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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

A.M.,

Petitioner,

v.

THE SUPERIOR COURT OF FRESNO
COUNTY,

Respondent;

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Real Party in Interest.

RAYMOND L.,

Petitioner,

v.

THE SUPERIOR COURT OF FRESNO
COUNTY,

Respondent;

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Real Party in Interest.

F063929

(Super. Ct. No. 10CEJ300028-1)

OPINION

F063930

(Super. Ct. No. 10CEJ300028-1)

THE COURT*

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Jane Cardoza, Judge.

Fresno Dependency Office, and Samuel D. Kyлло, for Petitioner A.M.

Fresno Child Advocates, and Elizabeth E. Cullers, for Petitioner Raymond L.

* Before Levy, Acting P.J., Cornell, J., and Kane, J.

No appearance for Respondent.

Kevin Briggs, County Counsel, and William G. Smith, Deputy County Counsel, for Real Party in Interest.

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Petitioners, A.M. and his two-year-old son Raymond, seek extraordinary writ review from the juvenile court's orders issued at a contested 18-month review hearing. (Welf. & Inst. Code, § 366.22.)¹ A.M. challenges the juvenile court's findings that Raymond cannot be placed in his care without risk of detriment and that he was provided reasonable services and its order terminating his reunification services. Raymond, through appellate counsel, challenges the juvenile court's decision not to place him with paternal relatives. We consolidated their writ petitions and deny relief.

PROCEDURAL AND FACTUAL SUMMARY

In February 2010, newborn Raymond was taken into protective custody by the Fresno County Department of Social Services (department) after his mother, Jessica, tested positive for methamphetamine and marijuana. Jessica identified two possible fathers for Raymond, including A.M. (hereafter "father") who she said was not present at the time of Raymond's birth and had no contact with Raymond. The department filed a dependency petition on Raymond's behalf consisting of a single count, alleging that Jessica's drug abuse placed Raymond at a substantial risk of harm. (§ 300, subd. (b).) The petition indicated that father's whereabouts were unknown.

The juvenile court ordered Raymond detained and the department placed two-week-old Raymond with foster parents, Mr. and Mrs. V., where he would remain

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

throughout these proceedings. In March 2010, the department filed a declaration of due diligence for father.

In May 2010, the juvenile court ordered reunification services for Jessica, but not for either of the alleged fathers whose whereabouts remained unknown. The juvenile court set the six-month review hearing for November 2010.

Jessica visited Raymond several days after he was removed from her custody and then had no further contact with him and only sporadic contact with the department. The department recommended that the juvenile court terminate her services at the six-month review hearing in November 2010, and in October 2010, sent Jessica notice of its recommendation.

In November 2010, father appeared for the first time at the six-month review hearing. The juvenile court appointed counsel for him and ordered paternity testing. The court also ordered the department to prepare an addendum report and continued the hearing.

In January 2011, the juvenile court found biological paternity as to father and continued the matter to February for the department to assess him for services. Father met with social worker Lindsey VerNooy to discuss family reunification services. Ms. VerNooy asked a Spanish-speaking social worker to translate, as father speaks primarily Spanish. Ms. VerNooy asked father when he first became aware that Jessica delivered Raymond. He said they lived together during her pregnancy and around the time she was due to deliver, she left and did not return. He said he knew she gave birth in January 2010, but he did not know where she was and her family would not give him any information. He said he attempted to go to the hospital at the time of the delivery, but hospital security instructed him to leave. He said Jessica called him when Raymond was detained, but he could not remember when that occurred. He said Jessica called him again in September 2010 and told him he needed to attend the next dependency hearing

so that she would not “lose the baby.” He had no explanation as to why he waited until November to appear. He said he was not aware that Jessica was using drugs while they lived together.

Father also told Ms. VerNooy that he was employed part time and shared an apartment with other males. He said he did not have any other children and was not in a relationship with Jessica, but spoke to her occasionally by telephone, which she initiated.

The department opined that it would not be in Raymond’s best interest to provide father reunification services because Raymond did not know him and was attached to his foster parents who wanted to adopt him.

