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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CARLOS C. et al., Petitioners, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;	D061194 (San Diego County Super. Ct. No. SJ12205D)
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Real Party in Interest.	

PROCEEDINGS in mandate after reference to a Welfare and Institutions Code section 366.26 hearing, Carol Isackson, Judge. Petitions denied; stay vacated.

Carlos C. and M.C., the parents of E.C., seek extraordinary writ relief (Welf. & Inst. Code, § 366.26, subd. (*l*);[1] Cal. Rules of Court, rule 8.452); they challenge the juvenile court order terminating reunification services after six months and setting a section 366.26 hearing. Both parents contend the court used an incorrect legal standard in terminating services. Additionally, Carlos contends he did not receive reasonable services.

We issued an order to show cause, the San Diego County Health and Human Services Agency (Agency) responded, and the parties orally argued the case. We review the petitions on their merits and deny them. The stay order issued on April 12, 2012, is vacated.

FACTS

E.C. was born in December 2010, and required treatment for opiate withdrawal because M.C. used Vicodin excessively during the pregnancy. E.C. remained in the neonatal intensive care unit for almost six weeks.

On January 2, 2011, police were called to the family home in response to a reported domestic violence incident. M.C. had become intoxicated after drinking more than a bottle of vodka and an argument ensued when she threatened to throw Carlos's tools and clothing off the balcony.

On January 20, the San Diego County Health and Human Services Agency (Agency) filed a dependency petition on behalf of E.C. under section 300, subdivision

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1 Statutory references are to the Welfare and Institutions Code.

(b), alleging he was at substantial risk of harm because of M.C.'s abuse of Vicodin and alcohol during pregnancy and domestic violence between her and Carlos.[2]

Before the petition was filed, M.C. had enrolled in the Vista Hill Parent Care Central Treatment Program (Vista Hill) and had admitted she used more Vicodin than she should have during the last trimester of her pregnancy. She had one-hour visits with E.C. two times a week, and later three times a week, at Vista Hill. Carlos had one 1-hour visit a week with E.C. because of his work schedule.

The social worker reported Carlos and M.C. had a history of domestic violence as far back as 1997. Carlos was convicted of willful infliction of corporal injury in 2007 and infliction of corporal injury on a spouse in 1999.

On April 14, the court sustained the petition, declared E.C. a dependent child and ordered him removed from his parents' custody. The court also ordered reunification services for Carlos and M.C. Carlos's reunification plan required him to complete a parenting education class, participate in an outpatient substance abuse program and a 12-step program, and to undergo counseling with a TERM approved therapist to address drug and alcohol abuse, domestic violence, anger management and any other issues as they arose. M.C.'s reunification plan required her to complete a parenting class, participate in an outpatient substance abuse program and a 12-step program, and undergo general counseling with a TERM approved therapist.

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[2] The petition also referred to previous dependencies of E.C.'s older siblings, who are currently under a legal guardianship.

On May 2, Carlos attempted to hang himself. Later that month, the social worker gave Carlos referrals to therapists and modified his reunification plan to substitute random drug testing for the requirement of participating in an outpatient drug program. Carlos complied with the random testing except for one no-show in August. Carlos was attending therapy, but his therapist reported he was denying the reasons for E.C.'s dependency.

On May 3, M.C. was involved in a knife fight with her mother's boyfriend. According to the police report, M.C. was intoxicated. On August 16, police responded to the family residence after receiving a domestic violence call. Carlos and M.C. fought after he took her muscle relaxant pills. Carlos slapped and punched M.C. several times in the face and back. M.C. had a bump on her forehead. She minimized the incident to the police and charges were not filed against Carlos. M.C. initially minimized the incident to the social worker, but later told her that Carlos "slapped the shit out of me."

M.C. enrolled and completed a parenting education program, but by the end of August she had been discharged from the Vista Hill program. M.C.'s attorney referred her to a TERM therapist and an appointment was scheduled, but she did not show up for the appointment or call the therapist, who closed the referral.

M.C. entered the KIVA drug program on October 10. On November 21, M.C. was discharged from the program. M.C. reentered the KIVA program on December 1 and was discharged again on December 21.

In November, Carlos's therapist reported that he was making progress by talking about his Child Welfare Services history and starting new behaviors. Carlos told the

therapist he would no longer speak to his abusive older brother, and admitted he needed to stop drinking. On November 22, Carlos called the social worker and apologized for his behavior. " 'I am blaming everybody else for this situation,' " Carlos said. He also reported he had begun to actively participate in the Alcohol Anonymous meetings he attended.

M.C. enrolled in the Harmony inpatient drug program on December 29. By the time of the contested six-month review hearing, she was in therapy. Agency recommended reunification services be terminated for Carlos and M.C. at the six-month review hearing.

At the conclusion of the contested six-month review hearing, the court found that returning E.C. to his parents would create a substantial risk of detriment to his safety, protection or emotional well-being. Additionally, the court found, by clear and convincing evidence, Agency had provided reasonable services to M.C. and Carlos, but neither parent had made substantive progress with the provisions of their respective case plans.[3] The court further found "there is not a substantial probability that [E.C.] will be returned home by the 12-month review date, which is just a little over two months away." The court terminated services for both parents and scheduled a section 366.26 hearing.

