting P.J.

We concur:

Banke, J.

Becton, J.*

* Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.