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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SHAUN S., Petitioner, v. THE SUPERIOR COURT OF STANISLAUS COUNTY, Respondent; STANISLAUS COUNTY COMMUNITY SERVICES AGENCY, Real Party in Interest.	F064955 (Super. Ct. Nos. 515955, 515956) **OPINION**

THE COURT*

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Ann Q. Ameral, Judge.

Nadine Salim, for Petitioner.

No appearance for Respondent.

John P. Doering, County Counsel, and Robin McIver, Deputy County Counsel, for Real Party in Interest.

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

Shaun S. seeks an extraordinary writ (Cal. Rules of Court, rule 8.452) from the juvenile court's orders issued at a contested 18-month review hearing terminating reunification services and setting a Welfare and Institutions Code section 366.26[1] hearing as to his two sons, three-year-old Timothy and two-year-old Gabriel. Shaun contends the juvenile court erred in finding that it would be detrimental to return the children to his custody and that he was provided reasonable services. He seeks the return of the children to his custody or alternatively an order continuing reunification services. We deny the petition.

PROCEDURAL AND FACTUAL SUMMARY

Shaun and Desiree, a married couple, are the parents of Timothy and Gabriel, the subjects of this writ petition. Shaun has a long history of domestic violence. When these proceedings were initiated in November 2010, Shaun was on probation for battering the mother of his older son, Eugene. Eugene was detained from Shaun in 2002 and Shaun's mother adopted him after Shaun failed to reunify with him. Desiree also has a history of violent and aggressive behavior, including engaging in domestic violence with Shaun. In addition, she was addicted to opiates, mainly illegally obtained prescription drugs.

In June 2010, Desiree admitted to having a problem with opiates. The Stanislaus County Community Services Agency (agency) provided Shaun and Desiree parenting classes, domestic violence counseling and drug treatment through the Families in Partnership program, however they did not consistently attend the classes and Desiree unsuccessfully attempted drug treatment. Shaun completed a substance abuse assessment and was not determined to be in need of treatment. In December 2009, the case was closed due to their noncompliance. The agency allowed then one-year-old Timothy to remain in their care.

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

In July 2010, the agency was notified that Desiree gave birth to Gabriel and that he was drug exposed and in respiratory distress. He also had a positive newborn screen for cystic fibrosis. Over the next several months, the agency provided Shaun and Desiree family maintenance services but Desiree continued to take prescription drugs and there were multiple reports of domestic violence between Shaun and Desiree. It was also reported that Timothy took two Risperdal and two Benadryl tablets. In addition, he was found in a neighbor's home in a dog crate eating food he took from the neighbor's refrigerator. Shaun went to the neighbor's house to get Timothy and was seen riding away on a bicycle holding then two-year-old Timothy by the hand as Timothy ran alongside. After conferring on the family situation, the agency took the children into protective custody and placed them in foster care.

In January 2011, the juvenile court exercised its dependency jurisdiction and ordered reunification services for Shaun and Desiree. Shaun's services plan required him to participate in individual counseling, complete a parenting program and submit to random drug testing. The agency recommended that Shaun's services be provided in a one-on-one setting as he did not appear to understand what was being asked of him.

In April 2011, the children's foster parents filed a request to be declared the children's de facto parents. In the application, the foster parents informed the juvenile court that Gabriel was being medically monitored for cystic fibrosis every three to six months and that he was taking four medications to assist his respiration, including two nebulizers. They also stated that Gabriel could not be around smokers. A letter from Gabriel's doctor confirmed this and asked the juvenile court to consider that when assessing the suitability of his placement.

In May 2011, the juvenile court granted the foster parents' request for de facto parent status.

By the time of the six-month review hearing in June 2011, Shaun had made some progress in his services plan. He was participating in codependency counseling,

completed his group parenting classes and was testing negative for drugs. He only had individual parenting sessions and parent/child labs to complete. However, he did not have a place of his own, was unemployed and did not drive. As a result, he could not take Gabriel to his medical appointments or visit the children outside the agency facility. Given Shaun's cooperation and compliance, the agency recommended that the juvenile court continue Shaun's reunification services to the 12-month review hearing so that he could obtain a job, housing and a driver's license. Desiree, in contrast, was noncompliant. Therefore, the agency recommended that the juvenile court terminate her reunification services.

