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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FREDERICK F.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Real Party in Interest.

D062993

(San Diego County
Super. Ct. No. J515627B)

PROCEEDINGS for extraordinary relief after reference to a Welfare and Institutions Code section 366.26¹ hearing. Carol Isackson, Judge. Petition denied; request for stay denied.

¹ Statutory references are to the Welfare and Institutions Code unless otherwise specified.

Frederick F. seeks writ review of juvenile court orders denying reunification services to him and setting a section 366.26 hearing regarding his daughter, Christina F. He contends no substantial evidence supports the finding of jurisdiction as to him, and, even if the jurisdictional findings were supported, there was no substantial evidence warranting removal of Christina from his care. He also argues the court erred by denying him reunification services under section 361.5, subdivision (b)(11). We deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

On September 19, 2012, the San Diego County Health and Human Services Agency (the Agency) filed a petition under section 300, subdivision (b) on behalf of one-year-old Christina alleging that her mother, Tina S., and Frederick used amphetamine/methamphetamine; they had histories of drug use and agreed to participate in drug treatment, but Frederick had not done so; and Tina continued to use drugs.

In January 2012, while executing a search warrant, federal agents found Frederick and Christina asleep in a motor home in the backyard of a home. Tina was asleep in a car next to the motor home.² Frederick and Tina both tested positive for amphetamines and methamphetamine. Tina admitted to recently using drugs. At first, Frederick denied recent drug use, but then said he had used drugs one week earlier and had been around people who used methamphetamine. The social worker released Christina to Tina's care

² No drugs were found at the scene. However, during the previous October, while executing a search warrant, a narcotics team had found drugs in the home and in the motor home and had arrested Frederick and another man for selling drugs.

on the condition that she live with the maternal grandparents. The parents agreed to a voluntary safety plan providing they would have only supervised visits with Christina until they had completed 90 days of drug treatment and had clean drug tests. However, Frederick did not participate in voluntary services. Tina's attempts at drug treatment were unsuccessful and she continued to have positive drug tests.

The family was involved in a 2004 dependency proceeding when Christina's older brother, Joshua S., tested positive for methamphetamine at birth. The Agency petitioned on Joshua's behalf and identified Frederick as one of three alleged fathers. Frederick had no contact with the Agency and did not establish paternity. Tina made little progress with her reunification services regarding Joshua and, in September 2005, her parental rights and the parental rights of Frederick and the other two alleged fathers were terminated. Joshua was adopted in 2006.

In November 2012, Frederick executed a declaration of paternity regarding Christina. The court found Frederick to be Christina's presumed father under Family Code section 7573, and entered a judgment of paternity.

The social worker reported that Frederick's history of drug-related criminal convictions dated to 1994. In January 2012, he was convicted of possessing a controlled substance for sale, and was granted three years of probation on the condition he serve 365 days in jail. Frederick's friend, Patrick B., who lived on the same property with Frederick, is a registered sex offender and prohibited from being around small children. Frederick did not believe Patrick posed a threat to Christina and allowed him to have contact with her.

At the jurisdictional/dispositional hearing on November 14, 2012, the court took judicial notice of documents concerning Joshua's dependency. It received stipulated testimony from Frederick that he had not come forward in Joshua's case because he did not believe Joshua was his child. After considering the evidence, the court found the allegations of the petition to be true, and removed Christina from parental custody. The court denied reunification services to Tina under section 361.5, subdivision (b)(10) and (11) and to Frederick under section 361.5, subdivision (b)(11) and set a section 366.26 hearing.

Frederick petitioned for review of the juvenile 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

Frederick contends no substantial evidence supports the jurisdictional findings. Specifically, he argues there was no evidence he currently abuses drugs or that he is unable to supervise and protect Christina.

A reviewing court must uphold a juvenile court's findings and orders if they are supported by substantial evidence. (*In re Amos L.* (1981) 124 Cal.App.3d 1031, 1036-1037.) "[W]e must indulge in all reasonable inferences to support the findings of the juvenile court [citation], and we must also ' . . . view the record in the light most favorable to the orders of the juvenile court.' " (*In re Luwanna S.* (1973) 31 Cal.App.3d 112, 114, quoting *In re Biggs* (1971) 17 Cal.App.3d 337, 340.) The appellant bears the burden to

show the evidence is insufficient to support the court's findings. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

A petition is brought on behalf of the child, not to punish the parent. (*In re La Shonda B.* (1979) 95 Cal.App.3d 593, 599.) The focus of the statute is to avert harm to the child. (*In re Jamie M.* (1982) 134 Cal.App.3d 530, 536.) If the actions of either parent place the child at substantial risk according to the provisions of section 300, the juvenile court may assume jurisdiction over the child. (*In re Joshua G.* (2005) 129 Cal.App.4th 189, 202; *In re Jeffrey P.* (1990) 218 Cal.App.3d 1548, 1553-1554.) A juvenile court is not required to wait until a child is actually hurt before assuming jurisdiction. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, disapproved on other grounds in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.)

Frederick has not shown that the evidence was insufficient to support the juvenile court's jurisdictional findings. The petition alleged Frederick and Tina used amphetamines/methamphetamines as evidenced by their positive drug tests in January 2012, and they have histories of drug use. The petition also alleged Frederick agreed to voluntary drug treatment services, but had not participated in any services.

