

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

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

SAN FRANCISCO HUMAN SERVICES
AGENCY,
Plaintiff,

v.

J.P.,
Defendant and Respondent;

P.W., a Minor,
Real Party in Interest and Appellant;

MICHAEL W.,
Real Party in Interest and Respondent.

A145319

(City & County of San Francisco
Super. Ct. No. JD 143297)

SAN FRANCISCO HUMAN SERVICES
AGENCY,
Plaintiff and Respondent,

v.

J.P.,
Defendant and Respondent;

MICHAEL W.,
Real Party in Interest and Appellant.

A145861

(City & County of San Francisco
Super. Ct. No. JD 143297)

J.P. et al.,
Petitioners,

v.

THE SUPERIOR COURT OF THE CITY
AND COUNTY OF SAN FRANCISCO,
Respondent;

SAN FRANCISCO HUMAN SERVICES
AGENCY.
Real Party in Interest.

A145996

(City & County of San Francisco
Super. Ct. No. JD 143297)

In this consolidated appellate proceeding, petitioners J.P. (mother) and Michael W., who was adjudged the presumed father, seek writ review of the juvenile court's six-month review order terminating family reunification services and setting a permanency planning hearing for their daughter, who was less than one-year old when she became a dependent of the court. (Welf. & Inst. Code, §§ 300, 366.26.)¹ Petitioners contend there is insufficient evidence to support the juvenile court's findings that mother and the presumed father failed to participate regularly in court-ordered treatment and that there was no substantial probability the child could be returned to their care within the time during which additional services might have been provided. In separate appeals, the child's legal representative contests the court's grant of presumed father status to Michael, and Michael contests the court's determination that he was not entitled to continuation of the review hearing to afford him six months of reunification services.²

We conclude there is insufficient evidence to support presumed father status for Michael, thus mooting his claims, and sufficient evidence to support the juvenile court's termination of reunification services to mother. We shall deny the petitions for extraordinary writ, affirm the six-month review order, reverse the order granting Michael presumed father status, and dismiss as moot Michael's appeal of the order denying extension of reunification services.

Statement of Facts

Mother was 27 years old, unmarried, and in a residential drug treatment program when she gave birth to her daughter. When the child was nine months old, mother was arrested for violating probation. Mother had previously been convicted of inflicting injury on a cohabitant and required to complete a domestic violence program as a condition of her probation. A bench warrant was issued and mother arrested on that warrant after she

¹ All further sections references are to the Welfare and Institutions Code except as noted.

² Hereafter, we refer to Michael W. by name as his status as a presumed father is contested.

was terminated from the program for nonattendance. Upon her arrest, mother left the child in the care of mother's father, a registered sex offender.

Days after mother's arrest, on September 3, 2014, the San Francisco Human Services Agency (agency) took the child into protective custody and filed a juvenile dependency petition. The agency stated the identity of the child's father was unknown and alleged the child was at risk of suffering serious physical harm as a result of mother's failure or inability to care for the child based on mother's incarceration, failure to provide a safe caregiver, and substance abuse. (§ 300, subds. (b), (g).) Mother was released from jail in advance of the jurisdictional hearing but did not attend the hearing. On September 18, 2014, the juvenile court found the jurisdictional allegations true and set the matter for an October 2014 settlement conference on disposition.

In advance of the scheduled settlement conference, the agency filed a report stating that mother was out of custody on probation but homeless, living a few days at a time in the home of her father or friends. The agency interviewed mother, who reported using alcohol and drugs but expressed a willingness to obtain treatment. Mother said she wanted services to help her reunify with her daughter and the agency referred mother to services, including substance abuse assessment, residential treatment programs, and case management. The child was placed with mother's aunt and the agency set twice-weekly visitation.

At that point the child's father had not been identified. Mother said she believed the child's father was Lloyd M., who was then incarcerated. Another man, Michael, was listed as the father on the child's birth certificate but genetic testing in an earlier child support proceeding established that Michael is not the child's biological father. In October 2014, the court appointed attorneys to represent mother, Michael and Lloyd and, the following month, ordered paternity testing. Testing was scheduled for Lloyd. No test was scheduled for Michael as he was indisputably not the child's biological father as a previous test and judicial proceeding had determined. The court ordered counsel to "file any motions re[garding] paternity" by December 12, 2014, when testing was expected to

be completed. No motions were filed by that date but neither was paternity testing completed at that time.

