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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re DANA L., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

DONALD L.,

Objector and Appellant.

D061356

(Super. Ct. No. J517257B)

APPEAL from findings and orders of the Superior Court of San Diego County,
Laura J. Birkmeyer, Judge. Affirmed.

Donald L. contends the juvenile court erred when it (1) found that it would be detrimental to return his daughter, Dana L., to his physical custody; (2) returned Dana to the physical custody of her mother, Brenda L.; (3) denied Donald's request for overnight

visitation with Dana; and (4) required Donald to submit to random alcohol testing. We affirm the findings and orders.

FACTUAL AND PROCEDURAL BACKGROUND

Donald L. and Brenda L. are the parents of Dana L., born August 2008. Their household also included Brenda's son, J.C., born February 1997. The parents have a history of domestic violence aggravated by alcohol abuse. Brenda has a history of severe alcoholism and involvement with child protective services. She lost custody of her two other children prior to the dependency proceedings at issue here.

In September 2008, when Dana was one month old, the San Diego County Health and Human Services Agency detained Dana and J.C. in protective custody after the parents engaged in an incident of domestic violence. Donald hit Brenda when he returned home from a weekend with his friends and found her intoxicated. He had been "drinking all weekend." Police found Brenda lying in the middle of the road with bruising on her face and arms. She was extremely intoxicated. J.C. said Brenda had dropped one-month old Dana approximately three feet onto a dog bed while caring for her.

Donald was in the United States Navy. He had received two Combat Action Ribbons for his service during two tours in Iraq. He was described as a loyal, dedicated and talented soldier and a superb leader.

Donald and Brenda engaged in services provided by the Agency and the U.S. Navy. Brenda participated in an intensive outpatient program five days a week. Donald denied having any alcohol problems. He attended 90 AA meetings in 90 days and

submitted to on-demand drug tests, with no adverse results. Donald said he was "better off without" alcohol. The parents participated in conjoint therapy. The court returned the children to the parents' custody in July 2009 and terminated jurisdiction in November 16, 2009.

On November 16, the Agency received a referral alleging there had been several incidents of domestic violence between the parents in the previous five weeks, none of which had been reported to the police. The Agency offered the parents a voluntary service plan, which the parents refused. The Agency closed the matter without taking further action.

In February 2011, after a court-martial, Donald was sentenced to 75 days in the brig for various incidents of domestic violence and other charges, including restraining Brenda with luggage straps and duct tape, pushing and kicking her, contacting her in violation of a restraining order, swearing at J.C., trying to influence Brenda's and J.C.'s testimony, and endangering J.C.'s mental health.

In April 2011, the Agency detained Dana and J.C. in protective custody and filed petitions pursuant to Welfare and Institutions Code,¹ section 300, subdivision (b), after police conducted a welfare check after receiving a report that Brenda was extremely intoxicated. Brenda's blood alcohol level was .362. Earlier that day, Brenda's friend came to the home and discovered a dishtowel on fire. At the time, Dana was at home with Brenda, who was very intoxicated. J.C. said Brenda had pulled him out of school so

¹ Further statutory references are to the Welfare and Institutions Code.

he could watch Dana while she drank. Donald was in the brig at the time of the incident. The parents were in the process of divorcing. On June 2, 2011, the court declared Dana a dependent, placed her in the home of a nonrelative extended family member and ordered reunification services.

Donald's family reunification case plan required him to participate in individual therapy, parent-child interaction therapy (PCIT), parenting classes, participation in Al-Anon and three random drug tests in three months. The Agency recommended the court deny family reunification services to Brenda. Instead, the juvenile court ordered the Agency to provide services to Brenda, including individual therapy, PCIT, parenting classes, in-patient substance abuse treatment and random drug testing.

In reports prepared for the six-month status review hearing, the Agency stated that Donald was participating in services. He visited Dana approximately 18 hours each week without concerns or supervision. His drug tests were negative. However, Donald was not able to admit his role as a nonprotective parent. He wanted to prove Brenda was lying about the domestic violence incidents. He discontinued therapy after four sessions. Donald blamed Brenda for the dependency proceedings and said he was not responsible. In November, Donald asked the social worker to stop contacting him and hung up the telephone on her.

Brenda cooperated with the Agency and participated in all services required by her case plan. By the time of the six-month status review hearing, Brenda had been clean and sober for eight months.