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[3] Although at one point the court stated Carlos had made substantive progress in his treatment plan, it is clear from the court's other comments that the court was discussing Carlos's participation, not progress, in the plan.

DISCUSSION

I

Both Carlos and M.C. contend the juvenile court applied an incorrect legal standard in terminating services and setting a section 366.26 selection and implementation hearing. They argue the court bypassed the test applicable at the six-month review hearing and substituted the test for the 12-month review hearing. The Agency argues the parents have forfeited this issue because they did not raise it below. We exercise our discretion to address the issue on the merits. We find no error and no abuse of discretion.

When a dependent child is under three years of age on the date of his or her initial removal from parental custody, reunification services are presumptively limited to six months. (§ 361.5, subd. (a)(1)(B); see *Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 843.) Section 366.21, subdivision (e), which governs the proceedings at the six-month review hearing, provides: "If the child was under three years of age on the date of the initial removal, . . . and the court finds by clear and convincing evidence that the parent failed to participate regularly and make substantive progress in a court-ordered treatment plan, the court *may* schedule a hearing pursuant to section 366.26 within 120 days." (§ 366.21, subd. (e), italics added.) The statute also provides the juvenile court discretion to continue services for the parent of a child under three years of age at the time of removal. The court may continue the case to the 12-month hearing if it finds a substantial probability the child *may* be returned to the parent within six months or if the parent was not offered reasonable services. (*Ibid*.; *Tonya M.*, at p. 845.)

Section 366.21, subdivision (g)(1), governs the procedure at the 12-month review hearing. At the 12-month review hearing, the court can continue the case to the 18-month review hearing "only if it finds that 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 or that reasonable services have not been provided to the parent . . . ." (§ 366.21, subd. (g)(1), italics added.)

Because the court used the language of section 366.21, subdivision (g)(1)—"substantial probability that the child will be returned"—to the parents' custody by the next hearing, Carlos and M.C. claim the court employed the incorrect standard at the six-month review hearing and in effect required them to show that E.C. would be returned by the 12-month review.

The court orally misstated the standard for the six-month review hearing by using "will" rather than "may," the word used in section 366.21, subdivision (e). We realize that subdivisions (e) and (g)(1) of section 366.21 involve different "operable standards" for the six-month review hearing and the 12-month review hearing. (*Tonya M.*, *supra*, 42 Cal.4th at p. 848; see also *M.V. v. Superior Court* (2008) 167 Cal.App.4th 166, 180 (*M.V.*).) The difference has been described as requiring "a strong likelihood of a *possibility* of return [under subdivision (e) of the statute versus requiring] a strong likelihood the return will in fact [occur]" under subdivision (g)(1). (*M.V.*, at p. 181.)

However, the court's extensive remarks in announcing its ruling demonstrate it implicitly found there was no substantial probability that E.C. "may" or might have been returned to the custody of either parent by the 12-month date. To paraphrase the Court of

Appeal in *M.V.*, *supra*, 167 Cal.App.4th at page 181, the court implicitly found there was no "strong likelihood of a *possibility* of return" and explicitly found there was no "strong likelihood the return will in fact occur."

The court observed that Carlos was in denial about domestic violence and "disingenuous" regarding the latest incident of domestic violence. The court also noted Carlos was not ready to have unsupervised visitation, had only begun to make process with his services, and had almost no understanding of his anger or what triggers his alcohol abuse. The court summed its observations: "This is terrifying. [Carlos] has an almost complete lack of awareness of his own behavior. In his view, he is in [c]ourt because he failed to stop his wife from using Vicodin. This is all that he sees. There is a whole lot more that he needs to address before this [c]ourt could ever find that he had made substantial progress. There is no evidence that he would be ready for [the] return of this child in two months."

The court found M.C. "disingenuous" as well, noting she was less than truthful in her testimony and she was discharged from the KIVA program because " 'she lied' " while at the program. As a result, the court observed M.C. was "certainly not a trustworthy parent with whom . . . a small [child] can be left unsupervised." As to M.C.'s progress, the court observed she "has just scratched the surface of treatment after 27 years of addiction. The testimony from her clearly was that she went through the motions through much of the treatment that preceded her coming into court. She now claims she is ready to buckle down and address the addiction, but this is the very beginning steps."

The court explicitly found there was not "any evidence that [E.C.] could be returned to [M.C.] by the 12-month date."

Although the court misspoke by using the word "will" rather than "may," the record does not support the conclusion it conducted an improper analysis or applied an incorrect, heightened legal standard. There is no doubt the court found there was not a substantial probability that E.C. "may" or might have been returned to the parents by the 12-month date. Accordingly, even were we to consider the court's misstatement as error, it was not prejudicial to either parent because it is not reasonably probable the court would have ordered additional reunification services had it not misspoken. Moreover, the record supports the court's decision not to extend services to the 12-month hearing date for either Carlos or M.C.

