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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re DAVID M., et al., Persons Coming
Under the Juvenile Court Law.

CLAUDIA V.,

Petitioner,

v.

THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR THE
COUNTY OF LOS ANGELES,

Respondent.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Real Party in Interest.

B271730

(Los Angeles County
Super. Ct. No. DK03185)

ORIGINAL PROCEEDINGS in mandate. Stephen C. Marpet, Juvenile Court Referee. Petition denied.

Law Offices of Alex Iglesias, Steven Shenfeld and Kristen Fahrenholz, for Petitioner, Claudia V.

No appearance for Respondent.

Office of the County Counsel, Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Real Party in Interest.

INTRODUCTION

Mother Claudia V. (mother) seeks writ review of the juvenile dependency court's order under Welfare and Institutions Code¹ section 366.22, subdivision (a), finding that returning her sons, David M. and Isaias M., to her care and custody would place them at substantial risk of detriment to their health, safety and well-being. We deny the petition because substantial evidence supports the court's finding that despite more than two years of domestic violence counseling, mother is unable to protect the children from domestic violence with father, which poses a substantial and ongoing risk to the physical and emotional health of the children.

FACTS AND PROCEDURAL BACKGROUND

Mother and father, Jose M., married and had two children: David, born in July 2012, and Isaias, born in March, 2013. Isaias was born premature at 25 weeks gestation; he has severe disabilities, including spastic cerebral palsy, seizure disorder, and global developmental delays. Prior to the involvement of the Department of Children and Family Services (department), mother obtained a domestic violence protective order against father, after he assaulted her while she was pregnant with Isaias.

The department filed a petition under section 300 on January 24, 2014 as to both Isaias and David, citing subdivisions (a) [serious physical harm], (b) [failure to protect], (i) [severe abuse], (j) [sibling abuse]. The court subsequently found the children to be dependents of the court, sustaining the following core allegation: "On 01/20/2014, nine month old, Isaias [M.] was medically examined, hospitalized and diagnosed with a detrimental and endangering condition consisting of five posterior rib fractures at different stages of healing and a fracture to the child's left tibia. The child's mother, . . . gave no explanation of the manner in which the child sustained the child's injuries. The child's injuries are consistent with the non accidental trauma. [*sic*] Such injuries would not ordinarily occur except as the result of deliberate, unreasonable and neglectful act[s] by the child's mother who had care, custody and control of the child.

¹ Further unspecified section references are to the Welfare and Institutions Code.

Such deliberate[,] unreasonable and neglectful acts by the child's mother endanger the child's physical health, safety and well-being, and place the child . . . and the child's sibling[,] David [M.], [at] risk of physical harm, damage and danger.” In addition, the court sustained allegations that father has a five year history of substance abuse and is a current user of cocaine, and that mother and father have a history of domestic violence. The court further found that David was at risk of physical harm due to the severe physical abuse suffered by his brother. The department detained the children and placed them in foster care.

Mother consistently visited with both children, and began unmonitored visitation with David in November 2014. Although mother said she enjoyed visiting with David, and he was never injured while in her care, she had difficulty handling David's behavioral issues and tantrums. Eventually, the court permitted mother to have extended, overnight visitation with David. However, the department was never able to conduct unannounced home visits because mother's apartment complex was surrounded by a fence with a locked gate. Department social workers were able to observe mother on a few occasions when she had both David and Isaias in her care, and she proved to be unable to protect Isaias—who is medically fragile—from young David, who was prone to hitting and poking Isaias.

Father participated sporadically in a drug rehabilitation program. Despite several positive drug tests for methamphetamines in July 2014, the court permitted father to have unmonitored visitation with the children in November 2014. However, the court quickly ordered a return to monitored visitation after Isaias suffered an injury during an unmonitored visit with father. Following that incident, the department filed a subsequent petition under section 342 and the court sustained the following core allegation: “On 11/22/2014, the child Isaias [M.] sustained injuries resulting in a medical exam on 12/01/2014, which found the child to be suffering from a detrimental and endangering condition consisting of patterned bruising and redness consistent with a hand print or slap mark injury to the child's cheek and bilateral ear bruising, including behind the ear, with blunt force trauma to each side of the child's head. The child's

