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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ENRIQUE A., JR., a Person Coming  
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

DANIELLE H.,

Defendant and Appellant.

D061556

(Super. Ct. No. SJ12542)

APPEAL from an order of the Superior Court of San Diego County, Garry G. Haehnle, Judge. Affirmed.

At the six-month review hearing in the juvenile dependency case of Enrique A., Jr., the court terminated the reunification services of his mother, Danielle H. Danielle appeals, contending substantial evidence does not support the findings she was provided reasonable services and failed to comply with her case plan. She also contends Enrique,

Jr.'s, best interests required that she be provided an additional six months of services, so the court abused its discretion by terminating reunification services. We affirm.

## BACKGROUND

In April 2011, the San Diego County Health and Human Services Agency (the Agency) filed a dependency petition for two-year-old Enrique, Jr. The petition alleged as follows: Danielle acknowledged having used methamphetamine since January. She admitted she had most recently smoked methamphetamine on April 2 and marijuana in early March. On April 4, Danielle was arrested at the San Ysidro port of entry from Mexico for transporting more than one-half pound of methamphetamine across the border. She was on foot at the time of her arrest, and Enrique, Jr., was with her. (Welf. & Inst. Code, § 300, subd. (b).)<sup>1</sup> Danielle was incarcerated and unable to arrange care for Enrique, Jr., and the whereabouts of Enrique, Jr.'s, presumed father, Enrique A., Sr., were unknown. (§ 300, subd. (g).)

On April 4, 2011, Enrique, Jr., was detained in a foster home. Danielle was first detained in a holding cell in San Ysidro. By May 2, she had been moved to the Western Region Detention Facility (WRDF) in San Diego. That day, a social worker met with Danielle and gave her a parenting prison packet. The social worker told Danielle she would have six months to participate in services and reunify with Enrique, Jr.; if she did not, Enrique, Jr., might be placed in long-term foster care or under guardianship, or parental rights might be terminated so he could be adopted. The social worker and

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

Danielle discussed relevant services, including counseling, drug treatment and parenting education. Danielle completed the prison packet on May 12 and returned it to the Agency. In the prison packet, Danielle acknowledged the juvenile court's process for custody decisions had been explained to her. In June, the Agency prepared a case plan for Danielle including counseling, parenting education and inpatient substance abuse treatment.

On June 9, 2011, the juvenile court dismissed the section 300, subdivision (g) allegations and entered a true finding on the section 300, subdivision (b) allegations. The court ordered Enrique, Jr., removed from Danielle's custody and placed in foster care and gave the Agency discretion to place Enrique, Jr., with a relative. The court found the Agency's recommended case plans were appropriate, and ordered reunification services for Danielle and Enrique, Sr., who had been located in prison on May 5. The court explained to Danielle, who attended the hearing, that because Enrique, Jr., was younger than three years old when he was initially removed from her custody, she would have six months to participate in services and reunify with Enrique, Jr., if she was unable to do so within that time, her parental rights might be terminated so Enrique, Jr., could be adopted, or he might be placed in long-term foster care or under guardianship. (§ 361.5, subd. (a)(1)(B), (3) 3d par.) Danielle's counsel noted Danielle had not received a telephone calling card, but made no other objection.

On June 9, 2011, Enrique, Jr., was moved to the home of a maternal aunt. On September 12, Enrique, Sr., was released from prison and began participating in services.

On October 20, Danielle, who had been charged with importing approximately 00.58 kilograms of methamphetamine,<sup>2</sup> was sentenced to three years in prison with five years of supervision and a 500-hour drug program. On December 1, the social worker reported Danielle's exact location was unknown; information from the Federal Bureau of Prisons reflected she was "in transit" and her release date was November 13, 2013.

On December 5, 2011, Danielle was transferred to the Federal Correctional Institution (FCI) in Dublin, California. On December 15, the social worker spoke to a counselor at FCI. The counselor said Danielle had been moved recently to a different housing unit and would be assigned a new counselor, and available services included Narcotics Anonymous and Alcoholics Anonymous meetings, parenting classes, anger management, job preparation and residential drug treatment. The counselor said a complete listing of services was posted outside the office of Danielle's case manager. On December 15, the social worker sent Danielle a letter informing her of the services available to her at the prison, giving the names of her counselor and case manager and encouraging her to contact them for more information. The letter set forth the social worker's telephone number for collect calls, and included postage paid envelopes so Danielle could write to Enrique, Jr., and the Agency.

In its report for the six-month review hearing, the Agency asked the court to find that the Agency had provided or offered reasonable services to Danielle and she had not

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<sup>2</sup> The record does not explain why the petition alleged Danielle had imported only "over a half pound of methamphetamine."

made substantive progress with her case plan. The Agency requested that Danielle's services be terminated. At the hearing on January 11, 2012, Danielle's counsel asked the court not to terminate Danielle's services. The court found, by clear and convincing evidence, that Enrique, Jr., was younger than three years old when he was removed from parental custody; the Agency had provided reasonable services; Danielle's incarceration had rendered her unable to make substantial progress on her case plan; she had not made substantial progress; her release date was November 13, 2013; and there was not a substantial probability Enrique, Jr., would be returned by the October 24, 2012, 18-month review date.<sup>3</sup> The court terminated Danielle's services, continued services for Enrique, Sr., and set a 12-month review hearing.

