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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

D.U. et al.,

Petitioners,

v.

THE SUPERIOR COURT OF CONTRA
COSTA COUNTY,

Respondent;

CONTRA COSTA COUNTY CHILDREN
& FAMILY SERVICES BUREAU, et al.,

Real Parties in Interest.

A144741

(Contra Costa County Super.
Ct. No. J13-01295)

Petitioners are the Mother and Father of minor N.R. They are seeking to vacate the juvenile court’s March 26, 2015 order terminating services to both parents and setting a July 22, 2015 hearing, pursuant to Welfare and Institutions Code section 366.26.¹ On May 4, 2015, this court issued an order to show cause. After considering the parents’ petitions and the opposition filed by the Contra Costa County Children and Family Services Bureau’s (“CFS”) we deny the petitions.

¹Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

FACTUAL AND PROCEDURAL BACKGROUND

N.R. came within the jurisdiction of the juvenile court in December 2013 when she was just four days old. CFS filed a juvenile dependency petition alleging that pursuant to section 300, subdivision (b) she had suffered or there was a substantial risk that she would suffer serious physical harm or illness. Specifically, it was alleged that Mother had “a serious and chronic substance abuse problem which significantly impairs her ability to provide adequate support and care to the child.” The report supporting detention and jurisdiction alleged that Mother tested positive for methamphetamine, THC, and opiates when N.R. was born; the baby tested positive for methamphetamine. Mother reportedly had a “lengthy history of poly substance abuse,” dating back to junior high school. She described herself as going from one drug to another, including heroin. Mother was diagnosed with bipolar disorder at the age of 15, and had been taking Seroquel until several months prior to N.R.’s birth, when she stopped because she was incarcerated. Mother’s history included a previous psychiatric hospitalization and the issuance of a felony arrest warrant. Mother also had a five-year old daughter, for which her mother, the child’s grandmother, had been appointed as legal guardian. Mother reported that she had been homeless for about one year following her arrest for using heroin. Mother’s arrest history includes public nuisance, loitering with the intent to prostitute herself, indecent exposure, disorderly conduct (prostitution), disorderly conduct (soliciting a lewd act), disorderly conduct (intoxication), battery on a peace officer/emergency personnel, and possession of narcotics for the purpose of transporting/selling narcotics. She suffered a single misdemeanor conviction for loitering with the intent to prostitute and was sentenced to 24 months probation.

When Mother was interviewed by the social worker and a police officer she reported that Father had been physically violent in the past and that she was afraid of him. Father later admitted a single incident of violence towards Mother before he learned that she was pregnant. Father’s arrest history includes inflicting corporal injury on a spouse or cohabitant, unlawful possession of a firearm, trespass, driving without a license, marijuana possession, obstructing and resisting a public officer, disorderly

conduct (intoxication), pimping for a prostitute who was under sixteen years old, and threatening a crime with the intent to terrorize. He had a prior conviction for battery, for which he was sentenced to 36 months probation with jail time, and a fine. When N.R. was detained, Father was participating in a re-entry program. When he completed that program he planned to live with his grandparents.

N.R. was placed in the maternal grandmother's home on December 4, 2013. The court also ordered genetic testing for Father.

On December 12, 2013, Mother entered her no contest plea to an amended charge that she had a serious and chronic substance abuse problem which significantly impaired her ability to provide adequate support and care to her child. N.R. was declared a dependent of the court, and a dispositional hearing was set for February 13, 2014.

The CFS report prepared for the disposition hearing chronicled Mother's history of substance abuse beginning in 1998 when she was 12 years old. Her substance abuse included using alcohol, marijuana, cocaine, mushrooms, methamphetamine, ecstasy, prescription pills, and heroin. At 13 she ran away from home, after her grandmother was diagnosed with various medical problems. When Mother was 16, in 2002, she started working as a prostitute. In February 2002 she was kidnapped and forcibly taken to Jalisco, Mexico and delivered to a drug dealer. There she was beaten and raped and had alcohol forced down her throat over a period of two to three months. She escaped, called her mother, and had to wait three days for the authorities to locate her. Due to fear of retaliation, she did not testify against her kidnappers.

