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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KATHRYN M. et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Real Party in Interest.

D061722

(San Diego County
Super. Ct. No. NJ10204C)

PROCEEDINGS in mandate after referral to a Welfare and Institutions Code section 366.26 hearing. Blaine K. Bowman, Judge. Petitions denied; stay vacated.

Kathryn M. and Gabriel V. contend the juvenile court abused its discretion when it set a hearing to select and implement a permanency plan for their daughter, R.V., under

Welfare and Institutions Code section 366.26.¹ Kathryn and Gabriel argue the court erred when it found that R.V. was a member of a sibling group and, based on that, terminated reunification services at the six-month review hearing. Kathryn also contends the court improperly denied her section 388 petition seeking reversal of the jurisdictional and dispositional findings and orders for lack of proper notice. We deny the petitions.

FACTUAL AND PROCEDURAL BACKGROUND

R.V., who is now 13 years old, is the daughter of Kathryn M. and Gabriel V. R.V.'s family constellation includes maternal half brothers Richard and Daniel and paternal half sister S.V.² Kathryn and Gabriel have lengthy substance abuse histories, including methamphetamine use. Kathryn also has a history of mental health issues.

In 2007 the Riverside County Department of Public Social Services (DPSS) initiated dependency proceedings on behalf of R.V. and her half brother Daniel. Kathryn received 18 months of family maintenance services but was not able to manage her mental health condition or provide appropriate care for her children. In 2009, DPSS detained R.V. and Daniel in protective custody. The juvenile court placed R.V. with Gabriel, who had completed an inpatient substance abuse treatment program, and transferred the case to San Diego County. Kathryn last saw R.V. in April 2009. They had a telephone conversation in February 2010.

¹ All further statutory references are to the Welfare and Institutions Code.

² S.V.'s mother is Gabriel's wife, B.C.

In April 2010 the court terminated dependency jurisdiction. The court awarded sole legal and physical custody of R.V. to Gabriel, and ordered Kathryn's visits with R.V. to be professionally supervised at Kathryn's expense.

On June 30, 2011, the San Diego County Health and Human Services Agency (Agency) detained R.V. and S.V. in protective custody after Gabriel was arrested on charges of drug possession, possession of controlled substance paraphernalia, reckless driving and child endangerment. Gabriel's wife, B.C., was present during the incident that led to his arrest. She showed signs of recent methamphetamine use.

The Agency placed 12-year-old R.V. with a paternal cousin who had cared for her "on and off" since she was placed with her father. Two-year-old S.V. was placed in San Bernardino County with another caregiver.

At some point in time before the August 17 jurisdictional and dispositional hearing, Kathryn telephoned social worker Patricia McCollough and left a message requesting visits with R.V. Kathryn did not leave a contact number or address. R.V.'s caregivers reported that Kathryn telephoned them on July 23, 2011, and said she was homeless. The social worker initiated a parent search for Kathryn.³ In the course of doing so, the social worker learned that in March 2011 DPSS had initiated a parent search for her in Daniel's ongoing Riverside County dependency case but did not locate her.

³ The Agency's efforts to locate Kathryn are detailed in Discussion, part II, *post*, of this opinion.

Gabriel did not remain in contact with his children or the social worker. The Agency initiated a parent search for him. He told a relative he was happy living without his children and did not want to be involved in juvenile court proceedings.

At the August 17 hearing, after sustaining the dependency petitions, the court removed R.V. and S.V. from parental custody. The court found that Gabriel's and Kathryn's whereabouts were unknown and the Agency had made reasonable efforts to locate and provide notice of the proceedings to them. The court ordered the Agency to provide services to the parents consistent with their case plans.

Kathryn was arrested for robbery and incarcerated in Riverside County on November 13. The Agency learned of her whereabouts on January 9, 2012.

Gabriel was arrested and incarcerated on January 12 on charges of assault and resisting arrest. The Agency learned of his whereabouts on January 17.

In March, Kathryn filed a section 388 petition asking the court to reverse its dispositional orders and provide reunification services to her. She asserted she was not properly noticed of the proceedings. The court denied the petition.

R.V.'s and S.V.'s six-month status review hearing was held on April 9, 2012. Gabriel was present but Kathryn, who was in custody, was not. The Agency recommended the court terminate family reunification services at the six-month hearing and set a section 366.26 hearing. The Agency maintained the court was authorized to terminate services because R.V. was a member of a sibling group, and her half sibling was under three years old at the time she was removed from parental custody.