Meanwhile, between October 2014 and January 2015 mother twice entered a residential treatment program and each time left the program within 24 hours. Mother also missed multiple intake appointments with a different program. Mother's failure to stay in a program violated the terms of her probation and in December 2014 a bench warrant was issued for her arrest.

In late December 2014 the child's placement was changed from the home of a maternal aunt to a foster home. Placement with the aunt proved unworkable for several reasons, including the aunt's unwillingness "to participate with visitation" and mother's unwillingness to visit the child at the aunt's home. Following the change in placement, mother visited her daughter once in early January 2015. In or before January 2015, Michael asked for visitation but it was denied because paternity was not yet established and mother objected, saying she did not want Michael "involved with her child."

The dispositional hearing occurred on January 9, 2015, before paternity testing was complete. Mother, Michael and Lloyd attended. The court continued the child in foster care and ordered reunification services for mother alone. Mother was directed to complete substance abuse assessment and follow all recommendations for treatment, undergo individual therapy, complete a parenting education course, obtain suitable housing, and comply with the terms of her probation. Mother was granted supervised visitation. Given unsettled paternity, the parties agreed that "the orders regarding disposition would be without prejudice to either alleged father" receiving reunification services "should he become a presumed father at a later date." The court set a six-month review hearing for July 2015.

In mid-January 2015, shortly after the disposition hearing, mother was found in violation of probation and jailed. The agency arranged child visitation with mother in jail over the next few months and, during this same time period, mother participated in a therapy program for substance abusers.

In February 2015, a genetic test report was filed concluding that Lloyd is not the child's biological father and he withdrew from the proceedings. Three weeks later, in March 2015, Michael filed a motion seeking presumed father status. Michael alleged that mother was living with him when the child was conceived in early 2013, before mother went into a residential treatment program in May 2013. Michael averred that he was present at the hospital when the child was born. He signed a voluntary declaration of paternity and is listed as the father on the birth certificate. The child bears his last name. Michael alleged that mother and child lived with him for one month in early 2014, after mother left the treatment program, and stayed with him "off and on" from February to September 2014, when the child was taken into protective custody. Michael acknowledged that his paternity declaration was set aside in a June 2014 child support proceeding when he was found not to be the biological father. Nevertheless, Michael stated that he is "fully committed to [his] parental responsibilities including all financial and emotional responsibilities" toward the child, saying: "I have fed her, bathed her, changed her diaper, held her, changed her clothes, played with her, and done all the things a father does with his child."

The agency and the child's appointed counsel opposed the motion. Counsel for the child argued that Michael had a short and sporadic relationship with the child, inadequate for presumed father status. Counsel also noted that Michael did not seek continuation of his relationship with the child at the time of the prior child support proceeding nor contest the setting aside of his declaration of paternity.

The court granted Michael presumed father status in April 2014, ordered supervised visitation, and indicated that reunification services should be provided to Michael. The agency said it intended to file a subsequent dependency petition with allegations against Michael and, two weeks later, did so. The agency filed a petition alleging Michael's failure to protect the child stating that Michael was aware of mother's substance abuse but allowed her "to continue to move around with the child, not providing stability and care for the child," and, further, that Michael's ability to care for the child is impaired in that he has a long history of substance abuse for which he

requires assessment and treatment. (§§ 300, subd. (b), 342.) The agency reported that Michael, who was then 51 years old, has a history of heroin abuse, mental health issues, and criminal convictions. Michael was currently on probation for a drug offense.

Mother was released from jail conditioned upon her participation in a residential treatment program. On April 20, 2015, three days after her release, mother and Michael by chance met at the agency while there on separate matters. The social worker sent Michael for drug testing, to be conducted that day, but he did not submit to testing. Mother later told a social worker that she and Michael left the agency together and went to his home where she consumed methamphetamines given to her by Michael. Mother was terminated from the residential treatment program and returned to jail on April 27, 2015. Mother used drugs in jail and, on May 14, 2015, was placed “on lock-down” where she was denied visitation and was unable to receive support services required by her reunification case plan. Meanwhile, Michael submitted to a drug test a week after being ordered to do so. No drugs were detected in his system at that time.