Mother entered the Orchid residential drug treatment program on December 5, 2013. In January 2014, her case manager reported to CFS that mother was in compliance with the program and doing well. She had six negative drug tests administered from December 5, 2013 through January 13, 2014. N.R. was then living with her maternal grandmother and older half-sibling. On January 16, 2014 mother transferred to another treatment program, operated by the same company, in order to live closer to N.R.

Mother and Father met in 2011. Mother described their relationship as “ ‘unhealthy,’ ” steeped in drug and alcohol use and domestic violence. Mother stayed with Father because he met her basic needs, including shelter.

At the February 13, 2014 hearing the court ordered that N.R. be placed out of the home with reunification services for Mother, as recommended by CFS. Mother was to receive a mental health assessment, comply with the recommendations of that assessment, complete an in-patient substance abuse program, undergo substance abuse testing, participate in a 12-step program, and complete a parenting class.

Father was arrested in early February 2013 after “ ‘stomping [Mother] in the face.’ ” Incidents of domestic violence continued during her pregnancy, during which Father also expressed concern about the mother’s lack of prenatal care.

Father graduated high school in 2004 and began working. He attended Heald College, and intended to go to community college to obtain his associate degree. He described himself as coming from a “long line of drinkers,” and said that all he knows is drugs and alcohol. His mother first introduced him to marijuana and alcohol when he was five years old. Despite this history, Father repeatedly denied that he had any problem with illicit substances.

Father considered himself to be in a relationship with Mother, and intended to marry her. He denied knowing that the mother was using drugs while she was pregnant and that there was any domestic violence in their relationship. He participated in a “Back to Family” program, sponsored by Centerforce, which is a non-profit organization that provides comprehensive services to current and former prisoners and their families. He stated that he attended a 12-step program. A previous social worker referred Father for substance abuse testing on December 18, 2013, and the current worker provided him with contact information for intake and testing services on December 26. He was also mailed written instructions about the testing. As of January 23, 2014, Father had not yet completed the intake process.

At the February 13 hearing Father was granted one hour of weekly, supervised visitation. The court continued the issue of his paternity and services to March 3, 2014.

On March 3 the court determined Father was N.R.'s biological father and raised his status to presumed parent, pursuant to Family Code section 7611, subdivision (d). Father's case plan, adopted by the court, required him to complete domestic violence counseling and parenting classes. He was required to submit to random drug testing and to successfully participate in an outpatient substance abuse program. However, if he tested positive for illicit substances or the outpatient program recommended it, Father was to complete a residential treatment program.

At the July 30, 2014 six-month review hearing, Mother was making good progress. She completed her residential treatment program on July 16, 2014 and was at her mother's home with N.R. pending a suitable placement. She was receiving psychiatric treatment at Pittsburg Adult Mental Health Services, taking her prescribed medications, and had participated in individual therapy while in residential treatment. A referral for community-based mental health services had been submitted. Between January 30, 2014 and July 21, 2014 Mother had regularly tested negative for drugs and was attending 12-step meetings.

Father was also making progress. He attended 17 out of 18 domestic violence treatment sessions and was actively participating in the program. He completed a parenting program designed to assist parents who are reentering society following their incarceration. The course facilitator considered him to be an "outstanding" student. Similarly, at Anka Behavioral Health, which provided group treatment for early recovery skills, dual recovery, relapse prevention, anger management and relationship skills, the case manager also thought Father was an "outstanding" client. Between March 5, 2014 and July 23, 2014 Father had tested negative for drugs 17 times. But on one occasion he tested positive for alcohol. He claimed that he did not understand that he was being tested for alcohol and promised to discontinue drinking.

On this record the court found that reasonable services had been offered or provided to aid the parents in overcoming the problems which led to N.R.'s initial removal and continued the minor's custody. Court ordered services to the mother were essentially the same as earlier, except that she no longer required visitation because she

was now living with N.R. Father was ordered not to live at home with N.R., but was allowed one hour per week of visitation.