In July 2011, following a contested six-month review hearing, the juvenile court terminated Desiree's services and granted Shaun an additional six months of services. The court specifically ordered that neither child was to be around second-hand smoke and set the 12-month review hearing in January 2012. No appeal was taken from this order.

In November 2011, minors' counsel filed a section 388 petition requesting a mental health assessment for Shaun and an order moving the visits back to the agency offices. Subsequent to the six-month review hearing, Shaun moved into Solidarity, a clean and sober living facility for men. The petition alleged that the visits were taking place at Solidarity and that Shaun knew that cigarette smoke exacerbated Gabriel's condition yet occasionally took a break from the visit to smoke a cigarette and returned smelling of smoke. Additionally, many of the Solidarity residents smoked around Timothy and Gabriel. When confronted on the issue, Shaun stated that he tried to keep the children away from smoke but that he was not God and could not make people stop smoking. The agency believed that moving visits back to its facility would resolve the issue as there was no smoking allowed there.

In support of its request for a mental health evaluation, the agency declared in its petition that Shaun stated he was autistic and had Attention Deficit Hyperactivity Disorder and made questionable claims. For example, he said he was previously a Navy

Seal, a nurse, a construction worker and a dress maker. He also told the juvenile court at one of the hearings that he purchased a respiratory device for Gabriel and described it to the court. However, the device he described was one the foster father described to him when, just before the hearing, he asked the foster father what Gabriel's respiratory device looked like. Also when asked how he was going to get to the children's appointments, Shaun said his mother was going to buy him a car or he was going to make arrangements for a driver to take him even though it would be at great expense to him. The agency did not know if Shaun fabricated the falsehoods or if he believed them.

Shaun contested the section 388 petition and the juvenile court set it for January 2012 to coincide with the 12-month review hearing.

Meanwhile, the agency filed its report for the 12-month review hearing and informed the juvenile court that Shaun completed his services plan but still was unemployed and did not have a home where the children could be placed. He left Solidarity in December 2011 because he did not want to lose his children because of the smoking. He moved in with his mother but said he had to work on the flooring in the children's room before they could visit him there. In addition, the other occupants of the home had to be fingerprinted and the home had to be inspected before visitation there could begin. In the meantime, Shaun visited the children at the agency.

The agency also reported that Shaun was on the list for government-funded housing and the agency referred him to Aspira Pro Families who assigned him a mentor to help him find housing, transportation and employment.

The agency recommended that the juvenile court continue Shaun's services for another six months so that he could resolve his housing and transportation issues and grant the agency discretion to begin a trial visit once Shaun obtained appropriate housing. During this review period both children were admitted to the University of California Davis Medical Center, Timothy for a gastrointestinal bacterial infection and Gabriel for pneumonia. Shaun did not visit either of them while they were hospitalized.

As to its section 388 petition, the agency reported that Shaun said he may not have explained himself well when he said he was a Navy Seal and a nurse. He said he did not join the Navy but participated in Reserve Officers' Training Corps in high school and while working for In Home Supportive Services "nursed" a man for whom he provided care.

In January 2012, the juvenile court found that Shaun made good progress and continued his services to the 18-month review hearing which it set for May 2012. The agency withdrew its section 388 petition and the juvenile court amended Shaun's services plan to include a clinical assessment. The court also appointed a court-appointed special advocate (CASA) for the children.

In April 2012, the CASA filed her report, informing the juvenile court that Gabriel was diagnosed with cystic fibrosis transmembrane conductance regulator-related metabolic syndrome (CRMS). She attached information from the Cystic Fibrosis Foundation explaining that a diagnosis of CRMS means that the child does not have cystic fibrosis but nevertheless requires monitoring by a cystic fibrosis specialist. In addition, she reported that he was assessed by an infant development specialist and had delays in all areas of development.

The CASA expressed concern that from January through March 2012, Shaun cancelled or missed five visits, did not show up for four visits and left three visits early. She was also concerned that he returned Gabriel to the foster mother with very wet and/or soiled diapers after numerous visits.

In its report for the 18-month review hearing, the agency recommended that the juvenile court terminate Shaun's reunification services. The agency reported that Shaun had not completed his clinical assessment. He met with clinician Maryanne Cose two times but missed his appointment in April 2012. Ms. Cose was concerned about Shaun's "storytelling" but was two sessions short of completing his assessment and could not provide a final report. The agency also reported that Shaun was working with a mentor

from Aspira Pro Families to file divorce papers, create a resume and attend job interviews. He had not found a job or housing but qualified for General Assistance and planned to apply for the Homeless program.

