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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SARA S.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Real Party in Interest.

D061923

(San Diego County
Super. Ct. No. EJ3301)

PROCEEDINGS in mandate after referral to a Welfare and Institutions Code section 366.26 hearing. Gary M. Bubis, Judge. Petition denied; request for stay denied.

Sara S. seeks writ review of a juvenile court order terminating reunification services in the dependency case of minor her son, Connor S., and setting a Welfare and Institutions

Code section 366.26¹ hearing. Sara contends the court erred by failing to return Connor to her custody and by terminating her reunification services. We deny Sara's petition and request for a stay.

FACTUAL AND PROCEDURAL BACKGROUND

In 1993 or 1994, when Sara was 12 years old, she began drinking alcohol. She soon began using marijuana and methamphetamine. When she was 13 or 14 years old, her parents sent her to a drug rehabilitation program. Sara attempted suicide twice during her teenage years. She said she completed a three-month outpatient drug treatment in 2007 in conjunction with a criminal case,² but "then used drugs off and on until" November 2006. At that time, she learned she was pregnant with Connor, and began what she claimed was a four-year period of sobriety.

Connor was born in June 2007. Sara often left him with relatives, and told him, "I wish I never had you"; "go away, just go"; and "I'm going to leave you out for the garbage man." Connor told maternal aunt Amy W., "[m]y mom is mean to me," and "my mom doesn't like me that's why she doesn't keep me." Connor imitated drug use with a plastic spoon and an imaginary cigarette lighter.

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

² Sara was charged with transporting, possessing and being under the influence of a controlled substance; driving under the influence of methamphetamine; possessing drug paraphernalia; and driving without a license. The record does not reflect which of these charges resulted in convictions.

In August 2010, Sara and Connor were living with the maternal grandparents. The grandmother cared for Connor while Sara drank heavily and slept late. On August 19, Sara left the home, leaving Connor behind. On August 20, the grandmother and Amy opened two locked boxes Sara kept in the room she shared with Connor. The boxes contained drug paraphernalia, heroin and marijuana seeds, and there were empty alcohol bottles in the room. On August 23, Sara returned and picked up Connor. On September 9, Sara told a social worker she had used methamphetamine, marijuana and alcohol a few days earlier, and was unsure whether she would continue using. Sara refused the social worker's offer of voluntary services.

On September 24, 2010, Sara took three-year-old Connor to the grandparents' home. He was crying, hungry and dirty. Sara said, "I'm going to go kill myself," then left. The San Diego County Health and Human Services Agency (the Agency) detained Connor with Amy.³ On September 26, Sara admitted daily use of methamphetamine but denied needing treatment. She acknowledged she could not meet Connor's needs.

On September 29, 2010, the Agency filed a dependency petition based on the above facts. In November, the court entered a true finding on the petition; ordered Connor removed from Sara's custody and placed with a relative; and ordered reunification services for Sara. The Agency designed a reunification plan composed of substance abuse treatment and testing, parenting education, individual therapy and visitation. The Agency also offered Sara assistance with transportation and housing. The goals of the plan were for Sara to stay

³ Connor was comfortable in Amy's home and remained there for the rest of this case.

sober; know her substance abuse triggers and relapse prevention skills; put Connor's needs first; and provide him a safe and stable environment.

For the first seven months of this case, Sara refused to participate in services. She initially refused any contact with Connor and the first supervised visit did not occur until December 2010. Visits generally went well, but in early February 2011, Sara stopped visiting. In March, she moved in with the grandparents, and they found drug paraphernalia among her belongings and saw track marks on her body. Sara admitted she needed inpatient drug treatment. In April, she resumed visiting. Sara was patient and loving with Connor, and they were affectionate with each other. Sara usually occupied a parental role, but sometimes put her own needs ahead of Connor's. At the six-month review hearing in May, the court found Sara had not made substantive progress in her case plan, but continued her services.

In May 2011, Sara entered residential drug treatment. In June, she tested positive for marijuana and left residential treatment. She moved in with the grandparents and began individual therapy and a parenting program. In July, Sara began an outpatient substance abuse treatment program. In August, she tested positive for methamphetamine. In September, she completed the parenting program and began telephoning Connor. At the 12-month review hearing on November 29, the court found Sara had made substantive progress in her case plan and continued services.