[father's] . . . explanation of the manner in which the child sustained the child's injuries is inconsistent with the child's injuries. The child's injuries would not ordinarily occur except as the result of deliberate, unreasonable and neglectful acts by the child's father who had care, custody and control of the child. Such deliberate[,] unreasonable and neglectful acts on the part of the father endanger the child's physical health, safety and well-being, and place the child and the child's sibling, David [M.], at risk of physical harm, damage and danger." The court subsequently reauthorized father's unmonitored visitation with David beginning in April 2015, but then restricted his visitation again, after David's foster mother reported a series of interactions with father in which he was inexplicably angry and aggressive in his interactions with her, while he had David in his custody. Because father refused to take an on-demand drug test at that time, the department suspected father had resumed using drugs and expressed concern for David's safety in light of father's erratic behavior.²

In April 2016, two years and three months after the department filed its initial petition, the court conducted a contested 18-month permanency review hearing under section 366.22. Over the course of several days, the court heard testimony from mother, father, and a social worker from the department. After considering the testimony, as well as the department's prior reports, the court terminated reunification services and set the matter for a permanency planning hearing under section 366.26. The court concluded that returning Isaias and David to mother's custody would create a substantial risk of detriment to their safety and well-being. Specifically, the court concluded the children were at substantial risk of harm because father continued to exhibit aggression toward mother and failed to complete domestic violence classes during the two year course of the proceedings. The court concluded that mother's behavior—the fact that she continued to pursue a relationship with father despite their

² In August 2015, Isaias's foster mother observed additional injuries (abrasions to Isaias's face [1 cm], scrotum [4 cm by 3 cm], and penis [3 cm by 1/2 cm]) following visits with mother and father. However, the department was unable to determine the cause of these injuries and closed the referral as inconclusive.

history of domestic violence and father’s drug use, even after two years of individual counseling and domestic violence education—demonstrated that she is unable to protect herself and her children from father. The court set the section 366.26 hearing on August 9, 2016.

On June 6, 2016, mother filed the instant petition for extraordinary relief. We issued an order to show cause and stayed the permanency planning hearing pending our decision in this matter.

CONTENTION

Mother contends the court erred by finding under section 366.22, subdivision (a), that returning her children to her care would place them at a substantial risk of detriment to their safety, protection, or physical or emotional well-being.³

DISCUSSION

We review the court’s finding that returning Isaias and David to mother’s care would create a risk of detriment to their physical or emotional well-being for substantial evidence. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 763; *In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1400.) “ ‘In juvenile cases, as in other areas of the law, the power of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination as to whether or not there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact. All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the verdict, if possible.’ [Citation.]” (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.)

Under section 366.22, subdivision (a), the juvenile court is required to return the child to the custody of the parent at the 18-month permanency hearing unless it determines, by a preponderance of the evidence, that returning the child would “create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child.” (§ 366.22, subd. (a)(1).) If the minor is not returned to the

³ Father did not appeal from the court’s order.

parents, the juvenile court must develop a permanent plan. (§ 366.22, subd. (a).) Although family preservation is the primary objective during the reunification period (§ 202, subd. (a)), upon cessation of reunification efforts, the scale tips away from the parents' interest in maintaining family ties and toward the child's interest in permanence and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Thus, "the proceeding terminating [family] reunification services and setting a section 366.26 hearing is generally a party's last opportunity to litigate the issue of parental fitness as it relates to any subsequent termination of parental rights, or to seek the child's return to parental custody." (*In re Matthew C.* (1993) 6 Cal.4th 386, 392.) Where there is clear and convincing evidence the child will be adopted, and there has been a previous determination that reunification services should be ended, termination of parental rights at the section 366.26 hearing is relatively automatic. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249-250.)

"[T]he decision whether to return the child to parental custody depends on the effect that action would have on the physical or emotional well-being of the child." (*In re Joseph B.* (1996) 42 Cal.App.4th 890, 899.) "The risk of detriment must be *substantial*, such that returning a child to parental custody represents some danger to the child's physical or emotional well-being." (*In re Yvonne W., supra*, 165 Cal.App.4th at p. 1400.) In making its detriment finding, the court must review and consider the social worker's report and recommendations as well as the efforts or progress, or both, demonstrated by the parents. (§ 366.22, subd. (a)(1).) The court must also consider the progress the parent has made toward eliminating the conditions that led to the child's out-of-home placement. (§ 366.22, subd. (a); *In re Yvonne W., supra*, 165 Cal.App.4th at p. 1400.)

In this case, the court relied on several factors to conclude that both children would be at a substantial risk of detriment to their safety and well-being if returned to mother's care.