On January 13, 2015, things changed. CFS filed a supplemental petition, pursuant to section 387,² alleging that ten days earlier Mother had suffered a relapse when she overdosed on heroin in the presence of N.R. and her older half-sibling. When the older child found her mother unresponsive, she called her grandmother, who was at work. The grandmother instructed the child to call 911 and to get a neighbor to come to the house. Mother was transported to Sutter Delta Medical Center. Mother then moved out of her mother's house, while her children remained. Mother continued to attend Ujima East (outpatient treatment) and was on the waiting list for a residential treatment program. The court detained N.R., with placement in her maternal grandmother's home, ordered professionally supervised visits for each parent once a week, and ordered that both parents be provided alcohol and drug testing and substance abuse treatment. The court also ordered mental health services for Mother. The court found that reasonable efforts were made to prevent or eliminate the need for removing N.R. from the home, and set a jurisdictional hearing for January 26, 2015. At that hearing Mother pled no contest to the first supplemental petition, which alleged that she had overdosed on heroin while her two daughters were at home.

A contested disposition hearing on the supplemental petition was held on March 26, 2015. CFS' disposition report, filed that same day, recommended that the court terminate reunification services to both parents and set a section 366.26 hearing. The report summarized the current situation as follows: (1) N.R. was living with her maternal grandmother and [half-]sibling; (2) it was not in N.R.'s best interests to be cared for by her mother due to Mother's "long history of substance abuse," which manifested itself

²Section 387 allows a court to modify a previous order by removing a child from the parent's physical custody after holding a noticed hearing on a supplemental petition. (§ 387.)

most recently in January 2015 when she overdosed on heroin;³ (3) Mother's mental illness needed to be addressed; and (4) Father conceded that he was in no position to care for his child, lacking both stable housing and the necessary financial resources.⁴

At the March 26, 2015 hearing CFS stood by the recommendation contained in its report. The worker agreed that both parents' visits with N.R. were going well. However, Father's case plan required him to enter residential drug treatment if he tested positive for drugs, and he tested positive for methamphetamine on October 21 and November 4, 2014. He was referred to a residential treatment program on November 14, 2014, but he never entered residential treatment. Father also missed a drug test on January 12, 2015. CFS considered this to be a positive test.

Mother testified that she suffers from bipolar disorder and post-traumatic stress disorder, and was being treated with four psychoactive medications. She conceded that she was an addict and that was why she had placed her older daughter with her mother. Before N.R. was returned to her care, Mother had already received approximately seven months of substance abuse treatment. Despite that treatment, Mother agreed that she overdosed in January 2015 and placed both her daughters at risk.

Father testified that he was instructed to attend an outpatient substance abuse program, but not a residential one. In response to a direct question from the court, Father denied that he had a substance abuse problem. The minor's counsel supported the CFS recommendation to discontinue services and schedule a termination hearing.

At the conclusion of the hearing, the court adopted CFS' recommendations, declined to extend services, and set a section 366.26 hearing. In its findings, the court first contrasted the parents with one another, finding that Mother showed insight into her problem and accepted responsibility, but Father was "defensive" and "hostile." The court recognized Father's "long history of substance abuse" and domestic violence issues, but

³The report also noted that Mother tested positive for methamphetamine on January 28, 2015 and failed to test three times in January and February 2015.

⁴The report also noted Father's criminal history involving controlled substances and inflicting corporal injury on the mother.

found that even after he completed the STAND anti-domestic violence program, he exhibited a “complete and utter lack of understanding” of his issues. The court concluded it had no reason to disbelieve the social worker when she testified that she told Father he had to participate in a residential treatment program, especially because the worker’s testimony was consistent with the written documentation she had sent to Father via email. The main issue for the court regarding Father was that although he had positive and missed drug tests and acknowledged that his life had been immersed in drugs and alcohol, he refused to acknowledge he had a drug problem.

