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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

K.H. et al., Petitioners, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent; RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Real Party in Interest.	E054932 (Super.Ct.No. RIJ119488) OPINION

ORIGINAL PROCEEDINGS; petitions for extraordinary writ. Matthew Perantoni, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petitions granted.

Dawn Shipley for Petitioner K.H.

Anastasia Georggin for Petitioner A.O.

No appearance for Respondent.

Pamela J. Walls, County Counsel, and Anna M. Deckert, Deputy County Counsel, for Real Party in Interest.

Petitioners K.H. (mother) and A.O. (father) filed separate petitions for extraordinary writ pursuant to California Rules of Court, rule 8.452, challenging the juvenile court's order denying reunification services as to their child, M.O. (the child), and setting a Welfare and Institutions Code[1] section 366.26 hearing. They both argue that the juvenile court erred in denying them reunification services under section 361.5. The Riverside County Department of Public Social Services (the department) originally recommended that the court order reunification services for mother and father (the parents), and it maintains that recommendation. We grant the writ petitions.

FACTUAL AND PROCEDURAL BACKGROUND

Previous Dependencies

On March 23, 2010, the court detained mother's son, K.H., after mother was found masturbating in her sleep and rubbing K.H. K.H. was four months old at the time. The court ordered reunification services for mother, but denied them for K.H.'s father.[2]

On or around September 28, 2010, the department received a referral after mother gave birth to another baby, H.O. The reporting party was concerned for H.O.'s safety in mother's care since her son, K.H., was in protective custody and mother was not complying with her case plan. The department filed a section 300 petition on behalf of

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[1] All further statutory references will be to the Welfare and Institutions Code, unless otherwise noted.

[2] Father is not the father of K.H.

H.O., which alleged that mother kept the family home in an unsanitary condition, and that mother had an open dependency case with regard to K.H. for substantiated allegations of general neglect due to mother's unresolved substance abuse problem. The petition further alleged that mother was not actively participating in that case plan. In addition, the petition alleged that the identity and whereabouts of H.O.'s father were unknown. In the detention report, the social worker stated she had discovered that mother wanted to put K.H. up for adoption, rather than participate in services. The detention hearing was held on October 1, 2010. Mother named father as the father of H.O., and said his whereabouts were unknown. The court detained H.O. The court subsequently declared H.O. a dependent and ordered the parents to participate in services.

In the six-month review report regarding H.O., the social worker reported that both parents said that father was not H.O.'s biological father. However, father said he was willing to help mother raise H.O., since he was now living with mother. Father admitted to using drugs and said he could benefit from substance abuse services. He said he was willing to do whatever was necessary to support mother in reunifying with H.O. On January 25, 2011, father was given referrals to substance abuse services and individual counseling. Mother was given referrals for substance abuse services, counseling services, and parenting classes. Both parents failed to complete any of the services.

At the six-month review hearing on May 2, 2011, the court found that the parents had failed to participate adequately in their case plans and terminated services.

In the section 366.26 report, the social worker reported that father said he was no longer with mother, and he did not want any involvement in this matter. Mother's parental rights as to K.H. and H.O., and father's parental rights as to H.O., were terminated on August 30, 2011.

Current Dependency

On September 16, 2011, the department filed a petition on behalf of the child, who was about one week old at the time. The petition alleged that the child came within section 300, subdivisions (b) (failure to protect) and (g) (no provision for support). Specifically, the petition alleged that mother had an extensive history with the department and was provided with reunification services as to the child's siblings, K.H. and H.O., beginning in March 2010. Mother failed to reunify with those children, and her parental rights were terminated on August 30, 2011. The petition also alleged that mother had mental health issues and unresolved substance abuse issues. The petition further alleged that father was provided with reunification services as to H.O., but failed to reunify, resulting in the termination of his parental rights. He also had a criminal arrest history. His whereabouts were unknown, and he had failed to provide for the child.

In the detention report, the social worker reported that the department and the Riverside County Child Abuse Hotline received referrals regarding the child on September 12, 2011. Mother gave birth on September 10, 2011, and she tested negative for drugs. The baby was not tested. Mother admitted to using drugs up until three months prior to the birth. The reporting party was concerned because mother had a history of drug use, and her two other children were in protective custody.

