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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DANIELLE S.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Real Party in Interest.

D061153

(San Diego County
Super. Ct. No. EJ2920)

PROCEEDINGS in mandate after referral to a Welfare and Institutions Code section 366.26 hearing. Ronald F. Frazier, Judge. Petition denied. Request for stay denied.

Danielle S. contends the juvenile court erred when it set a hearing to select and implement a permanency plan for her son, Z.G., under Welfare and Institutions Code¹ section 366.26. She argues the juvenile court was required to consider the possibility or probability she would qualify for extended services at the 18-month review hearing in determining at the 12-month hearing whether to extended services. We deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Z.G. is the son of Danielle S. and B.G.² Z.G. is now 12 and one-half years old. The record shows that Z.G. is a healthy, well behaved young man who loves to read and is developmentally on target.

Danielle has a history of involvement with child protective services and the criminal justice system. In 2000, when Z.G. was nine months old, the San Diego County Health and Human Services Agency (the Agency) substantiated a child abuse referral for emotional abuse due to domestic violence between Danielle and B.G. In 2001 the Agency substantiated another domestic violence referral after Danielle chased B.G. with a knife and injured his lip. She was arrested on charges of domestic violence.

Danielle was convicted on charges of felony perjury and fraud in 2000; spousal abuse in 2001; possession of stolen property, taking a vehicle without permission and

¹ Statutory references are to the Welfare and Institutions Code.

² B.G. did not file a writ petition. He is mentioned in this opinion only when relevant to the claims raised by Danielle.

possession of drug paraphernalia in 2005; and possession of stolen property and domestic violence in 2006.

In October 2007 Z.G. was made a dependent of the juvenile court after police found 11 baggies of methamphetamine, drug paraphernalia and drug manufacturing materials at Danielle's home. Danielle was charged with possession of a controlled substance and possession for sale, being under the influence of a controlled substance, child cruelty, receiving stolen property, possession of drug paraphernalia, illegal sale of hypodermic needles and inflicting corporeal injury on a spouse.

During the 2007-2009 dependency proceedings, Danielle participated in substance abuse treatment, parenting education and individual counseling. She reunified with Z.G. and dependency jurisdiction was terminated in January 2009.

In March 2010 the Agency filed a petition alleging there was a substantial risk that Z.G. would suffer serious physical harm or illness as a result of Danielle's inability to adequately supervise him. (§ 300, subd. (b).) Z.G. found Danielle unresponsive and/or incoherent, and telephoned for emergency services. At the hospital Danielle tested positive for methamphetamine and valium. She denied using methamphetamine, instead claiming she had mixed alcohol and prescription medication.

Danielle enrolled in an outpatient substance abuse treatment program and started individual therapy. At the May 2010 jurisdiction and disposition hearing, the Agency recommended that Z.G. be returned to Danielle's care. The juvenile court sustained the petition and ordered a plan of family maintenance services.

From May 1 to June 15, 2010, Danielle had six unexcused absences from her treatment program. On July 21 she tested positive for alcohol. The next day she tested positive for methamphetamine. Danielle enrolled in a detox program, missed a day, and was terminated from the program. She did not appear at a drug test on August 31 or for an intake appointment on September 3.

On September 10, 2010, Danielle was arrested on charges of battery, felony battery with serious bodily injury and possession of methamphetamine. During an argument, Danielle repeatedly hit a woman in the face and assaulted a man who came to the woman's defense. The woman suffered a laceration to the bridge of her nose, a possible broken nose and swelling to the left side of her face and right eye. Another person at the scene admitted that she and Danielle had smoked methamphetamine together that evening, and said Danielle had been drinking. When arrested Danielle yelled obscenities, tried to spit on the deputy and attempted to scratch his hands and forearms. She tried to kick another deputy in the testicles. The deputies physically restrained Danielle and placed a spit sock over her head. Once inside the vehicle, Danielle managed to remove the spit sock. She then "spit all over the back of the patrol vehicle."

The Agency detained Z.G. in protective custody with his paternal aunt and filed a supplemental petition. The juvenile court removed Z.G. from Danielle's custody and ordered a plan of family reunification services.

Z.G. expressed sadness that his mother had been arrested. He said he would like to return to her care when she was released from jail.

Danielle remained in jail until February 2011, when she was released on condition she enter an inpatient substance abuse treatment program. Starting in early March, Z.G. and Danielle had supervised weekly visits. The social worker observed they had a strong bond and enjoyed each other's company. In April the Agency authorized limited unsupervised visits between Danielle and Z.G.

In May 2011 Danielle left the inpatient treatment program. She refused to follow the advice of her substance abuse treatment counselor to enroll in another inpatient program. Instead, she entered a three-day-a-week outpatient program. In June the social worker spoke with Danielle's parole officer. The parole officer stated Danielle was very manipulative and a chronic recidivist. Danielle had to either reenter inpatient treatment or serve her full sentence. Danielle entered another inpatient treatment program in July.