In January 2012, authorities executed a search warrant and an arrest warrant at a home where Frederick and Christina were sleeping in an unheated vehicle in the backyard. A drug test given to Frederick was positive for amphetamine and methamphetamine. Frederick claims there was a lack of evidence that he abuses drugs and he has never tested positive for drugs while on probation. However, his probation officer indicated drug testing was not a requirement of his probation. Frederick's only

drug test contained in this record was positive. Frederick refused to acknowledge he has a substance abuse problem or that Christina was removed, in part, because of his substance abuse problems. He did not participate in voluntary services although he agreed to do so, and he did not remain in contact with the Agency. Substantial evidence supports the findings of jurisdiction.

II

Frederick asserts even if the juvenile court's assertion of jurisdiction was proper, there was not substantial evidence to support removing Christina from his custody.

Assuming that Frederick has preserved this issue for appeal, he has not shown a lack of substantial evidence to support the removal order. Frederick abused drugs and associated with others who were using drugs. He was offered several months of voluntary services, but he continued to deny that he has a substance abuse problem and did not participate in the offered services. Substantial evidence supports the order removing Christina from parental custody.

III

Frederick maintains the court erred by denying reunification services to him under section 361.5, subdivision (b)(11). He argues this subdivision does not apply because he was only one of three alleged fathers named in Joshua's case and paternity was never established as to that minor. He also notes he offered stipulated testimony at Christina's hearing that he had not come forward in Joshua's case because he did not believe Joshua was his child. He adds that he did not have counsel during Joshua's dependency to advise him that it would be better to come forward for a paternity test to show he is not the

biological father and/or to ask for a judgment of nonpaternity. He claims the Legislature could not have intended to require an alleged father to establish that he is not a child's biological father to prevent him from losing the opportunity to participate in reunification services for future children who are subjects of dependency proceedings.

It is presumed in dependency cases that parents will receive reunification services. (*Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 95.) However, "[n]otwithstanding the crucial role of reunification services when a child is removed from the home [citation], the Legislature, by enacting section 361.5, subdivision (b), has discerned ' . . . it may be fruitless to provide reunification services under certain circumstances.' " (*In re Joshua M.* (1998) 66 Cal.App.4th 458, 467.)

Section 361.5, subdivision (b)(11) states the provision of reunification services may be bypassed for a parent when the court finds by clear and convincing evidence:

"That the parental rights of a parent over any sibling or half sibling of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling"

Here, substantial evidence supports the court's denial of services under section 361.5, subdivision (b)(11) because Frederick lost parental rights to Joshua and he did not make a reasonable effort to treat the problems that led to Joshua's removal.

The court in *Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 590, 598 (*Francisco G.*) held the bypass provisions apply to a father whose parental rights to a sibling or half sibling were terminated when his status in the previous dependency

proceeding was that of an alleged or biological father. (*Id.* at p. 599.) The prior termination of parental rights triggers the potential application of the statutory bypass provision. However, the court must still inquire into the nature of the problems that caused the earlier dependency and ask whether the father has taken reasonable steps to resolve them. (*Ibid.*) "[E]ven if the parent is found to fall within the bypass provision, the juvenile court is still empowered to order reunification services if it finds that reunification services are in the best interests of the child. (§ 361.5, subd. (c).)" (*Ibid.*)

Frederick argues *Francisco G.* is highly distinguishable from this case. We disagree. The holding in *Francisco G.* is directly relevant to the issue here. In *Francisco G.*, the parents had had their parental rights terminated to three children in a previous dependency proceeding. The dependency petitions were based on the mother's drug abuse and the father's history of domestic violence and drug abuse. The father was identified as an alleged father of two of the children and the biological father of the other. He participated in the prior dependency proceedings involving the other children. (*Francisco G., supra*, 91 Cal.App.4th at p. 591.)

Frederick also was identified as an alleged father in a prior dependency proceeding. He has a history of substance abuse, had a positive drug test in January 2012 and did not participate in the voluntary services offered to him. The termination of his parental rights to Joshua triggered the potential application of section 361.5, subdivision (b)(11). The court followed the requirement of section 361.5, subdivision (c) by considering Frederick's efforts to resolve his drug abuse problem. It found that he had

not made any effort to remedy that problem and it was not in Christina's best interests to offer Frederick reunification services. The court stated:

"So the court finds that the original dependency was triggered by substance abuse. The parents did not address the problem, did not treat the problem or take reasonable efforts to treat the problem. And there's absolutely no evidence before the court, given the parents' history as to both of these children, that it would be in Christina's best interest for services to be provided to the parents."

The *Francisco G.* court observed that to not apply the bypass provision to a parent who had not achieved presumed father status as to the sibling or half sibling in a prior dependency would be to disregard the best interests of the child. (*Francisco G., supra*, 91 Cal.App.4th at p. 598.) Frederick cannot now take advantage of the fact that he did not establish paternity in Joshua's case to insist on being provided reunification services regarding Christina. He has not shown the juvenile court erred in applying the provision of section 361.5, subdivision (b)(11).

DISPOSITION

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

IRION, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.