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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

PRINCE B., Petitioner, v. THE SUPERIOR COURT OF SAN FRANCISCO COUNTY, Respondent; SAN FRANCISCO HUMAN SERVICES AGENCY, ET AL., Real Parties in Interest.	A149156 (San Francisco County Super. Ct. No. JD16-3083)

Petitioner Prince B. (Father) filed a petition seeking extraordinary writ relief following the juvenile court's orders denying reunification services with respect to his daughter B.B. (Minor) and setting a Welfare and Institutions Code section 366.26[1] permanency planning hearing on December 8, 2016. Father also requests a stay of the hearing. This court issued an order to show cause. We deny the petition and the request for a stay.

BACKGROUND

Father and F.R. (Mother) (jointly, Parents) are the parents of P.B. and Minor.

On March 21, 2016, real party in interest San Francisco Human Services Agency (Agency) filed a petition under section 300, subdivisions (a), (b), and (j), alleging, among

[1] All undesignated statutory references are to the Welfare and Institutions Code.

other things, that Mother hit Minor (born October 2009) in the eye after discovering the child had wet the bed, resulting in bruising around the eye socket and upper cheek; that Minor reported other physical abuse; that Mother admitted to investigators she physically abused Minor; that Mother had an anger management problem; and that there were prior referrals reporting physical abuse by Mother. The petition also alleged that Father had been unable to protect Minor from Mother's abuse, and that Parents failed to reunify with Minor's older sibling, who was removed due to physical abuse. An April 2016 amendment alleged under section 300, subdivision (c) that Minor is suffering serious emotional damage, as evidenced by aggressive behavior at school including hitting peers and adults.

According to the detention report, on March 17, 2016, Minor arrived at school with a bruise around her eye and said Mother had punched her because she wet the bed. Minor also said Mother had pushed her two days earlier, knocking her on her back. Minor was taken to the hospital, where she told medical personnel that Mother struck her in the right eye, left arm, and left thigh. Mother had struck her before, but Minor could not say when. Mother was interviewed and arrested by the police at the hospital; a police sergeant told the Agency social worker Mother had admitted to physical abuse of Minor on more than one recent occasion.

The detention report also noted that in 2007, before Minor was born, her older brother P.B. (born March 2007) was the subject of a dependency case. Parents failed to reunify and P.B. was adopted.

The Agency reported it had been unable to locate Father, even after speaking with his family members, his former dependency attorney, and Mother. Mother said Father had not had contact with Minor for a "long time" and she had heard he was living in Las Vegas. Nevertheless, Father appeared at the detention hearing on March 23, 2016, was appointed counsel, and denied the allegations in the petition. The juvenile court ordered Minor detained with no visitation for Mother and supervised visitation for Father.

The Agency's jurisdiction/disposition report related that Mother denied the allegations of physical abuse and denied telling the police she hit Minor. To explain

Minor's black eye, she suggested she may have accidentally hit Minor in the face when moving her hands in conversation with Minor about the bedwetting incident. The Agency's report also related that Father had not been a consistent part of Minor's life for the previous four years, and that the Agency had concerns about his ability to retain stable housing and his mental health.

Regarding the 2007 dependency case involving Minor's sibling, the Agency explained a report from that case related that, while in Parents' care, three-week-old P.B. sustained two bilateral skull fractures, a broken upper arm bone, a broken shin bone, a fracture of the left tibia, and a broken rib. According to records from P.B.'s case, Father was diagnosed in November 2007 with "Major Depressive Disorder with psychotic features." Father was prescribed anti-depressant and anti-psychotic medication, but was ambivalent about taking them. Another evaluator recommended a full psychological evaluation, continued individual therapy, and substance abuse treatment. The social worker at the time expressed concern to Father that his mental health condition posed a risk to P.B. A further psychological evaluation concluded additional assessment would be required to rule out "a cognitive disorder, major depression, bipolar disorder or schizoaffective disorder." The evaluator recommended that Father continue regular therapy, engage in medication monitoring, undergo neuropsychological testing, and take parenting classes. Assessment of Father's alcohol and marijuana use was also recommended.

The Agency asked the juvenile court to take judicial notice of documents from the 2007 dependency proceedings showing Parents submitted to the petition's allegations under section 300, subdivision (a); they failed to reunify; and parental rights as to Minor's older brother were terminated.

Father told the Agency social worker that Mother had taken Minor four years before and had refused in-person contact with Minor. He spoke to Minor on the phone every three to four months and received updates on Minor from his mother and sister. Mother, on the other hand, said Father had made no attempt to visit Minor. Father said

he was living in Las Vegas on disability payments. He was not taking medication and claimed to have no mental health concerns.

The Agency's jurisdiction/disposition report described numerous serious behavioral problems Minor was having at school, including defiance and physical aggressiveness. Minor told the social worker she wanted to remain in foster care rather than live with any family members. The Agency recommended that the juvenile court take jurisdiction over Minor and that reunification services for Parents be bypassed under section 361.5, subdivision (b)(11).