In December 2011, Sara and Connor began conjoint therapy. In February 2012, Sara completed individual therapy, although her therapist reported Sara had not learned to

"[recognize] unhealthy relationship dynamics." By early 2012, Sara had progressed to unsupervised visitation⁴ and, in February, overnight visits began. Overnight visits ended in March; Connor was uncomfortable spending the night with Sara,⁵ and she was not always attentive to him. In April, overnight visits resumed.

In April 2012, Sara attended one of Connor's medical appointments for the first and last time.⁶ Connor had a relatively severe case of asthma that required constant attention, and Sara did not understand how to manage his medication and inhaler regimen. Connor's physician said it would be best for Connor's health that he continue to live with Amy.

As of late April 2012, Sara was on a two-month waiting list for housing at St. Vincent De Paul. She had rejected the social worker's advice to consider a sober living

⁴ The record suggests unsupervised visits may have started as early as December 2011. Sara sometimes brought her friend Steve A. to visits, without the social worker's authorization, and told Connor not to tell. Steve had a history of drug use, and claimed to be sober but was not in treatment. His roommate died in March 2012, possibly from an overdose, and Sara missed a visit with Connor to attend the memorial service.

⁵ Connor was reluctant to start overnight visits, but agreed to do so with the social worker's encouragement. Connor was used to sleeping with a night light and to having his caregivers awaken before he did. Sara did not have a night light, and Connor said she was still asleep when he awakened. He also said she did not let him call Amy when he asked. Sara and Amy had a tense relationship and sometimes clashed over visitation arrangements.

⁶ Near the beginning of the case, the social worker told Sara she needed a longer period of sobriety before she attended Connor's appointments. In December 2011, the social worker gave Sara permission to attend, and Sara received notice of four February 2012 appointments. Amy was willing to change the times to suit Sara, but Sara never requested a change. On one occasion, Sara said she would come to an appointment, but cancelled at the last minute. On another occasion, despite being given 11 days' notice, Sara missed an appointment and claimed "she didn't know the bus schedule."

facility.⁷ At the time of the 18-month review hearing in early May, Sara was living with the grandmother in senior housing, where Connor would not be allowed to reside. The grandmother used syringes to inject prescribed narcotic medication and had a history of enabling Sara's addiction. Sara said that needles were one of her triggers. The social worker had told her several times that she would need to move before Connor could be placed with her.

By the time of the hearing, Connor was not quite five years old. Visits were occurring almost daily, although Sara did not take advantage of all the time she was offered. Connor generally enjoyed visits, but sometimes resisted visiting, and never asked to call Sara between visits. After visits, he was happy to return to Amy's home. Following visits, he sometimes acted out and had trouble sleeping. He wet his pants, bit his cuticles until they bled, bit Amy and kicked her daughter in the face. Sara told Connor to say he wanted to spend the night with her, and prompted him to repeat this in a voicemail message to the social worker. Sara told Connor he was going to live with her.

At the hearing, Sara testified she was going to move in with her uncle "this weekend."⁸ The uncle had a history of illicit drug use, and had a medical condition that required him to use syringes. Sara testified she had no income and could not afford to move to a sober living facility. She had just begun looking for a job, planned to apply for public

⁷ The social worker had also referred Sara to subsidized housing.

⁸ The Agency learned of Sara's plan the day before the hearing and had not evaluated her uncle's home.

assistance⁹ and admitted that financial stress was one of her triggers. When the court asked Sara to define asthma, Sara replied, "I'm not exactly sure." She was also unsure how much medication to give Connor if he had an asthma attack. Against the recommendation of Connor's teacher, Sara planned to transfer Connor to a different school.¹⁰

The social worker testified it would be detrimental to Connor's emotional well-being to be returned to Sara's custody. Overnight visits and increased visitation were difficult for Connor, and visits made him anxious.¹¹ Sara had an 18-year history of substance abuse, was in the early stages of recovery and had relapsed previously. The social worker was concerned about Sara's ability to manage Connor's asthma.

On May 3, 2012, the court made the following findings: Sara had "a significant drug addiction"; "chose to ignore [her] situation for seven to eight months"; participated in services for only seven or eight months; did not complete drug treatment; and failed in residential drug treatment, a program necessitated by her long history of drug use. Sara knew housing was an issue, yet did nothing to address it. She showed a lack of insight by planning to live with her uncle, who used needles, one of her triggers. Sara had not created a safe and stable environment. Her therapist had observed that Sara had "not yet found

⁹ In February 2012, contemplating Connor's return, Sara had asked Amy if Connor "came with food stamps."

¹⁰ Sara showed no interest in seeing Connor's schoolwork and disputed the teacher's advice that Connor needed help learning to write his name.