The contested six-month status review hearing was held on January 13, 25 and 31, 2012. The Agency recommended the juvenile court place Dana with Brenda. Donald objected to the proposed placement because of Brenda's extensive history of alcoholism and child neglect, and asked the court to return Dana to his care. The juvenile court admitted the Agency's reports in evidence and heard the testimony of Jan Slack, L.M.F.T., a PCIT therapist; social worker Eileen Lapid; social worker Dianna Lucas; Brenda; and Donald.

Jan Slack testified she had conducted 15 PCIT sessions between Donald and Dana. Donald met the protective goals. He placed Dana's needs ahead of his own and appropriately responded to her verbal and nonverbal signals. Donald was very gentle and kind with Dana. He was aware of Dana's needs and calmly responded to accidents. Donald did not speak negatively about Brenda.

Social worker Lapid was assigned the case from April to August 2011. She supervised numerous visits between Donald and Dana. Dana looked to Donald for comfort and their interactions were positive.

Social worker Lucas said Donald visited Dana approximately 18 hours each week. Lucas would not permit overnight visits until Donald reengaged in services, particularly therapy. There was an incident outside the courtroom on January 22 in which Donald lost his temper and contacted Brenda in violation of a restraining order. Lucas did not believe that Donald had addressed his alcohol use. She acknowledged his two random drug tests were negative and there were no indications he was currently drinking.

Lucas recommended the court return Dana to Brenda's care. Brenda had been clean and sober for eight months. She completed a substance abuse treatment program, was living in a safe, structured environment and had daily contact with her AA sponsor. Brenda's visits with Dana were positive and consistent.

Brenda testified she was participating in a substance abuse treatment aftercare program and attending AA five times a week. She acknowledged there were ongoing unreported incidents of domestic violence during Dana's first dependency case.

Donald said he was participating in services, including individual therapy with a new therapist. He also received services through the Veterans Administration such as individual cognitive therapy, anger management and support for "war issues." Donald acknowledged he was an alcoholic. He asserted alcohol was not a problem for him. He acknowledged he had an anger management issue.

The juvenile court found that Donald and Brenda were alcoholics. Brenda's alcoholism was chronic and severe. Donald's alcoholism was sporadic. The court viewed Donald's alcohol and domestic violence issues as untreated, and found there would be a substantial risk to Dana if she were returned to his care. The court denied Donald's request for overnight visits with Dana. It authorized the Agency to implement overnight visits and set an interim review hearing for April 23 to address visitation issues. The court ordered Donald to undergo random substance abuse tests twice a month.

The juvenile court found that Brenda appeared to be fully engaged in recovery and had resolved domestic violence issues. Although Brenda's alcoholism presented a "high,

high risk" to Dana's well-being, the court found that with appropriate conditions in place, it would not be detrimental to Dana to return her to Brenda's care.

DISCUSSION

I

Donald Challenges the Court's Findings Under Section 366.21, Subdivision (e)

Donald contends there is insufficient evidence to support the juvenile court's findings that (1) returning Dana to Donald's custody would create a substantial risk of detriment to her safety, protection, or physical or emotional well-being; and (2) it would not create a substantial risk of detriment to Dana to return her to Brenda's care.

A

Statement of Law and Standard of Review

At the six-month review hearing, the court must return the child to the physical custody of his or her parent unless the Agency proves, by a preponderance of the evidence, that return to the parent would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child (detriment finding). (§ 366.21, subd. (e); see *In re Marilyn H.* (1993) 5 Cal.4th 295, 308; *In re Jasmon O.* (1994) 8 Cal.4th 398, 420.) The failure of the parent to participate regularly and make substantive progress in court-ordered treatment programs is prima facie evidence that return would be detrimental to the child. (§ 366.21, subd. (e).) At a review hearing, the focus is on the child's well-being, rather than on the initial grounds for juvenile court intervention. (*In re Joseph B.* (1996) 42 Cal.App.4th 890, 899.)

The reviewing court must affirm an order setting a section 366.26 hearing if it is supported by substantial evidence. (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1020.) "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874; *Elijah R. v. Superior Court* (1998) 66 Cal.App.4th 965, 969.) The judgment will be upheld if it is supported by substantial evidence, even though substantial evidence to the contrary also exists and the trial court might have reached a different result had it believed other evidence. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

B

There Is Substantial Evidence To Support the Finding It Would Be Detrimental To Return Dana to Donald's Physical Custody

Donald contends the court erred when it did not return Dana to his physical custody. He points out the evidence shows that he and Dana had a good relationship, and visited 18 hours a week without any reported problems. His interactions with her were described as gentle and kind, he was aware of her needs, and she looked to him for comfort. Donald argues there is no evidence to support the finding Dana would suffer detriment if placed in his care.

