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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KAREN E. et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Real Party in Interest.

D062624

(San Diego County
Super. Ct. No. SJ12644A-B)

PROCEEDINGS for extraordinary relief after reference to a Welfare and Institutions Code section 366.26¹ hearing. Gary M. Bubis, Judge. Petitions denied; requests for stay denied.

¹ Statutory references are to the Welfare and Institutions Code.

Karen E. and Skyler P. (together, the parents) seek writ review of juvenile court orders terminating their reunification services and setting a hearing under section 366.26 regarding their daughters, S.E.P. and S.L.P. Karen contends the court erred by terminating her reunification services. Skyler asserts the San Diego County Health and Human Services Agency (the Agency) did not make active efforts to reunify his Indian family and did not provide reasonable services to him. Karen joins in Skyler's arguments. We deny the petitions.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2011, the Orange County Social Services Agency (Orange County Agency) petitioned on behalf of 21-month-old S.E.P. and three-month-old S.L.P. under section 300, subdivision (b). The petitions alleged the parents had left the children in the care of the paternal grandmother (the grandmother) and her boyfriend despite knowing the grandmother is an alcoholic and had been drinking. The grandmother and her boyfriend had a domestic violence dispute and crashed the boat they had been living on with the parents and the children, and the boat and the children were filthy and the children were extremely hungry. The petitions further alleged Skyler has a criminal history and a history of substance abuse, and Karen had not obtained treatment for her depression. The Orange County Juvenile Court ordered the children detained. They went to live with nonrelated extended family members in San Diego.

Skyler said he has American Indian heritage in the Osage Nation through his maternal grandfather, Jamie F. The Orange County Agency provided notice under the Indian Child Welfare Act (the ICWA) of 1978 (25 U.S.C. § 1901 et seq.), and the Osage

Nation in Pawhuska, Oklahoma, responded that S.E.P. and S.L.P. were of Osage descent through Jamie.

The Osage Nation moved to intervene in order to monitor the proceedings. Original birth certificates were required to enroll the children in the Osage Nation, and the grandmother was required to enroll to establish lineage. The Indian expert reported the children were eligible for enrollment. He opined that active efforts had been made to prevent the breakup of the Indian family.

At the jurisdictional hearing on August 2, 2011, the Orange County Juvenile Court took jurisdiction. On August 25, it transferred the case to San Diego County because the children were living in San Diego. The San Diego County Juvenile Court accepted the transfer and found the ICWA applied. It found active efforts had been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family, but the efforts had been unsuccessful. It removed custody and ordered the parents to participate in services. Karen was required to participate in counseling and parenting education programs. Skyler's plan included parenting education and substance abuse treatment.

In February 2012, Skyler was arrested. At a special hearing on May 9, the court authorized \$25 per month for Skyler to make telephone calls to the children on the condition the caregiver was willing to accept calls from the jail. The court ordered Karen to participate in dependency drug court. At the time of the hearing, the children had not yet been enrolled in the Osage Nation because of complications in obtaining necessary documents.

The social worker reported Karen had entered a residential substance abuse treatment program. The parents' visits with the children had been inconsistent, but after Skyler's incarceration, Karen began calling and visiting the children on a regular basis. She attended therapy, parenting classes and drug court, but she admitted she had recently used methamphetamine. In May 2012 and again in July, the Osage Nation recommended the parents receive an additional 90 days of services. The Osage Nation stated the children's placement with the nonrelative extended family members was in their best interests.

At the six-month review hearing in June 2012, the court found there was good cause to place the children with nonrelative extended family members not in accordance with placement preferences of the ICWA. It continued the children as dependents, found reasonable services had been offered and that neither parent had made substantive progress. It ordered services to continue to the 12-month date.

For the 12-month review hearing, the social worker reported the children's membership in the Osage Nation was still pending because the paternal grandmother had not yet provided her original birth certificate.

Skyler pleaded guilty to criminal charges, and it was assumed he would serve at least two years in prison. He said he had telephoned the children, but did not want them to visit him in jail. Karen tested positive for methamphetamine in July 2012. She said she knew it would take a long time before she could be a stable parent. She remained in her treatment program, started therapy and visited the children. The Osage Nation stated that ending rehabilitation services for the parents and terminating parental rights were not

in the children's best interests. It reasoned that because Karen was engaged in treatment and Skyler had expressed a desire to seek treatment upon his release from custody, they should be given additional time to rehabilitate.