The court characterized Mother’s situation as “tragic,” and stated she loves her children very much. But both parents had been given “ample opportunity” to resolve their issues and N.R. had, nonetheless spent virtually her whole life in dependency and been cared for by someone other than a parent. Thus, the court could not “possibly find that there is a substantial probability that [N.R.] could be safely returned to either” parent if it extended services. The court set the section 366.26 hearing for July 22, 2015. Mother and Father filed timely notices of intent to file a writ petition.

On May 4, 2015 this court issued an order to show cause and set a schedule for briefing and oral argument. After the briefing was completed no party requested oral argument.

DISCUSSION

Mother’s petition contends that (1) there was no substantial evidence to support the finding that even with additional reunification services N.R. could not have been returned to her within six months, and (2) there was no substantial evidence demonstrating that CFS services provided her were reasonable. Father argues that his services should have been extended because he was not afforded reasonable services. He also argues that the court erred in concluding there was no substantial probability that N.R. could be returned to him.

I. NEITHER PARENT RAISES A VIABLE CLAIM THAT SERVICES WERE NOT REASONABLE.

Our role is not to inquire whether optimal reunification services have been provided to parents in dependency proceedings; we accept practical limitations on the services counties provide. Our inquiry focuses instead on whether the services provided were reasonable. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 547; *Elijah R. v. Superior Court* (1998) 66 Cal.App.4th 965, 969.) Services are reasonable if the agency identifies the family's problems, offers services to address those problems, maintains reasonable contact with the parents, and makes reasonable efforts to assist them when compliance is problematic. (*In re Riva M.* (1991) 235 Cal.App.3d 403, 414.) A juvenile court ruling on the adequacy of reunification services is reviewed for substantial evidence. (*In re Alvin R.* (2003) 108 Cal.App.4th 962, 971.) All legitimate inferences must be drawn in support of the juvenile court's findings. (*Ibid.*) Those findings must be made upon clear and convincing evidence. (*Ibid.*) In applying the substantial evidence test, the effect of the heightened burden of proof is to require the evidence to be so clear as to leave no substantial doubt concerning the lower court's conclusions. (*Ibid.*)

A. Mother's Challenge to the Adequacy of Services Is Forfeited.

Mother's argument that she was not provided reasonable services hinges on the alleged failure by CFS to have her undergo a complete psychological assessment. Mother had a documented history of bipolar disease, which CFS acknowledged required treatment. Accordingly, as part of the mother's case plan she was to "complete a Mental Health Assessment arranged through Contra Costa County Mental Health or other Mental health provider, approved by the social worker, sign necessary releases of information regarding previous Mental Health treatment and follow all recommendations resulting from that assessment." Mother testified that she had been diagnosed with, and was being treated for bipolar disorder, anxiety, depression and post-traumatic stress disorder. Based on her very brief testimony about her mental health treatment, she was apparently seeing a psychologist once every two months and her psychiatric medications were adjusted.

But the record is silent on whether Mother received the mental health assessment required under her case plan. Rather, the entry under “Counseling/Mental Health Services” in the six month report simply indicated that she was required to “enter and successfully complete individual counseling approved by the social worker and receive a positive evaluation from [her] therapist that [she] understands the factors contributing to this dependency, [has] successfully addressed those issues and the child is not at risk at this time.” She was also required to take her prescribed psychiatric medications.

In light of Mother’s extensive history of mental illness and trauma it was entirely appropriate for the court to require that she receive a thorough mental health assessment as contemplated in her case plan. The fact that this goal—without explanation or discussion—was interpreted to simply require Mother’s successful participation in counseling and taking her prescribed medications—is not reasonable. There is some indication in the record that she received a partial evaluation. But nothing suggests she received a full assessment, designed to preserve the family, while tailored to the unique needs and circumstances of her family. (*In re Taylor J.* (2014) 223 Cal.App.4th 1446, 1450.) Thus, there is no excuse for the failure to provide Mother a psychological assessment in light of her significant psychiatric diagnoses, history of extreme trauma, and impaired functioning.