The record shows that Dana was repeatedly exposed to incidents of domestic violence between her parents. Her basic needs for safety and consistent care were

neglected. Although Brenda's chronic and severe alcoholism was a major factor in this dynamic, Donald's drinking, anger and lack of protective parenting were significant contributing factors as well. For example, when the family was stationed in Italy, Dana was found sleeping in the street. Her clothes were dirty. In San Diego, Brenda's friend found her passed out on the couch while a dishtowel by the stove was burning. On both occasions, Donald was in military custody for assaulting Brenda.

There were consistent reports that Donald's drinking contributed to the chaotic conditions in the family's home. Until his testimony in the six-month review hearing in Dana's second dependency case, Donald denied he had a drinking problem. Even after acknowledging that he was an alcoholic, Donald asserted he did not have a problem with alcohol. The record also shows that Donald was aware he had difficulty controlling his anger. Despite participating in extensive services through the VA and the Agency since approximately September 2008, Donald lost his temper outside the courtroom in January 2012 and violated the restraining order by speaking to Brenda. He was not cooperative with the Agency and refused to speak with the social worker. Donald blamed Brenda for the dependency proceedings and did not understand how his actions contributed to the dangerous environment they created for Dana.

The record supports the finding that Donald's issues with alcohol and domestic violence had not been effectively treated. Donald attended AA meetings and a domestic violence prevention program for offenders during Dana's first dependency case. Alcohol abuse and domestic violence continued to be central themes in Donald's and Brenda's lives, leading to Donald's court-martial. There is no indication in the record to show

Donald successfully addressed those issues. The record also supports the reasonable inference that Donald's lack of contact and cooperation with the social worker would increase the risk to Dana's safety and well-being if she were returned to his physical custody. The court could reasonably conclude that until Donald is able to successfully treat his alcoholism, accept responsibility for his role in creating the conditions that led to Dana's dependency proceedings and appropriately control his anger, returning Dana to Donald's physical custody would create a substantial risk of detriment to her safety, protection, or physical or emotional well-being. (§ 366.21, subd. (f).)

C

There Is Substantial Evidence To Support the Finding It Would Not Be Detrimental To Return Dana to Brenda's Physical Custody

Donald contends there is no evidence to support the juvenile court's finding that returning Dana to Brenda's physical custody would not create a risk of detriment to the child. He points out that Brenda has a protracted history of severe and chronic alcohol abuse, and this was the seventh dependency proceeding involving her children. In view of this history, Donald asserts that an eight-month showing of sobriety is not sufficient to mitigate the detriment to Dana in her care.

Donald's contentions are not without merit. The juvenile court might have reached a different result had it believed other evidence. (*In re Dakota H.*, *supra*, 132 Cal.App.4th at p. 228.) However, the court believed Brenda's testimony and found that she was fully engaged in her recovery. The credibility of witnesses and the weight to be given their testimony are within the sole province of the trier of fact. (*As You Sow v.*

Conbraco Industries (2005) 135 Cal.App.4th 431, 454.) To the extent the trial court's findings rest on an evaluation of credibility, the findings should be regarded as conclusive on appeal unless it is physically impossible for the statements to be true or falsity is apparent without resorting to inferences of deductions. (*In re Jordan R.* (2012) 205 Cal.App.4th 111, 136.)

The court recognized that Brenda's history of severe and chronic alcoholism created a high level of risk to Dana. The court found this risk was ameliorated by imposing significant protective conditions on the placement, including: Brenda's continued residence in a structured sober living environment, placing an ignition interlock device on Brenda's car, requiring the social worker to make one unannounced home visit each week, requiring Brenda to drug test weekly in addition to testing required by her sober living program, and attending AA meetings at least three times a week. The court directed the Agency to immediately remove Dana from Brenda's care if Brenda violated any of those conditions.

The record shows that by the time of the six-month review hearing, Brenda had maintained her sobriety for eight months. She completed a substance abuse treatment program and resolved domestic violence protective issues. Brenda was close to completing therapy and no longer blamed others for her mistakes. She was cooperative with the social worker and forged a close, supportive relationship with a dedicated AA sponsor. Brenda recognized she would have to work on maintaining her sobriety her entire life. Knowing her history only too well, Brenda's son, J.C., observed, "I don't know if it will hold, but right now it seems like it will." This was a realistic but positive

assessment. There is substantial evidence to support the court's finding that with protective conditions in place, returning Dana to Brenda's physical custody would not create a substantial risk of detriment to Dana's safety, protection, or physical or emotional well-being. (§ 366.21, subd. (e).)

