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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

In re ELIZABETH C. et al., Persons
Coming Under the Juvenile Court Law.

SUTTER COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Respondent,

v.

JESSE C.,

Defendant and Appellant.

C069854

(Super. Ct. Nos.
DPSQ09-6519,
DPSQ09-6541,
DPSQ11-6666)

Jesse C., father of the minors, appeals from orders terminating his parental rights. (Welf. & Inst. Code, §§ 366.26, 395 [further undesignated statutory references are to the Welfare and Institutions Code].) Appellant contends the court erred in failing to return the minors to his care at the disposition hearing on the second petition removing the minors from his care (§ 387) and in allowing his counsel to withdraw

just prior to the section 366.26 hearing. Appellant further contends his trial counsel was ineffective for failing to ask for a bonding study. We affirm.

FACTS

In July 2009, the Sutter County Department of Human Services (Department) removed nine-month-old Elizabeth C. from parental care due to ongoing domestic violence in the home and the mother's mental health problems. In August 2009, the mother was in jail for child cruelty and spousal abuse and was pregnant with a second child. By October 2009, the minor had been placed with the paternal grandmother. The court ordered reunification services.

Shortly thereafter, Isabelle C. was born and immediately detained. Both parents were participating in services but each needed further services.

In April 2010, the Department recommended returning the minors to the parents with family maintenance services. The mother was pregnant with a third child. The court found the parents had made excellent progress and returned the minors home under a family maintenance plan. A review after two months indicated the family was making progress and the court continued the family maintenance.

By October 2010, the reunited family was under stress. Appellant was becoming increasingly frustrated and angry. After meetings and discussions of the parents' needs and appropriate services, the parties agreed to a safety plan for the family and renewed services. The parents did not respond to their

intervention counsel's telephone calls and did not engage in the new service plan. Nonetheless, the court ordered an additional six months of family maintenance services.

In January 2011, the Department filed a section 387 supplemental petition to remove Elizabeth and Isabelle and a section 300 petition to remove the new baby, Tabitha C. The petitions alleged the mother was arrested in December 2010 for domestic violence and mother later reported that, during this time, appellant hit the mother hard enough to cause her injury. Appellant had a restraining order against the mother, but invited her to his home and encouraged ongoing violations of the order. In January 2010 appellant called the mother to come and get the baby, which she did. The mother witnessed appellant physically and emotionally abuse Elizabeth and Isabelle. The court ordered the minors detained.

The jurisdiction report for the petitions recounted the ongoing violence between appellant and the mother and the parents' failure to comply with the safety plan by continuing to have contact with each other. The minors were placed with the paternal grandmother in February 2011. The report stated that 19 months of services had not been effective in modifying the parents' behavior to protect the minors from neglect and abuse and that the parents were now ignoring court orders and safety plans designed to assist them. The court sustained the petitions.

The disposition report filed in May 2011 recommended termination of services. The report reviewed the ongoing

contact and violence between appellant and the mother from the time the first petition was filed. Violent interactions continued despite the parents' participation in services, which included various marriage therapy interventions and parenting instruction. The report stated that the parents had not benefitted from services, appearing to have engaged in services until the minors were returned and participating only minimally thereafter. At visits with the parents following removal, the minors seemed to be confused as to who they were visiting but greeted the paternal grandmother with smiles when she came to pick them up. The Department's assessment was that the parents were unwilling or unable to address their problems and place the welfare of the minors above their own troubled relationship. A February 2011 progress report for the preceding six months from appellant's therapist stated that appellant appeared to be "marginally motivated" for treatment and the therapist would not provide joint treatment with both appellant and the mother present due to a domestic violence incident during the course of treatment. Appellant had reports of positive participation in several programs in 2009 and 2010 from his services coordinator.

An addendum report stated that appellant visited the mother in jail and after her release. Appellant's rationale was that his restraining order did not state he was to stay away from her, but rather she was to stay away from him. In March 2011, the parents got into an dispute in the Department's parking lot. During the dispute appellant ran over the mother and left the

scene. The mother suffered injuries. Appellant told police and the social worker he was unaware he had run over the mother.

At the disposition hearing in May 2011, the paternal grandmother testified that appellant was now a better parent than he had been and thought that appellant and the mother could parent the minors separately if they were not involved with each other. She stated the parents were getting a divorce.

Appellant's therapist testified he believed appellant had benefitted from therapy in communication and in regard to his posttraumatic stress disorder and panic attacks. He had not seen any problems which would indicate appellant would not be a good parent. The therapist testified that appellant's overall functioning had improved, he was less impaired and was an active participant in therapy although he attended only 15 of 24 sessions. The therapist acknowledged writing a letter which stated appellant was marginally motivated for treatment on his own and reasonably more motivated when appellant and the mother were being seen together.

