Filed 4/19/12 T.V. v. Super. Ct. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

T.V., Petitioner, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Real Party in Interest.	E055377 (Super.Ct.No. J228403) OPINION

ORIGINAL PROCEEDINGS; petition for extraordinary writ. Barbara A. Buchholz, Judge. Petition denied.

Brian Huerter for Petitioner.

No appearance for Respondent.

Jean-Rene Basle, County Counsel, and Jeffrey L. Bryson, Deputy County Counsel, for Real Party in Interest.

Petitioner T.V. (mother) challenges the juvenile court's order of January 10, 2012, setting a hearing under Welfare and Institutions Code section 366.26.[1] She argues the court used the wrong standard when it determined that her daughter T.V. (the child) should not be returned to her care, and that under the correct standard, the child would have been returned to her. Specifically, mother contends the juvenile should have used the "substantial risk of detriment" standard applicable when the parent is receiving reunification services, rather than the far less favorable "best interest" standard the court actually used pursuant to section 366.3, subdivision (h), when the child is already in a permanent plan. As discussed below, the juvenile court used the correct standard. We deny the writ petition.

FACTS AND PROCEDURE

Detention, Jurisdiction and Disposition

The child came to the attention of the Department of Children and Family Services (CFS) shortly after her birth when the hospital social worker initiated contact. The child was born full-term, but at the time mother had a methicillin-resistant strain of Staphylococcus aureus (MRSA), which is a highly contagious bacterial infection. Mother had not received prenatal care because she did not know she was pregnant until shortly before she delivered the child. The child tested positive for MRSA on August 3, 2009.

---

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Mother's five other children had been in placement since May 30, 2009, for severe neglect. The maternal grandfather was working on getting the family home into a habitable condition. The social worker visited the home, spoke with maternal grandfather, and concluded the home was not yet in habitable condition. On August 3, 2009, CFS filed a section 300 petition alleging mother had failed to protect the child because the child's five siblings had been removed from mother because of the unsafe condition of the home and the home had not yet been made safe. The juvenile court ordered the child detained on August 4, 2009.

At the jurisdiction and disposition hearing held on August 25, 2009, the child's father waived his rights to reunification and mother waived her right to challenge jurisdiction.[2] The court took jurisdiction over the child and ordered CFS to provide mother with reunification services. The court ordered that the child have five-hour, unsupervised visits with her five siblings and mother each week at the family home.

Six-Month Review Hearing

The six-month review hearing was held on January 19, 2010. The court found that mother had made substantial progress in her service plan, but returning the child to mother at that time would be detrimental.

---

[2] Only Mother is a party to this appeal.

The record[3] contains the report of a pediatric neurologist who diagnosed the child with microcephaly (small head) and developmental delays at the age of four months. The neurologist noted the foster mother's report that two of the child's five siblings have developmental delays or mental retardation. The child was receiving therapies through the Inland Regional Center

Twelve-Month Review Hearing

The 12-month hearing was held on July 19, 2010. Mother's five other children had been placed with her at home under family maintenance. The court found that mother had made moderate progress in her service plan and that returning the child at that time would be detrimental. The court authorized one unsupervised overnight visit at mother's home each week.

Eighteen-Month Review Hearing and Permanent Plan Review Hearings

At a special hearing held on September 16, 2010, the child's weekly overnight visits to mother's home were changed to unsupervised day visits because the child had received contusions, abrasions, and a mild concussion at one of her visits to mother's home. The foster mother kept a log of the child's visits in 2009 and 2010, which showed the child often projectile vomited and was sick and exhausted after visits. At the 18-month review hearing initially set for January 19, 2011, the juvenile court ordered visits to be stopped until mother and the child's five siblings all tested negative for MRSA.

---

[3] Several status review reports are missing from this record. CFS stated in its responsive brief that "augmenting the record this late in the proceedings, after Mother decided not to request augmentation, would not be warranted because it would unduly delay permanency for" the child.

The child had again contracted MRSA during visits to mother's home and it was affecting her development. The child's doctor told the social worker in September 2010 that continued exposure to MRSA could lead to pneumonia (which the child had already had) or meningitis, either of which could be fatal.

On March 23, 2011, the court dismissed jurisdiction over mother's other five children and issued a family law custody order.

The 18-month review hearing was eventually held on May 10, 2011. CFS initially recommended terminating reunification services and setting a section 366.26 hearing. Mother was requesting continued services because of exceptional circumstances. After an in chambers conference, the court found that mother had failed to make substantive progress in her service plan and that returning the child at that time could be detrimental. The court ordered the permanent plan to be placement with the foster parents with a specific goal of adoption. The court terminated reunification services. The court ordered, "Services to the mother will be under the minor's permanent plan, as ordered, for maximum of six months." The court authorized mother and the child's siblings to visit with her for one hour a week at the CFS office once they all tested negative for MRSA. The court continued the matter to November 10, 2011, for the permanent plan review hearing.