Despite this failure in CFS’ delivery of services to Mother, we will not reverse the juvenile court’s ruling. Nowhere in this record do we find evidence that Mother raised the failure to give her a complete psychological assessment before the juvenile court. In order for a challenge to the reasonableness of services to be preserved on appeal, the issue must first be raised with the juvenile court. (*In re Christina L.* (1992) 3 Cal.App.4th 404, 416. [party allegedly receiving inadequate services must seek the juvenile court’s intervention to address any infringement of his/her legal rights]; see also *Los Angeles County Dep’t of Children etc. Services v. Superior Court* (1997) 60 Cal.App.4th 1088, 1093 [parent may not wait silently until the final reunification review hearing to seek an extension of the reunification period based on a perceived inadequacy of the services offered, which occurred long before that hearing].) Moreover, at Mother’s

six-month review, by which time it was apparent that a full psychological assessment had not been accomplished, the juvenile court found that reasonable services had been provided. This ruling was not challenged. Accordingly, it is too late for Mother to challenge the adequacy of these services now. (*In re Cicely L.* (1994) 28 Cal.App.4th 1697, 1705.) The issue has been forfeited. CFS' failure to conduct a psychological assessment is not a valid basis for this court to overrule the juvenile court's setting a section 366.26 hearing.

B. Father Received Reasonable Services.

Father's claim that he received inadequate services centers on his contention that he was not referred for inpatient drug treatment after his positive drug tests. He asserts that the only services he was provided was a list of a broad range of programs, some of which did not even deal with substance abuse. Father also testified he did not understand that he was required to participate in a residential substance abuse program.

In her testimony, the social worker made it clear that she monitored Father's participation in different programs and credited him with participation in them based on how often he attended them and the fact that he received very favorable reports. She sent Father an admittedly overinclusive list of service providers, but she was unequivocal that on November 14, 2014, she referred Father to inpatient substance abuse treatment. Moreover, Father's denial that he had a substance abuse problem, casts doubt on whether he would have entered and participated in a residential program even if he understood the context of the referral.

There is substantial evidence in testimony from the social worker and the referral list she provided to Father that he was referred for inpatient treatment. Moreover, once a child is made a ward of the court the parent is on notice of the conduct which required this extreme intervention and bears the burden of correcting his/her behavior; the social worker need not lead the parent by the hand. (*In re Christina L.*, *supra*, 3 Cal.App.4th at pp. 414–415.)

Father's reliance on *In re Dino E.* (1992) 6 Cal.App.4th 1768 is misplaced. *In re Dino* required an extension of reunification services to the father because no formal

reunification plan had ever been developed for him. (*Id.* at p. 1773.) In contrast, a reunification plan was developed for Father in this case, taking into account his individual needs, and his progress was monitored. Thus, the “mechanical approach” that was rejected in *In re Dino* (see *id.* at p. 1777) was not presented here where there was an integrated plan for Father. Similarly, Father’s attempt to analogize his situation with the one that existed in *In re Taylor J.* (2014) 223 Cal.App.4th 1446 fails. In *Taylor* the court ordered the agency to refer the mother for low cost or no cost counseling. (*Id.* at p. 1448.) The agency provided two lists of counseling agencies, one of which identified one agency near the mother’s home that provided domestic violence services; the other listed no counseling agencies near her home. Neither listed agencies that provided adult counseling. (*Ibid.*) Furthermore, when the mother complained that she lacked the money to pay for parenting classes or counseling, the social worker seemed to refute that claim in her report. (*Id.* at p. 1449.) Other than noting these facts in the report, however, the social worker did nothing to help the parent with her problem. (*Id.* at p. 1452.) Finally, the agency in *Taylor J* provided the parent with no services whatsoever for the six months between the 12 and 18-month reviews. (*Id.* at p. 1453.) In contrast, here Father had a detailed plan which required his compliance with court orders, attending and progressing in a domestic violence prevention program, maintaining his sobriety, maintaining a relationship with his child, submitting to drug testing, refraining from further instances of domestic violence, participating in outpatient and/or residential substance abuse treatment, as needed, and participating in a 12-step program. When the execution of the plan needed adjustment because Father tested positive for drugs, the social worker made the necessary referral. Thus, the comparison with *Taylor* is invalid. We therefore reject Father’s claim that he received inadequate services.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE COURT'S ORDER TO TERMINATE SERVICES TO EACH PARENT.

