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

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

BRITTANY M.,
Petitioner,

v.

THE SUPERIOR COURT OF ALAMEDA
COUNTY,
Respondent;

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,
Real Party in Interest.

A147620

(Alameda County
Super. Ct. No. OJ15026003)

The dependency court denied family reunification services to Brittany M. (Mother) for her infant son Darrell B. (Darrell), and set a hearing under Welfare and Institutions Code¹ section 366.26 to select a permanent plan for Darrell.

The basis for the denial of services was section 361.5, subdivision (b)(10), which applies when reunification services have previously been terminated for that parent because of failure to reunify with a child’s sibling who has been removed from the parent’s custody, and subdivision (b)(11), which applies when parental rights have been

¹ All further statutory references are to the Welfare and Institutions Code.

terminated over a child's sibling. (§ 361.5, subs. (b)(10) & (11).) Both provisions apply only if the parent has not "subsequently made a reasonable effort to treat the problems that led to removal of the sibling." (§ 361.5, subs. (b)(10) & (11).) Years earlier, the dependency court removed Darrell's sibling, Z.M., from Mother's custody because Mother had abandoned Z.M., terminated reunification services for Mother and Z.M., and terminated Mother's parental rights over Z.M.

Here, Mother challenges the dependency court's orders denying reunification services for Darrell and setting a section 366.26 hearing by a petition for extraordinary writ. She argues that even though the dependency court previously terminated reunification services and severed her parental rights with respect to Z.M., the court erred in finding that she had failed to make reasonable efforts to correct the problems that led to Z.M.'s removal. We agree, and consequently we grant Mother's petition.

FACTUAL AND PROCEDURAL BACKGROUND

A. Mother's Background

Darrell was born in December 2015. He and Mother both tested positive for cocaine and opiates on the day of his birth. A few days later, Darrell was transferred to a children's hospital for treatment of breathing and heart complications, and was diagnosed with tachycardia and symptoms of withdrawal. Darrell was weaned from morphine by late December and was released from the hospital at the end of the month and placed in foster care.

Darrell was Mother's sixth child, and the second to be the subject of dependency court proceedings. Mother herself was a dependent of the court from age 12 to 18, and had her first child at 13 and her second at 16. Her oldest child has lived with one of Mother's aunts since birth. When her second child, Z.M., was born, Mother and Z.M. were placed with an aunt. Mother had a history of running away, and after about eight months she left her aunt's home, abandoning Z.M., who became a dependent of the juvenile court. Mother never appeared at court in connection with Z.M.'s dependency case, and her parental rights were terminated as to Z.M., who was adopted by Mother's cousin.

Mother had three children after Z.M. and before Darrell, one at age 18, one at 21, and one at 24. Those children lived with Mother until mid-2014, when they were age 6, 4, and 1, respectively. At that time, Mother started using drugs and lost her housing and arranged for the three children to live with relatives, where they remain.

B. December 2015: Darrell Is Detained

The Alameda County Social Services Agency (Agency) detained Darrell while he was still in the hospital, and filed a dependency petition on December 14, 2015, pursuant to section 300, alleging failure to protect under subdivision (b) and abuse or neglect of sibling under subdivision (j). To support the claim of failure to protect, the Agency alleged that Mother had been abusing drugs for about two years including during the pregnancy, lacked stable housing and lived in abandoned homes, had an arrest history that included solicitation and theft, and had given birth to five other children who were not in her care. The Agency also alleged that the alleged father had a history of substance abuse and, like Mother, lacked stable housing and lived in abandoned homes. To support the claim of abuse or neglect of sibling, the Agency alleged that Mother “has not provided any care” for her five older children and that her parental rights were terminated with respect to Darrell’s older sibling, Z.M.

