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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

D.S.,

Petitioner,

v.

THE SUPERIOR COURT OF
SAN BERNARDINO COUNTY,

Respondent;

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Real Party in Interest.

E059136

(Super.Ct.Nos. J249606, J249607 &
J249608)

OPINION

ORIGINAL PROCEEDINGS; petition for extraordinary writ. Cheryl C. Kersey,
Judge. The petition is denied.

Rebecca S. Lohman for Petitioner.

No appearance for Respondent.

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

Petitioner D.S. (hereinafter “Mother” to distinguish her from the youngest minor) challenges the order of the superior court denying family reunification services and setting a selection and implementation hearing pursuant to Welfare and Institutions Code section 366.26.¹ We find no error and deny the petition.

STATEMENT OF FACTS

Mother has given birth to a total of eight children. Three—A.H., A.W., and S.A.—have been “adopted out” after reunification failed. Two others live with relatives, one being Mother’s sister, who Mother describes as a methamphetamine smoker who will “never stop.” The other child lives with the paternal grandmother. The current proceedings involve Mother’s three youngest children, D.S., R.H., and F.H. (The minors.)²

The minors came to the attention of the Children and Family Services department (CFS) after both Mother and D.S. tested positive for methamphetamine after his birth. Mother planned to live with her sister after the birth; after D.S. was detained, F.H. was located with Mother in a motel with her sister and a registered male sex offender.

¹ All subsequent statutory references are to the Welfare and Institutions Code unless otherwise specified.

² It appears that all three minors are the children of F.H., although his name is not on D.S.’s birth certificate. F.H. was never located during the proceedings below and he is not a party to this petition.

The jurisdictional/dispositional report recommended that Mother *not* be provided with reunification services. Mother had admitted to the social worker that she had a long-standing addiction to methamphetamine and that she had used methamphetamine the day of D.H.'s birth. Although Mother had been ordered to submit to drug testing at the detention hearing on May 29, 2013, she had not done so, claiming a "misunderstanding." She also told the social worker that, had she tested at that time, she would "only" have tested positive for marijuana. Mother admitted that she had used methamphetamine only a few days before speaking with the social worker, attributing it to "lack of familial support and the stress of having the children . . . removed"

Although the circumstances leading to the placement of Mother's two oldest children are not clear—we agree with CFS that Mother's drug abuse may be presumed to have contributed to the decisions—CFS was able to provide some court records involving S.A. and A.W. These records showed that dependency petitions were filed in 2001 as to S.A. and in 2007 as to A.W. In both cases Mother's drug use was the major issue impacting her ability to care for the children. CFS also reported that proceedings were initiated with respect to A.H. in 2009, and that both she and A.W. had tested positive for methamphetamine at birth. Mother had failed to reunify with any of these three children and all had been adopted.³

³ The three minors in this case have been placed with the paternal grandparents, who wish to adopt them.

By the time of the jurisdictional/dispositional hearing on July 10, 2013, it had also been determined that in 2009 Mother was charged with possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and, following a plea of guilty, was assigned to a “drug court” program. In May 2012 the criminal court found that Mother had successfully completed “all terms of drug court program,” including an outpatient program and AA/NA meetings, and dismissed the charge while terminating probation.

At the hearing, however, Mother admitted that she had relapsed about a month after the charge was dismissed, first with marijuana and then methamphetamine, attributing this to the recent death of her mother and the termination of her parental relationship with the “middle three” children. On cross-examination, Mother also admitted that she had been given referrals for outpatient drug programs at the time of the detention hearing on May 29, but had not enrolled.

After finding the minors to be dependent children, the trial court agreed with CFS’s recommendation that Mother not be provided with reunification services. It relied on the facts that Mother had failed to reunify with her three older children and that her parental rights to siblings or half siblings of the minors had been terminated; it further found that she had not made reasonable efforts to treat the problems leading to termination of services and her parental rights. (§ 361.5, subds. (b)(10), (11).) As an additional basis for denying services, the court also found that Mother had a

long-standing substance abuse problem and had resisted court-ordered treatment during the three-year period prior to filing the petitions in this case. (§ 361.5, subd. (b)(13).)