The agency also reported that Shaun's visits with the children still occurred at the agency facility for several reasons. He was living with his parents who had not been cleared by the agency. In addition, he said he needed to "work" on his parents' house before the children could visit him there but did not explain what that would entail and had not completed it. Also, the social worker went to the home in early April 2012 and detected a heavy smell of smoke.

The agency also had concerns about the quality of visitation. The visitation aides reported to the agency that during one visit in March 2012 Shaun appeared to be sleeping. He denied sleeping and said he was joking around with the children and pretending to sleep. During another visit in March, two of the aides noted that Shaun smelled of alcohol.

The de facto parents were also concerned that Shaun continued to smoke. In a statement filed with the juvenile court, they reported seeing him smoking after visits with the children and saw a cigarette behind his ear. Timothy also witnessed this, stating "daddy has a cigarette in his head."

In May 2012, the juvenile court conducted a contested 18-month review hearing. Shaun was called to testify by the agency. He testified that he started working in construction in mid-April 2012. He acknowledged not visiting the children since the end of April 2012 because of work and attributed many of his prior missed visits to illness. He missed one visit because his mother had open heart surgery and another because his girlfriend was taken to the hospital. He said he left visits early for a variety of reasons: because the children were "throwing fits," to catch the bus, for a job interview and to find a suitable place for the children. He denied sleeping during visits or drinking alcohol.

Shaun testified that he was aware of Gabriel's special medical needs. He testified that secondhand smoke could damage Gabriel's lungs and impaired his breathing. He also knew that Gabriel needed a nebulizer, which he said he knew how to use but had never administered a nebulizer treatment to Gabriel. Shaun testified that he did not attend Gabriel's medical appointments because he was not always informed about them. He said he knew that Gabriel was admitted to UC Davis and contacted the social worker. He said she told him it would be beneficial if he went to the medical center but if he could not go, he should at least call and inquire, which he did. He said he did not visit Timothy at UC Davis because he was at Solidarity and not permitted to go there.

Shaun further testified that he believed his parent's home would be a suitable, smoke-free place for the children if he made certain repairs. He scrubbed and repainted the walls, because his mother had been a smoker, shampooed the carpets and cleaned the draperies to eliminate the cigarette smoke. He also revamped the structural support of the house, which took about four months. According to the social worker, he still needed to install smoke detectors and child safety locks and clean up some clutter. He said his parent mentor took his parents to be fingerprinted about three to four weeks before the hearing but he did not know the results.

Shaun's plan to care for the children if returned to his custody was to have his stepfather take them to daycare after which he or his stepfather would pick them up. He testified that he did not yet have a driver's license but anticipated getting it soon. In the meantime, he had could use one of his boss's trucks or his sister's van to transport the children to their medical appointments. In the event of an emergency, his sister could help him since she lived across the street.

Social worker Kathleen Grundy testified that she never told Shaun that he needed to have a job to regain custody of the children but did discuss employment as it related to his ability to support the children. She said he was on the list for government-funded housing. She also testified that she never told Shaun that he had to renovate his parents'

home in order to have the children visit him there and he did not ask her to assess their home to determine what he needed to do to make it safe.

Ms. Grundy further testified that in December 2011 Shaun started asking about the children's medical appointments after she told him to ask and that he asked for assistance with transportation to the children's appointments at Children's Hospital in Madera.

The de facto mother testified that her biggest concern was Gabriel's need for daily medical attention. She said he required breathing treatments twice a day and could not miss his medical appointments. Even with vigilant medical monitoring, she testified, Gabriel's condition could become very serious. She said his oxygen levels could decrease even after receiving regular treatments and stronger medication. On one occasion when this occurred, it became a medical emergency, requiring Gabriel's transport to the hospital by helicopter.