The contested jurisdiction and disposition hearing took place over two days in June and August 2016. At the outset of the hearing, Parents agreed to submit to the allegations of an amended petition that, among other things, deleted certain allegations against Father and added an allegation that Father "was and is unable to provide care and support to the child due to his mental health issues, which include short term memory loss and mood disorder for which he has been prescribed psychotropic medication and currently receives SSI." The juvenile court took jurisdiction over Minor under section 300, subdivisions (a), (b), (c), and (j).

Father did not agree to the Agency's recommendation for bypass of reunification services. The juvenile court received testimony from two Agency social workers and Parents. One social worker described Minor's "intensive foster home placement," which involved the provision of extra supportive services. She also described Minor's serious behavioral problems at school, involving tantrums and hitting. Father had been having near-daily telephone calls with Minor and had one in-person visit. To the social worker's knowledge, Father had not received substance abuse treatment, was not taking psychotropic medication, had not undergone any individual therapy, and had not taken parenting classes. The social worker testified she understood that parental rights to Minor's sibling had been terminated because Parents did not recognize their role in P.B.'s injuries or show an ability to protect him in the future. She opined Father had similarly failed to take reasonable steps to protect Minor; Father claimed Mother kept Minor away

from him, but he could have obtained Mother's address from his sister. Minor told the social worker she did not want to live with Father.

Mother testified Father moved to Las Vegas when Minor was about two-and-a-half years old. Father saw Minor once when Minor was three years old, but had no other visits with her. Father spoke to Minor on the telephone about every three months. Before Father moved, Parents would fight in front of Minor; Father had hit Mother when he was drunk.

Father testified he lived in an apartment in Las Vegas; he had lived in Las Vegas for two years, with frequent trips to Los Angeles. He receives social security benefits due to a "short-term memory" disability. He used to take "antidepressant pills," but stopped because they made him sleepy. He testified he was not presently suffering from depression. Father admitted to prior excessive drinking, but said he drinks only "recreationally" following a 2013 incident in which he passed out and woke up in a hospital. He smokes marijuana two or three times a month. He never received treatment for his drinking. He had been referred to a substance abuse class and a psychological evaluation, but had not yet started either. He recently started a parenting class and had attended five sessions so far. Father testified he was not worried about Minor's safety in Mother's care, even though he believed Mother was responsible for the serious injuries to Minor's sibling.

After argument, the juvenile court found the section 361.5, subdivision (b)(11) bypass provision applied and denied reunification services to Parents. The court also found reunification with Parents would not be in Minor's best interests. A section 366.26 permanency planning hearing was set for December 8, 2016.

On September 30, 2016, Father petitioned for issuance of an extraordinary writ; on October 18, this court filed an order to show cause; and, on October 28, the Agency filed its response.

DISCUSSION

I. *Substantial Evidence Supports Denial of Reunification Services to Father*

Father contends there was insufficient evidence to support the juvenile court's finding that he failed to make a reasonable effort to treat the problems that led to removal of Minor's sibling P.B. We disagree.

"Ordinarily, when a child is removed from parental custody, the juvenile court must order services to facilitate the reunification of the family. (§ 361.5, subd. (a).) ' "Nevertheless, as evidenced by section 361.5, subdivision (b), the Legislature recognizes that it may be fruitless to provide reunification services under certain circumstances. [Citation.] Once it is determined one of the situations outlined in subdivision (b) applies, the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources." ' [Citation.] An order denying reunification services is reviewed for substantial evidence." (*R.T. v. Superior Court* (2012) 202 Cal.App.4th 908, 914 (*R.T.*).) "[W]e review the record in the light most favorable to the court's determinations and draw all reasonable inferences from the evidence to support the findings and orders. [Citation.] 'We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court.' " (*Kevin R. v. Superior Court* (2010) 191 Cal.App.4th 676, 688–689.)

Section 361.5, subdivision (b)(11) authorizes denial of services to a parent whose parental rights to another child were terminated if the juvenile court finds by clear and convincing evidence that the parent "has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling . . . of that child from the parent." Father does not dispute there is a prior court order terminating his parental rights to Minor's sibling P.B. The case then turns on whether Father made a reasonable effort to treat the problems that led to removal of P.B. "The reasonable effort requirement focuses on the extent of a parent's efforts, not whether he or she has attained 'a certain level of progress.' [Citation.] 'To be reasonable, the parent's efforts must be more than

"lackadaisical or half-hearted." ' [Citation.] However, '[t]he "reasonable effort to treat" standard "is not synonymous with 'cure.' " ' " (*R.T.*, *supra*, 202 Cal.App.4th at p. 914.)

In the present case, substantial evidence supports the juvenile court's finding Father did not make a reasonable effort to treat the problems that led to removal of P.B. in 2007 based on allegations of serious physical abuse. Father testified in the present proceedings that he believed Mother caused P.B.'s injuries. Nevertheless, the evidence showed Father left Minor with Mother when Minor was two years old, and Father made no effort to ensure Minor's safety in the three years between then and initiation of the present proceedings after Minor appeared at school with a black eye. Thus, Father made essentially no effort to protect Minor from Mother.