This petition followed. Mother contends that the cited statutory subdivisions were improperly applied to her, relying upon her participation in and completion of the “drug court” program beginning in late 2009 or early 2010.

DISCUSSION

We acknowledge that there is a presumption in dependency cases that parents will receive reunification services. (*Riverside County Dept. of Public Social Services v. Superior Court* (1999) 71 Cal.App.4th 483, 487.) However, section 361.5, subdivision (b), reflects the legislative realization that in some cases, providing reunification services is so unlikely to succeed that it would be a wasteful use of scarce governmental resources. (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744.) Our task is to decide whether the trial court correctly determined that this is such a case, and we find that it is.

A.

Subdivision (b)(10) of section 361.5 reads in pertinent part that services may be denied to a parent as to whom “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 . . . 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” Subdivision (b)(11) is similar with

respect to the “reasonable efforts” requirement, but applies when “the parental rights of a parent over any sibling or half sibling of the child had been permanently severed.”⁴

As CFS points out, services were terminated with respect to two of Mother’s older children, and Mother’s problems in all cases were drug-related. This indicates that no, or at least inadequate, progress was made during the dependency periods. The issue therefore is whether Mother subsequently made a “reasonable effort” to address the effect of her drug use on her parenting ability.

As noted above, as a consequence of the criminal charge against her, Mother participated in a “drug court” program that included, at a minimum, some kind of outpatient program and attendance at NA/AA meetings. As Mother received a “19-month clean-and-sober” certificate, we may assume that it also included drug testing. Nevertheless, very shortly after her discharge from the program, Mother relapsed and was unable to refrain from methamphetamine use even after she became pregnant with D.S. Thus, it is apparent that Mother’s efforts following the termination of parental rights to her other three children were unsuccessful.

⁴ Thus, subdivision (b)(10) will apply to the exclusion of subdivision (b)(11) if the parent was offered reunification services and failed to reunify, but it was found in the child’s best interest not to terminate parental rights. (See section 366.26, subds. (b) & (c).) Subdivision (b)(11) will apply to the exclusion of subdivision (b)(10) if reunification services with respect to the sibling or half sibling were never offered and parental rights have been terminated. In many cases, such as this one, both subdivisions can apply because Mother was offered reunification services with respect to A.H. and S.A. and failed to reunify; her parental rights were severed with respect to these children and A.W., as to whom services were not offered.

However, it is agreed that the “reasonable effort to treat” standard is not synonymous with “cure,” and that the requirement focuses on the extent of a parent’s efforts rather than mandating any specific level of progress. (*R.T. v. Superior Court* (2012) 202 Cal.App.4th 908, 914 (*R.T.*); *Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 99.) On the other hand, *R.T.* also makes clear that a parent who struggles after making even reasonable efforts to resolve problems cannot simply rely on those unsuccessful attempts.

In *R.T.*, the mother had a long-standing substance abuse problem that had resulted in the termination of her parental rights to one child in 2006. With respect to the subject child, dependency proceedings were begun in 2009 but the minor was returned to his parents later in the year; the mother had completed a six-month program (evidently for substance abuse) and had remained clean for about a year. However, by July 2011 she and the father were homeless and abusing multiple substances. (*R.T., supra*, 202 Cal.App.4th at pp. 911-912.) Following the minor’s removal at that time, the mother began some sort of program, attended “a few” 12-step meetings, and signed up for a bed at “Teen Challenge.”

The appellate court pointed out that the mother took *no* steps to address her problems after the 2006 termination of parental rights until the subject child was removed in 2009. It also noted that despite her completion of one six-month program and a substantial period of sobriety, she relapsed into drug use and wound up in a homeless camp spending whatever cash she and the father had on drugs—the same situation from which her older child had been removed. (*R.T., supra*, 202 Cal.App.4th at p. 915.)