Matthew John Floe, appellant's services coordinator for mental health services, parenting and a father's support group, also testified. The services were provided in 2009 and 2010. Appellant completed Fathers First, a father's support group, and two parenting classes. Floe continued meeting with appellant on and off until March 2011. Floe believed appellant had matured over the last two years and described his participation in classes as consistent and positive.

Appellant testified he did not maintain the restraining order because he was trying to work things out with the mother but ultimately realized they could not. Appellant testified the mother filed for divorce. He stated he believed they were both great parents but were just not right for each other. Appellant further testified he and the mother were not seeing each other since the minors' most recent detention. Appellant stated he did not realize the mother had been injured when, in a parking lot, he ran over her with his car, and he believes she was 90 percent responsible for the dispute and, thus, his violent misconduct. Appellant believed he could benefit from further services.

The court sustained the petitions and found the parents had made minimal efforts to alleviate their problems and that there was clear and convincing evidence of substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minors if returned home. The court denied further services to the parents and set a section 366.26 hearing to select a permanent plan for the minors.

Appellant filed a petition for extraordinary writ which was summarily denied on the merits pursuant to *Joyce G. v. Superior Court* (1995) 38 Cal.App.4th 1501, 1513-1514. The sole issue raised in the skeletal petition was: "There was substantial evidence that the children could be safely returned to Petitioner at the hearing."

The report for the section 366.26 hearing recommended termination of parental rights with a permanent plan of adoption

by the paternal grandmother and her husband. Appellant visited fairly consistently and had over five hours of visitation per week.

On August 9, 2011, the date set for the section 366.26 hearing, the mother asked for, and was granted, time to retain private counsel. At an interim hearing she informed the court she had not retained counsel and the section 366.26 date was confirmed.

The hearing was to begin September 6, 2011, however appellant's previous counsel, Kristin Cobery, was not present and new counsel, Amanda Hopper, appeared in her place to represent him. However, Hopper had a conflict and was relieved. The court appointed a third attorney, Richard Thomas, who had briefly represented appellant at the outset of the dependency, to represent appellant again. Appellant did not object to either of these substitutions. The hearing was continued to September 20, 2011. Appellant appeared with Thomas who asked for, and received, a one-month continuance. Appellant did not object to Thomas's representation.

At the hearing on October 18, 2011, minor's counsel raised the possibility of guardianship instead of adoption as a permanent plan. Appellant's counsel, Thomas, also argued for a permanent plan of guardianship.¹ He noted that, in the current

¹ The reporter's transcript incorrectly identifies him as the deputy county counsel. It is clear, however, that the statements are Thomas's.

report, Ms. Cobery was still listed as representing appellant. Thomas went on to comment that, over the two years of the case appellant had the same counsel who, in Thomas's opinion represented him ably. Thomas continued: "Then because of a quirky little system we have here relative to contracts, he is handed to another attorney who has no idea what is going on other than what he reads in a file." Thomas later stated this was his first appearance with appellant, that they had a long talk and he had read the file. County counsel opposed a permanent plan of guardianship. The court continued the matter for two weeks to consider the arguments. At no time during the hearing did appellant object to having new counsel or to anything about his prior or current representation.

At the continued hearing, the court inquired if there was additional evidence. The Department's counsel stated that he had been informed by state adoptions that the paternal grandmother had completed all steps necessary for an adoption. The court tentatively ruled that it would adopt the recommended findings and orders and asked for additional comments. None of the parties' attorneys had any argument and there was no objection to the tentative ruling. The court terminated parental rights and selected adoption as the permanent plan for the minors.

DISCUSSION

I

Appellant contends the court erred in failing to return the minors to his custody at the May 3, 2011, disposition hearings on the section 387 and section 300 petitions.

Appellant filed a petition for extraordinary writ to review the juvenile court's orders at the May 3, 2011, hearing and the petition was summarily denied pursuant to *Joyce G. v. Superior Court, supra*, 38 Cal.App.4th at pages 1513-1514. When "the denial is summary, the petitioner retains his or her appellate remedy (§ 366.26, subd. (1)(1)(C)) but is limited to the same issue on the same record (§ 366.26, subd. (1)(1)(B)) and thus is destined on appeal to receive the same result." (*Joyce G. v. Superior Court, supra*, 38 Cal.App.4th 1501 at p. 1514.)

Appellant argues substantial evidence supported return of the minors to his custody because he had completed the case plan, had previously reunified with the older minors, the mother had filed for divorce and moved out, he had a strong bond with the minors and was capable of meeting their needs, and had benefitted from therapy and parenting classes.