First, the court noted that mother failed to take responsibility for Isaias's severe physical injuries. Although mother admitted she may have accidentally caused the

fracture to Isaias's leg while attempting to perform some physical therapy exercises, she denied causing Isaias's broken ribs, and further denied knowing who caused those injuries. But Isaias's doctor advised the department that the rib fractures, which were in various stages of healing at the time of his detention, are uncommon injuries in infants and young children, and "are generally due to a significant compression of the chest from front to back on an unsupported back, such as occurs when forcefully grasping and severely squeezing the chest." The department concluded that because mother failed to take responsibility for Isaias's injuries, she necessarily failed to address the stressors and conditions which led to the injuries, which in and of itself placed Isaias at risk of future injury. A parent's failure to accept responsibility for a child's injury, sustained while the child was under her care, is a valid basis for concern about the child's risk of future harm. (Accord, *In re A.M.* (2013) 217 Cal.App.4th 1067, 1077-1078 [affirming denial of reunification services under section 361.5 where mother refused to acknowledge source of child's injuries, and concluding that "[i]n those circumstances, there is no reason to believe further services will prevent her from inflicting or ignoring the infliction of similar injuries in the future"].)

Second, the court concluded that the ongoing relationship between mother and father, and more particularly mother's pursuit of a relationship with father despite past and ongoing abuse, placed the children at a substantial risk of detriment to their safety and physical and emotional well-being. Substantial evidence supports this finding. Prior to the date the department filed the petition, mother had filed for divorce from father and the couple no longer resided together. In fact, mother had obtained a domestic violence restraining order against father after father pushed her, slapped her in the jaw, and punched her in the stomach while she was pregnant with Isaias. Isaias was born six days after the court issued the restraining order, at only 25 weeks gestation. At one point, father threatened to kill mother. But although the domestic violence restraining order was still in place when the department filed the petition, mother and father continued to see each other during the pendency of the proceedings below. Father was arrested in May 2014 for violating the domestic violence restraining

order. At the time of the arrest, father and mother were spending the day together in Palos Verdes.⁴ Mother continued to pursue a relationship with father throughout the proceedings below.

In addition, father did not complete a domestic violence program, as ordered. Not surprisingly, father and mother continued to have conflict during their conversations about the children, and mother reported that father continued to be verbally aggressive during their exchanges. In addition, mother changed her telephone number several times in an effort to avoid father's ongoing harassment. She also reported to the department that father broke into her car and stole some property from it. On the basis of these facts, the department expressed concern that although mother participated in domestic violence classes over the course of two years, she continually chose to have ongoing and frequent contact with father. Indeed, mother admitted that just a few weeks prior to the 18-month review hearing, she drove father to take a drug test and that father was angry and aggressive during that visit.

On the basis of these facts, the department concluded that mother failed to learn to set strong boundaries with father, a necessary step to protect both herself and her children. Accordingly, the department expressed concern that father's unabated aggressive behavior combined with mother's lack of protective capacity placed the children's safety and physical well-being at risk. Given that father previously abused both mother and Isaias physically, and did not complete a domestic violence course despite the court's order that he do so, the court had good cause for concern. Father's ongoing struggle with drug abuse, as evidenced by a relapse in July 2014 and missed tests during the proceedings below, also supports the court's detriment finding. Taken together, these facts support the court's determination that the children would be at substantial risk of detriment if returned to mother's custody.

Mother asserts, accurately, that she actively participated in individual therapy, as well as parenting classes, domestic violence classes, and training relating to Isaias's

⁴ Mother eventually petitioned the family court to have the restraining order lifted.

medical needs. She contends these efforts helped her improve her parenting skills and she notes that the court consistently increased her visitation with each of the children as she progressed. However, the record also reflects that even after attending parenting classes, mother had difficulty caring for both children at the same time and, in particular, repeatedly failed to protect Isaias when David would hit him during conjoint visits. Moreover, although mother did have overnight visitation with the children for a time, the court ultimately withdrew that option and required mother's visitation to be monitored because she continued to have contact with father, who continued to display aggression toward her and failed to complete the required domestic violence courses.

In any event, the court acknowledged mother made significant strides in learning to care for the children, but based its decision not to return the children to her at the 18-month hearing on its assessment that she had not, during the two-year period of reunification services, gained the skills needed to protect herself and the children from father and from the domestic violence inherent in her relationship with him. The fact that mother made efforts to improve her parenting during the reunification period, while admirable, does not overcome the court's concern for the safety of the children which emanates from her unwillingness to accept responsibility for Isaias's prior injuries and her unwillingness to separate from father, who remains abusive and noncompliant with the court's case plan.

DISPOSITION

The petition for extraordinary relief is denied and the stay issued by this court on June 8, 2016 is vacated.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

STRATTON, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.