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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

T.W. et al.,

Petitioners,

v.

THE SUPERIOR COURT OF THE
COUNTY OF SAN BERNARDINO,

Respondent;

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Real Party in Interest.

E056728

(Super.Ct.Nos. J234685 & J234686)

OPINION

ORIGINAL PROCEEDINGS; petition for extraordinary writ. Gregory S. Tavill,
Judge. Petitions denied.

Valerie Ross for Petitioner T.W.

Jasmine Pico for Petitioner J.F.

No appearance for Respondent.

Jean-Rene Basle, County Counsel, and Jamila Bayati, Deputy County Counsel, for

Real Party in Interest.

Father, T.W., and mother, J.F., seek review of the juvenile court's order terminating reunification services and setting a hearing pursuant to Welfare and Institutions Code,¹ section 366.26, for their minor children T.W. and M.W. (the children). The children were removed from the parents' custody when their six-year old half sister, C.V., reported being sexually molested by father and her cousin. In addition to the molestation allegation, the dependency was grounded on the parents' substance abuse and domestic violence. During the reunification period, the parents made some progress in some areas, but mother had never disclosed her substantial mental health issues and both parents remained in denial about C.V.'s sexual abuse allegations, resulting in the termination of services and the ultimate setting of a hearing to select and implement a permanent plan.²

In his writ petition, father maintains that the children should have been placed in his care on a family maintenance plan, while mother argues that the court erred in terminating her reunification services and refusing to return custody to her at the hearing. We affirm.

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

² An order terminating services and selecting a planned permanent living arrangement (PPLA) had originally been adopted by the juvenile court during the 18-month review hearing pursuant to section 366.22, held on May 25, 2012. However, that order was vacated after father filed his notice of appeal therefrom, and a new order was made terminating services and setting the section 366.26 hearing. Because the proceedings relating to the May 25, 2012, were rendered moot by the July 23, 2012, order, we dismissed father's appeal in case No. E056529, *In re T.W., et al.*

BACKGROUND

This dependency originated when C.V., mother's six-year-old child from a prior relationship, was taken to the hospital by her maternal grandmother on August 24, 2010. The maternal grandmother informed the hospital staff that the injury was sustained when she fell down some stairs a day or so earlier. However, the grandmother was concerned because the child's mother used drugs and mother's live-in boyfriend, T.W., Sr. (father of mother's two younger children) was abusive. The parents had a prior history with the San Bernardino Children and Family Services (CFS) agency for various unfounded or inconclusive allegations.

The medical examination revealed the vaginal laceration and hymenal oddities. The findings were not specific for sexual abuse but the child's history raised concerns about neglect and sexual abuse. C.V. had fallen on some stairs and sustained vaginal injuries. C.V. was interviewed following the medical examination and informed the social worker that both her six-year-old cousin T., and her "daddy" (T.W., Sr.), had touched her "down there" at the paternal grandmother's residence in Newberry Springs. A detention warrant was obtained from the juvenile court resulting in the temporary removal of C.V., along with her two younger half-siblings, M.W. and T.W., Jr.

Juvenile dependency petitions were filed with respect to M.W., age four, and T.W., Jr., age two, alleging that they were at risk of abuse or neglect due to the parents' failure to protect due to mother's substance abuse and ongoing acts of domestic violence (§ 300, subd. (b)), sexual abuse of C.V. (§ 300, subd. (d)), and the abuse of a sibling. (§ 300, subd. (j).) At the detention hearing, the juvenile court ordered the children

detained from their parents' custody upon a finding of a prima facie case. At that hearing, the juvenile court also sustained father's demurrer to an allegation that substance abuse prevented him from properly parenting the children.

The jurisdictional hearing commenced on January 25, 2011. At the conclusion of the testimony, the juvenile court found that C.V. had been touched by father but that he had not caused the laceration in her vagina. The court then made true findings under section 300, subdivisions (b), (d), and (j), as to M.W. and T.W., Jr. The children were declared dependents, and were removed from their parents' custody; the court approved a reunification plan as to M.W. and T.W., Jr., ordering both parents to participate in it. Father timely appealed the jurisdictional and dispositional findings and orders. On November 15, 2011, we affirmed the judgment. (*In re T.W., et al.; San Bernardino County Children and Family Services v. T.W.* (Nov. 15, 2011, E052867) [nonpub. opn].)

By the time of the six-month review hearing, the parents had complied with some but not all of their service plans. CFS recommended continuation of reunification services based on father's progress reports, although the social worker noted he had never taken responsibility for the sexual abuse of his stepdaughter. Based on a mediated agreement and the social worker's recommendations, the court continued services and gave CFS authority to liberalize visits.