The social worker met with mother, who resided in a sober living home (through the House of Miracles program) with two other mothers and a staff member. Mother admitted that she had used methamphetamine since she was 11 years old. She identified father as the father of the child, but said his whereabouts were unknown.

The social worker asked mother why she failed to reunify with her other two children. Mother said "the circumstances of [K.H.'s conception] made it difficult . . to bond with him." With H.O., mother said she was "being stubborn about participating in the services," and she was dealing with her own mother's illness at the time.

The social worker also talked to mother's grandmother, who told her that mother was using drugs up to five and one-half months into this pregnancy. The social worker subsequently talked to another social worker, who informed her that mother had enrolled in the outpatient substance abuse program at the MFI Recovery Center (MFI) on August 1, 2011. She tested negative for drugs on August 1 and August 8.

The court held a detention hearing on September 19, 2011. Father, as well as mother appeared. The court detained the child in foster care. The court ordered DNA testing for father.

Jurisdiction/disposition

The social worker filed a jurisdictional/dispositional report on October 11, 2011, recommending that the child be declared a dependent of the court. The social worker reported that mother's attendance and participation at MFI were good. She had tested negative in the program.

The social worker further reported that father had abused drugs for the past nine years, and he stated that his last use of drugs was in June 2011. Father reported that he and mother were together for about one year, and they separated when she was five months pregnant with the child. He had no plans to reunite with mother. Father lost his last job because of substance abuse issues, and he was currently unemployed. He said he had previously been in treatment three times to address his problem. On October 3, 2011, he started outpatient substance abuse services in Riverside County, and he tested negative that day. He also started individual counseling through Catholic Charities on October 6, 2011, and planned to start attending a parenting education class in November.

The social worker stated that the circumstances did not warrant providing the parents with reunification services, but the department was requesting services nonetheless. Father was still merely an alleged father, as results from the paternity test were pending, and the parents had both had services and parental rights terminated as to the child's sibling(s). (§ 361.5, subd. (b)(10) & (b)(11).) The social worker acknowledged that the parents both had extensive drug histories, and they needed time to work on maintaining sobriety and developing parenting skills. Mother also needed time to participate in individual counseling and to stabilize on her medication she was taking for her bipolar disorder. Father needed time to stabilize himself financially. The parents were willing to participate in services.

In an addendum report filed on November 3, 2011, the social worker reported that the paternity results showed that father was the father of the child. The social worker stated that the parents had been engaging in substance abuse and counseling services.

Mother had been participating in 12-step meetings, random testing, relapse prevention, and parenting education classes at MFI, since August 1, 2011. According to her MFI counselor, her participation and attendance were good, and she was meeting all the requirements of her recovery process. Mother had also enrolled in a one-year drug and alcohol rehabilitation program on June 3, 2011, at the Victorious Living Institute, and she was successfully participating in that program. The evidence showed that father enrolled in the Corona Substance Abuse Program on October 3, 2011. The parents were consistently visiting the child. Thus, despite their previous histories of failing to follow through on their case plans, the social worker felt that they would have a good chance of reunifying with the child, if provided with reunification services.

A contested jurisdictional hearing was held on November 8, 2011. The court designated father as the presumed father of the child. Counsel for father informed the court that father was in full compliance with his substance abuse program and counseling. He was maintaining his sobriety and testing negative. Counsel for mother explained that mother's first child, K.H., was conceived as a result of a sexual attack on mother; thus, mother chose not to reunify with him. Regarding her second child, H.O., mother did not "avail[] herself of services" because she was depressed over K.H. However, mother entered the MFI treatment program in August 2011, and she was now living at the Victorious Living Institute. Mother's counsel said mother was doing very well, and asserted that the department wanted to give mother an opportunity to try.

The court addressed county counsel, acknowledging that the department was asking the court to grant services. However, the court asked whether it had to find clear

and convincing evidence that it would be in the best interests of the child to do so. County counsel contended that it would be in the child's best interest, since the parents were participating in their case plans. The court found the allegations in the petition to be true, sustained the petition, and declared the child a dependent. The court then stated: "As provided for under Welfare and Institution Code Section 361.5, by clear and convincing evidence, the court finds mother . . . is a person described by . . . section 361.5, subdivision (b)(10) and (b)(11). [¶] The court does not find that there is clear and convincing evidence to indicate that services would be in the best interest of the child. There is no clear and convincing evidence to convince the court of that. Reunification services are denied as not being in the best interest of the child." The court further stated that it found father to be a person described under section 361.5, subdivision (b)(10). The court reiterated that it did not find that there was clear and convincing evidence that reunification services would be in the best interests of the child. The court set a section 366.26 hearing for March 7, 2012.