In May 2015, the court sustained the allegations of the subsequent dependency petition concerning Michael and ordered reunification services for him. Michael asked for six months of reunification services from that date forward and moved to continue the review hearing set for July 2015. The agency and child’s counsel objected, arguing that parents are not entitled to separate timelines for reunification services and insisting that the review hearing proceed in two months as scheduled. The court denied Michael’s request and confirmed the review hearing for July 2015.

In June 2015, the agency filed a report in advance of the review hearing recommending termination of reunification services and setting a permanency planning hearing. The agency reported that mother remained in jail, with an expected release date the following month. Since January 2015, mother had seven visits with the child, six in jail before her May 2015 lock-down and one out of jail. Mother “positively interacted” with the child during these visits. The agency reported that mother “has made minimal progress in her reunification services, and has continued to use drugs, both in and out of jail. The mother is young and does not appear ready/able to make the progress she needs,

as despite being given the chance to enter treatment (through early release from jail), the mother relapsed within days of her release.” Mother completed a parenting class in jail but completed little else in her case plan as services were not available to her after her in-jail drug use placed her on lock-down.

As for Michael, the agency reported that he missed two of seven scheduled visits with the child and was late to all but one of those he attended. The child did not interact well with him. She cried for much of the first visit, “did not appear to know” him and “seemed scared,” calming down only when held by a social worker. The child “cautiously interacted” with Michael at the second visit but did not “come near him easily” and preferred to engage with the social worker. On the third visit, Michael was almost an hour late for a two-hour visit. The child “was more willing to play around the general vicinity” of Michael than during previous visits but “interaction really only occurred when he was feeding her and when it was time to end the visit.” At the end of the third visit, the child “would not go directly to [Michael] to say good-bye, but waved good-bye and allowed him to give her a kiss good-bye without having an adverse reaction while [the social worker] was holding her.” Michael was 25 minutes late to the fourth visit. The child “initially kept a distance” from Michael and stayed next to the social worker despite Michael calling the child’s name and trying to engage her. The child became “very upset” when the social worker left her alone with Michael and remained so “for about 20 minutes.” “[T]hroughout the second part of the visit, [Michael] kept picking up the case plan, and read pieces over and over to himself” rather than engage with the child. On the last visit, Michael arrived 18 minutes late. He was “able to engage with [the child] in different activities for short periods of time.”

The agency reported that Michael had “minimal participation” in reunification services and that his “engagement in the recommended services has not been significant enough to make progress towards reunification.” Michael admitted using heroin “periodically from 1994 until around September 2014” when he entered a residential treatment program and “that he was using a medication to help him with his addiction, which was discontinued around January 2015 when he ran out of medication.” In April

2015, the agency referred Michael to drug assessment and treatment but Michael denied needing treatment. Michael denied current drug use but had failed to submit to drug testing over the previous two months.

The agency filed a supplemental report in July 2015. The agency reaffirmed its recommendation that reunification services be terminated and a permanency planning hearing set. Mother remained in jail but was no longer on lock-down and was expected to be released on probation that month conditioned upon completion of a treatment program. The child had three visits with mother over the previous weeks and the visits had “generally gone well.”

Michael admitted to a social worker on June 19, 2015, that he was using heroin but claimed “it is not a mind altering drug.” Michael agreed to receive outpatient treatment but enrolled in a sobriety support group rather than the recommended intensive treatment program and had poor attendance at the support group. Michael continued to miss drug tests. The agency reported: Michael’s “pattern of testing appears to indicate he chooses when to comply with testing, based on when he may have last used, to then only test when he knows he will be clean and sober. Out of the 24 scheduled tests, [Michael] has complied with 4 dates in the past 2 1/2 months.” Michael began a parenting class in late June 2015 and attended five of the six classes to date. Michael continued his weekly visits with the child, although he missed one visit and was late to another. The visits were uneven. In one visit, the child “immediately had a fear response to [Michael] as indicated by crying and hiding” behind a social worker’s leg. On the last visit in early July 2015, Michael brought food snacks for the child (as suggested by a social worker) and the child responded well to them. At the close of the visit, the child allowed Michael to pick her up and hold her; “she also said bye-bye daddy and gave him a kiss,” which was “the most affectionate” the child had ever been with Michael.