In October 2011 the Agency reported that Danielle was doing well in her inpatient treatment program and recommended that the juvenile court continue services to the 18-month review date. The social worker noted there was a strong bond between Z.G. and Danielle, and Z.G. wanted to return to his mother's care.

On November 4, 2011, Danielle refused to drug test. She told the social worker that she had been drinking and that this was her first relapse all year. Danielle was instructed to enter a detox program. The Agency reinstated supervised visitation, and changed its recommendation from continuing family reunification services to selecting a permanent plan for Z.G.

On November 30, 2011, Danielle was arrested after she met with her parole officer while under the influence of alcohol. The results of a November 28 drug test were also

positive for alcohol. She was sentenced to serve 365 days in jail. Her parole officer stated that when released, Danielle would enter a long-term residential treatment program.

The contested 12-month review hearing was held on December 15, 2011. The juvenile court admitted the Agency's reports in evidence, and heard testimony from the social worker and Danielle. The social worker said that with credit for time served, Danielle would be released from jail in approximately February 2012.

Danielle acknowledged she was not in a position to care for Z.G. at that time and would not be in a position to have him in her care when she was released from custody in February or March.

The juvenile court found that Danielle did not make substantial progress with her case plan and there was not a substantial probability that Z.G. would be returned to her physical custody by the 18-month review hearing. The court terminated reunification services and set a hearing under section 366.26.

Danielle petitions for review of the juvenile court's orders. (§ 366.26, subd. (l); Cal. Rules of Court, rule 8.452.) She asks this court to reverse the order setting a section 366.26 hearing, and to remand the matter with directions to the juvenile court to vacate the order for hearing under section 366.26 and continue family reunification services to her. This court issued an order to show cause, the Agency responded, and oral argument was heard on April 9, 2012.

DISCUSSION

A

The Parties' Contentions

Danielle acknowledges she has severe substance abuse problems and has had difficulty resolving those problems. She further acknowledges she has a history of starting substance abuse treatment programs, not being able to complete them and relapsing. Danielle nevertheless asserts the court erred when it found that she would not be able to provide a home for Z.G. by the 18-month review date and terminated family reunification services.

Danielle contends the Legislature, in response to the difficulties that incarcerated parents have in reunifying with their children, enacted a provision allowing the juvenile court to extend the reunification period to 24 months when a parent is participating in a court-ordered residential substance abuse treatment program, or has recently been released from incarceration. (§ 366.22, subd. (b).) In view of Z.G.'s close relationship with her and his desire to reunify, and her progress in substance abuse treatment services, Danielle maintains the court should have considered the possibility or probability that she would qualify for extended services at the 18-month review hearing, and extended reunification services to her to that date.

The Agency contends Danielle did not raise this new and novel issue in the juvenile court and has therefore forfeited her right to raise it on review. The Agency further contends that section 366.21, subdivision (g)(1), which governs the 12-month review hearing, provides specific criteria for the juvenile court to consider when deciding

whether to extend services, and it would be speculative for the court to try to determine what the posture of the case would be at the 18-month review date. Finally, the Agency contends there is substantial evidence to support the juvenile court's findings and orders at the 12-month review hearing.

A

The Doctrine of Forfeiture

A party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court. Forfeiture "applies in juvenile dependency litigation and is intended to prevent a party from standing by silently until the conclusion of the proceedings." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 221-222.)

Here, Danielle failed to bring to the juvenile court's attention her contention that the court should have considered her probable future status as a recently released inmate or participant in long-term inpatient substance abuse treatment in determining whether to extend services to her to the 18-month review date. A party may not assert theories on appeal which were not raised in the trial court. (*Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1489.) Thus Danielle has forfeited the right to assign error on review.

Even were the issue not forfeited, we would reject Danielle's argument. (*In re Dakota H.*, *supra*, 132 Cal.App.4th at p. 222.) This issue presents a pure question of law, which is subject to de novo review. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

B

The Statutory Framework

Unless specified exceptions apply, when a child is removed from parental custody, the juvenile court must order child welfare services for the child and the parent to facilitate family reunification. (§ 361.5, subs. (a), (b).) A parent of a child age three years or older is entitled to receive family reunification services "beginning with the dispositional hearing and ending 12 months after the date the child entered foster care." (§ 361.5, subd. (a)(1)(A).)

At the 12-month review hearing, if the court does not return the child to parental custody, the court may continue the case to the 18-month review date, set a section 366.26 hearing, or order a permanent plan of long-term foster care for the child.

(§ 366.21, subd. (g)(1), (2) & (3).) The court may extend family reunification services to the 18-month date *only* if it finds there is a substantial probability that the child will be returned to the physical custody of his or her parent and safely maintained in the home within the extended period of time (substantial probability of return), or that reasonable services have not been provided to the parent. (§ 366.21, subd. (g)(1) (*italics added*).)

"For the purposes of this section, in order to find [there is a substantial probability of return], the court shall be required to find all of the following:

"(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." (§ 366.21, subd. (g)(1).)