ANALYSIS

The Court Improperly Denied Reunification Services

Both parents argue that the court erred in denying reunification services since it failed to recognize their subsequent efforts to treat the problems that led to the removal of their other children. The department asserts that it showed that the parents were doing well in their substance abuse treatment programs, and it agrees that the court erred. Upon review of the record, we conclude that there was sufficient evidence to support a finding that they had made reasonable efforts, and that the court erred in denying services.

A. *Standard of Review*

"A court reviews an order denying reunification services under section 361.5, subdivision (b) for substantial evidence. [Citation.]" (*Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96 (*Cheryl P.*).)

B. *Mother and Father Have Made Reasonable Efforts to Treat Their Problems*

"There is a presumption in dependency cases that parents will receive reunification services. [Citation.] Section 361.5, subdivision (a) directs the juvenile court to order services *whenever* a child is removed from the custody of his or her parent *unless* the case is within the enumerated exceptions in section 361.5 subdivision (b). [Citation.] Section 361.5, subdivision (b) is a legislative acknowledgement 'that it may be fruitless to provide reunification services under certain circumstances.' [Citation.]" (*Cheryl P.*, *supra*, 139 Cal.App.4th at pp. 95-96.)

Under section 361.5, subdivision (b), services may be denied if the court finds by clear and convincing evidence "[t]hat the court ordered termination of reunification services for any siblings or half siblings of the child because the parent or guardian failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 . . . and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent or guardian . . . . [¶] [t]hat the parental rights of a parent over any sibling or half sibling of the child had been permanently severed . . . 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 . . . ." (§ 361.5, subd. (b)(10), (11).)

"Thus, section 361.5, subdivision (b)(10) has two prongs or requirements: (1) the parent previously failed to reunify with a sibling of the child; *and* (2) the parent failed to make reasonable efforts to correct the problem that led to the sibling being removed from the parent's custody." (*Cheryl P.*, *supra*, 139 Cal.App.4th at p. 96.) Similarly, section 361.5, subdivision (b)(11), has two prongs: the first one is that parental rights were severed as to a sibling of the child, and the second prong is the same as in subdivision (b)(10). (§ 361.5, subd. (b)(11).) "The 'no reasonable effort' clause provides a means of mitigating a harsh rule that would allow the court to deny services based only upon the parent's prior failure to reunify with the child's sibling 'when the parent had in fact, in the meantime, worked toward correcting the underlying problems.' [Citation.]" (*Cheryl P.*, *supra*, 130 Cal.App.4th at p. 97.)

"The 'reasonable effort to treat' standard 'is not synonymous with "cure."' [Citation.] The statute provides a 'parent who has worked toward correcting his or her problems an opportunity to have that fact taken into consideration in subsequent proceedings.' [Citation.] To be reasonable, the parent's efforts must be more than 'lackadaisical or half-hearted.' [Citation.]" (*K.C. v. Superior Court* (2010) 182 Cal.App.4th 1388, 1393 (*K.C.*).) Furthermore, "[i]f the evidence suggests that despite a parent's substantial history of misconduct with prior children, there is a *reasonable* basis to conclude that the relationship with the current child could be saved, the courts *should always attempt to do so*. Courts must keep in mind that '[f]amily preservation, with the

attendant reunification plan and reunification services, is the first priority when child dependency proceedings are commenced.' [Citation.] The failure of a parent to reunify with a prior child should never cause the court to reflexively deny that parent a meaningful chance to do so in a later case. To the contrary, the primary focus of the trial court must be to *save* troubled families, not merely to expedite the creation of what it might view as better ones." (*Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1464, italics added.)