In February 2011, the juvenile court set a contested six-month review hearing which was continued and ultimately conducted in May 2011. Meanwhile, father signed a declaration of paternity and asked the juvenile court to elevate him to presumed father status and provide him reunification services.

In April 2011, Ms. VerNooy and a Spanish-speaking social worker met with father. Ms. VerNooy explained to him that the department wanted to offer him parenting classes taught in Spanish and a mental health assessment. Ms. VerNooy asked father about his relationship with Jessica. He denied any contact with her, but said that he occasionally accompanied her to her appointments and took her for drug testing and to a “clinic.”

In late April 2011, father had his first supervised visit with Raymond. Ms. V. accompanied Raymond to the visit and waited outside the visitation room while father and Raymond visited alone. However, within 15 minutes, Raymond was crying hysterically and it appeared to the social worker supervising the visit that he was not breathing properly so she took Raymond and father into the waiting room where Mrs. V. was sitting. As soon as Raymond saw Mrs. V., he reached for her. The rest of the visit was conducted with Mrs. V. present. During the visit, father attempted to interact with

Raymond by approaching him with toys. However, each time he did so, Raymond cried and went to Mrs. V. Father remained patient and did not get upset about Raymond's reaction to him.

Also in late April 2011, Ms. VerNooy met with Jessica and a substance abuse specialist. Jessica said she was using methamphetamine less often, but had developed a heroin addiction for which she was receiving methadone treatment. Jessica also told Ms. VerNooy that she was living with father and he was supporting her financially and emotionally. She said she was hoping to reestablish their relationship and raise Raymond together. She admitted telling father not to tell Ms. VerNooy about their relationship because she was worried that the department would not provide him services if it knew. She also admitted to being on probation as the result of an arrest in October 2010 on a drug possession charge.

In May 2011, at the contested six-month review hearing, the juvenile court terminated Jessica's reunification services and ordered father to complete a parenting program and mental health and substance abuse evaluations. The juvenile court also ordered the department to assess the bond between father and Raymond and evaluate the appropriateness of therapeutic visitation.

In June 2011, the juvenile court conducted the 12-month review hearing. The juvenile court found that the department provided father reasonable services and ordered them continued. The court set the 18-month review hearing for August 2011.

Meanwhile, in late June 2011, the juvenile court conducted a hearing to consider a request by father for supervised therapeutic visits and by minor's counsel to assess Raymond's paternal aunt and uncle, Mr. and Mrs. L., for placement. The juvenile court asked if Mr. and Mrs. L. had previously requested placement. The court officer from the department told the court that, to his knowledge, Mr. and Mrs. L. had not contacted the department and he did not believe the social worker knew about them. The court ordered

the department to verify that they were asking for placement, evaluate them and report back at the August hearing. Father's attorney told the court that father was scheduled to begin therapeutic visitation in early July.

In August 2011, minor's counsel renewed her request that Raymond be placed with Mr. and Mrs. L. and disputed the department's reasoning for not approving their home. A discussion followed about the height of the gate enclosing their swimming pool and whether it met the safety requirements. County counsel stated that he would provide minor's counsel the relevant code regulation and asked the court to set a trial date. Minor's counsel also requested visitation for Mr. and Mrs. L. The juvenile court ordered the department to assess Mr. and Mrs. L. for visits, granted it discretion to arrange unsupervised visits and set the settlement conference and trial for dates in September 2011.

On the date set for the settlement conference, minor's counsel advised the juvenile court that Mr. and Mrs. L. had corrected any deficiencies that prevented their home from being approved. County counsel informed the court that their home had not yet been approved and that the social worker would not place Raymond with them even if their home was approved because it would not be in his best interest to change placement at that time.

In September 2011, the juvenile court set a contested 18-month review hearing at the request of parents' and minor's counsel. The hearing was continued over the course of the next six weeks. During that time, Mr. and Mrs. V., Raymond's foster parents, filed a motion to be designated Raymond's de facto parents. Also during that time, Mrs. L. had four supervised visits with Raymond. Raymond responded to Mrs. L. much as he had to father. He cried and was only comforted by Mrs. V. whom he called "Mommy."