Social worker Joseph West testified he was assigned to the case on November 17, 2011, and that on February 28, 2012, Kathryn called him. She asked to have telephone contact with R.V. West mailed a prison packet to Kathryn, who indicated she planned to enter an inpatient substance abuse treatment program when she was released from custody.

Gabriel completed a prison packet. Before his incarceration, Gabriel did not participate in family reunification services and did not visit or contact R.V. He planned to enter an inpatient substance abuse treatment program when he was released from custody. Contrary to information in the Agency's reports, R.V. wanted to have contact with her mother and father.

West reported that R.V. and S.V. were in separate placements and sibling visitation had been limited. He asked the children's caregivers to initiate telephone and in-person contact in the future. They agreed to do so.

Regarding the Agency's recommendation to terminate services, the court noted there was a lack of evidence in the Agency's reports and testimony about the strength and closeness of the sibling bond, and R.V.'s feelings about her younger half sister. However, based on common sense and knowledge of human behavior, the court was aware that "younger sisters always [look] up to their older sisters and older sisters take great pride in their younger sisters." The court found that it was in R.V.'s and S.V.'s best interests to maintain the sibling bond and to terminate reunification services to the parents. The court found that there was not a substantial probability R.V. would be returned to the physical custody of a parent by the next review hearing, terminated family reunification

services and set a section 366.26 hearing to select and implement a permanency plan for R.V.

Gabriel and Kathryn petitioned for review of the court's findings and orders. (§ 366.26, subd. (I); Cal. Rules of Court, rule 8.452.)⁴ They request that this court reverse the order setting the section 366.26 hearing. Kathryn also requests that all postdetention findings and orders be reversed, and that the case be remanded with instructions to provide family reunification services to her. This court issued an order to show cause, the Agency responded and the parties waived oral argument. On August 2, 2012, this court issued a stay of the section 366.26 hearing.

DISCUSSION

A

The Parties' Contentions

Kathryn contends all postdetention findings and orders must be reversed because the Agency's search for her was inadequate and she did not receive notice of the jurisdictional and dispositional hearings. She argues the court erred when it summarily denied her section 388 petition seeking a new disposition hearing on the ground of inadequate notice. Kathryn also asserts the Agency did not meet its responsibility under rule 5.530(f)(5) to prepare an Order for Prisoner's Appearance at Hearing Affecting Parental Rights (form JV-450) to have her produced from custody for the March 29 and April 9, 2012 hearings.

⁴ Further rule references are to the California Rules of Court.

Kathryn and Gabriel further contend the juvenile court erred when it found that R.V. and S.V. were a sibling group. They argue the finding is not supported by substantial evidence because the Agency did not present any evidence about the sibling relationship, the children were not placed together and there were no plans to find them a permanent home together.

The Agency argues its search procedures were adequate and the court did not err when it summarily denied Kathryn's section 388 petition. It denied it has responsibility to prepare the order to produce the parent from custody for a dependency court hearing. The Agency concedes there is no substantial evidence to support the finding that R.V. was a member of a sibling group within the meaning of sections 366.21, subdivision (e) and 361.5, subdivision (a)(1)(C). Nevertheless, the Agency contends reversal is not required because the court may terminate services at the six-month review hearing if the parent has failed to contact or visit the child. (§ 366.21, subd. (e).) The Agency argues there is substantial evidence to support the implied finding that the parents did not visit or contact R.V., and the court did not abuse its discretion when it terminated reunification services and set a section 366.26 hearing.

B

The Agency's Search Efforts for Kathryn Were Adequate; the Court Did Not Abuse Its Discretion When It Summarily Denied Kathryn's Section 388 Petition

Kathryn contends the Agency did not fulfill its duty to locate and provide notice of R.V.'s dependency proceedings to her. She argues the Agency did not follow clear leads that would have led to the discovery of her whereabouts.

Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (*In re DeJohn B.* (2000) 84 Cal.App.4th 100, 106 (*DeJohn B.*)). A parent has a statutory right to notice of the jurisdictional and dispositional hearings. (§ 291, subd. (a)(1).) The child welfare agency must act with diligence to locate a missing parent. Reasonable diligence denotes a thorough, systematic investigation and an inquiry conducted in good faith. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188 (*Justice P.*)). There is no due process violation when there has been a good faith effort to provide notice to a parent who is transient and whose whereabouts are unknown for the majority of the proceedings. (*Ibid.*) However, if the party conducting the search ignores the most likely means of finding the missing parent, the service is invalid even if the affidavit of diligence is sufficient. (*In re Arlyne A.* (2000) 85 Cal.App.4th 591, 598-599 (*Arlyne A.*)).

A section 388 petition is a proper vehicle to raise a due process challenge based on lack of notice. (*Justice P., supra*, 123 Cal.App.4th at pp. 188-189, citing *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 481, 487-488.) Under section 388, a party may petition the court to change, modify or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, there is a change of circumstances or new evidence and the proposed modification is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Amber M.* (2002) 103 Cal.App.4th 681, 685.)

The court must liberally construe the section 388 petition in favor of its sufficiency. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309; rule 5.570(a).) "The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*Marilyn H.*, at p. 310.) "The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806 (*Zachary G.*)) In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. (*Justice P.*, *supra*, 123 Cal.App.4th at pp. 188-189.)

We review a summary denial of a hearing on a modification petition for abuse of discretion. (*Zachary G.*, *supra*, 77 Cal.App.4th at p. 808.)

The Agency filed declarations of due diligence in August 2011 and again in February 2012. The August 2011 declaration reflects Agency searched for Kathryn through the child support division, prison locator, probation/parole, Department of Justice, county jail, voter registration, Department of Motor Vehicles, postal service, local police, property rolls and local and out-of-county jails but was unable to locate her. In addition, the record shows that Kathryn's whereabouts had been unknown since at least March 2011, when DPSS initiated a parent search for her in Daniel's Riverside dependency case. It also shows that Kathryn telephoned R.V.'s caregiver on July 23 and said she was homeless and that Kathryn left a telephone message for the social worker prior to the jurisdictional hearing, but left no contact information.

In the jurisdictional and dispositional report, the social worker said she interviewed R.V. on July 21 and asked her about Kathryn's whereabouts. R.V. said, "I don't know where my mom is at. I haven't seen her in a long time. My brother Richard said that she is in a hospital in Riverside." The social worker reported "it would appear [R.V.'s older] brother Richard has contact with [Kathryn]."

Kathryn contends the Agency did not contact Richard for information about her whereabouts, ignoring the most likely means of finding her, and we agree that the record supports her argument. Early in the case, the Agency had information indicating Richard was in contact with Kathryn, but there is nothing suggesting the social worker tried to contact Richard to locate Kathryn. Thus, the Agency ignored the most likely means of finding Kathryn and erred in failing to pursue this lead. (*Arlyne A.*, *supra*, 85 Cal.App.4th at pp. 598-599.)

However, errors in notice do not automatically require reversal. (*In re Angela C.* (2002) 99 Cal.App.4th 389, 393-394 (*Angela C.*); but see *DeJohn B.*, *supra*, 84 Cal.App.4th at pp. 102, 110 [reversal is mandated where no effort has been made to provide notice].) We review such an error to determine whether it is harmless beyond a reasonable doubt. (*Angela C.*, at pp. 392-395.)

We conclude that any notice error for the jurisdictional and dispositional hearings was harmless beyond a reasonable doubt. A child may be adjudicated dependent because of the actions of one parent. (*In re James C.* (2002) 104 Cal.App.4th 470, 482.) R.V.'s custodial parent was arrested on charges including child endangerment and drug possession. Kathryn's presence at the jurisdictional hearing would not have altered the

finding that R.V. was described by section 300, subdivision (b) because of her father's actions. Similarly, R.V.'s removal from Kathryn's custody at the dispositional hearing was harmless beyond a reasonable doubt. Kathryn lost custody of R.V. through dependency proceedings in April 2009; she had not visited her daughter since that time; she had spoken to her once in two years; and Kathryn's current circumstances were unstable. According to Daniel's social worker, Kathryn was homeless and "still using drugs." She was not in a position to safely care for R.V. and provide for her well-being. (§ 361, subd. (c).) In addition, the court ordered a plan of reunification services and visitation for Kathryn. Additionally, the record permits the reasonable inference that Kathryn had actual notice that R.V. was in the dependency system. Kathryn knew how to contact the social worker, she knew where R.V. was living and she knew how to contact R.V.'s caregivers. She did not come forward to participate in services and reenter R.V.'s life. Reversal of the jurisdictional and dispositional hearings is not required. (*Angela C.*, *supra*, 99 Cal.App.4th at pp. 392-395.)

