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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DIANA R. et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Real Party in Interest.

D060962

(San Diego County
Super. Ct. No. SJ12430A-B)

PROCEEDINGS for extraordinary relief after reference to a Welfare and Institutions Code section 366.26 hearing. Garry G. Haehnle, Judge. Petition denied; request for stay denied.

Diana R. and Edgar R., Sr., seek writ review of juvenile court orders terminating their reunification services regarding their sons, Edgar R., Jr., and David R., and referring

the matter to a Welfare and Institutions Code¹ section 366.26 hearing. Diana contends the court abused its discretion because it misunderstood the scope of its authority to continue her services. She also asserts substantial evidence does not support the court's finding there was no substantial probability the children would be returned to her custody by the 18-month date. Edgar, Sr., joins in her arguments. We deny the petition and deny the request for a stay of the proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2010, when police came to Diana's home to arrest the children's maternal uncle, they discovered two-year-old Edgar, Jr., and one-year-old David in the care of the maternal grandmother. The parents had agreed with Child Protective Services not to leave the children with the maternal grandmother because of her mental illness and threatening behavior. Also in the apartment, police found sharpened throwing knives accessible to the children, and outside they found six marijuana plants with children's toys scattered around them. There was no food in the refrigerator and David's belly was large and distended. The San Diego County Health and Human Services Agency (the Agency) petitioned under section 300, subdivision (b), alleging the children were at substantial risk of harm. The juvenile court ordered the children detained.

Diana and Edgar, Sr., denied leaving the children in the maternal grandmother's care or knowing about the unsafe conditions in the home. Edgar, Sr.'s, criminal history includes numerous arrests, including for drug-related crimes and domestic violence. He

¹ Statutory references are to the Welfare and Institutions Code.

said he began using alcohol and marijuana at age 13 and methamphetamine at 16, but denied current drug use. He said he recently was discharged from parole. He denied living with Diana and the children.

At the jurisdictional and dispositional hearing in September 2010, the court found the allegations of the petitions to be true, removed custody from Diana, found it would be detrimental to place the children with Edgar, Sr., and ordered them placed in foster care. It ordered the parents to participate in reunification services.

In November 2010 Edgar, Sr.'s, case plan was amended to include anger management classes and his visitation became supervised after he bullied Edgar, Jr., at the child's birthday party. The parents participated in services and Edgar, Sr., who had missed numerous visits, began visiting more consistently. Diana acknowledged being responsible for the dependency, but denied knowing about the marijuana plants. At the six-month review hearing, the court continued services.

Edgar, Sr., then began missing visits again and missed some drug tests. In May 2011 Diana had trouble finding stable housing and stopped communicating with the social worker. She started conjoint therapy with Edgar, Jr., but missed her individual therapy appointments. Her therapist said Diana's behavior had changed and in July she terminated therapy, saying Diana was not taking it seriously.

In June 2011 police arrested Diana after a violent altercation with Edgar, Sr., who told police Diana woke him up and hit his arm with a hammer because she found another woman's number in his phone. Diana volunteered to take an anger management class. Later, both parents denied the incident. Diana pleaded guilty to misdemeanor battery

against a cohabitant and was granted probation on the condition she enroll in a 52-week domestic violence program.

Edgar, Sr., then missed more visits. Diana participated in services, attended visits and made progress in conjoint therapy with Edgar, Jr., but she did not take advantage of additional opportunities to see the children.

The 12-month hearing was held in October and November 2011. The therapist who had provided conjoint therapy for Diana and Edgar, Jr., since April 2011 opined Edgar, Jr., needed additional therapy. Diana's domestic violence group facilitator testified Diana participated well, and Diana said she had used some of the techniques she had learned. The group facilitator said Diana likely viewed some behavior as normal because of her childhood experiences, and she needed to learn new ways of dealing with issues. The Community Services for Families worker said she had met with Diana six times on parent/child relationships.

The social worker testified the parents' pattern had been to participate in services for a while, stop and then begin participating again. She said Diana had progressed from weekly to biweekly therapy, but then stopped therapy. She had had unsupervised visits for a time, but her visits became monitored after the domestic violence incident. Recent supervised visits had been appropriate. The social worker said Edgar, Sr., began therapy after the domestic violence incident in June 2011. She opined there was not enough time before the 18-month date for the parents to learn to be safe parents for the children.