A contested six-month review hearing was held on July 31, 2015. The hearing was attended by Michael, mother, who had been released from jail 10 days earlier, and the foster parents who had been granted de facto parent status two months prior to the hearing. An agency social worker testified, as did mother and several witnesses on behalf

of mother and Michael. The social worker testified that mother started a one-year residential treatment program the previous day and father was two weeks into an outpatient treatment program, meeting the agency's standards. Despite recent compliance with these aspects of the case plan, the social worker reaffirmed her recommendation that reunification services be terminated. The social worker did not believe it likely that continuation of services would enable the child to be returned to mother or placed with Michael within the maximum time permitted by statute.

The juvenile court found that mother and Michael made "minimal to moderate" progress toward alleviating their substance abuse for most of the reunification period and became engaged in addressing their problems only a few weeks before the hearing. The court determined there was no substantial likelihood the child could be placed with either of them by the time of the 12-month review hearing in September 2015. The court terminated reunification services and set a permanency planning hearing for December 2015.

Mother and Michael filed writ petitions challenging the court's six-month review order. We consolidated the writ petitions with two pending appeals in which the child's legal representative contests the order granting Michael presumed father status and Michael contests the court's denial of his request to continue the review hearing to give him six months of reunification services. To permit review of these matters, we stayed the permanency planning hearing.

Discussion

1. There is insufficient evidence to support presumed father status for Michael.

We begin with the court's order granting Michael presumed father status, which the child's counsel appeals. The agency joins in counsel's position that there is insufficient evidence to support presumed father status for Michael.

The extent to which one may participate in dependency proceedings, and one's rights in those proceedings, depend on parentage status. (*In re T.R.* (2005) 132 Cal.App.4th 1202, 1209.) Fathers are designated as either presumed, de facto, biological

or alleged. (*In re J.H.* (2011) 198 Cal.App.4th 635, 644.) A presumed father is vested with the greatest parental rights; he is entitled to “appointed counsel, custody (absent a finding of detriment), and a reunification plan.” (*In re T.R.*, *supra*, at p. 1209.) “One who claims he is entitled to presumed father status has the burden of establishing, by a preponderance of the evidence, the facts supporting that entitlement.” (*Ibid.*)

A presumed father need not be the biological father. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 603-604.) At issue here is the presumption of paternity that arises when an individual “receives the child into his or her home and openly holds out the child as his or her natural child.” (Fam. Code, § 7611, subd. (d).) “Presumed fatherhood, for purposes of dependency proceedings, denotes one who ‘promptly comes forward and demonstrates a full commitment to his paternal responsibilities—emotional, financial, and otherwise.’ ” (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801-802.) “[T]o become a presumed father, a man who has neither married nor attempted to marry his child’s biological mother must not only openly and publicly admit paternity, but must also *physically* bring the child into his home.” (*Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1051.) He must have an *existing* “parental relationship that warrants protection, not the mere desire to parent a child.” (*In re D.M.* (2012) 210 Cal.App.4th 541, 553.) While public policy favors two parents, reliance upon that policy “is misplaced if it comes before an accurate finding of parenthood.” (*Id.* at p. 554.) “The well-intentioned desire to provide a child with two parents does not trump the need to make sure that the persons we designate actually are the parents.” (*Id.* at p. 555.)

The juvenile court’s finding that Michael is the presumed father is not supported by substantial evidence. (See *In re D.M.*, *supra*, 210 Cal.App.4th at p. 549 [standard of review is substantial evidence].) Mother was living with Michael when the child was conceived in early 2013 and then, when three months pregnant, mother went into a residential treatment program where she remained until the child was two months old. When released from the program in January 2014, mother and child spent one month living with Michael. During mother’s pregnancy and the child’s first few months of life,

Michael believed he was the child's biological father and he made some efforts to care for the child.