When the sufficiency of the evidence to support a finding or order is challenged on appeal, even where the standard of proof in the trial court is clear and convincing, the reviewing court must determine if there is any substantial evidence -- that is, evidence which is reasonable, credible and of solid value -- to support the conclusion of the trier of fact. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924; *In re Jason L.* (1990) 222

Cal.App.3d 1206, 1214.) In making this determination we recognize that all conflicts are to be resolved in favor of the prevailing party and that issues of fact and credibility are questions for the trier of fact. (*In re Jason L.*, *supra*, 222 Cal.App.3d at p. 1214; *In re Steve W.* (1990) 217 Cal.App.3d 10, 16.) The reviewing court may not reweigh the evidence when assessing the sufficiency of the evidence. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

Viewing the evidence in the light most favorable to the juvenile court's order, appellant's contention fails. It is true that appellant had participated in services and made some progress in areas which did not relate directly to parenting, but only marginally to domestic violence. However, appellant continued to violate the restraining order and demonstrated explosive anger, clearly having failed to benefit from this aspect of therapy. He was marginally motivated to actively participate in therapy after the minors were returned, rationalized his behavior and injured the mother when he ran over her with his car in a violent outburst two months before the hearing. The evidence of his participation in services, the benefit he derived from those services, and his ability to parent the minors and meet their needs was in conflict at best. The juvenile court resolved the conflict adversely to appellant. The juvenile court did not err in concluding that the evidence did not support returning the minors to appellant's custody.

II

Appellant argues the court erred in permitting his attorney to withdraw prior to the section 366.26 hearing because counsel did not give notice, show cause, or get appellant's consent to be relieved.

Once appointed, "[c]ounsel shall represent the parent . . . at the detention hearing and at all subsequent proceedings before the juvenile court. Counsel shall continue to represent the parent . . . unless relieved by the court upon the substitution of other counsel or for cause. . . ." (§ 317, subd. (d).)

Appellant's argument and authorities apply in circumstances where counsel requests to be relieved. Here, we observe that the record is not clear on the circumstances of the change of counsel from Cobery to Hopper which may have triggered issues of notice, right to a hearing or consent. While one might surmise from Thomas's later remarks that the change involved contractual matters with the county, this is far from apparent from the record before us.²

It is well settled that a party raising an issue on appeal has the burden of showing reversible error by an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) Because appellant has failed to provide such a record by augmentation or

² Respondent erroneously represents that Hopper "advised the court she was taking over the contract for representation previously held by Ms. Cobery." The record does not reflect this statement was made.

settled statement, we have no occasion to consider the merits of his argument further.

III

Appellant argues counsel was ineffective for failing to request a bonding study. We disagree.

A parent claiming ineffective assistance of counsel has the burden of showing that counsel failed to act in a manner to be expected of reasonably competent counsel, that "counsel's representation fell below an objective standard of reasonableness." (*Strickland v. Washington* (1984) 466 U.S. 668, 688; [80 L.Ed.2d 674, 693]; *In re Emily A.* (1992) 9 Cal.App.4th 1695, 1711.) The parent must also show prejudice, that is, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra*, at p. 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.)

A bonding study, whether inter-sibling or parent-child, is not required prior to termination of parental rights. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1339; *In re Richard C.* (1998) 68 Cal.App.4th 1191, 1195.) The court has discretion to order a bonding study even late in the process, but denial of a belated request is not, in itself, and abuse of discretion. (*In re Richard C., supra*, 68 Cal.App.4th at p. 1197.) Absent a showing of clear abuse the exercise of the court's discretion

will not be overturned. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318; *In re Lorenzo C.*, *supra*, 54 Cal.App.4th at p. 1341.)

A bonding study, is, of course, an expert opinion on the relationship between the parent and child. The juvenile court is never required to appoint an expert when making a factual determination unless "it appears to the court . . . that expert evidence is . . . required" (Evid. Code, § 730.) Thus, when there is ample evidence in the record of the relationship between parent and child, a bonding study is unnecessary.

The record in this case has such evidence. Each of the minors had been removed from appellant's care when they were infants. Elizabeth and Isabelle were returned for nine months but removed again when they were still very young. Appellant visited the minors after the second removal, but, although they had lived with him for many months, Elizabeth and Isabelle were unsure who he was. Tabitha could not be expected to have any significant relationship with him due to her age. In contrast, the minors responded positively to the paternal grandmother who had cared for them when they were first removed and to whose custody they returned. Appellant continued to visit, but given the ages of the minors, the most he could expect, without having had a substantial preexisting bond, was that he could achieve the status of a friendly visitor.

Due to the state of the record, it would not have appeared to the court that a bonding study was required. Neither Cobery nor Thomas can be faulted for failing to request one. Cobery, from her long involvement with the case, was well aware of the

evidence of the relationship between appellant and the minors. Thomas had read the file, discussed the case at length with appellant, and had the current reports. Due to the continuances prior to the hearing, he also had ample time to assess the need for a bonding study and conclude that any request would be rejected. Neither counsels' representation fell below an objective standard of reasonableness. Appellant has failed to meet his burden to show either counsel was ineffective.

DISPOSITION

The orders of the juvenile court are affirmed.

NICHOLSON, Acting P. J.

We concur:

BUTZ, J.

MURRAY, J.