Diana testified she had stopped therapy because of her work schedule, it took time to resume therapy, and she had attended three or four sessions with a new therapist. She

said she had not hit Edgar, Sr., with a hammer during the June incident, but admitted she had yelled at him. She denied living with him, but said he often visited and sometimes spent the night. She was attending domestic violence treatment and she believed she had addressed her issues with anger during the eight sessions she had attended.

Edgar, Sr., testified he had completed a parenting class and anger management classes and had participated in two months of a six-month substance abuse program. He testified the June incident was only a loud argument and Diana had not hit him with a hammer. He had had six therapy sessions and had not yet addressed domestic violence issues.

Stipulated testimony was offered that the facilitator for Edgar, Sr.'s, anger management class would say Edgar, Sr., had actively participated in a 10-week class and reenrolled when he completed the class. The facilitator for a substance abuse outpatient program would say Edgar, Sr., attended three sessions each week, had had one positive drug test and three negative tests, and if he made the necessary progress would graduate in January 2012.

After considering the evidence and argument by counsel, the court terminated the parents' services and set a section 366.26 hearing.

Diana and Edgar, Sr., petition for review of the court's orders. (§ 366.26, subd. (l); Cal. Rules of Court, rule 8.452.) This court issued an order to show cause, the Agency responded and the parties waived oral argument.

DISCUSSION

I

Diana joined by Edgar, Sr., contends the court abused its discretion when it declined to extend her services to the 18-month date. She argues it misunderstood the scope of its authority to do so and points to statements the court made which she claims indicate it did not believe it had discretion to continue her services. She maintains it cannot be determined with certainty that she did not suffer prejudice.

Although Diana did not argue at the 12-month hearing that the court misunderstood its discretion to extend services to the 18-month date, we exercise our discretion to address the issue she raises. Reviewing her claim, we determine she has not shown prejudicial error.

It is presumed in dependency cases that parents will receive reunification services. (§ 361.5, subd. (a); *Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 95.) Reunification services for a parent of a child under the age of three generally are limited to six months, but may be extended to the 12-month date. (§§ 361.5, subd. (a)(1)(B) & 366.21, subd. (e).) Court-ordered services may be extended to a maximum time of 18 months after the child was originally removed from parental custody if the court finds there is a substantial probability the child will be returned to the parent's physical custody and safely maintained in the home by that time, or that reasonable services were not provided to the parent. (§§ 361.5, subd. (a)(3); 366.21, subd. (f); 366.21, subd. (g)(1); *In re T.G.* (2010) 188 Cal.App.4th 687, 695.)

Under section 366.21, subdivision (g)(1), a court may continue a case to the 18-month date only if there is a substantial probability the child will be returned to the parent's physical custody and safely maintained in the home by that time. In considering whether to extend the case for 18 months, the court must make all of the following three findings:

"(A) That the parent or legal guardian has consistently and regularly contacted and visited with the child.

"(B) That the parent or legal guardian has made significant progress in resolving problems that led to the child's removal from the home.

"(C) The parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her treatment plan and to provide for the child's safety, protection, physical and emotional well-being, and special needs."

Edgar, Jr., and David were under the age of three when they were removed from parental custody in August 2010. Thus, reunification services were presumptively limited to six months. (§ 361.5, subd. (a)(1)(B).) However, if the parents were meeting statutory requirements, the court had discretion to continue services to the 12-month review date and then to the 18-month date. By the time of the court's decision at the 12-month hearing, Diana and Edgar, Sr., had been offered nearly 15 months of services.

Diana argues comments the court made show it did not recognize its discretion to continue services. The court stated:

"At this point I am not going to make any findings or force the Court of Appeals to tell me I'm wrong or right on this matter, but with the change in the law in 2009 I am not sure the parents actually get to go to 18 months. *Tonya M.* [*Tonya M. v. Superior Court* (2007) 42

Cal.4th 836]² was decided before the change in the law when the Legislature really clamped down on the time periods for the parents to participate in services and prove they could reunify with their children. I'm not convinced children under three get to go to 18 months. Their 12-month date is their 18-month date, but I'm not making any findings as to that."

Diana has not shown prejudicial error. "It is presumed that official duty has been regularly performed." (Evid. Code, § 664.) Although the court's comments are confusing regarding whether it recognized its discretion to extend services to the 18-month date, the court explicitly stated it was not making any findings as to that issue. Instead, it expressly found under the requirements of section 366.21, subdivision (g)(1), that there was no probability of return by the 18-month date. It recognized Diana had consistently visited the children as required by section 366.21, subdivision (g)(1)(A), and she had made good progress, although not significant progress as required by section 366.21, subdivision (g)(1)(B), but it then specifically found the parents had not satisfied the requirement of section 366.21, subdivision (g)(1)(C), in that they had not shown the ability and capacity to complete the requirements of their case plans and provide for the children's safety, protection, well-being and special needs. The court stated:

"[Diana] has made good progress with the problems that led to the removal. However, . . . neither parent has demonstrated the capacity and/or ability to complete the objectives of their case plan and to provide for the child's protection, well-being and needs."