However, no discernable effort was made to preserve a parental relationship after March 2014, when child support proceedings were commenced. Michael filed an answer in the proceeding denying support obligations based on lack of income and, following his exclusion as the biological father in June 2014, did not contest a court order vacating his voluntary declaration of paternity. Michael could have preserved the declaration of paternity, despite lack of biological fatherhood, had he requested the parent-child relationship to continue and shown the relationship to be beneficial to the child. (Fam. Code, § 7575, subd. (b)(1); *In re Giovanni B.* (2013) 221 Cal.App.4th 1482, 1494-1495.)

We do not find, as the child's counsel urges us to find, that the order vacating the declaration of paternity in the child support proceeding was an adjudication against presumed father status that collaterally estops Michael from seeking presumed father status in this dependency proceeding. However, Michael's failure to assert a father-child relationship during the child support proceeding is a relevant factor to consider under the totality of circumstances. Also relevant is his refusal to provide financial support. In seeking presumed father status here, Michael offers to share with the child any veteran and social security benefits to which he may be entitled. Yet, in the child support proceeding conducted from March to June 2014, Michael unconditionally refused all financial support, stating he had "no income." His actions in the earlier proceeding suggest something less than " 'a full commitment to his paternal responsibilities— emotional, financial, and otherwise.' " (*In re Jerry P.*, *supra*, 95 Cal.App.4th at pp. 801-802.)

Moreover, Michael's short, inconsistent and sporadic contact with the child does not demonstrate a parental relationship. Mother and child lived just one month with Michael, when the child was about two months old. From that time until the child was taken into protective custody when nine months old, Michael did not bring the child into his home and raise the child as his own; he simply allowed mother and child to stay with him "off and on" for two or three nights at a time. Michael later admitted to a social

worker that he last saw the child at the end of July 2014, a month before she was taken into custody in late August 2014. Mother and child were living with mother's father at that time. Mother never identified Michael as the child's father or even as a caregiver, and she left the child in her father's care when she was arrested. Mother informed the agency, in late 2014, that she did not want Michael "to have visits with her child as he is not the child's father and she did not want him involved with her child." There is no evidence the child interacted with Michael as a child does with a parent and, indeed, later court-ordered visitation showed the child "did not appear to know" him and only grew to know him through those visits. Support services are meant to reunite a family, not create a new one. (*In re A.A.* (2003) 114 Cal.App.4th 771, 787.)

Presumed father status "requires something more than a man's being the mother's casual friend or long-term boyfriend; he must be 'someone who has entered into a familial relationship with the child: someone who has demonstrated an abiding commitment to the child and the child's well-being' regardless of his relationship with the mother." (*In re D.M.*, *supra*, 210 Cal.App.4th at p. 553.) In *In re D.M.*, the mother's boyfriend, who was not the biological father, moved in with her three months before the minor was born. (*Id.* at p. 545.) The boyfriend helped the mother prepare the home for an infant, bought baby supplies, and visited the minor in the hospital. (*Id.* at pp. 546 -547.) The infant, however, was taken into protective custody directly from the hospital based on the mother's lack of bonding, termination of parental rights to a sibling, and an ongoing dependency proceeding regarding another sibling. (*Id.* at p. 545.) The juvenile court found the boyfriend to be the presumed father, observing he had "'received the child into his home as far as he could under the circumstances of this particular case.'" (*Id.* at p. 548.) The Court of Appeal reversed, stating "the juvenile court's observation that [the boyfriend] had done what he could to 'develop' a bond . . . suggest[s] that the court considered only the possibility that [the boyfriend] would develop a parental relationship with the child, not that the relationship already existed." (*Id.* at p. 555.)

Similarly, Michael's desire to develop a parental relationship—and we do not question the sincerity of that desire—is insufficient to support presumed father status.

Presumed father status is accorded to a man with an existing “parental relationship that warrants protection, not the mere desire to parent a child.” (*In re D.M.*, *supra*, 210 Cal.App.4th at p. 553.)

We therefore reverse the order granting Michael presumed father status. Michael, who is neither the presumed nor biological father, has no entitlement to family reunification services (§ 361.5, subd. (a)) or custody (§ 361.2, subd. (a)) and, thus, the various claims he raises in his petition and on appeal concerning the adequacy of the reunification services he received are moot.