During the next review period, the parents failed to make progress to rectify the problems that brought the family to the attention of CFS and the court, namely, the areas of substance abuse and sexual abuse. Mother continued to have a substance abuse problem and failed to complete any program. Although father complied with some of his

services and was engaged in therapy, he continued to deny sexually abusing C.V. Visits went well and both children were described as bonded to the parents. Nevertheless, CFS recommended that services be terminated and that a hearing pursuant to section 366.26 be scheduled.

The 12-month review hearing was continued in order to obtain a report or letter from father's therapist regarding risk factors from the prior sexual abuse reports. Father's therapist reported that father had made excellent progress in all of the treatment areas except the issue of sexual abuse of C.V. However, father's therapist concluded father was a low risk for sexual abuse of his children, but would be a high risk if he were to resume substance abuse. The social worker concluded that the parents, while willing to complete parts of the service plan, had failed to address the problems that brought the family to the attention of the court, which were substance abuse and sexual abuse.

The juvenile court continued the 12-month review hearing a second time to obtain additional opinions about father's history, progress, and risk factors. The new hearing date was also scheduled as an 18-month review hearing. (§ 366.22.) A psychological evaluation pursuant to Penal Code section 288.1 was prepared, using the actuarial assessment instruments to determine his potential for reoffending. It concluded that father was not capable of safely and competently parenting children and presented an unacceptable risk of reoffense. The 12-month review hearing was continued once again to give father an opportunity to obtain another report.

On May 25, 2012, the court conducted the contested 18-month review hearing. In his testimony, father denied molesting C.V. and indicated that what he had learned about

sexual abuse from his therapy sessions related to what was considered sexual abuse, such as kissing the mother or having sex in front of the children. However, father demonstrated he had successfully completed the other aspects of his reunification plan. As to mother, the only remaining protection issue was her unwillingness to acknowledge the sexual abuse findings made by the court.

After hearing testimony and the arguments of counsel, the court terminated reunification services to the parents, but determined that it was not in the best interest of the minors to consider termination of parental rights. Over the objections of county counsel and the minors' attorney, the court ordered a PPLA with the children in their current placement, with the goal of returning them to mother's custody. Reunification services to father were terminated, but mother was to receive services under the children's plan. On June 20, 2012, father timely appealed.³

On July 23, 2012, the juvenile court reconsidered the orders made on May 25, 2012, and vacated them, concluding that it lacked authority to order a permanent plan of PPLA at the section 366.22 hearing. Prior to the hearing, the social worker filed an interim review report indicating mother had never complied with the therapy portion of her reunification plan, attending only one session in June 2012, although she had completed an outpatient substance abuse program.

Additionally, the social worker learned from mother's psychiatrist that she suffered from mental illness in addition to bipolar disorder, namely schizoaffective

³ On August 29, 2012, we issued an order on our own motion that the writ petition in case No. E056728 would be considered with the appeal in case No. E056529.

disorder, which continues to impair her parenting ability and put the children at risk for further abuse. Mother had not made CFS aware of her mental health issues. The medication prescribed for mother's mental illness apparently was ineffective in eliminating the auditory hallucinations she experienced. Additionally, mother's behavior at visits showed poor judgment and lack of empathy for the oldest child, C.V., the victim of the molestation, in contacting father during the visits and showing the children pictures of the step cousin who had molested C.V.

The court granted county counsel's request to reconsider the prior order and, after vacating the previous order, the court entered a new order terminating reunification services for both parents, and setting a hearing for the selection and implementation of a permanent plan pursuant to section 366.26. Both parents filed notices of intent to file extraordinary writ petitions.

DISCUSSION

Father's petition challenges the juvenile court's finding of detriment and argues that the children should have been returned to his custody at the section 366.22 hearing. In father's opinion, the only basis for the juvenile court's detriment finding is the father's failure to publicly admit that he touched his six-year-old stepdaughter inappropriately. Mother's writ petition basically replicates this argument in that mother argues that the basis for the detriment finding against her was due to her failure to acknowledge that father sexually abused her daughter and her failure to attend counseling to address the sexual abuse. We disagree.

Section 366.22, subdivision (a), governs the conduct of the 18-month review

hearing. It provides that the child shall be returned to the custody of the parent unless the court finds, by a preponderance of the evidence, that return would be detrimental.

(*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 704.) The section further provides that unless the court determines that return is likely within six months, the failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental.

In addition, the code section provides that if the child is not returned to a parent or legal guardian at the permanency review hearing, the court shall order that a hearing be held pursuant to section 366.26 in order to determine whether adoption,⁴ or, in the case of an Indian child, in consultation with the child's tribe, tribal customary adoption, guardianship, or long-term foster care is the most appropriate plan for the child.

(§ 366.22, subd. (a).)