At the conclusion of the hearing, the juvenile court found that it would be detrimental to return the children to Shaun's custody. The court was particularly concerned that Shaun missed so many visits, stating that he had "a lot of excuses." The court found it concerning that Shaun did not visit the children in the hospital and placed his girlfriend's welfare above that of the children. The court was also concerned that he left the visits early and had not completed his clinical assessment despite having had four months to do so. The court found that the agency provided Shaun reasonable services but that he made poor progress. Consequently, the court terminated Shaun's reunification services and set a section 366.26 hearing. This petition ensued.[2]

DISCUSSION

I. Detriment

Shaun contends that the juvenile court erred in finding that Timothy and Gabriel would be at a substantial risk of detriment if placed in his care. Rather, he further

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[2] Desiree did not file a writ petition.

contends, the evidence shows that he completed his court-ordered services, secured employment and housing, and had a plan in place to care for the children with the support of his family. He asks this court to order that his children be returned to his care. We decline to do so, concluding that substantial evidence supports the juvenile court's finding that it would be detrimental to the children for the reasons we now explain.

At the 18-month review hearing, there is a statutory presumption that a dependent 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. (§ 366.22, subd. (a).) Though a parent's participation and progress in a court-ordered reunification plan is a significant factor in assessing detriment, it is not determinative. (*In re Dustin R*. (1997) 54 Cal.App.4th 1131, 1141-1143.) Rather, the ultimate question is whether the parent has the capacity to provide for the child's safety and well-being. (*Ibid*.)

Contrary to his assertion, Shaun had *not* completed his court-ordered services, namely the clinical assessment. He acknowledges this but argues his failure to complete it was insignificant in the determination of detriment because the impetus for ordering it was based on "exaggerated statements" he made. He also argues that the agency did not demonstrate that he suffered mental illness or that the children were at risk of harm because of some unknown mental illness he may have been suffering. Shaun misses the point. The juvenile court found the question of his mental state sufficiently important to order a clinical assessment to determine whether the children would be safe in his care. Practically speaking, Shaun's choice not to complete the assessment left the juvenile court no choice but to decide that it would be detrimental to return the children to his custody.

Further, there was additional evidence that supported the juvenile court's finding of detriment. Shaun knew that Gabriel had a respiratory condition that was exacerbated by smoking yet he continued to smoke. In addition, Shaun was not proactive in Gabriel's

care. He did not attend the medical appointments until told to do so by the social worker, he made no attempt to visit his sons when they were hospitalized and never administered Gabriel's nebulizer treatment. He also demonstrated a lack of commitment to visiting his sons by missing a significant number of visits without compelling reasons.

Under the circumstances, there was no reason for the juvenile court to believe that Shaun could safely provide for Timothy and Gabriel's physical well-being if they were returned to his custody. Consequently, we find no error in its finding of detriment.

II. Reasonableness of Services

Shaun contends that the juvenile court erred in finding the agency provided him reasonable services, citing the agency's failure to help him find housing and facilitate overnight visitation. He further contends that, because the juvenile court's reasonable services finding was error, the court also erred in terminating his reunification services and setting a section 366.26 hearing. Shaun asks this court to direct the juvenile court to continue his reunification services. We decline to do so, concluding substantial evidence supports the juvenile court's reasonable services finding.

According to the appellate record, the problem was not that Shaun was having difficulty finding housing. He moved in with his parents for the purpose of having the children placed with him there. The problem was that he delayed in getting his parents cleared to live in the same house as the children and he decided on his own that certain repairs needed to be made before the house was suitable for the children. Meanwhile, the agency supported Shaun's choice to prepare his parents' house for the children. Shaun testified that Ms. Grundy walked through the house and told him he needed to install smoke detectors and child locks. According to the agency in its report for the 18-month review hearing, it was prepared to arrange overnight visits as soon as Shaun found a suitable place. In addition, as alternatives to Shaun's parents' home, the agency provided Shaun a mentor to help him locate housing and placed his name on a waiting list for federally funded housing.

As to overnight visitation, Shaun contends the agency could have provided him motel vouchers or helped him arrange for overnight visits in the home of a friend or relative. In essence, he is arguing that visitation was unreasonable because it was not overnight visitation. We conclude otherwise. Presumably, overnight visitation is a step toward placing the child back into the parent's home. To arrange visitation somewhere other than the parent's home would serve only to increase parent/child contact but would not provide the agency information as to how the parent would provide the children day-to-day care in the home setting. Moreover, even if the agency were amenable to overnight visitation in the places Shaun proposes, nothing precluded him from asking for it and/or arranging it himself. Indeed, there is no mention in the appellate record that it was even discussed. In any event, the agency's failure to arrange overnight visitation under the circumstances is not unreasonable and we find no error in the juvenile court's reasonable services finding. Thus, we deny the petition.

DISPOSITION

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