#### DISCUSSION

Danielle contends substantial evidence does not support the findings she was provided reasonable reunification services and failed to comply with her case plan. She premises her contention largely on the unavailability of the required services at WRDF, where she was incarcerated for nearly the entire reunification period. This premise renders Danielle's contention a belated challenge to the case plan ordered at the June 9, 2011, dispositional hearing. By June 9, Danielle had been at WRDF for approximately one month. She attended the dispositional hearing. Her trial counsel stated, "I reviewed the case plan with [Danielle]. She has agreed to comply." Danielle did not appeal the

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<sup>3</sup> The court need only have found there was not a substantial probability Enrique would be returned within six months. (§ 366.21, subd. (e); *Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 845.)

order for services; she may not now challenge it or any preceding orders or events.

(*Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 811.)

Danielle additionally argues the Agency should have adjusted her case plan after the dispositional hearing because WRDF did not offer the ordered services. This argument is also unavailing. "If [Danielle] felt during the reunification period that the services offered her were inadequate, she had the assistance of counsel to seek guidance from the juvenile court in formulating a better plan: 'The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.' [Citation.]" [Citation.]" (*In re Christina L.* (1992) 3 Cal.App.4th 404, 416.) Neither Danielle nor her trial counsel sought adjustment of the case plan before the six-month review hearing, or complained that services were unavailable.<sup>4</sup>

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<sup>4</sup> For this reason, among others, *S.T. v. Superior Court* (2009) 177 Cal.App.4th 1009, 1013 is distinguishable. Danielle relies on the discussion in that case of "the Legislature's policy of encouraging the reunification of families of incarcerated parents by easing the difficulties such parents encounter in attempting to obtain services and maintain contact with their children." (*Id.* at pp. 1016-1017.) Such reliance might have been appropriate in an appeal following the dispositional hearing; it is belated in this appeal.

*Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996 is also distinguishable, as there was evidence the father complained to the social services agency that services were not available in his facility. (*Id.* at p. 1008.)

The Agency asserts there was a further forfeiture of Danielle's right to challenge the adequacy of the services she received: her failure to raise that challenge at the six-month review [hearing]. At the hearing, Danielle's counsel stated: "[Danielle] does ask this court to not terminate her reunification services. She understands this is a six-month review hearing; however, she has recently moved to Dublin. She is able to participate now in all of her services. She'll start her parenting class in February [2012]. She's already in her drug court class with an expected graduation date of September 13th and she has seen the psychiatrist on staff at the Dublin facility. She is committed to doing whatever she needs to do while she's in her program and she asks this court in the best interest of [Enrique, Jr.], considering we are continuing services to [Enrique, Sr.], not to terminate her services as well." With one exception, we interpret this statement as a challenge to the Agency's proposed finding that it had provided reasonable services, and Danielle had not made substantive progress with her case plan. The exception is visitation. As discussed below, however, Danielle has also forfeited her right to contest the adequacy of visitation.

In her opening brief, Danielle does not mention visitation as a component of her case plan. The Agency's brief does discuss visitation, and in her reply brief Danielle argues, for the first time, she was not provided reasonable visitation. We need not consider contentions raised for the first time in a reply brief. (*In re Tiffany Y.* (1990) 223 Cal.App.3d 298, 302.)

Furthermore, Danielle's only complaint in the juvenile court regarding visitation occurred at the May 2011 detention hearing. At that hearing, Danielle's counsel complained Danielle had not had a visit with Enrique, Jr., and requested visitation. The court stated "visitation is very difficult at [Danielle's] facility," WRDF, and "I'm sure the Agency is making best efforts with the limitations that facility put in place." As noted above, Danielle remained at WRDF for most of the case. There was a visit after a May hearing; this was apparently the first visit. After that, maternal relatives facilitated visits once or twice a month; those visits took place "behind glass." According to a report written on December 1, the last visit took place at the end of October. The Agency's next report, the final report before the six-month review hearing, was written after Danielle's December 5 transfer to FCI in Dublin, and does not mention further visits.

At the six-month review hearing, Danielle's counsel said Danielle was "able to participate now in all of her services," and mentioned parenting, drug court and psychiatry. Counsel requested another telephone calling card, but did not mention visits. Thus, Danielle is precluded from complaining now that she was not provided reasonable visitation. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, superseded by statute on other grounds as stated in *In re M.R.* (2005) 132 Cal.App.4th 269; *In re Riva M.* (1991) 235 Cal.App.3d 403, 411-412.)

Keeping in mind the above limitations on Danielle's contentions, we discuss the merits.