Absent extraordinary circumstances, the 18-month review hearing constitutes a critical juncture at which “the court must return children to their parents and thereby achieve the goal of family preservation or terminate services and proceed to devising a permanent plan for the children.” (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 596, citing *In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1788.) Although the goal of the juvenile law is to reunite children with their parents whenever possible, this

⁴ In our separate opinion in case No. E056529, *In re T.W., et al.*, we addressed the propriety of the juvenile court's order reconsidering and vacating the order made on May 25, 2012, which purported to select a permanent plan of PPLA, without setting a section 366.26 hearing.

reunification must be accomplished within 18 months from the time the child is originally taken from his or her parents' custody. (*Katie V.*, at p. 596.) This strict time frame, in turn, recognizes that a child's needs for a permanent and stable home cannot be postponed for an extended period without significant detriment. (*In re Joshua M.* (1998) 66 Cal.App.4th 458, 474.)

The focus of reunification services is to remedy those problems which led to the removal of the children. (*Katie V. v. Superior Court*, *supra*, 130 Cal.App.4th at p. 598, citing *In re Michael S.* (1987) 188 Cal.App.3d 1448, 1464.) Neither parent claims that services were unreasonable, so we do not need to examine whether CFS provided reasonable services which were tailored to the particular needs of the family.

CFS has the burden of establishing detriment. (§ 366.22, subd. (a); *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1345.) The risk of detriment must be substantial, such that returning a child to parental custody represents some danger to the child's physical or emotional well-being. (*David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 788.) In evaluating detriment, the juvenile court must consider the extent to which the parent participated in reunification services (*Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1748), and the efforts or progress the parent has made toward eliminating the conditions that led to the children's out-of-home placement. (§ 366.22, subd. (a); *In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1141-1142.)

We review the record to determine whether substantial evidence supports the court's finding that the children would be at substantial risk of detriment if returned to the custody of either parent. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 763-

764.) We review factual findings in the light most favorable to the juvenile court's order. (*In re H.B.* (2008) 161 Cal.App.4th 115, 119, citing *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430.) In the presence of substantial evidence, we are without the power to reweigh conflicting evidence and alter a dependency court determination. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

We first address mother's challenges to the court's decision to terminate services and its refusal to return the children to her care. The record demonstrates that the mother has a number of psychological or psychiatric issues which were not disclosed to CFS during the pendency of the reunification plan. Mother failed to attend any therapy sessions other than a single session in June of 2012, a month prior to the hearing that is the subject of this writ proceeding. Her behavior during visitation with the children demonstrated she lacked empathy for her oldest daughter, the subject of the molestation allegation. Mother experienced auditory hallucinations despite taking several psychotropic medications.

These problems are substantial and posed a substantial risk of detriment to the children. The fact that mother did not disclose her mental illness or participate in therapy during the entire reunification period shows her unwillingness to cooperate in the reunification efforts. Mother also remained in denial respecting the molestation of C.V., which posed a serious question respecting her ability to protect the two younger children. Under the circumstances relating to these unresolved and substantial issues, the juvenile court's finding of detriment and its decision not to return the children to her custody were supported by substantial evidence.

Father claims the sole basis for the detriment finding was his failure to publicly admit that he touched his six-year-old daughter on her vagina, notwithstanding the expert testimony he presented that indicated a person who fails to admit could still benefit from services. This argument would have been better presented at a disposition hearing because at the section 366.22 hearing, the issue is not whether a parent *could* benefit from services, but, rather, whether the parent *has* benefitted from services.

Father was offered services to address the issue of molestation but he did not address it, raising a serious question as to his ability to protect the children or recognize the boundaries of appropriate and inappropriate touching. Learning that kissing the mother or having sex with her in the presence of children is interpreted by some as sexual abuse does not address the risk of sexually inappropriate conduct with the children. As a major issue in the dependency, father's intractable resistance to treatment was properly treated as detriment. Father's inability to benefit from services was demonstrated by his past performance; by the time of the section 366.22 hearing, it is too late to address whether a parent "could" benefit from services.

Additionally, although father presented the expert testimony that he poses a low risk of reoffending to support his assertion that there was no substantial detriment, this testimony was not the only evidence the juvenile court had to consider. Another expert evaluated father and concluded that father posed a low-moderate to medium risk of reoffending. Along with father's failure to take responsibility for his behavior, this examiner also noted that father's preoccupation with his own needs, as well as his lack of

emotional closeness with his children, supported a conclusion that he may sometimes relegate a child's legitimate needs to secondary importance.

Other evidence considered by the court included the report of father's therapist, who determined that although father was not a risk to his children, his opinion would change if father resumed his substance abuse. Additionally, father testified that he would love to get back with the mother. There was substantial evidence to support the juvenile court's finding of detriment.

Since return of the children to the parents' custody was not possible, family maintenance services were a moot issue. Both parents have failed to demonstrate that the orders terminating services and setting the section 366.26 hearing were error, given that the findings of detriment and the determination that return was unlikely within six months were supported by substantial evidence.

DISPOSITION

The petitions are denied.

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RAMIREZ
P. J.

We concur:

KING
J.

MILLER
J.