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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In the Matter of JOHNNY R.,

A Minor.

2d Juv. No. B233428
(Super. Ct. No. J067615)
(Ventura County)

HUMAN SERVICES AGENCY,

Petitioner and Respondent,

v.

JOANN M.,

Defendant and Appellant.

Joann M. (Mother), the biological mother of Johnny R., born in October 2006, appeals from the juvenile court's orders denying her petition for modification (Welf. & Inst. Code, § 388)¹ and terminating her parental rights. (§ 366.26.) She contends the trial court erred when it took judicial notice of findings and orders it had made in a dependency case involving Johnny R.'s sibling and that its summary denial of her section 388 petition was an abuse of discretion. We affirm.

¹ All statutory references are to the Welfare & Institutions Code unless otherwise stated.

Facts

In November 2009, respondent Ventura County Human Services Agency (HSA) filed a juvenile dependency petition regarding Johnny and his then four-year old sister, Brianna. The petition alleged that Mother failed to protect Brianna from sexual abuse by a maternal uncle, that Mother's substance abuse periodically prevented her from providing adequate care for Johnny, and that Johnny's biological father failed to provide care or support for him. The children were not detained. Four days later, HSA detained the children after Mother refused to attend a court hearing and threatened to flee with them. The children were detained in foster care.

Over the next 12 months, Mother had mixed success in addressing the circumstances that created this dependency matter. She attended parenting and anger management classes, individual therapy, Alcoholics Anonymous and Narcotics Anonymous meetings, and outpatient substance abuse treatment. Unfortunately, Mother dropped out of an inpatient drug treatment program after about two weeks due to "personality conflicts" and thereafter, periodically relapsed in her use of illegal drugs, particularly methamphetamine. For example, Mother received her "level one recovery certificate" from the outpatient drug treatment program on July 15, 2010, but tested positive for methamphetamine on July 12, 2010. During the first six months of this dependency matter, 72 percent of Mother's drug tests were positive; during the second six-month period, that rate decreased to 33 percent, but should have been zero. Mother also became pregnant during the pendency of this action. She was pregnant when she tested positive for methamphetamine in July 2010.

Mother attended her supervised visits with Johnny. Her behavior during these visits was not always appropriate however. Mother sometimes used a loud, intimidating voice when speaking with her children. On other occasions, she upset the children by crying when they either resisted visiting or expressed a desire to go back to their foster homes.

Meanwhile, Johnny thrived in foster care. He bonded with his foster parents and both his speech and social skills improved. Johnny also had night terrors and

experienced fear and anxiety associated with memories of domestic violence and neglect. His nightmares and other symptoms of anxiety appeared to peak in the days before and immediately after his visits with Mother. Johnny expressed fear of Mother and told the social worker that he did not feel safe with her. He made statements about Mother hitting his sister with a belt and also described Mother being hit by one of her "friends."

At the conclusion of the 12-month review hearing on December 30, 2010, the juvenile court referred to this as a "difficult case," because "mom has done a very good job of complying with her drug abuse case plan. [¶] But I am absolutely convinced that today there's a substantial risk of detriment that prevents returning Johnny to mom today And I do think it's because of mom's inability to put his needs in front of hers." The court found that Mother would not benefit from additional services because, even after receiving 12 months of services, she continued to lack empathy for her child or understand his emotional needs. "If I felt that mom could make progress in six months with her ability to support Johnny emotionally, I would offer more services, but I'm not convinced, given all of the services she's done and given . . . her position that everybody is lying about Johnny's behavior and his problems . . . that [Mother would make enough progress in six months] to allow Johnny to be able to go home with her without suffering emotional harm." The juvenile court terminated reunification services to Mother and scheduled the matter for a section 366.26 permanency planning hearing.

Mother gave birth to her third child, a daughter, in January 2011. About one month later, the daughter was detained in foster care after Mother again tested positive for methamphetamine use.² Over the next nine months, Mother had one missed, one diluted and four positive drug tests in that matter.