Viewing this history in its totality, the court found that reasonable efforts to treat her substance abuse issues had *not* been made and that services were properly denied under section 361.5, subdivisions (b)(10) and (11).

R.T. is highly instructive here. Had Mother been able to maintain her sobriety after her completion of the “drug court” program, even suffering occasional brief relapses that did not endanger her children, we might find that she had made reasonable efforts. It is well known that the path to sobriety is a long one and immediate success cannot always be guaranteed, and an isolated incident representing a temporary lapse in judgment might be forgiven. (See *In re N.M.* (2003) 108 Cal.App.4th 845, 856; generally *Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1456-1457, 1464.)⁵ But here, Mother succumbed to “stress” and returned to the use of methamphetamine and marijuana as soon as the threat of jail was removed. She continued to use drugs during her pregnancy with D.S., thus evidencing a callous disregard for the safety and health of her unborn child. She made no apparent efforts to seek assistance in combating her substance abuse issues after she was discharged from drug court.

In our view, although a parent’s obligation to make “reasonable efforts” may not be subject to a “bright-line” success or failure evaluation, the efforts must at least be ongoing so long as the problems have not been resolved. That is, the parent must demonstrate a continuing commitment and a willingness to try and overcome initial failures. Efforts that are reasonable at one point, when substantial success has been

⁵ This case involves the same parties as those in the Supreme Court case of the same name cited above, but different issues.

achieved, do not continue to be “reasonable” when the parent gives up all his or her gains and makes no attempt to arrest the backsliding.

We therefore conclude that services were properly denied under section 361.5, subdivisions (b)(10) and (11).⁶

We therefore need not consider whether denial of services was appropriate under subdivision (b)(13).⁷

⁶ Mother argues that because the trial court made a comment, which indicated its belief that it was conceivable that Mother might benefit from “an intensive inpatient treatment,” the court should have attempted to salvage the family by ordering her to participate in such a program. First, although the court indicated that no such program had been made available to Mother, the record does not confirm this. Secondly, this speculation by the trial court—which appears to be overly optimistic—does not create an entitlement to services where a parent clearly falls within the letter and spirit of subdivisions (b)(10) and (11).

⁷ That subdivision applies when the parent “has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court’s attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible.” With respect to the first clause, CFS therefore uses a start date of May 28, 2010—three years before D.S.’s detention. Noting that Mother was ordered into treatment in the proceedings relating to A.H. on August 24, 2009, CFS *hypothesizes* that the order was still in effect beyond May 28, 2010. It then argues that subdivision (b)(13) applies to orders made *before* the start date but continuing in effect within the three-year period. We might agree, but we decline CFS’s invitation to “fairly infer” that the 2009 order remained effective well into 2010. Although services in the A.H. case were terminated on August 17, 2010, there is no evidence that Mother was actually “resisting treatment” at any time after May 28. For all we know she may have been participating but making insufficient progress to justify additional services. She also clearly *was* participating in, rather than resisting, the treatment ordered by the criminal court.

CFS also relied on the drug treatment orders from 2002 with respect to S.A. Arguably this, coupled with her behavior in the A.H. matter (we assume, *arguendo*, that the three-year period is not applicable to the second clause of subdivision (b)(13))

[footnote continued on next page]

DISPOSITION

The petition is denied.

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HOLLENHORST

Acting P. J.

We concur:

KING

J.

CODRINGTON

J.

[footnote continued from previous page]

satisfied the “two failures” clause. Again, however, we would hesitate to so conclude because the record does not reflect sufficient circumstances. For example, the minute order from the S.A. case simply recites that the court “adopts findings listed on page 10 & 11 . . . of the status review report,” but the record does not include those findings. Thus, although we could infer that Mother failed to resolve her substance abuse issues (Mother was apparently incarcerated at the time), we cannot conclude that she failed or refused to comply with programs which were “available and accessible.”