¹¹ The social worker took into account the statement of Connor's therapist that anxiety regarding visits was common in children in foster care.

those with whom she can identify who have not either used or had criminal backgrounds." Although Sara had a working knowledge of how to treat asthma, in 18 months she had not taken the simple step of learning what asthma was. The court concluded Sara had been provided reasonable services and had made "some progress" in her case plan, but returning Connor to Sara's custody would create a substantial risk of detriment to his physical and emotional well-being. The court continued Connor's relative placement, terminated Sara's services and set a section 366.26 hearing.¹²

After the court made its findings and orders, Sara's counsel requested an order for "family counseling," apparently to address the conflict between Sara and Amy. Counsel also requested conjoint therapy for Sara and Connor. Counsel cited no authority for the requests, but claimed these services would be in Connor's best interests. The court denied the requests.

Sara petitioned for review of the court's orders. (§ 366.26, subd. (l); Cal. Rules of Court, rule 8.452.) This court issued an order to show cause, the Agency responded and the parties waived oral argument.

¹² The court viewed some of the Agency's arguments as "speculative" and "red herrings." The court thus refused to infer "that Steve is a drug user" and refused to consider Sara's "lack of housing as detriment." The court made no mention of the social worker's testimony that Sara had said she intended to continue smoking marijuana; Sara's Facebook page included old photographs related to substance abuse; and her excused absences for approximately one-quarter of the classes in her treatment program allowed her to avoid substance abuse tests. In making its detriment finding, the court expressly declined to consider Connor's reaction to overnight visits, noting Connor was "a victim . . . of a family that is not quite getting along"

DISCUSSION

I

Sara contends the Agency failed to prove there would be a substantial risk of detriment to Connor if he were returned to her custody, and therefore the court erred by refusing to order his return. Sara claims she participated regularly and made substantive progress in reunification services and her unsupervised visits were regular, appropriate and loving. She concludes the court should have returned Connor to her, with family maintenance services if necessary.¹³

A

At the 18-month review hearing, "[t]he court shall order the return of the child to the physical custody of his or her parent . . . unless the [Agency proves], by a preponderance of the evidence, that the return . . . would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. . . . The failure of the parent . . . to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental. In making its determination, the court shall . . . consider the efforts or progress, or both, demonstrated by the parent . . . and the extent to which he or she availed himself or herself of services

¹³ Sara also asserts that in criticizing her for relapsing nine months before the hearing, the court said "a certain amount of perfection is expected of parents in dependency proceedings." In context, the court stated: "[W]e went to the 18-month date, but . . . my impression was [Sara] had a lot to do . . . , and that a certain amount of perfection is going to be required, and I know we are not looking for perfect parents, but sometimes we need perfect participation because this is a time sensitive [case]." The court did not, as Sara suggests, expect her to be a perfect parent.

provided" (§ 366.22, subd. (a).) "[W]hile the court must consider the extent the parent has cooperated with the services provided and the efforts the parent has made to correct the problems which gave rise to the dependency [citation], the decision whether to return the child to parental custody depends on the effect that action would have on the physical or emotional well-being of the child." (*In re Joseph B.* (1996) 42 Cal.App.4th 890, 899.) The showing of detriment is not restricted "to the type of harm which necessitated dependency intervention." (*Ibid.*)

On appeal, we apply the substantial evidence standard of review, and view the record in the light most favorable to the court's order. (See *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426.) We give " 'full effect to the respondent's evidence, however slight, and [disregard] the appellant's evidence, however strong.' " (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 881, quoted in *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581.) "We do not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) "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." (*Ibid.*)

B

During Sara's 18-year history of substance abuse, she participated in four treatment programs. At the time of the hearing, she had been sober for slightly more than eight months, a far shorter period than the previous four years of sobriety she claimed. She had

progressed in her drug treatment program, but her tenure of approximately nine months was three months shy of the duration of a typical program. She planned to live with her uncle, who used needles, one of her triggers, and had only begun to look for work, although financial stress was another trigger. She had completed a parenting course and individual therapy.

While Sara had made some progress in services, she continued to demonstrate a lack of concern for Connor's physical and emotional well-being. Rather than seeking to alleviate his anxiety regarding visitation, she coached him to say he wanted overnight visits and told him he was going to live with her. Sara showed little interest in Connor's schoolwork, and planned to send him to a new school against his teacher's advice. Sara had made little effort to learn about Connor's asthma. In short, she had not created a safe, secure and stable environment for him. There is thus substantial evidence to support the court's finding that a return to Sara's custody would be detrimental Connor, and the court did not err by declining to order a return.