If the court continues family reunification services to the 18-month review date, and the child is not returned to the parent's custody, *in certain limited circumstances* family reunification services may be extended up to 24 months. (*Earl L. v. Superior Court* (2011) 199 Cal.App.4th 1490, 1504.) These circumstances apply to a parent who is making significant and consistent progress in a court-ordered residential substance abuse treatment program, or was recently discharged from incarceration or institutionalization and is making significant and consistent progress in establishing a safe home for the child's return. (§§ 366.22, subd. (b), 361.5, subd. (a)(4).) To extend reunification services to the 24-month date in those circumstances, the court must find there is a substantial probability of return. (*Ibid.*) To find there is a substantial probability of return, the juvenile court is required to find all of the following:

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

"(2) That the parent or legal guardian has made significant and consistent progress in the prior 18 months in resolving problems that led to the child's removal from the home.

"(3) The parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her substance abuse treatment plan as evidenced by reports from a substance abuse provider as applicable, or complete a treatment plan postdischarge from incarceration or institutionalization, and to provide for the child's safety, protection, physical and emotional well-being, and special needs." (§ 366.22, subd. (b).)

Having set forth the statutory framework for continuation of reunification services to the 18-month and 24-month review dates, we now discuss Danielle's argument the juvenile court erred at the 12-month review hearing when it did not consider the possibility or probability that she would be eligible to receive extended services at the 18-month review hearing, and instead terminated services.

C

Statutory Analysis

Danielle's argument implies that the court may disregard the findings required at the 12-month review hearing under section 366.21, subdivision (g)(1), and extend services when it appears the parent may be eligible for extended services at the 18-month review hearing under section 366.22, subdivision (b). We disagree.

We begin with the text of the statute as the best indicator of legislative intent, giving the words their ordinary meaning. (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 844; *In re Jesusa V.* (2004) 32 Cal.4th 588, 622.) If there is no ambiguity in the language we presume the Legislature meant what it said, and the plain meaning of the statute governs. (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.) "Furthermore, we consider portions of a statute in the context of the entire statute and the statutory scheme of which it is a part, giving significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose." (*Ibid.*)

We find nothing within the plain text of section 366.21, subdivision (g), suggesting the court may consider a parent's probable eligibility for extended services at the 18-month hearing in deciding whether to extend services at the 12-month review

hearing. To the contrary, section 366.21, subdivision (g), sets forth specific criteria the court must find to extend services to the 18-month review date: the parent must show that he or she *has visited* the child regularly, *has made* significant progress and *has demonstrated* the capacity to complete his or her treatment plan and provide for the child's needs. (§ 366.21, subd. (g)(1), italics added.)

Thus the plain text of the statute indicates the juvenile court reviews the parent's performance prior to and up to the date of the 12-month review hearing,³ and does not, as Danielle contends, consider "the possibility that the parent can make a credible case for extended services" at the 18-month review. Instead, to determine whether an extension of services is justified under section 366.21, subdivision (g)(1), the court examines the parent's past performance in visiting the child, making significant progress and demonstrating the capacity to complete treatment and provide for the child's needs. If, based on the evidence before it at the 12-month hearing, the court is not able to make those findings, the court may not continue services to the 18-month review date.

Further, the text of section 366.22, subdivision (b)(2), indicates that unless the court was able to find at the 12-month review hearing that the parent had made significant progress, the parent would not be able to make a "credible case for extended services" at the 18-month review hearing. To continue services to the 24-month review

³ The use of the present perfect form of the verb in each of the three prongs of section 366.21, subdivision (g)(1), indicates the action of the verb was completed prior to the present time. (Random House Unabridged Dict. (2d ed. 1993) p. 1530, col. 2; see also Webster's New Int. Dict. (3d ed. 2002), p. 1794, [present perfect verb tense expresses action or state completed at the time of speaking].)

date, the court is required to find that the parent has made "*significant and consistent progress in the prior 18 months*" in resolving problems that led to the child's removal from the home. (§ 366.22, subd. (b)(2), italics added.) If, as here, the court has found that the parent has *not* made significant progress at the 12-month hearing, as required under section 366.21, subdivision (g)(1)(B), it is unlikely the parent will be able to meet the more stringent criteria at the 18-month review hearing, which requires the parent to have made significant and consistent progress in the prior 18 months. A parent is not eligible for extended services merely because he or she may be incarcerated or institutionalized, or in long-term inpatient substance abuse treatment, at the time of the 18-month hearing; the parent must have met specific criteria to merit the extension of services to that date. (§ 366.21, subd. (g).)

As set forth earlier in this opinion, the record leaves no doubt Danielle did not make substantial progress in resolving problems that led to the child's removal from the home, and did not demonstrate the capacity and ability both to complete the objectives of her treatment plan and to provide for Z.G.'s needs. (§ 366.21, subd. (g)(1).) We conclude that the juvenile court correctly applied the law and there is ample evidence to support its findings and orders under section 366.21, subdivision (g).

DISPOSITION

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

NARES, J.

WE CONCUR:

MCCONNELL, P. J.

AARON, J.