At the 12-month review hearing in September 2012, the social worker testified she had met Skyler face-to-face only once and had perhaps two e-mail communications. She said he told her he had been attending Narcotics Anonymous (NA) meetings and life skills and parenting classes in jail. She said his plan required outpatient substance abuse treatment, a 12-step program and parenting classes, and the plan had not been adjusted after his incarceration. She had not talked with jail personnel about his need for services. A telephone card had been ordered for him in May 2012, and in June he told her he had been calling the girls.

Skyler testified he had entered custody in February 2012. He said his first contact with the social worker was in June, and he told her of his participation in the jail programs and said he had not received a telephone card. He testified he had completed a parenting program in Orange County and had completed parenting and other programs at the jail. He said he anticipated being released from custody in February 2013 and, at that time, planned to enter inpatient drug abuse treatment.

The court found by clear and convincing evidence that active efforts had been made to provide remedial services in rehabilitative programs designed to prevent the breakup of the Indian family. The court determined there was not a substantial probability the children would be returned to parental custody by the 18-month date. It terminated services and set a section 366.26 hearing.

Karen and Skyler 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.

DISCUSSION

I

Skyler, joined by Karen, contends there was a lack of substantial evidence to support the juvenile court's finding there were active efforts to reunify his Indian family. Skyler argues the Agency did nothing to assist with the reunification process between the six- and 12-month review hearings. He complains the social worker did not notify jail personnel of his services plan requirements, discuss what services would be available in jail, ensure that he received a calling card or ask the children's caregiver whether he had been calling them.

In *In re Michael G.* (1998) 63 Cal.App.4th 700, 712, this court ruled the Agency has the burden to prove by the standard of clear and convincing evidence that active efforts were made to prevent the breakup of the Indian family. The court stated the "standards in assessing whether 'active efforts' were made to prevent the breakup of the Indian family, and whether reasonable services under state law were provided, are essentially undifferentiable." (*Id.* at p. 714; see also *In re C.B.* (2010) 190 Cal.App.4th 102, 134; *Adoption of Hannah S.* (2006) 142 Cal.App.4th 988, 998.)

Under the ICWA and state law, services must include the use of available resources of the extended family, the tribe, Indian social services agencies and Indian

caregivers. (*In re Michael G., supra*, 63 Cal.App.4th at p. 714; § 361.7, subd. (b).)

Section 361.7, subdivision (b) specifies:

"[t]he active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe. Active efforts shall utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers."

"Whether active efforts were made is a mixed question of law and fact." (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1286.) The reviewing court determines the services that were provided by reference to the record. "Whether those services constituted 'active efforts' within the meaning of section 361.7 is a question of law which we decide independently." (*Ibid.*)

We hold that here active efforts were made within the meaning of the ICWA to prevent the breakup of this Indian family. Although the social worker could have been more proactive in ensuring that Skyler received all of the services available in the jail, he participated in the services that were accessible there and has not shown any real effect from the social worker not taking a more active role.

A reunification plan was developed for Skyler at the beginning of the dependency case. He was not in custody at that time. After the case was transferred to San Diego, he participated in the development of a case plan and signed that plan in November 2011. The Indian expert witness advised Skyler of the culturally appropriate Native American resources available to him in the San Diego region. A few months after Skyler moved to San Diego, he was arrested and entered custody. He was in jail at the time of the six-

month review hearing and remained there throughout the 12-month review period. While in custody, he participated in parenting education classes, NA and Alcoholics Anonymous (AA) meetings and drug education, and life skills and adult basic educational programs. He testified he told his counselor at the jail what he needed to do toward reunification, the counselor told him what was available to him and he took advantage of the programs there. Skyler testified he had received an e-mail from the social worker while he was in custody in May. They had a face-to-face meeting in June, and she asked him what services he had been working on. Skyler knew of the requirements of his case plan and took advantage of the programs available, including AA and NA meetings, parenting classes, life skills and drug education. The resources Skyler could access once he was in custody depended on the facility where he was housed.