On this record, the court could reasonably conclude that the record would not sustain a favorable decision on the petition, and Kathryn did not make the required showing that it was in R.V.'s best interests to reverse the jurisdictional and dispositional findings and orders. (*Zachary G.*, *supra*, 77 Cal.App.4th at p. 806; *In re Jasmon O.*, *supra*, 8 Cal.4th at p. 415.) The court did not abuse its discretion when it summarily denied Kathryn's section 388 petition.

C

Assuming Without Deciding the Agency Had the Burden To Produce Kathryn, She Was Not Prejudiced by Her Absence at the Section 388 and Six-Month Review Hearings

Kathryn contends the Agency failed twice in its duty to prepare an order to produce her from custody under rule 5.530(f)(5), which resulted in the denial of her right to attend the prima facie hearing on her section 388 petition and the six-month review hearing.

We need not address whether the Agency or the parent's attorney has the burden to prepare an order to produce under rule 5.530(f)(5). Kathryn has forfeited the issue by not raising it at trial. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 221-222 [a party forfeits the right to claim error as grounds for reversal on appeal when she does not raise the objection in the trial court].) Kathryn's counsel did not raise the issue at the start of the section 388 hearing or request a continuance to allow her client to be present. At the close of that hearing, the court ordered counsel to prepare an order to produce if Kathryn wanted to be present at future hearings. Counsel said "I shall submit the Order to Produce, and if we can make it telephonically, great." The issue is forfeited on appeal.

Even were the issue not forfeited, we would not be persuaded by Kathryn's argument. She does not provide legal support for her assertion she had a "right" to attend the section 388 and six-month review hearings and does not assert she was prejudiced by her absence. To the contrary, Kathryn acknowledges rule 5.530(f)(5) permits but does not require the court to order the parent's production from custody at a review hearing or a hearing other than a jurisdictional, dispositional or section 366.26 hearing. (See rule

5.530(f).) Further, in dependency proceedings, due process is satisfied when the prisoner-parent, who is involuntarily absent from the proceedings, receives meaningful access to the court through appointed counsel and is not denied the opportunity to present evidence in some form and cross-examine the witnesses. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 601-602, citing *Payne v. Superior Court* (1976) 17 Cal.3d 908, 914.) Kathryn's rights to present evidence and cross-examine the witness through appointed counsel were not violated.

D

The Statutory Provision Allowing Termination of Reunification Services to an Older Sibling at the Six-Month Review Hearing Does Not Apply

A parent of a child who was three years of age or older when removed from parental custody is generally entitled to receive family reunification services for a period of 12 months. (§ 361.5, subd. (a)(1)(A).) A parent of a child who was under three years of age when removed from parental custody is generally entitled to six months of reunification services. (§ 361.5, subd. (a)(1)(B).)

When the children are members of a sibling group⁵ in which one member was less than three years of age at the time of removal, the court may limit reunification services to six months for some or all members of the sibling group. (§ 361.5, subd. (a)(1)(C).) The purpose of this provision is to place and maintain the sibling group together in a permanent home should reunification efforts fail. (*Ibid.*)

⁵ For the purposes of section 361.5, subdivision (a)(1)(C), a sibling group is defined as two or more children who are related to each other as full or half siblings.

In assessing the nature of the sibling relationship, section 366.1, subdivision (f)(1) requires that each supplemental report include a factual discussion of the nature of the relationship between the child and his or her sibling, the appropriateness of developing or maintain the sibling relationship, the efforts being made to place separated siblings in the same home or why those efforts are not appropriate, the frequency and nature of visits between separated siblings and the impact of the sibling relationships on the child's placement and planning for legal permanence. The factual discussion in the report shall include indicators of the nature of the child's sibling relationships, including, but not limited to, whether the siblings were raised together in the same home, whether they have shared significant common experiences or have existing close and strong bonds, whether either sibling expresses a desire to visit or live with his or her sibling and whether ongoing contact is in the child's best emotional interests. (§ 366.1, subd. (f)(2).)