II

Sara contends her tense relationship with Amy was the main obstacle to reunification, and their communication difficulties adversely effected visitation arrangements, Sara's telephone contact with Connor and her participation in his medical appointments. Sara argues because the Agency failed to offer her and Amy family counseling, services were not reasonable, and the court therefore abused its discretion by denying Sara's request, under section 352, for a continuance of services beyond the 18-

month date. Sara claims an extension of services, including family counseling, would have allowed her to reunify and would not have prejudiced Connor. The Agency argues Sara forfeited her right to raise these contentions by not doing so in the juvenile court.

A

In an appeal from orders made at the 18-month review hearing, the appellant may not challenge "prior orders for which the statutory time for filing an appeal has passed." (*Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 811.) Thus, Sara may not now challenge the adequacy of the reunification plan ordered at the dispositional hearing. (*Ibid.*) Moreover, "[i]f [she] 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 [or her] 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.)

Sara notes that at a July 2011 meeting, the parties discussed family counseling, but the Agency did not offer it.¹⁴ The meeting took place several months before the 12-month

¹⁴ Fewer than three weeks after the meeting, Sara complained she was overwhelmed and wanted to quit her parenting class.

review hearing, at which the court found Sara had been provided reasonable services. Sara did not appeal the 12-month review findings and may not now challenge them.

Following the 12-month review hearing, Sara did not dispute the adequacy of services. At the 18-month review hearing, her counsel expressly said she was "not contesting services."¹⁵ After the court made its findings and orders, counsel asked the court to order family counseling, but cited no legal authority. Counsel's belated request is a classic case of remaining "silent as to . . . objections until it would be too late to obviate them" (*In re Christina L.*, *supra*, 3 Cal.App.4th at p. 416.) Sara has thus forfeited the right to challenge the court's failure to order family counseling and the Agency's failure to offer family counseling.¹⁶

B

Even if we construe trial counsel's request for family counseling as a request for a continuance, Sara cannot prevail. Section 352, subdivision (a) provides: "[T]he court may continue [a] hearing . . . beyond the time limit within which the hearing is otherwise

¹⁵ Later, while arguing Connor's return to Sara would not be detrimental to him, counsel said Sara's conflicts with Amy made Connor anxious and caused Sara to miss his medical appointments, and family counseling had not occurred although it was in Connor's best interests and Sara was willing to participate. Counsel said, "The conflict between the family is certainly something that can be addressed if Connor is with [Sara] just as easily [as] if he is not there. Certainly family counseling could be put in place, and I think should be Taken in context, this statement was a suggestion that family counseling should occur if Connor were returned to Sara.

¹⁶ On the merits, substantial evidence clearly supports the court's finding Sara received reasonable services. (*Tracy J. v. Superior Court* (2012) 202 Cal.App.4th 1415, 1428.) Over a span of more than one and one-half years, she was offered individual counseling, conjoint counseling with Connor, drug treatment and parenting education.

required to be held, provided that no continuance shall be granted that is contrary to the interest of the minor. In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements. [¶] Continuances shall be granted only upon a showing of good cause" "At the 18-month review hearing, the court may continue the hearing under section 352 if it finds that reasonable family reunification services have not been offered or provided to the parents."¹⁷ (*Tracy J. v. Superior Court, supra*, 202 Cal.App.4th at p. 1424.) We review the denial of a continuance for abuse of discretion. (*In re Giovanni F.* (2010) 184 Cal.App.4th 594, 605.) Thus, we will not disturb the juvenile court's ruling unless we can say it "was 'arbitrary, capricious, or patently absurd,' or that no reasonable court would have ruled the same way." (*In re S.A.* (2010) 182 Cal.App.4th 1128, 1139, quoting *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 421.)

Even if the court's reasonable services finding was unsupported by substantial evidence, there would be no abuse of discretion in failing to continue services beyond the 18-month date. Connor had been in the dependency system for more than one and one-half years. It was time to honor his "need for prompt resolution of his . . . custody status," and his need for a "stable environment[]." (§ 352, subd. (a).)

¹⁷ Section 366.22, subdivision (b) allows the court to continue reunification services at the 18-month review hearing for "a parent . . . in a court-ordered residential substance abuse treatment program, or a parent recently discharged from incarceration or institutionalization" if certain conditions are met. By its terms, section 366.22, subdivision (b) is inapplicable here.

DISPOSITION

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

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.