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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DULCE G. et al.,

Petitioner,

v.

THE SUPERIOR COURT OF
SAN DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Real Party in Interest.

D062403

(San Diego County
Super. Ct. No. EJ03303A)

PROCEEDINGS for extraordinary relief after reference to a Welfare and Institutions Code section 366.26 hearing. Gary M. Bubis, Judge. Petitions denied; requests for stay denied.

Dulce G. and Andres A. are the parents of Dominic A. (born in 2007). They contend the juvenile court erred when it set a hearing to select and implement a permanency plan for Dominic under Welfare and Institutions Code section 366.26. (Undesignated statutory references are to the Welfare and Institutions Code.) We deny the petitions and the requests for a stay.

FACTUAL AND PROCEDURAL BACKGROUND

In 2008, 2009 and 2010 the parents were involved in domestic violence incidents in front of Dominic. In October 2010, the San Diego County Health and Human Services Agency (Agency) filed a petition in the juvenile court on behalf of Dominic alleging that he had suffered, or there was a substantial risk that he would suffer, serious physical harm or illness, as a result of the failure or inability of the parent to adequately supervise or protect him as he is periodically exposed to violent confrontations between the parents. (§ 300, subd. (b).) Among other things, Andres violated a criminal protective order on several occasions and Dulce failed to follow through on signed safety plans. The Agency detained Dominic in the home of the maternal grandmother.

At the jurisdictional/disposition hearing in January 2011, the juvenile court found Dominic was a minor described in section 300, subdivision (b), removed custody from the parents, placed Dominic with the maternal grandmother and ordered reunification services for the parents. In early April 2011, Dulce gave birth to a daughter, A.A. She named Andres as the father. Ultimately, at the 18-month review hearing in April 2012, the court found that Dulce had made substantive progress with the provisions of her case plan and ordered Dominic placed with her.

In May 2012, Dominic told the social worker that his father was a liar because he denied doing anything, but always fought with his mother. Dominic described an incident where he heard his parents saying bad words and then heard slapping noises. Dominic also reported that on a Saturday his parents fought at his paternal grandfather's house where he lived. The parents fought in the bathroom, his mother was crying and had blood on her arm when she left the bathroom. During this incident A.A. was in another bedroom.

The maternal grandmother reported that the following Sunday, Dominic had watery eyes and appeared sad. When she asked him what was wrong, he replied that he could not say, but then stated that his "dad hit [his] mom." Dominic explained that he heard his parents fighting and then saw Andres kicking Dulce. He heard Dulce asking Andres to let her go and thought Andres might have covered Dulce's face with a pillow because he heard her struggling to breathe. While babysitting the children, the maternal grandmother observed burns on A.A.'s legs. Dominic and Dulce told her that A.A.'s legs had caught fire after Andres used warm rubbing alcohol on her to bring down a fever. The maternal grandmother also stated that Dulce had been living with Andres in the paternal grandfather's home, and that Dulce had moved all of her belongings out of the maternal grandmother's home in the beginning of May. The paternal grandfather confirmed that the family was living with him and that the parents were sharing a bedroom, but he was uncertain of the sleeping arrangements.

However, when the social worker told Dulce about the Agency's concerns, Dulce claimed that Dominic was lying, that she was not living with Andres and that A.A. had

been burned accidentally. The Agency detained the children after the social worker observed the burns on A.A.'s legs. It filed a supplemental petition alleging that Dulce had moved in with Andres against the dependency court order and in violation of the criminal protective order, and that Dominic had witnessed incidents of domestic violence between his parents. (§ 387.) A physician evaluated A.A. at the Polinsky Center and opined that she had suffered fairly significant burns and that it was neglect for the parents not to seek medical care.

At the jurisdictional and disposition hearing on the supplemental petition in July 2012, the juvenile court heard from the parents and a social worker. At the conclusion of the hearing, the juvenile court stated that it carefully listened to the witnesses's testimony, watched the manner in which they testified, heard the arguments of counsel and read all the reports three times. The court found that Dominic's allegations had the context of a time and place to show that the events took place recently. It concluded that the maternal grandmother was very protective of her grandchildren and did not have a motive to lie. It disbelieved the paternal grandfather's testimony that he did not know who lived in his house and found it "[made] sense" that the parents were living together. Regarding A.A.'s burns, the court found that the parents did not take her to the hospital because they had something to hide. The court concluded that the parents were lying and that Dominic presented the most credible evidence.

The juvenile court found the previous disposition had not been effective in protecting Dominic, that there was a substantial danger to his physical health or emotional well-being unless removed from Dulce's custody and that both parents had

received 18 months of reunification services. It removed custody from Dulce, terminated services and set the matter for a section 366.26 hearing. Both parents filed a petition for review of the court's orders. (§ 366.26, subd. (l); Cal. Rules of Court, rule 8.452.) We issued an order to show cause, the Agency responded and the parties requested oral argument.

DISCUSSION

I. *General Legal Principles*

A supplemental petition is used when a dependent child must be removed from a parent and placed in out-of-home care. (§ 387; Cal. Rules of Court, rule 5.560(c); *In re Javier G.* (2005) 130 Cal.App.4th 1195, 1200.) The Agency has the burden to show by a preponderance of the evidence that the factual allegations of the supplemental petition are true. (*In re Jonique W.* (1994) 26 Cal.App.4th 685, 691.) If the court finds the allegations true, it must then determine whether the previous disposition is no longer effective in protecting the child. (*Ibid.*) If both allegations are found to be true, the court then determines whether removal is required. (*Ibid.*)

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.) We do not consider the credibility of witnesses, attempt to resolve conflicts in the evidence or weigh the evidence and must draw all reasonable inferences in support of the court's findings. (*Id.* at p. 1021.)