At a six-month review hearing, in addition to the factors listed above, the court is required to consider "the appropriateness of maintaining the sibling group together, the detriment to the child if sibling ties are not maintained, the likelihood of finding a permanent home for the sibling group, whether the sibling group is currently placed together in a preadoptive home or has a concurrent plan goal of legal permanency in the same home, the wishes of each child . . . , and the best interest of each child in the sibling group." (§§ 366.21, subd. (e), par. 4, 366, subd. (a)(1)(D).)

We 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.)

Appellants correctly observe the Agency's reports are nearly devoid of information about the sibling relationship. The court noted there was a lack of evidence in the Agency's reports and testimony about R.V. and S.V.'s relationship, but nevertheless determined there was a sibling relationship between R.V. and her younger half sister because "younger sisters always [look] up to their older sisters and older sisters take great pride in their younger sisters." This was error. The applicable statutes require the court's assessment of the sibling relationship to be based on a factual discussion of the nature of that particular sibling relationship, not on an idealized vision of sibling relationships.

More importantly, the purpose of terminating reunification services for an older sibling at the six-month hearing is to allow the sibling group to be placed and maintained together in a permanent home should reunification efforts fail. (§ 361.5, subd. (a)(1)(C).) Here, the court did not find that it was in the children's best interests to be placed and maintained together in a permanent home. The Agency concedes it does not plan to place the children together in a permanent home. Thus, section 361.5, subdivision (a)(1)(C) did not apply here, and there is no evidence to support terminating reunification services in R.V.'s case at the six-month hearing under that statute.

The Agency argues that reversal of the orders terminating reunification services and setting a section 366.26 hearing is not required because substantial evidence supports implied findings under sections 361.5, subdivision (a)(1)(C)(2) and 366.21, subdivision (e). Those statutes provide that the court may terminate reunification services at the six-month review hearing if it finds by clear and convincing evidence one of the following:⁶ (A) the child was initially removed under section 300 because the parent's whereabouts were unknown and the parent's whereabouts remain unknown; (B) the parent has failed to contact and visit the child; or (C) the parent has been convicted of a felony indicating parental unfitness. (§ 361.5, subd. (a)(1)(C)(2)(A), (B), (C); see also, § 366.21, subd. (e), par. 5.) The Agency contends that except for one phone call, Kathryn had not been in contact with R.V. for three years and Gabriel had not been in contact with R.V. for more than seven months.

The record shows that minor's counsel argued the court could terminate reunification services at the six-month review hearing on the ground the parents did not contact R.V. for six months. County counsel noted that neither parent came forward when they were out of custody to participate in visitation or reunification services. The court found that the parents had not made any effort to come forward and participate in services. The court did not make express findings under sections 361.5, subdivision (a)(1)(C)(2) and 366.21, subdivision (e) concerning the lack of contact and visitation. Where the trial court has not made express findings the appellate court generally implies

⁶ A motion to terminate reunification services under section 388, subdivision (c) is not required to consider whether the parent is described by section 361.5, subdivision (a)(1)(C)(2)(A), (B), (C).

such findings only where the evidence is clear. (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1825.)

Here, however, the evidence clearly shows that Gabriel and Kathryn did not contact and visit R.V. during the first six-month reunification period. Kathryn last saw R.V. in April 2009. They had a telephone conversation in February 2010. Gabriel said Kathryn promised to visit R.V. and never did, which was detrimental to R.V. In a report prepared on February 3 for the six-month review hearing, the social worker reported that Kathryn had not had any contact or visits with R.V. for the last six months and had not inquired about her well-being. Kathryn knew where R.V. was placed but made no efforts to contact her.

The record clearly shows that Gabriel knew where R.V. was placed. He did not come forward to participate in reunification services, including visitation. Gabriel told a family member he was happy living without his children. In a report prepared on February 3 for the six-month review hearing, the social worker reported that Gabriel had not had any contact or visits with R.V. for the last six months and had not inquired about her well-being.

The record clearly supports the finding that Kathryn and Gabriel knew R.V.'s whereabouts and did not contact or visit her during the reunification period. (§§ 361.5, subd. (a)(1)(C)(2), 366.21, subd. (e), par. 5.) We conclude that the court did not abuse its discretion when it terminated family reunification services at the six-month review hearing.

DISPOSITION

The petitions are denied. The stay issued August 2, 2012, is vacated.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.