The detention report filed by the Agency included an account of a child welfare worker’s interviews with Mother and the alleged father in the days after Darrell’s birth. The worker reported that the parents “were cooperative and easy to engage, and presented with an appropriate affect to the context, and displayed no visible indication of cognitive impairment or substance use.” The parents reported that they had all necessary baby items including formula, diapers, crib and car seat. Mother “appeared knowledgeable about newborns,” and said that Darrell was the first of her children to be born exposed to drugs. Mother told the worker that she had been using cocaine and heroin for about 2 years, and that she understood the Agency’s concerns and would like Darrell to be raised by the aunt who is raising her oldest child. Mother said she had never been to a substance abuse treatment program, and would be interested in an outpatient treatment program that was available at the hospital where she gave birth to Darrell. At one

interview, Mother said that she did not tell the alleged father about her drug use and that the alleged father does not use any drugs. Later, Mother said that the alleged father introduced her to heroin and cocaine.² At one point, Mother told the Agency that she would check herself into a detox facility while she tried to find an inpatient substance abuse treatment facility.

Mother was not present at the detention hearing on December 15, 2015. Because it was reported that Mother was developmentally delayed and on her way to the court, the dependency court appointed counsel for Mother, made temporary findings, and set a further hearing for the next day.³ Mother was not present at the continued hearing, where the dependency court admitted the detention report, detained Darrell, and set a jurisdiction/disposition hearing for December 29.

C. *December 2015 and January 2016: Preparations for Jurisdiction/Disposition Hearing*

On December 23, 2015, the Agency filed a jurisdiction/disposition report. According to the report, Darrell remained in the hospital, and Mother's whereabouts were unknown. One of Mother's relatives reported that Mother lived in abandoned homes, used drugs, and was not capable of raising children at this time, and that Mother had told the family that she wanted Darrell to be raised by the aunt who was raising her oldest child. Mother was not present at the December 29 hearing, and at the request of Mother's counsel, the matter was set for a contested hearing on January 22, 2016.

² Darrell's father, whose status remains "alleged," is represented by counsel in the proceedings below and is not a party to this petition. We do not discuss him further here.

³ At the detention hearing, there was discussion off the record to the effect that Mother was developmentally delayed. Although the detention report filed by the Agency included the statement, "It was reported that the Mother is developmentally delayed," it provided no further details." At the jurisdiction/disposition hearing, the judge addressed this issue as follows: "So as it relates to the allegation that mom is developmentally delayed, I'm not really sure. I don't have a lot of information about that, other than it states in the [jurisdiction/disposition] report that that is the case. . . . So I'm not really sure how that affects the Court's decision, because I don't know to what extent mom is delayed, if at all. Just that it has been reported at some point that mom had some level of developmental delay."

The Agency filed an addendum to the jurisdiction/disposition report on January 20, 2016. The report described efforts by the Agency to locate Mother. On January 19, the agency was informed that Mother had been arrested on January 6 and was being detained at Santa Rita jail.

Mother was not present at the January 22 hearing. Mother's counsel informed the dependency court that she had recently learned that Mother had been incarcerated, and asked for a continuance. The dependency court continued the hearing to February 16, and asked Mother's counsel to submit a removal order for her client.

D. *February 2016 Jurisdiction/Disposition Hearing*

Mother was present at the jurisdiction and disposition hearing on February 16, 2016. The dependency court admitted the Agency's reports into evidence, and heard testimony from child welfare worker Karen Gage (Gage) and from Mother. Gage testified that the Agency sought to deny reunification services because she had no contact with Mother during the two months she had the case, and because of Mother's previous history of termination of parental rights as to Z.M. She testified that the allegations in the matter of Z.M. were abandonment by Mother.