II. *Analysis*

The parents contend the evidence did not support the juvenile court's true findings on the allegations of the supplemental petition and that the previous disposition had not been effective in protecting Dominic. We disagree.

The parents have a long history of domestic violence dating back to 2008. The Agency filed its initial petition in the case in October 2010 alleging that Dominic was exposed to violent confrontations between his parents and the juvenile court made true findings on that petition in January 2011. Thus, the court's true findings on the allegations of continued domestic violence contained in the supplemental petition turned on the credibility of the witnesses regarding recent incidents of domestic violence. Cognizant of this fact, the parents assert the court's credibility findings are suspect because it never heard Dominic testify and Dominic may have been referring to past incidents of domestic violence.

In a roundabout way, the parents are challenging the admissibility of Dominic's hearsay statements contained in the reports. However, a social study prepared by the petitioning agency and hearsay evidence contained in that study is admissible and constitutes competent evidence upon which a finding of jurisdiction may be based. (§ 355, subd. (b).) Nevertheless, if a party to the jurisdictional hearing raises a timely objection to the admission of specific hearsay evidence contained in a social study, such hearsay evidence shall not be sufficient by itself to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based. An exception to this rule exists where the petitioning agency establishes the hearsay declarant is a minor under the age of

12 who is the subject of the jurisdictional hearing. The hearsay statement of such a minor shall be inadmissible if the objecting party establishes the statement is unreliable because it was the product of fraud, deceit, or undue influence. (§ 355, subd. (c)(1)(B).)

The parents, however, did not object to Dominic's statements as inadmissible hearsay evidence. (Evid. Code, § 353, subd. (a) [failure to object waives the issue].) "It is well settled that hearsay or other incompetent evidence . . . if received without proper objection or motion to strike is to be regarded as competent evidence in support of an order or judgment." (*Flood v. Simpson* (1975) 45 Cal.App.3d 644, 649.) In any event, as we shall discuss, Dominic's statements possessed indicia of reliability. Indicia of reliability are based on the "time, content and circumstances" of the child's statement. (*In re Cindy L.* (1997) 17 Cal.4th 15, 29.) These indicia include, but are not limited to: spontaneity and consistency, the mental state of the declarant, the use of terminology unexpected of a child of similar age, and a lack of a motive to fabricate. (*Id.* at pp. 29-30.) Further, "any factor bearing on reliability may be considered." (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1250.)

Here, the evidence amply supported the juvenile court's true findings on the supplemental petition. Dulce asserted that there had been no domestic violence incidents with Andres since the case began and Andres claimed there had been no incidents of domestic violence with Dulce for two years eight months. Andres, however, later admitted that the court had made a true finding on Dominic's original petition within the last two years. Moreover, while the court did not hear Dominic testify, Dominic's

description of the domestic violence incidents he witnessed were consistent and suggested that the events were recent.

A few days before the Agency filed the supplemental petition, the maternal grandmother reported that Dominic appeared sad. When she asked Dominic about it, he stated that he had seen Andres kicking Dulce, he heard Dulce beg Andres to let her go, that Dulce was struggling to breathe and A.A. was crying. Dominic also told the maternal grandmother about a fight between his parents in the bathroom the prior week where Dulce was bleeding. That same day, Dominic told the social worker about two fights, one where his parents had fought in the bathroom of his paternal grandfather's house and that Dulce was bleeding. Dominic cried at the end of the interview.

Dulce and the children had moved into the paternal grandfather's house earlier that month. Thus, Dominic's description of the incidents as occurring in the paternal grandfather's house and that A.A. was in the home strongly suggest he was recounting recent events. Additionally, maternal grandmother and school staff members all noted recent behavioral changes in Dominic. As the juvenile court sagely noted, "if [Dominic] has not seen any domestic violence for two and a half years, why would he all of a sudden react like this." This evidence also supported the court's finding that Dominic's placement with Dulce had not been effective in protecting him.

Having determined that the juvenile court properly sustained the section 387 petition, we next consider whether the juvenile court erred in removing Dominic from Dulce's care. The test for removal on a supplemental petition is whether, based upon clear and convincing evidence at the time the petition was initiated, there was "a

substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor . . . and there are no reasonable means by which the minor's physical health [could] be protected without removing the minor from the minor's parents' . . . physical custody." (§ 361, subd. (c)(1).) The parents assert there was insufficient evidence to warrant Dominic's removal from Dulce's custody and complain that the juvenile court failed to consider an alternative disposition, such as ordering Andres not to reside in the paternal grandfather's home with Dulce and the children. We reject their contentions.

When assessing potential danger to the physical or emotional well-being of a child, the juvenile court does not view the child's current circumstances in a vacuum. As the Agency points out, Dulce's history suggests she is unable to distance herself from Andres. As far back as 2008, Dulce indicated she would have contact with Andres only for visitation purposes, yet she continued to suffer from incidents of domestic violence despite the existence of a criminal protective order. By the end of 2011, the social worker reported that Dulce spent "most of her time" with Andres while the maternal grandmother took care of Dominic. Although Dulce regained custody of Dominic at the 18-month review hearing in April 2012, she quickly moved in with Andres and the pattern of domestic violence continued. On this record we find no fault in the juvenile court's decision to remove Dominic from Dulce's custody or in its implied conclusion that ordering Andres to move out of the paternal grandfather's home would not be effective. We find no error on this record and deny the petitions.

DISPOSITION

The petitions are denied. The requests for a stay are denied.

McINTYRE, J.

WE CONCUR:

McDONALD, Acting P.J.

O'ROURKE, J.