2. Substantial evidence supports the termination of reunification services to mother.

Due to the special needs of infants and toddlers for permanency and stability, court-ordered services for children who are younger than three years old are presumptively limited to six months from when the child enters foster care. (§ 361.5, subd. (a)(3); *Fabian L. v. Superior Court* (2013) 214 Cal.App.4th 1018, 1027.) The juvenile court must order the return of a child to her parent at the six-month review hearing unless the court finds that doing so would create a “substantial risk of detriment to the safety, protection or physical or emotional well-being of the child.” (§ 366.21, subd. (e)(1).) A parent’s failure “to participate regularly and make substantive progress in court ordered treatment programs” is prima facie evidence that return would be detrimental. (*Ibid.*) If a parent does not make substantive progress in court-ordered treatment programs the juvenile court may set a section 366.26 hearing and terminate reunification services. (*Fabian L.*, *supra*, at p. 1027.) If, however, the court finds there is a substantial probability that the child may be returned to her parent at or before the 12-month permanency hearing or that reasonable services have not been provided, the court shall continue the case to the 12-month permanency planning hearing. (*Ibid.*) We review the juvenile court’s findings for substantial evidence. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 763; *In re Alvin R.* (2003) 108 Cal.App.4th 962, 971.)

Mother contends there is insufficient evidence that she failed to make progress in the court-ordered treatment plan as to warrant termination of services at the six-month

review hearing. However, the record amply supports the finding. The agency referred mother to substance abuse assessment and treatment in September 2014, following the jurisdictional hearing. Mother failed to obtain treatment. She twice entered a residential treatment program between October 2014 and January 2015 and, each time, left the program within 24 hours. Mother also missed multiple intake appointments with a different program. Mother's failure to stay in a program put her in violation of probation. In mid-January 2015, shortly after the disposition hearing, mother was found in violation of probation and jailed. Over the next few months, mother participated in a therapy program for substance abusers and, in April 2015, was released from jail conditioned upon her participation in a residential treatment program. But within three days of her release, mother relapsed. Mother used methamphetamine, was terminated from the residential treatment program, and returned to jail in late April 2015. Mother continued to use drugs even while jailed and, in May 2015, was placed "on lock-down." Mother completed a parenting class in jail but completed little else in her case plan as services were not available to her after her in-jail drug use placed her on lock-down. Mother was released from jail just 10 days before the July 2014 six-month review hearing (held 10 months after the jurisdictional hearing) and had entered a one-year residential drug treatment program one day prior to the hearing.

Mother says she "admittedly had a troubled start in addressing" her substance abuse but that her participation in an in-jail parenting class and recent enrollment in a drug treatment program shows a commitment to the reunification process. Substantial evidence supports a contrary conclusion. In reviewing a juvenile court's order, an appellate court does not reweigh the evidence or exercise independent judgment; it simply determines whether the record discloses sufficient facts to support the findings. (*Kevin R. v. Superior Court* (2010) 191 Cal.App.4th 676, 689, citing *In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.) The record here fully supports the juvenile court's findings that mother did not make substantive progress over the many months between the jurisdictional and review hearings.

We also reject mother's contention that the juvenile court erred in finding there was not a substantial probability that the child could be returned to her care by the 12-month review hearing in September 2015. Mother notes that she was participating in a residential treatment program that allows a child to be placed with her. The juvenile court was cognizant of this fact but found it unlikely that mother would progress sufficiently in her treatment in the next two months to make it safe for the child to be returned to her care. The finding is well-supported by evidence of mother's long history of drug abuse, repeated failure to complete treatment programs, and multiple relapses.

Disposition

The petitions for extraordinary writ are denied and the six-month review order of August 5, 2015 is affirmed. The April 13, 2015 order granting Michael W. presumed father status is reversed. Michael W.'s appeal of the June 3, 2015 order denying extension of reunification services is dismissed as moot. The stay of proceedings issued by this court on October 2, 2015 is dissolved.

Pollak, J.

We concur:

McGuinness, P. J.

Siggins, J.