Mother testified that she visited Darrell in the hospital until she was incarcerated at Santa Rita jail after her arrest in early January.⁴ She testified that she had looked into the "Mom's program" at the jail, which she understood would teach her about parenting and help her reunify with Darrell; that she had never participated in a drug treatment program; and that she would be willing to go into a residential treatment program, take a parenting class, and visit Darrell on a regular basis. Asked why she had not contacted the social worker before she was incarcerated, Mother said, "I didn't find out about—my family never told me about—they didn't give me no number or anything. They just said

⁴ The jurisdiction/disposition report indicates that Mother was arrested for felony robbery and misdemeanor theft. Mother testified that she would be sentenced on February 26, and that her sentence would be "[s]ix months with half," and time served, and that after her release she would be required to have six months of outpatient drug treatment.

really nothing. It was just a social worker at the hospital that told me that I had a court date and gave me some bus tickets, but I never made it.” Asked why she had not come to the earlier court dates, Mother said she had been “Listening to the wrong people” and that there had been a “misunderstanding.”⁵ Mother also testified as to her history with her older children, including that when she started using drugs and lost stable housing about a year and a half earlier, she arranged for the three children who were living with her to stay with relatives.

After argument from counsel, the dependency court made findings and pronounced orders. The court said, “[I]n this case I don’t think it’s in the best interest of the child to provide reunification services to the mother based upon all of the evidence that I’ve heard, and all of the things that have been done and not been done. And as much as I would like to write-off termination of parental rights as it relates to a child that was born to a mother who was a minor, it really is the totality of the circumstances.”

The dependency court found that the court had previously ordered termination of reunification services for a sibling of Darrell because Mother failed to reunify with that sibling after the sibling was removed from her custody, and that Mother did not subsequently make a reasonable effort to treat the problem that led to the sibling’s removal. The dependency court also found that Mother’s parental rights were terminated as to a sibling of Darrell and that Mother had not subsequently made a reasonable effort to treat the problem that led to the sibling’s removal, and that Darrell, like his sibling, was being removed from Mother’s custody. On that basis, the dependency court denied reunification services for Mother pursuant to section 361.5, subdivisions (b)(10) and

⁵ The dependency court later asked Mother what the misunderstanding was about. Mother responded “The reason why I wasn’t coming is because I had a C-section, I could barely walk, listening to people saying, ‘Oh, reschedule it or call.’ You know, listening to the wrong people. So I just stayed up at the hospital.” The dependency court asked Mother if she called to reschedule a court date. Mother responded: “No. I talked to the lady, the social worker that was for him up there, and she said she was going to contact I guess her (indicating [Gage]). I don’t even know her name. [¶] . . . [¶] . . . And I never got back to her because I went to jail.”

(b)(11) and set the matter for a hearing under section 366.26, pursuant to section 361.5, subdivision (f). Mother's petition timely followed.

DISCUSSION

A. *Applicable Law*

The legal framework for the issues we address here is well established. “[U]p until the time the section 366.26 hearing is set, the parent’s interest in reunification is given precedence over the child’s need for stability and permanency.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) “ ‘It is difficult, if not impossible, to exaggerate the importance of reunification in the dependency system.’ (*In re Luke L.* (1996) 44 Cal.App.4th 670, 678.) The juvenile court is required to order family reunification service whenever a child is removed from the custody of his or her parent or guardian unless the court finds by clear and convincing evidence that one of the [16] exceptions set forth in section 361.5, subdivision (b), applies. (§ 361.5, subd. (a); *Rosa S. v. Superior Court* (2002) 100 Cal.App.4th 1181, 1188; see *Riverside County Dept. of Public Social Services v. Superior Court* (1999) 71 Cal.App.4th 483, 487 [‘there has long been a presumption that parents would receive reunification services’].)” (*In re Albert T.* (2006) 144 Cal.App.4th 207, 217 (*Albert T.*)) “These enumerated ‘bypass’ provisions are the specific instances in which the Legislature has recognized ‘that it may be fruitless to provide reunification services,’ and once the court has found one of these specific instances applicable, ‘the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources.’ (*In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 478.)” (*Melissa R. v. Superior Court* (2012) 207 Cal.App.4th 816, 821.)