Furthermore, during the proceedings relating to P.B., various issues relating to Father were identified as concerns, including his mental health, substance abuse, and lack of parenting skills. It is reasonable to infer those circumstances contributed to Father's failure to protect P.B. The record shows Father made minimal or no effort to address those circumstances. Father stopped taking his anti-depressant medication, did not receive ongoing treatment for his mental health problems, and had not yet obtained a psychological evaluation by the time of the jurisdiction/disposition hearing. Father claimed to be drinking and smoking marijuana less, but he had not obtained substance abuse treatment. Father only began taking parenting classes after the initiation of the present proceedings. Thus, the record shows Father failed to take reasonable steps to address the underlying deficits that likely contributed to his failure to protect P.B.[2]

Because Father's failure to protect P.B. was one of the bases for removal in 2007, and because Father's mental health and substance abuse issues contributed to that failure

[2] Father's petition emphasizes his willingness to undergo treatment for his mental health and substance abuse issues, and his interest in obtaining assistance in parenting Minor. However, he cites no authority his present stated willingness to improve himself undermines the showing he failed to make reasonable efforts after removal of P.B. (*R.T.*, *supra*, 202 Cal.App.4th at p. 915 ["the juvenile court properly could conclude this recent effort, even assuming the effort were substantiated, was simply too little, too late"].)

to protect, substantial evidence supports the juvenile court's finding the section 361.5, subdivision (b)(11) bypass provision applied.

II. *The Record Supports Finding Reunification is Not in Minor's Best Interests*

If a juvenile court finds a section 361.5, subdivision (b) bypass provision applies, the court may still order reunification services if it finds by clear and convincing evidence that providing those services is in the best interests of the child. (§ 361.5, subd. (c); *In re G.L.* (2014) 222 Cal.App.4th 1153, 1164.) The burden is on the parent to make that showing. (*In re William B.* (2008) 163 Cal.App.4th 1220, 1227.)

"In determining [a child's] best interests, the 'court should consider "a parent's current efforts and fitness as well as the parent's history"; "[t]he gravity of the problem that led to the dependency"; the strength of the bonds between the child and the parent and between the child and the caretaker; and "the child's need for stability and continuity." ' [Citation.] . . . . [¶] 'A juvenile court has broad discretion when determining whether . . . reunification services would be in the best interests of the child under section 361.5, subdivision (c). [Citation.] An appellate court will reverse that determination only if the juvenile court abuses its discretion.' " (*In re G.L.*, 222 Cal.App.4th at pp. 1164–1165.)

Despite Father's arguments to the contrary, the circumstances in the present case did not compel the juvenile court to exercise its discretion to find reunification with Father would be in Minor's best interests. The record does not show Father and Minor have a substantial bond: although they had spoken on a daily basis during the dependency proceedings, they had only seen each other once in the three years preceding the dependency and only once during the dependency proceedings, and Minor said she did not want to live with Father. Although Father expressed a desire to stabilize and improve his life circumstances, the record showed he failed to obtain treatment for his mental health and substance abuse issues in the years following P.B.'s removal. The juvenile court did not abuse its discretion.

III. *The Juvenile Court Did Not Err Under Section 361.2*

Under section 361.2, a juvenile court ordering the removal of a child from a custodial parent must decide whether the child can be placed with any parent "with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of § 300." (§ 361.2, subd. (a); see also *In re A.A.* (2012) 203 Cal.App.4th 597, 604–605.) Father contends the juvenile court erred in failing to consider placing Minor with him after the decision was made to remove Minor from the custody of Mother and before the court considered whether to bypass reunification services under section 361.5, subdivision (b).

Father forfeited that contention below. In closing argument during the jurisdiction/disposition hearing, Father's counsel referenced the possibility of immediate placement with Father, stating, "I'm not going to make that request of the Court. As much as my client would like to have his child, we are going to say, just for argument's sake, there is not enough evidence even for that." He subsequently re-stated the point, commenting "We're not asking -- like I said, we're not asking for placement right now, although I don't think the evidence is strong to show the kid shouldn't be placed with him." The juvenile court pressed counsel for clarification because Father had testified he was ready to take Minor into his custody. Father's counsel responded, "But I am arguing as his attorney -- he may want that, but I am arguing as a more reasonable position for the Court to take . . ." The court interrupted, stating "All right, I understand." Father's counsel confirmed Father would "like" Minor placed with him, but counsel did not actually request the placement, much less argue it was mandated by section 361.2.

Accordingly, because Father's counsel told the juvenile court Father was not requesting immediate placement of Minor with him—even though Father would like it—Father forfeited any claim for placement under section 361.2, subdivision (a). (*In re A.A.*, *supra*, 203 Cal.App.4th at p. 605 ["It is the noncustodial parent's request for custody that triggers application of section 361.2, subdivision (a); where the noncustodial parent makes no such request, the statute is not applicable. [Citations.] Failure to object to noncompliance with section 361.2 in the lower court results in forfeiture."].)

DISPOSITION

The writ petition is denied on the merits. The request for a stay is also denied. Because the section 366.26 hearing is set for December 8, 2016, our decision is final as to this court immediately. (Cal. Rules of Court, rules 8.452(i), 8.490(b)(2)(A).)

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.

(A149156)