A. Mother's Claim.

Mother argues that there is no substantial evidence to support the finding that even with additional services N.R. could not be returned to her within six months. We agree with Mother, citing *In re Albert T.* (2006) 144 Cal.App.4th 207, 216, that a substantial evidence standard governs our review of her claim. Mother is also correct when she says that a scintilla of evidence supporting the juvenile court's decision is not substantial evidence. (See *Id.* at pp. 216–217.) Mother then proceeds to outline the positive facets of her case; the strong and loving bond she has with N.R., her skill in caring for the child, her participation in a residential substance abuse program, her efforts to secure a sponsor in her 12-step program. None of that is disputed. Indeed, the juvenile court acknowledged the “great path” Mother was on, the difficulties she overcame, her insight, and her love for her children. But notwithstanding all those positive aspects of Mother's progress, we cannot conclude that her relapse to heroin use was merely a “scintilla” of evidence supporting the juvenile court's order. Mother's substance abuse began in 1998. Her own mother was the guardian for Mother's older child. Shortly, after N.R.'s birth, Mother entered residential treatment. She regained physical custody of N.R. after completing her residential program and was continuing to receive mental health services. Despite all this, she suffered such a severe relapse that she endangered both of her children when she overdosed on heroin. The court's conclusion that it could not “possibly find that there is a substantial probability that this child could be safely returned to” Mother is supported by substantial evidence.

In order for the juvenile court to find a substantial probability that a child will be returned to a parent's physical custody the court must find that (1) the parent has consistently and regularly been in contact with the child; (2) the parent has made significant progress in resolving the problems that led to the child's removal; and (3) the parent has demonstrated the capacity to complete the objectives of her treatment plan and

to provide for the child's safety and other needs. (§ 366.21, subd. (g)(1)(A)-(C).) Given Mother's relapse, it was clear to the juvenile court and is clear to us that she had not yet made significant progress resolving her issues of substance abuse and that her capacity to do so and to provide for N.R. properly remained in doubt.

B. Father's Claim.

The juvenile court's conclusion, that there was no substantial probability that N.R. would be returned to Father if he had been granted extended services is also supported by substantial evidence. Father also recites his accomplishments, including completion of a year-long domestic violence treatment program, an outpatient drug program, and attendance at 12-step meetings two times per week. However, none of this outweighs his recalcitrant denial of his substance abuse problem. Father's arrest history includes an arrest for marijuana possession and disorderly conduct with drug or alcohol intoxication. Father reports that his mother first introduced him to marijuana and alcohol when he was five years old, that he comes from a long line of drinkers, and that all he knows is drugs and alcohol. Yet, despite repeated intervention he has consistently denied having a drug problem and told the juvenile court at the March 26, 2015 hearing that he had no such problem. Father's consistent denial of any substance abuse problem, even though he twice tested positive for methamphetamine and failed to show for at least three drug tests, provide a sufficient basis to affirm the juvenile court's refusal to extend additional services to him. In addition, at the hearing Father still lacked stable housing and was looking for employment. This also supports the court's order. On these facts, the juvenile court could not find that Father had made significant progress resolving the issues that led to the child's removal from him and could not find he had demonstrated the capacity to complete the objectives of his treatment plan. (§ 366.21, subd. (g)(1)(B) & (C).)

DISPOSITION

The petitions for extraordinary writ are denied. To expedite the prompt resolution of this case, our decision is immediately final as to this court. (Cal. Rules of Court, rules 8.452(i), 8.490(b)(2)(A).)

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.