Skyler testified he had received a calling card in May 2012, and then testified he had not received a calling card. When the social worker spoke with him in June, he told her he had been calling the girls. Skyler had decided he did not want them to visit him at the jail. He acknowledged that his incarceration hindered his ability to complete substance abuse treatment and have face-to-face visits with his children. In view of all of the circumstances of the case, substantial evidence supports the juvenile court finding that reasonable services had been offered and active efforts had been made to prevent the breakup of this Indian family.

II

The parents contend substantial evidence does not support the finding there was not a substantial probability the children could be returned to parental custody by the 18-month date. Karen argues she regularly contacted and visited the children. Skyler claims, although he would be in custody at the 18-month date, he could continue to make progress and enjoy visits with the children while he was incarcerated.

Reunification services for a parent of a child under the age of three generally are limited to six months, but may be extended to the 12-month date. (§§ 361.5, subd. (a)(1)(B) & 366.21, subd. (e).) Court-ordered services may be extended to 18 months after the child was originally removed from parental custody if the court finds there is a substantial probability the child will be returned to the parent's physical custody and safely maintained in the home by that time, or that reasonable services were not provided to the parent. (§§ 361.5, subd. (a)(3), 366.21, subds. (f) & (g)(1); *In re T.G.* (2010) 188 Cal.App.4th 687, 695.)

Under section 366.21, subdivision (g)(1), a court may continue a case to the 18-month date only if there is a substantial probability the child will be returned to the parent's physical custody and safely maintained in the home by that time. In considering whether to extend the case for 18 months, the court must make all of the following three findings:

"(A) That the parent or legal guardian has consistently and regularly contacted and visited with the child.

"(B) That the parent or legal guardian has made significant progress in resolving problems that led to the child's removal from the home.

"(C) The parent or legal guardian has demonstrated the capacity and ability both to complete the objectives of his or her treatment plan and to provide for the child's safety, protection, physical and emotional well-being, and special needs." (*Id.*, subd. (g)(1)(A)-(C).)

S.E.P. and S.L.P. were under the age of three when they were removed from parental custody in June 2011. Thus, it is presumed the parents would receive six months of services. Eighteen months from the date of removal would be in December 2012, just three months from the 12-month review hearing in September.

Karen agreed to case plan requirements that included that she complete a parenting class, attend therapy and obtain and maintain suitable housing. She attended therapy, drug treatment and parenting education, but she did not complete her parenting class and she struggled with drug treatment. Although she remained in treatment, she tested positive for methamphetamine in July 2012. She discontinued therapy with one therapist and had recently begun therapy sessions with another. She had not yet obtained employment and did not have a regular home. Karen acknowledged that it would be a long time until she felt capable of being an adequate parent for her children. Substantial evidence supports the court's finding there was not a substantial probability the children could be returned to her care by the 18-month date.

Skyler remained in custody from the six-month to the 12-month review hearings. While in custody, he participated in parenting education, NA and AA meetings and drug education. He had not yet completed Agency approved drug treatment, submitted to random drug tests or provided documentation showing he had completed an Agency approved parenting class. Nor had he shown he could financially provide for his children

or provide a home. He has not yet shown he had the ability to complete the objectives of his case plan, make significant progress in resolving the problems that led to the children's removal or show he could provide a safe, appropriate home for the children. Substantial evidence supports the court's finding there was not a substantial probability the children could be returned by the 18-month date.

III

Skyler asserts the court erroneously delegated absolute discretion to the caregiver as to whether visits would occur when it ordered telephone visits contingent on the caregiver's willingness to accept them.

The court must consider the totality of the child's circumstances when making decisions concerning the child. (*In re Chantal S.* (1996) 13 Cal.4th 196, 201.) The court's orders regarding visitation may be reversed only upon a clear showing of an abuse of discretion. (*In re Emmanuel R.* (2001) 94 Cal.App.4th 452, 465.) A court may delegate discretion to determine the time, place and manner of visits "to the entity best able to perform them" (*In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1374.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' [Citation.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

The court ordered liberal supervised visitation, but Skyler declined to have face-to-face visits with the girls while he was in jail. Telephone visits with very young children like these would not be very beneficial. Although the court gave the caregiver

discretion on whether to receive telephone calls from Skyler, it did not limit his visits to telephone visits only. He was offered in-person visits, which he declined, and he said he had received some telephone visits. The court did not improperly delegate authority over visits to the caregiver.

DISPOSITION

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

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.