The contested 18-month review hearing was conducted in November 2011. By that time, father had either completed or nearly completed all of his court-ordered

services. He completed parenting instruction and a mental health assessment. No treatment was recommended. In addition, he also completed a substance abuse evaluation, resulting in a referral for outpatient substance abuse treatment. However, Ms. VerNooy considered outpatient treatment excessive in father's case. As a result, his plan was revised. His revised plan required him to participate in substance abuse education once a week, attend three support meetings a week and submit to a hair follicle test. Father tested negative for drugs and complied with his revised plan. He also completed an infant mental health evaluation.

Going into the 18-month review hearing, the department recommended that the juvenile court terminate father's reunification services, arguing it would be detrimental to return Raymond to him and it would not serve Raymond's best interest to continue reunification efforts given their lack of parent/child bond. Father's attorney argued for immediate placement or, in the alternative continued services. He also argued the department failed to provide reasonable services and unjustifiably delayed in placing Raymond with Mr. and Mrs. L. Jessica's attorney and minor's counsel joined in father's arguments.

Tammy Exum, a licensed therapist, testified that she supervised approximately 26 to 28 hours of weekly therapeutic supervised visitation between father and Raymond from July to October 2011. She said her role was to help relieve Raymond's anxiety and distress during visits and to help father achieve positive interactions and establish a relationship with Raymond. Asked whether she observed any progress in alleviating Raymond's anxiety, she said that Raymond continued to have a difficult time at the outset of each visit. When he saw father, he said "No mamma, no." She said it took anywhere from 20 to 40 minutes for him to become comfortable with father. When comfortable, he played with father but sought out Mrs. V. when she was in the waiting room. She said father was very patient with Raymond and approached him slowly when

Raymond was anxious. Father got down to Raymond's level as she had instructed him to do and brought snacks to every visit and either a toy or something interesting for Raymond to see. Once Raymond was comfortable, father sat on the floor and played with him. He was affectionate with Raymond and their interactions were positive.

However, Ms. Exum opined that Raymond viewed father as a stranger more than as a primary care provider and had not developed an attachment or bond to him. Instead, he was securely attached to Mrs. V. She explained that a child can form a secure attachment with any primary care provider and that it is deeper than a bond. She said that if Raymond were removed from Mrs. V., he would suffer emotional damage, and in the future, he could also suffer cognitive, social and emotional delay.

Lindsey VerNooy testified that she believed it would be detrimental to place Raymond with father because of the lack of a relationship between them and also because she believed father was untruthful about his relationship with Jessica. She referenced Jessica's statement that she was living with father in April 2011 and told him to lie about his contact with her. She also testified that Jessica accompanied father to a visit with Raymond in April and father visited Jessica in jail twice in June. She was concerned that father's deceit about Jessica might prevent him from protecting Raymond from her drug abuse.

On cross-examination, Ms. VerNooy testified that the department did not revise father's initial case plan ordered in May 2011. However, she said she referred him for additional services in compliance with the court's orders and spoke to him about his services. She also testified that there had never been a formal hearing at which an interpreter reviewed the case plan with father. Instead, she relied on Spanish-speaking social workers to translate for her. She also testified that Mr. and Mrs. V. expressed concern that Raymond could be removed from their care after father's paternity was established. However, she said she always made it clear that her objective was

Raymond's best interest. Following testimony and argument, the juvenile court continued the matter for its ruling.

In December 2011, the juvenile court found that it would be detrimental to place Raymond in father's custody and that the department provided father reasonable services. The juvenile court terminated father's reunification services and set a section 366.26 hearing. The court also vacated the matter of relative placement as a contested issue and approved Mr. and Mrs. V.'s request for de facto parent status. This petition ensued.

DISCUSSION

I. Detriment

Father challenges the sufficiency of the evidence to support the juvenile court's finding that placing Raymond in his care would expose Raymond to a substantial risk of detriment. He argues the juvenile court should have ruled differently because he participated in his court-ordered services, he was always appropriate with Raymond, there was evidence Raymond was bonding with him and Ms. Exum's opinion that it would be emotionally damaging to remove Raymond from Mr. and Mrs. V. was speculative. We conclude substantial evidence supports the juvenile court's finding.