² On November 2, 2011, Respondent filed two separate requests for judicial notice, asking us to take judicial notice of the March 21, 2011 Jurisdiction and Disposition Findings and Order in the daughter's juvenile dependency case (Ventura County Superior Court, Case No. J068148) and of the November 1, 2011 order in the same matter terminating Mother's reunification services and setting a section 366.26 permanency planning hearing. No opposition has been received. The orders are properly the subject of judicial notice. (Evid. Code, § 452, subd. (d)(1).) Accordingly, we grant both requests.

On May 12, 2011, Mother filed a section 388 petition to modify the trial court's order terminating her reunification services with respect to Johnny. She argued that services should be reinstated and the section 366.26 hearing postponed because she had re-enrolled in outpatient drug treatment and continued to participate in individual therapy. Mother stated: "I realize the struggle with addiction and other behavioral issues is life-long and I am committed to dealing with that struggle as indicated by the attached letters from various service providers." Mother contended the modification would be in Johnny's best interests because, "he recognizes me as his mother and has a strong bond with me."

The juvenile court summarily denied the petition on May 16, 2011. It found that the request did not state new evidence or a change in circumstances and that the proposed modification would not promote the best interests of the child. The trial court also noted that it was taking "judicial notice of findings and orders" in the case relating to Mother's infant daughter.

At the permanency planning hearing on May 17, 2011, the juvenile court explained that she denied the section 388 petition before she read a May 12, 2011 memo from the social worker documenting a positive drug test Mother had earlier in May. The court noted, however, that she did take judicial notice of the infant sibling's file because, "I knew that mom did have another positive test before the one that's reported in this May 12 memo." The court noted that information about the parent's progress in drug treatment would be relevant to the question of whether it would be beneficial to the child to continue his relationship with Mother. (§ 366.26, subd. (c)(1)(B)(i).) But, it noted, in this case the information was irrelevant because the court had no evidence of such a beneficial relationship. The trial court found Johnny was adoptable and terminated Mother's parental rights.

Discussion

Mother contends the trial court violated her due process rights in taking judicial notice of the findings and orders from the sibling's case without giving Mother prior notice and an opportunity to object. We conclude that any error in that regard was

harmless. First, the juvenile court's own findings and orders in the sibling's dependency action were properly the subject of judicial notice. (Evid. Code, § 452, subd. (d)(1); *In re Rocco M.* (1991) 1 Cal.App.4th 814, 819.) Second, prior notice and an opportunity to object are required where the judicially noticed records are of "substantial consequence to the determination of the action[.]" (Evid. Code, § 455) Here, however, the records were not of substantial consequence. Mother's section 388 petition would properly have been denied even without considering the sibling's dependency action, because the petition did not state any new evidence or describe any changed circumstances that would have justified modifying the order terminating reunification services. For example, the petition did not establish that Mother had acquired the empathy for and insight into Johnny's emotional needs that the trial court found so completely lacking at the 12-month review hearing. As a consequence, it is not reasonably probable the juvenile court would have granted Mother's section 388 petition had it not taken judicial notice of the findings and orders in the sibling's dependency case.

Mother also contends the juvenile court abused its discretion when it summarily denied the section 388 petition. There was no abuse. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) To avoid summary denial of a section 388 petition, the petitioner must make a prima facie showing of new facts or changed circumstances that would support granting the petition, if the evidence cited in the petition is credited. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912.) Here, no such facts or circumstances were shown. Mother contended that her services should be reinstated because she had voluntarily continued in therapy and drug abuse treatment. But the trial court had already considered Mother's record of participation and found that additional services were not likely to lead to reunification. The fact that Mother continued to participate in the same treatment and therapy as she had at the prior hearing does not constitute new evidence or a change in circumstances. (*In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451.) The petition was properly denied.

Disposition

The order dated May 16, 2011 denying appellant's petition pursuant to Section 388 and the order dated May 17, 2011 terminating appellant's parental rights pursuant to section 366.26, are affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.*

PERREN, J.

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Tari L. Cody, Judge
Superior Court County of Ventura

Ann E. Fragasso, under appointment by the Court of Appeal, for Appellant.

Leroy Smith, County Counsel, County of Ventura and Linda Stevenson,
Assistant County Counsel, for Respondent.