Here, the Agency invokes two of the statutory exceptions: section 361.5, subdivisions (b)(10) and (11), which authorize the denial of reunification services to a parent who has failed to reunify with another child or whose parental rights to another

child were terminated,⁶ but only if the court finds that the parent “has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling.” (§ 361.5, subds. (b)(10) & (11); see *Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96 [“subdivision (b)(10) has two prongs or requirements: (1) the parent previously failed to reunify with a sibling of the child; and (2) the parent failed to make reasonable efforts to correct the problem that led to the sibling being removed from the parent’s custody”].)

“The inclusion of the “no-reasonable effort” clause in the statute provides a means of mitigating an otherwise harsh rule that would allow the court to deny services simply on a finding that services had been terminated as to an earlier child when the parent had in fact, in the meantime, worked toward correcting the underlying problems.’ (*In re Harmony B.* [(2005) 125 Cal.App.4th 831,] 842; see *Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1464 [‘If the evidence suggests that despite a parent’s substantial history of misconduct with prior children, there is a reasonable basis to conclude that the relationship with the current child could be saved, the courts should always attempt to do so. . . . The failure of a parent to reunify with a prior child should never cause the court to reflexively deny that parent a meaningful chance to do so in a later case. To the contrary, the primary focus of the trial court must be to *save* troubled families. . . .’].)” (*Albert T., supra*, 144 Cal.App.4th at p. 218.)⁷

As the party seeking bypass of reunification services under section 361.5, subdivision (b), the Agency has the burden of proving by clear and convincing evidence

⁶ Under section 361.5, subdivision (b)(10), reunification services need not be ordered if reunification services for the sibling were terminated because the parent failed to reunify with the sibling, and under subdivision (b)(11), reunification services need not be ordered if the parental rights of the parent over a sibling of the child have been terminated.

⁷ If section 361.5, subdivision (b)(10) or (b)(11) is found to apply, the dependency court must deny reunification services unless it “finds, by clear and convincing evidence, that reunification is in the best interest of the child.” (§ 361.5, subd. (c).)

that the exceptions in subdivisions (b)(10) and (b)(11) apply here. (§ 361.5, subd. (b); *In re Angelique C.* (2003) 113 Cal.App.4th 509, 521.)

We review the dependency court's order denying reunification services under section 361.5, subdivision (b), for substantial evidence, bearing in mind that clear and convincing evidence requires a heightened burden of proof. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) "[W]e must decide if the evidence is reasonable, credible, and of solid value, such that a reasonable trier of fact could find the court's order was proper based on clear and convincing evidence." (*Curtis F. v. Superior Court* (2000) 80 Cal.App.4th 470, 474.)

B. *Analysis*

Mother argues that the record does not include substantial evidence to support the dependency court's finding that the requirements of section 361.5, subdivisions (b)(10) and (11) have been met. She acknowledges that she failed to reunify with Z.M. and that her parental rights over Z.M. were terminated, and argues that Z.M. was removed from her custody because of abandonment, and that the record does not support a finding that she failed to remedy that problem. Mother observes that there was little evidence of any failure to provide care for the three children born after Z.M. and before Darrell: to the contrary, she raised those children from the time they were born until mid-2014, when she placed them with close relatives. She points out that drug abuse, a primary reason for Darrell's removal, was not at issue in Z.M.'s case, and she argues that she did not abandon Darrell, but rather visited him regularly in the hospital.

The Agency concedes that drug use was not an issue in Z.M.'s case, but contends that similar problems led to the removal of Z.M. and Darrell, and that there is a "recurrent theme" in Mother's relationships with all her children, specifically, "that Mother has failed to adequately parent and abandoned each child in turn." On this basis, the Agency claims that similar problems led to the removal of Z.M. and Darrell, and that Mother has made no efforts at all "to treat her issues with adequate parenting and abandonment."

The Agency argues that Mother "essentially abandoned" Darrell by not visiting him often enough at the hospital and by not appearing at early hearings in this matter.

The Agency also argues that Mother “failed to adequately parent by putting [Darrell] at greater risk by using drugs while she was pregnant.”