There is a statutory presumption operative at each review hearing that the child will be returned to parental custody unless the juvenile court finds, by a preponderance of the evidence, that the return of the child would create a substantial risk of detriment to the child's safety, protection or well-being. (§§ 366.21, subs. (e) & (f); 366.22, subd. (a).) A parent's failure to regularly participate and make substantive progress in a court-ordered plan of reunification constitutes prima facie evidence of detriment. (§§ 366.21, subs. (e) & (f); 366.22, subd. (a).) However, compliance with a court-ordered plan does not negate the risk of detriment. (*In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1141-1142.) The ultimate question is whether the parent can meet the child's emotional and physical needs. (*Ibid.*)

In this case, there was no dispute that father participated in his court-ordered services and that he was consistently appropriate with Raymond. As the record reflects, father was patient, loving and committed to developing a relationship with his son. However, the record also reflects that father had much to overcome. By the time he and Raymond had their first visit in April 2011 Raymond was approximately 14 months old and had been in the care of Mr. and Mrs. V. all but the first two weeks of his life. As a result, he had already formed an essential and primary parent/child bond with them. More profoundly, he had formed a secure attachment to them. Consequently, when father attempted to bond with Raymond, Raymond resisted. Raymond's resistance waned after several months of therapeutic visitation and, as father correctly argues, there was evidence that Raymond was bonding with him. For example, Ms. Exum testified that Raymond enjoyed jumping from a chair into father's arms and, during their last visit, called him "Daddy."

However, though father and Raymond were bonding, Raymond was securely attached to Mr. and Mrs. V., and, according to Ms. Exum, severance of such an attachment could have grave and deleterious short- and long-term consequences.

Father contends Ms. Exum's opinion is speculative, however, she gave a professional opinion and no one challenged her qualifications to render such an opinion. Further, she unequivocally testified that severing Raymond's relationship with Mr. and Mrs. V. would cause emotional damage. She could not say how or when the emotional damage would occur, only that it could then "affect other areas, such as cognitive and social and emotional development."

We conclude based on the foregoing that substantial evidence supports the juvenile court's finding that removing Raymond to place him with father would cause Raymond emotional harm. Accordingly, we find no error in the juvenile court's finding of detriment.

II. Reasonableness of Services

Father contends that the juvenile court erred in finding he was provided reasonable reunification services, citing alleged deficiencies in the case plan as written and in Ms. VerNooy's handling of his case. We disagree.

The provision of reunification services involves both a case plan composed of specifically selected services to address the unique needs of a family and the execution of that plan by the department as represented by the social worker assigned the case. (*In re Ronell A.* (1995) 44 Cal.App.4th 1352, 1362.) The juvenile court is required to determine at each review hearing whether the case plan contents and the department's efforts in complying with it are reasonable. (§§ 366.21, subds. (e) & (f); 366.22.)

Father first contends that the case plan ordered for him in May 2011 was not modified to reflect a new case plan goal of reunification rather than adoption. He further contends that he was not allowed to participate in the development of the case plan and was not given a copy and allowed to sign it as required by section 16501.1, subdivision (f)(12).

It appears, based on our review of the appellate record, that most of what father raises with respect to the written case plan is true. Indeed, the concurrent plan for Raymond when father was ordered reunification services in May 2011 was adoption by Mr. and Mrs. V. Further, there is no evidence that father provided any input into his case plan although there is evidence that he was asked what his needs were. Additionally, the record does not contain a reunification case plan signed by him. Nevertheless, father never challenged the content of his case plan on appeal or filed a section 388 petition asking the juvenile court to modify it. By failing to challenge the plan content by direct appeal, father cannot now claim that the plan as ordered was unreasonable. (*In re Julie M.* (1999) 69 Cal.App.4th 41, 47.)

Further, substantial evidence supports the juvenile court's finding that Ms. VerNooy's efforts to assist father were reasonable. Father contends that Ms. VerNooy's inability to speak Spanish created a language barrier and that she advocated for adoption by Mr. and Mrs. V. rather than reunification by him. However, the record reflects otherwise. According to the record, Ms. VerNooy utilized Spanish-speaking social workers to assist in communicating with father and referred him for services provided in his language. Additionally, there is no evidence that this arrangement was not adequate. On the contrary, the fact that father successfully completed his services attests to the adequacy of his communication with Ms. VerNooy. Further, Ms. VerNooy's commitment to meeting father's reunification needs is evident. According to the record, she was the one who recommended referring father for therapeutic supervised visitation after realizing that visitation would be difficult. In addition, she initiated the change in his substance abuse treatment after concluding that outpatient treatment was unwarranted.