Permanent Plan Review Hearing – Section 366.26 Hearing Set

At the permanent plan review hearing on November 10, 2011, the parties agreed to return on December 12, 2011 for a contested hearing. Counsel for the child was not available on December 12, so the matter was reset for January 10, 2012.

The contested permanent plan review hearing was finally conducted on January 10, 2012. CFS introduced into evidence the status review report dated November 10, 2011. In the status review report, CFS reported that the child resumed visits with mother and her five siblings after all tested negative for MRSA on July 20, 2011. The visits went well. CFS recommended holding a section 366.26 hearing to consider terminating mother's parental rights and amending the permanent plan to allow the foster parents to adopt the child.

At the January 10, 2012 hearing, mother testified that she was living in a three-bedroom home in Victorville with her five children and a male friend. The male friend slept on the couch in the living room. Mother asked the friend if he had a criminal background and he said he had only one arrest on a minor matter when he was in the military. Mother had not told the social worker about the roommate because the case on her other five children had been closed and she did not have the child in her custody. Mother did not have a car or drivers license. She depended on her father for transportation. He lived in Azusa. Mother was aware that the child was scheduled for therapy three times a week, that she might need multiple surgeries, and required additional care, but believed she could properly care for the child.

The social worker testified that the child had been with her current caretakers since she was one day old and was very bonded with and attached to them. She believed it would be detrimental to the child to remove her from that home and to place her with mother. The caretakers wished to adopt the child. She also testified as to the child's medical issues. The child has microcephaly, which means that her skull is not growing.

If the child's brain grows, she will need surgery to remove part of the skull. The skull would have to remain open so the child would need to wear a helmet. In addition to medical appointments, the child was having occupational therapy and speech therapy three times a week because she does not speak well and has trouble moving her hips properly. The child's fingers and toes curl up on the ends. The social worker opined that the child's medical needs were beyond mother's ability to care for her. She also testified that she had spoken with the maternal grandfather and he indicated he would like to return to work, but could not while he was providing transportation for mother to attend the child's medical and therapy appointments.

The juvenile court commented that it had extended mother's services beyond the permissible 18 months by offering an additional six months of services through the permanent plan, in the hopes mother could make enough progress to reunify with the child. However, the court also commented, mother had not made any progress in visitation at all, and was still doing once weekly supervised visits. The court referred to the neurologist report from May 2011, in which the neurologist recommended against changing caregivers because the child needed structure, consistency, and nurturance if she were to improve. The court concluded, "*It is in the best interest of the minor* to consider termination of parental rights at a two-six hearing." (Emphasis added.) The juvenile court ordered the permanent plan changed from foster care to adoption, and it set a section 366.26 hearing to consider terminating mother's parental rights. This writ petition followed.

DISCUSSION

Mother argues the juvenile court should have used the "substantial risk of detriment" standard for determining whether to return a child to the parents that is applicable to hearings that take place at six-month intervals while the parent is receiving family reunification services. This standard is: "The court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (§366.21, subds. (e) [six-month review], & (f) [12-month review].)

Mother does not provide any case law for this assertion, arguing only that "the trial court's implied state of mind, as evidenced below, suggests the wrong standard was applied." Mother then points to the juvenile court's comment at the January 10, 2012 permanent plan review hearing that, "we [extended] services to the mother through this ppr [permanent plan review] period with hopefully, the goal that mother could reunify eventually with the minor." This means nothing regarding the proper standard for setting the section 366.26 hearing. If the court had believed at the 18-month review hearing that there was a *substantial chance* mother could reunite with the child in the following six months, it could have offered her continued *reunification* services. Instead, the court chose to offer mother services under the permanent plan, but only on the off chance she might possibly succeed in getting her act together enough to parent the child. Sadly, as

the court noted in providing the reasoning for its decision, mother did not make any progress at all.

The record makes very clear that the hearing held on January 10, 2012, was a permanent plan review hearing, at which the juvenile court properly used the "best interest" standard set forth in section 366.3, subdivision (h).[4] At the 18-month review hearing held on May 10, 2011, the court approved an agreement between CFS and mother that allowed mother to participate in services under the permanent plan, while postponing the setting of the section 366.26 hearing until the permanent plan review. The juvenile court did everything necessary to establish that: 1) reunification services were terminated; and 2) the next review hearing would be conducted as a permanent plan review. Mother provides no substantial support in the record or in case law for her assertion that the juvenile court used the wrong standard in deciding whether to return the child to mother's care. For this reason, we deny the petition.

---

[4] Section 366.3, subdivision (h), provides in part, "The court shall order that a hearing be held pursuant Section 366.26, unless it determines by clear and convincing evidence that there is a compelling reason for determining that a hearing held pursuant to Section 366.26 is not in the best interest of the child because the child is being returned to the home of the parent, the child is not a proper subject for adoption, or no one is willing to accept legal guardianship."

DISPOSITION

The petition is denied.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

RICHLI
J.