Carlos and M.C. place much reliance on *M.V.*, in which the juvenile court's order terminating services at the six-month review hearing was based on factors listed in section 366.21, subdivision (g)(1). Those factors are properly applied when deciding whether there is a substantial probability of return by the 18-month review hearing. (*M.V.*, *supra*, 167 Cal.App.4th at p. 181.) Here, the court did not erroneously base its decision on the factors listed in section 366.21, subdivision (g)(1).[4]

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[4] Section 366.21, subdivision (g)(1) reads in pertinent part: "For the purposes of this section, in order to find 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, the court shall be required to find all of the following: [¶] (A) That the parent . . . has consistently and regularly contacted and visited with the child. [¶] (B) That the parent . . . has made significant progress in resolving problems that led to the child's removal from the home. [¶] (C) The parent . . . has demonstrated the capacity

The court's misstatements regarding its ruling were not prejudicial. Unlike *M.V. v. Superior Court*, *supra*, 167 Cal.App.4th 166, this was not a close case. The court's decision to terminate court-mandated services at the six-month review hearing is supported by substantial evidence and was not an abuse of discretion.

II

Carlos contends the juvenile court erred by finding Agency provided reasonable reunification services to him. He claims that, given his history of domestic violence, Agency should have referred him to a domestic violence treatment program or to a therapist who specialized in domestic violence cases at the beginning of the dependency case.

Reunification services must be "designed to eliminate those conditions that led to the court's finding that the child is a person described by Section 300." (§ 362, subd. (c).) The social services agency "must make a good faith effort to develop and implement a family reunification plan. [Citation.] '[T]he record should show that the supervising agency identified the problems leading to the loss of custody, offered services designed to remedy those problems, maintained reasonable contact with the parents during the course of the service plan, and made reasonable efforts to assist the parents in areas where compliance proved difficult . . . .' " (*Amanda H. v. Superior Court* (2008) 166 Cal.App.4th 1340, 1345, italics omitted by *Amanda H.*) "The standard is not whether the services provided were the best that might be provided in an ideal world, but whether the

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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."

services were reasonable under the circumstances." (*In re Misako R.* (1991) 2 Cal.App.4th 538, 547.)

"The applicable standard of review is sufficiency of the evidence." (*Amanda H.*, *supra*, 166 Cal.App.4th at p. 1346.) "In reviewing the reasonableness of the services provided, this court must view the evidence in a light most favorable to the respondent. We must indulge in all legitimate and reasonable inferences to uphold the verdict. If there is substantial evidence supporting the judgment, our duty ends and the judgment must not be disturbed. [Citations.] ' " '[W]hen two or more inferences can reasonably be deduced from the facts,' either deduction will be supported by substantial evidence, and 'a reviewing court is without power to substitute its deductions for those of the trial court.' [Citations.]" [Citation.]' " (*In re Misako R.*, *supra*, 2 Cal.App.4th at p. 545.)

Substantial evidence supports the court's finding that Agency provided reasonable reunification services to Carlos. E.C. was removed from his parents' custody because he was born with opiate withdrawal and required hospitalization for 38 days. The parents had a history of substance abuse and domestic violence.

The record shows that appropriate services were provided to Carlos. His initial reunification required him to complete a parenting education class, participate in an outpatient substance abuse program and a 12-step program, and to undergo counseling with a TERM approved therapist to address drug and alcohol abuse, domestic violence, anger management and any other issues as they arose. After his May 2, 2011, suicide attempt, Agency modified Carlos's case plan to substitute random drug testing for the requirement of participating in an outpatient drug program. In May, the social worker

also gave Carlos referrals to therapists and resources for medications he said he could not afford.

Carlos began therapy in May. The social worker provided the therapist with copies of the detention report, the jurisdiction report (including Carlos's reunification plan), addenda submitted to the court and police reports. These reports discussed the protective issues, including domestic violence. The social worker was justified in assuming the therapist was aware that he was supposed to address domestic violence with Carlos in therapy. At the end of July, his therapist reported that Carlos was continuing to deny the reason's for E.C.'s dependency.

It was not until after the August 16, 2011, domestic violence incident that Carlos began discussing domestic violence in his therapy sessions. Carlos also apparently followed his therapist's recommendation and enrolled in a 52-week domestic violence program on October 10. Nonetheless, the therapist reported Carlos remained "disingenuous" regarding the August domestic violence incident.

Agency's initial decision to have Carlos address the protective issue of domestic violence through therapy was not unreasonable under the circumstances of the case. Furthermore, even if Agency had promoted earlier enrollment in a domestic violence program rather than initially relying on therapy to address the issue, there is no showing it would have made any difference. Even though Carlos appeared to have somewhat of a wake-up call after the August 16 incident—he began talking about domestic violence in therapy for the first time and apologized to the social worker, among other things—he nonetheless continued to minimize the incident. Minimization of a serious protective

issue raises questions about how resistant a person will be to treatment necessary to change his or her behavior. (See *In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1044.)

Although Agency did not provide Carlos with perfect services, the services were reasonable under the circumstances presented here.

DISPOSITION

The petitions are denied. The April 12, 2012, order staying the section 366.26 hearing is vacated.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.