In light of the evidence, we conclude father was provided reasonable reunification services.

III. Continuation of Reunification Services

Father contends the juvenile court erred in not continuing his reunification services. We disagree. The juvenile court can only extend reunification services "up to a maximum time period not to exceed 24 months after the date the child was originally removed from [the] physical custody of his or her parent" (§ 361.5, subd. (a)(4).) In order to extend reunification services, the juvenile court must find that it is in the child's best interest to do so and that there is a substantial probability that the child will be returned to parental custody within the extended time or that reasonable services were not provided. (*Ibid.*)

In this case, February 2012 marked the maximum period of 24 months of reunification services. In order to continue reunification services until then, the juvenile

court had to find that there was a substantial probability that Raymond could be placed with father by that time and that it would be in Raymond's best interest to do so. The juvenile court stated it could not make those findings since father had not progressed beyond supervised visitation. We concur.

Having concluded the juvenile court's decision not to continue father's reunification services was proper, we affirm its orders terminating his reunification services and setting a section 366.26 hearing.

IV. Relative Placement

Appellate counsel for Raymond contends that the juvenile court abused its discretion in not compelling the department to conduct a timely assessment of Raymond's aunt and uncle (Mr. and Mrs. L.) for relative placement pursuant to section 361.3 and in adjudicating the contested 18-month review hearing before the relative placement motion. We disagree.

Section 361.3 requires the juvenile court to give preferential placement consideration to the request of a relative. (§ 361.3, subd. (a).) Section 361.3, subdivision (a) states in relevant part: "In any case in which a child is removed from the physical custody of his ... parents ... , preferential consideration shall be given to a request by a relative of the child for placement" "Preferential consideration," for purposes of the statute, "means that the relative seeking placement shall be the first placement to be considered and investigated." (§ 361.3, subd. (c)(1).) Relatives entitled to preferential consideration for placement include an aunt and an uncle. (§ 361.3, subd. (c)(2).)

Section 361.3, subdivision (a) sets forth certain factors the juvenile court must consider in evaluating a relative for placement including: the best interest of the child; the wishes of the parents and relatives; the nature and duration of the child-relative

relationship; the relative's ability to care for the child; and the safety of the relative's home. (§ 361.3, subd. (a)(1)-(8).)

We find no support in the appellate record for counsel's argument that the department was dilatory in its efforts to assess Mr. and Mrs. L. for placement. Raymond's trial counsel requested placement of Raymond on behalf of Mr. and Mrs. L. in June 2011. The juvenile court ordered the department to assess their home for placement which it did. By August 2011, the assessment was completed and their home was disapproved. Counsel fails to show how two months to assess a home for placement in this case constituted undue delay.

Further, even assuming the department delayed in its assessment, it was harmless error. (*In re Joseph T.* (2008) 163 Cal.App.4th 787, 798.) By the time, Mr. and Mrs. L. requested placement of Raymond, he had been in Mr. and Mrs. V.'s care for 16 months and was attached to them. Conversely, he had no relationship with Mr. and Mrs. L. Under the circumstances, there is no reason to believe the juvenile court would have found it in Raymond's best interest to disrupt his bond with his foster parents to place him with his relatives.

Finally, the juvenile court has broad discretion to control the proceedings before it. (§ 350, subd. (a)(1).) Further, relative placement no longer applies once the juvenile court terminates reunification services. (*In Sarah S.* (1996) 43 Cal.App.4th 274, 285-286.) Given the state of the evidence going into the 18-month review hearing, there was no legally sound reason to consider placing Raymond with relatives before deciding whether reunification efforts with father should continue.

We find no abuse in the juvenile court's consideration of relative placement and find no error on this record.

DISPOSITION

The petition for extraordinary writ is denied. This opinion is final forthwith as to this court.