II

The January 31, 2012 Order Denying Donald's Request for Overnight Visitation with Dana Is Moot

Donald contends the juvenile court abused its discretion when it denied his request for overnight visitation with Dana. The record shows the court denied overnight visitation pending Donald's further participation in treatment but authorized the Agency to begin overnight visits on an appropriate showing of progress. The court set a hearing to review visitation issues.

Because the visitation hearing had been completed by the time this case came up for review, we requested the minute orders from the superior court file. On our own motion, we take judicial notice of the minute orders dated April 23, May 29, and June 4 and 14, 2012. The minute orders show that on April 23, Donald set the matter for a contested hearing on the issue of overnight visitation. At a pretrial status conference on May 29, Donald withdrew his trial set because the Agency had implemented overnight visits. On June 4, the court granted the Agency's request to temporarily suspend Donald's unsupervised visitation with Dana, and ordered Donald's visits with Dana to occur twice a week in a professional supervised setting. On June 14, the court ordered an expanded supervised visitation schedule and authorized the Agency to begin planned, unsupervised

visits in a public setting with the advance concurrence of minor's counsel. The court set a trial on the issues of unsupervised and overnight visitation for August 6, 2012.

"An appeal becomes moot when, through no fault of the respondent, the occurrence of an event renders it impossible for the appellate court to grant the appellant effective relief. [Citations.] On a case-by-case basis, the reviewing court decides whether subsequent events in a dependency case have rendered the appeal moot and whether its decision would affect the outcome of the case in a subsequent proceeding. [Citation.]" (*In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1054-1055.)

No effective relief can be afforded to Donald as to the court's order of January 31 denying his request for overnight visitation. That order has been superseded by the court's orders of June 4 and 14. The issue whether the court abused its discretion in denying overnight visitation has been rendered moot by subsequent events. (*In re Esperanza C., supra*, 165 Cal.App.4th at pp. 1054-1055.)

III

The Juvenile Court Did Not Abuse Its Discretion When It Required Donald To Submit To Random Drug and Alcohol Testing

Donald contends the court abused its discretion when it ordered him to undergo random drug and alcohol testing. He states there is no evidence to show he had a substance abuse problem. Donald argues he fully complied with case plan requirements to attend 90 AA meetings in 90 days and submit to three drug tests within a three-month period. He tested clean. Donald argues there were no concerns about his sobriety when he engaged in services or visited Dana.

The juvenile court has broad discretion to determine what best serves and protects the interests of a dependent child. Under section 362, the court may make " 'any and all reasonable orders to the parents' " to ameliorate the conditions that brought the child within the jurisdiction of the juvenile court. (*In re Neil D.* (2007) 155 Cal.App.4th 219, 224.) "This provision and others in the Welfare and Institutions Code 'have been broadly interpreted to authorize a wide variety of remedial orders intended to protect the safety and well-being of dependent children' [Citation.]" (*Id.* at pp. 224-225.)

We review an order directing a parent to participate in services for abuse of discretion. (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1006.)

The court's order directing Donald to submit to random drug and alcohol testing twice a month was reasonably tailored to fit his circumstances. (*In re Christopher H., supra*, 50 Cal.App.4th at p. 1006.) After steadfastly denying he had a problem with alcohol abuse, Donald acknowledged at the six-month review hearing that he was an alcoholic. The court found that his alcoholism was sporadic, not chronic, and was untreated. The record supports the reasonable inference that if left untreated, Donald's alcoholism would impede his ability to reunify with Dana.

From the beginning of Dana's first dependency proceeding, the incidents of domestic violence occurred in the context of both parents' consumption of alcohol. J.C. said during the first dependency case Donald and Brenda drank alcohol at night and then drank large amounts of water to avoid detection. Donald asserted he last drank in June 2010, and then acknowledged drinking in April 2011. He said attending AA meetings made him want to drink. The court's order for twice-monthly drug and alcohol testing

was within its broad discretion to fashion remedial orders to protect Dana's safety and well-being and promote family reunification. (*In re Neil D.*, *supra*, 155 Cal.App.4th at pp. 224-225.)

DISPOSITION

The findings and orders are affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P.J.

O'ROURKE, J.