² In *Tonya M. v. Superior Court*, *supra*, 42 Cal.4th at p. 848, our Supreme Court held the Court of Appeal had properly determined at the six-month review hearing whether there was a likelihood of reunification within the time remaining until the 12-month date, rather than within six months from the date of the six-month hearing. The court commented that services may be extended to the 18-month date.

Also, during argument, the attorneys for all parties had articulated the requirements under section 366.21, subdivision (1)(A), (B) and (C), to extend services to the 18-month date for parents of a child younger than three. The record does not indicate the court failed to consider the arguments when making its decision not to extend services.

Moreover, if a judgment is correct, a reviewing court will affirm the order even if the reasoning was faulty. (*In re Natasha A.* (1996) 42 Cal.App.4th 28, 38.) Any indication from the court's statements that it did not understand its discretion to extend services must be considered harmless error because, as we explain hereafter, substantial evidence supports the court's finding there was no substantial probability of returning the children to Diana's custody by the 18-month date.

II

Diana, joined by Edgar, Sr., argues substantial evidence does not support the finding there was no substantial probability of return by the 18-month date.

A reviewing court must uphold a juvenile court's findings and orders if they are supported by substantial evidence. (*In re Amos L.* (1981) 124 Cal.App.3d 1031, 1036-1037.) "[W]e must indulge in all reasonable inferences to support the findings of the juvenile court [citation], and we must also ' . . . view the record in the light most favorable to the orders of the juvenile court.' [Citation.]" (*In re Luwanna S.* (1973) 31 Cal.App.3d 112, 114.) The appellant bears the burden to show the evidence is insufficient to support the court's findings. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

Technical compliance with the components of a reunification plan is insufficient by itself to find that a child may be safe in a parent's care. (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 704; *In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1143.) At the 12-month hearing, at the time the court made its decision not to extend services, the 18-month date was only three months away. Although Diana had consistently visited the children, attended classes and participated in services, she had not learned to be a safe parent. She said she accepted responsibility for the dependency, but continued to say she did not know the marijuana plants were in her backyard. She stopped attending individual therapy, her therapist said she was not taking the therapy seriously, and she lost three months of therapy sessions before she was able to start over with a new therapist. She lived with Edgar, Sr., attacked him with a hammer, was arrested for assault with a deadly weapon and pleaded guilty to battery of a cohabitant. Despite Diana's attendance in programs, she had not made substantial progress with the goal of learning to be a safe parent.

Diana argues the court ignored the progress she had made and improperly focused on the June 2011 domestic violence incident. She claims this was a new issue that came up between the six- and 12-month hearings and was not an original basis for jurisdiction.

The court did not err in considering the issue of domestic violence. First, Diana's counsel argued that domestic violence was an issue that needed to be addressed, stating,

"I think [Diana], herself, has testified and has recognized that [domestic violence] was an additional protective issue that arose during these last six months. I think we need to look at what happened after that incident occurred.

Since Diana invited consideration of domestic violence issue and her participation in a domestic violence treatment program, she cannot not now argue this was not a proper issue for consideration.

Moreover, a court is not limited to considering only the original reasons for the removal of the children from parental custody when deciding whether the parents have made significant progress in resolving the problems that led to the removal. (*In re Joseph B.* (1996) 42 Cal.App.4th 890, 899.) Although domestic violence did not initially form the basis for juvenile court jurisdiction, it posed a substantial risk to the children. Diana engaged in domestic violence with Edgar, Sr., and lied about it. She testified she became angry when anyone disagreed with her, and both parents agreed to participate in anger management and domestic violence treatment after the domestic violence incident.

By the time of the 12-month hearing, the parents' visits remained supervised; domestic violence was an issue of concern; Diana and Edgar, Sr., were in a romantic relationship; and Edgar, Sr., had been free from marijuana use for only a short time. The social worker testified the parents would not be able to make sufficient progress by the time of the 18-month date to be able to safely parent the children. Substantial evidence supports the court's decision not to extend reunification services to the 18-month date.

DISPOSITION

The petition is denied. The request for stay is denied.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

McINTYRE, J.