When a child is younger than three years old on the date of initial removal from the parent's physical custody,<sup>5</sup> reunification services are presumptively limited to six months. (§ 361.5, subd. (a)(1)(B); *Tonya M. v. Superior Court*, *supra*, 42 Cal.4th at p. 843.) At the six-month review hearing in such a case, the Agency has the burden of proving, by clear and convincing evidence, that reasonable services have been provided. (§ 366.21, subd. (g)(2).) "So long as reasonable services have . . . been provided, the juvenile court must find 'a substantial probability' that the child may be safely returned to the parent within six months in order to continue services. (§ 366.21, subd. (e).)" (*Tonya M.*, at p. 845.) In order to continue services, the court must also find, by clear and convincing evidence (*In re Jesse W.* (2007) 157 Cal.App.4th 49, 61), that the parent "has participated in and made substantive progress with services . . . ." (*Id.* at p. 63.)

In "[determining] whether substantial evidence supports the trial court's [reasonable services] finding, [we review] the evidence in a light most favorable to the prevailing party[,] and [indulge] in all legitimate and reasonable inferences to uphold the court's ruling." (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 598.) "The standard is not whether the services provided were the best that might be provided in an ideal world, but rather whether the services were reasonable under the circumstances." (*Id.* at pp. 598-599, quoting *In re Misako R.* (1991) 2 Cal.App.4th 538, 547.) Viewed in this light, Danielle's reasonable services contention fails. The record does not reveal

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<sup>5</sup> Enrique was initially removed from Danielle's physical custody on April 4, 2011. (*In re Christina A.* (2001) 91 Cal.App.4th 1153, 1165, fn. 2.)

whether the services in her case plan were available at WRDF.<sup>6</sup> "It is, of course, appellant's burden to provide this court with a complete record on appeal." (*In re Joshua S.* (2011) 192 Cal.App.4th 670, 682, fn. 7.)

Additionally, it is clear there was no substantial probability Enrique, Jr., could be returned to Danielle's physical custody in six months, as her release date was nearly two years away. (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1366 [mother's release date was far beyond the 18-month date; "a different reunification plan would not have made a difference in the outcome"].) It was her responsibility to stay out of custody as "a fundamental first step" in the reunification process. (*In re Christopher A.* (1991) 226 Cal.App.3d 1154, 1162.) It is equally clear that Danielle had not participated in and made substantive progress in reunification services. The statement of trial counsel, at the six-month review hearing, that Danielle had begun to participate in services is not evidence. Even if it were, it does not address any progress Danielle might have made in those services.

Danielle cites section 361.5, subdivision (a)(3) which states, in part, "In determining whether court-ordered services may be extended, the court shall consider the special circumstances of an incarcerated . . . parent . . . , including, but not limited to, barriers to the parent's . . . access to services and ability to maintain contact with his or

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<sup>6</sup> Danielle claims the juvenile court accepted counsel's statement as evidence. This is apparently a reference to the court's statement, "Due to [Danielle]'s incarceration, I will find that she has not been able to make substantial progress with the provisions of her case plan.

her child. [¶] When counseling or other treatment services are ordered, the parent . . . shall be ordered to participate in those services, . . . unless a parent . . . is incarcerated and the corrections facility in which he or she is incarcerated does not provide access to the treatment services ordered by the court." (§ 361.5, subd. (a)(3), 1st & 2d pars.) The first quoted paragraph relates to the availability of services at the place of incarceration, a subject on which the record is silent. The second paragraph refers to the order for services, which Danielle may not now challenge. Danielle also cites a portion of section 366.21, subdivision (e), irrelevant here, pertaining to the decision whether to return the child to the parent's physical custody. (§ 366.21, subd. (e), 1st par.)

Danielle speculates that Enrique, Sr., may eventually gain custody of Enrique, Jr., notes her parental rights cannot be terminated unless Enrique, Sr.'s, rights are also terminated; and suggests the court should have continued her services because it continued services for Enrique, Sr. It does not follow from the continuation of services for Enrique, Sr., that the court should have continued services for Danielle. (*In re Jesse W.*, *supra*, 157 Cal.App.4th at p. 64.) "In deciding whether to terminate the services of one parent who has failed to participate or make progress toward reunification, the court is not constrained by a consideration of the other parent's participation in services." (*Id.* at p. 60.)

Finally, Danielle has not shown Enrique, Jr.'s, best interests required the continuation of her services. According to her briefs, she is a caring and dedicated mother. The record shows otherwise. When Enrique, Jr., was one to two years old,

Danielle was on juvenile probation.<sup>7</sup> Danielle violated probation several times, and was in juvenile hall for a total of approximately nine months for the violations. On other occasions, she left Enrique, Jr., in the care of the maternal grandmother for days at a time, then came home and slept all day. Danielle relied on the maternal grandmother to feed Enrique, Jr., in the middle of the night, and Enrique, Jr., began calling the maternal grandmother "Mom." At the outset of this case, Danielle acknowledged, "I've abandoned my baby for a long time now."

The court did not err by terminating Danielle's reunification services.

#### DISPOSITION

The order is affirmed.

McCONNELL, P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.

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<sup>7</sup> The terms of her probation required her to participate in parenting classes.