To support its argument that Mother made no efforts to treat the problems that led to the removal of Z.M., the Agency points to the following facts: Mother “did not even know if she had a case plan regarding Z.M.’s case, let alone participate in any services”; none of Mother’s children are currently in her care; Mother failed to take a parenting class or go into a drug treatment program, despite saying that she was willing to do so; and Mother did not contact child welfare workers after meeting with them in early December. These do not constitute substantial evidence that after Z.M. was removed from her custody Mother made no reasonable efforts to address the specific problem—abandonment—that led to the removal of Z.M.

The Agency’s emphasis on Mother’s “continued inability to adequately supervise and parent her children” avoids the pertinent issue. The record shows that Z.M. was removed from Mother’s custody because Mother abandoned her at the age of eight months.⁸ If reunification services are to be denied for Mother and Darrell under section 361.5, subdivision (b)(10) or (11), the Agency must present clear and convincing evidence that Mother made no reasonable efforts to treat the problem of abandonment that led to Z.M.’s removal. Evidence of a failure to “adequately supervise and parent” will not suffice.

From our review of the record, we conclude that there is not substantial evidence to support a finding that Mother has not made reasonable efforts to treat that problem. To the contrary, there is ample evidence that Mother not only made reasonable efforts to remedy the problem, but also had some success in doing so. She cared for each of the

⁸ There is no evidence to suggest that the drug use and homelessness that led to the detention of Darrell had anything to do with the removal of Z.M., which took place several years earlier. The Agency argues that Mother used drugs during a previous pregnancy, citing a report of a social worker that Mother tested positive for cocaine and opiates in July 2014 in connection with a miscarriage. This is consistent with Mother’s statements in December 2015 that she had been using drugs for about two years, and that Darrell is the only one of her children to be born exposed to drugs.

three children she had in the eight years after Z.M. was removed from her, one for six years, one for four years, and one for a year. When she could no longer care for them, she did not abandon them, but rather arranged to have them cared for by relatives. The Agency's petition does not allege that Mother abandoned Darrell. Darrell was removed from her custody in December 2015 while he was the hospital, and she visited him there until he was discharged to a foster family at the end of the month.

We conclude that there is not substantial evidence to support a finding that Mother failed to make reasonable efforts to treat the problems that led to the removal of Z.M. Consequently, we conclude that the dependency court erred in finding that the requirements of section 361.5, subdivisions (b)(10) and (b)(11) have been met. Because subdivisions (b)(10) and (b)(11) were the only bases advanced by the Agency for denying services, the dependency court must order reunification services for Mother.⁹ We express no opinion as to whether such efforts are likely to succeed, but we may not construe the statutory scheme as permitting us to circumvent reunification services even if the efforts appear doomed. (*In re John B.* (1984) 159 Cal.App.3d 268, 274.) Because Darrell is under three years of age, reunification services need not be offered for a period any longer than six months. (§ 361.5, subd. (a)(1)(B).)

DISPOSITION

The petition for extraordinary writ is granted. Let an extraordinary writ issue directing respondent court to vacate its findings and orders entered February 16, 2016, denying petitioner reunification services pursuant to section 361.5, subdivisions (b)(10) and (b)(11) and setting a section 366.26 hearing. Respondent court is further directed to conduct a new dispositional hearing, and, after taking into consideration any new

⁹ We do not reach the Agency's argument that the dependency court properly determined pursuant to section 361.5, subdivision (c), that reunification services were not in Darrell's best interest. Because section 361.5, subdivisions (b)(10) and (b)(11) do not apply, reunification services must be offered to Mother, and the provisions of section 361.5, subdivision (c) do not come into play.

evidence or change in circumstances, make any appropriate orders. Our decision is final as to this court immediately. (Cal. Rules of Court, rules 8.450(a), 8.490(b)(2)(A).)

Miller, J.

We concur:

Kline, P.J.

Stewart, J.