The parents do not dispute that their reunification services or parental rights as to the child's sibling(s) were terminated. Rather, they argue that the court erred in denying them services as to the child because they had made a "subsequent reasonable effort" to treat their problems. The problems which led to the removal of H.O. were that mother kept an unsanitary home, and she had an open dependency case with regard to K.H. for general neglect, due to her substance abuse problem. We note that none of the problems that led to H.O.'s removal related to father. In fact, the petition alleged that the identity and whereabouts of H.O.'s father were unknown. When mother named father as H.O.'s father, his whereabouts were unknown. It is unclear when father appeared and started living with mother. However, when he did appear, both he and mother informed the social worker that he was not H.O.'s biological father. Nonetheless, he told the social worker he was willing to help mother raise H.O. Thus, on this record, it appears that the social worker gave him referrals to substance abuse services and counseling services because he admitted to drug use and said he would benefit from those services.

In any event, in the current dependency, the court simply stated that it found, by clear and convincing evidence, that mother was a person described by section 361.5, subdivision (b)(10) and (b)(11). It similarly stated that it found father to be a person described by section 361.5, subdivision (b)(10). The court failed to mention the issue of the reasonable efforts made by them to treat the problems that led to the removal of H.O. However, the evidence clearly showed that, by the time of the dispositional hearing, mother had been living at the Victorious Living Institute for five months, and she was successfully participating in the drug and alcohol rehabilitation program there. She had also been participating in various classes at MFI, since August 1, 2011, and was meeting all the requirements. The evidence further showed that father enrolled in a substance abuse program on October 3, 2011, and he was in full compliance. The parents were consistent with their visitation. In view of their efforts and progress, the social worker opined that they had a good chance of reunifying with the child. We conclude that the parents' efforts were more than "lackadaisical or half-hearted" and were, therefore, reasonable. (*K.C.*, *supra*, 182 Cal.App.4th at p. 1393.) Thus, the second prong of section 361.5, subdivision (b)(10) and (b)(11)—that the parents had failed to make reasonable efforts to treat their problems—was not met. As such, the court should have ordered reunification services for the parents pursuant to section 361.5, subdivision (a). (*Cheryl P.*, *supra*, 139 Cal.App.4th at p. 95.)

C. *The Court Erroneously Denied Services Under Section 361.5, Subdivision (c)*

Even though the court declared that it found mother and father to be persons described in section 361.5, subdivision (b)(10) and (b)(11), the court stated that it was

denying reunification services "as not being in the best interest of the child." The court, thus, actually denied services under section 361.5, subdivision (c). However, the court apparently misapplied that subdivision to this case.

Section 361.5, subdivision (c), provides in part: "The court shall not order reunification for a parent or guardian described in paragraph . . . (10) [or] (11) . . . of subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child." Section 361.5, subdivision (c) "gives the court discretion *to order* services *after* finding section 361.5, subdivision (b)(10) is applicable." (*Cheryl P.*, *supra*, 139 Cal.App.4th at p. 96, fn 6, italics added.) In other words, even if a court finds a parent to be a person described in section 361.5, subdivision (b)(10), thereby allowing it to deny services, "the court may still order reunification services be provided if the court finds, by clear and convincing evidence, that reunification is in the best interests of the child. (§ 361.5, subd. (c).)" (*In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 478; see also *In re Allison J.* (2010) 190 Cal.App.4th 1106, 1116.)

The court misapplied section 361.5, subdivision (c), by using it to *deny* services, not grant them. Section 361.5, subdivision (c), did not even become operative here because, as discussed *ante*, there was insufficient evidence that section 361.5, subdivision (b)(10), was applicable. (See *Cheryl P.*, *supra*, 139 Cal.App.4th at p. 96, fn 6.) In other words, because the section 361.5, subdivision (b)(10), exception did not apply here, the court could order services under section 361.5, subdivision (a), and there

was no need for it to look to section 361.5, subdivision (c). (See *Cheryl P.*, *supra*, 139 Cal.App.4th at pp. 95-96.)

DISPOSITION

The petitions for extraordinary writ are granted. Let a writ issue directing the juvenile court to (1) vacate its order denying reunification services to mother and father for the child and setting the matter for a section 366.26 hearing in the child's dependency case, and (2) issue a new order directing the department to provide six months of services to mother and father.[3]

HOLLENHORST
Acting P. J.

We concur:

KING
J.

CODRINGTON
J.

[3] We note father's request for an immediate stay of the section 366.26 hearing, but deny such request, in light of the disposition.