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

HUGO H.,

Petitioner,

v.

THE SUPERIOR COURT OF  
TUOLUMNE COUNTY,

Respondent;

TUOLUMNE COUNTY DEPARTMENT  
OF SOCIAL SERVICES,

Real Party in Interest.

F067933

(Super. Ct. No. JV7275)

**OPINION**

**THE COURT\***

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. William G. Polley, Judge.†

Sierra Law Office of David L. Axelrod, and David L. Axelrod, for Petitioner.

No appearance for Respondent.

Sarah Carrillo, County Counsel, for Real Party in Interest.

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\* Before Gomes, Acting P.J., Franson, J., and Peña, J.

† Retired Judge of the Tuolumne Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Hugo H. seeks extraordinary writ review of the juvenile court's orders issued at a contested six-month review hearing (Welf. & Inst. Code, § 366.21, subd. (e)),<sup>1</sup> terminating his reunification services and setting a section 366.26 hearing as to his two-year-old daughter Leanna. We deny the petition.

### **PROCEDURAL AND FACTUAL SUMMARY**

On September 7, 2012, the San Joaquin County Human Services Agency (agency) removed then 10-month-old Leanna from the custody of her mother after mother was arrested for driving under the influence with Leanna "loosely" strapped in a car seat in the front passenger seat of the car. At the time, Hugo was living in Tuolumne County.

The agency filed a dependency petition on Leanna's behalf, alleging mother failed to protect Leanna and left her with no support. The petition did not include any allegations against Hugo.

In its report for the detention hearing, the agency informed the juvenile court that mother had a child welfare history dating back to 1996 associated with her use of methamphetamine and that she previously lost her parental rights to four children. By the time she gave birth to Leanna, mother was abusing prescription medication.

In late September 2012, the San Joaquin County Juvenile Court ordered Leanna detained and on November 15, 2012, sustained the petition at the jurisdictional hearing. In December 2012, the juvenile court transferred the case to Tuolumne County. The Tuolumne County Department of Social Services (department) placed Leanna in a foster home.

In January 2013, the Tuolumne County Juvenile Court accepted the juvenile case and set the dispositional hearing for February 2013.

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

In its report for the dispositional hearing, the department informed the juvenile court Hugo was born in Honduras and that Leanna was his only child. Hugo denied having a substance abuse problem although he was arrested for driving under the influence of alcohol. He and mother were in a committed relationship and living together in Tuolumne County. Hugo was not concerned about mother's ability to care for Leanna as long as mother stopped using illicit drugs and mixing prescription medication.

The department recommended the juvenile court deny mother reunification services under section 361.5, subdivision (b)(10), (11) and (13) but offer services to Hugo. The department prepared a proposed services plan, requiring Hugo to participate in a mental health assessment, a parenting program, mental health counseling and submit to random drug and alcohol testing.

On February 19, 2013, Hugo appeared at the scheduled dispositional hearing. Mother did not appear and was reportedly in the hospital. The juvenile court ordered Leanna removed from Hugo and mother's custody and ordered Hugo to comply with the proposed services plan. The juvenile court set a contested dispositional hearing as to mother and a six-month review hearing as to Hugo for August 2013. Hugo did not appeal from the juvenile court's dispositional findings and orders.

In April 2013, mother testified at the contested dispositional hearing. She acknowledged using methamphetamine from 1996 to 2006 and serving a prison sentence from 2007 to 2009 for being an accessory to murder. She was released on parole and served a 13-month term. During that time, she drug tested monthly and always tested negative for drugs. She met Hugo in 2010. She further testified she developed a hernia after Leanna's birth and was prescribed narcotics for pain. She denied abusing her medication. She said she wanted to participate in reunification services so she, Hugo and Leanna could be a family. She also testified she was working with her physician to wean herself off of narcotics.

Following mother's testimony and counsel's arguments, the juvenile court denied mother reunification services. Mother did not appeal.

During the ensuing months, Hugo lived with mother even though the social worker told him he needed to sever his relationship with her if he wanted custody of Leanna. In addition, mother continued to use methamphetamine and prescription medication. She was hospitalized multiple times for what she claimed were complications from her hernia. However, the social worker confirmed that the hospitalizations were the result of her ongoing drug use.

In May 2013, mother overdosed on multiple drugs, including methamphetamine, PCP (Phencyclidine), opiates and methadone. In July 2013, she admitted herself for inpatient drug treatment but remained in contact with Hugo. He told the social worker mother made it difficult for him to end their relationship and said he would remain with her if she stopped using drugs.

In its report for the six-month review hearing, the department advised the juvenile court that Hugo consistently tested negative for illicit substances and did not require substance abuse treatment. However, he did not begin either parenting or counseling services until late June 2013 even though the social worker reviewed his case plan with him monthly.

The department reported Hugo was attending a year-long parenting class. According to his parent educator, he attended three parenting classes and had not received a certificate of completion for any topic. He attended three sessions with counselor Claudia Forster who was concerned Hugo did not recognize mother's substance abuse and questioned whether he was capable of protecting Leanna.

The department considered Hugo's progress "minimal" given his delay in initiating his services and his continued involvement with mother while she was actively

using drugs. Consequently, the department recommended the juvenile court terminate Hugo's reunification services and set a section 366.26 hearing.

On the day set for the six-month review hearing, Hugo substituted in retained counsel who requested a contested hearing. Mother did not appear, reportedly because she was in drug rehabilitation. The juvenile court set a contested six-month review hearing for August 2013.

Prior to the contested hearing, the department filed an addendum report along with reports from Hugo's parenting educator stating Hugo attended an additional two sessions of general parenting instruction and participated appropriately in class. Also attached was a report from Ms. Forster who reported that Hugo had attended seven sessions and was more open and motivated. She said he appeared to have gained insight into the importance of setting boundaries with mother but still struggled to set them. She also said Hugo had taken responsibility for his role in Leanna's removal.

On August 29, 2013, the juvenile court convened the contested six-month review hearing. Mother's counsel informed the juvenile court that mother was in drug treatment. Social Worker Emily Amoruso testified Hugo was referred for parenting classes in March 2013 but did not begin until June. She explained the importance of attending the parenting classes to Hugo but it was unclear why he did not attend earlier. She further testified that she spoke with Ms. Forester about Hugo's progress in counseling. Ms. Forester said he participated in seven counseling sessions and he was working on his relationship with mother. Ms. Forester was concerned that Hugo was still in a romantic relationship with mother.

Ms. Amoruso testified she was concerned about Hugo's relationship with mother because of mother's drug abuse and his seeming inability to recognize she was using drugs. She testified mother was still communicating with Hugo by telephone from the

treatment facility and she believed, if given the chance, he would resume a romantic relationship with her.

Ms. Amoruso further testified Hugo was compliant with his case plan “for the most part,” but had not made substantial progress. She was concerned about his ability to protect Leanna because she had not seen a change in his attitude toward mother. She did not believe there was a substantial probability Leanna could be returned to Hugo’s custody within the ensuing two weeks, the end of which marked 12 months of reunification services.

Hugo testified the social worker told him to sever his relationship with mother in March 2013. He said mother moved out of his house in June, that he broke up with her and communicated with her through a family member. He said he would cease all communication with mother if the department wanted him to do so. He said she would not be welcome in his home after she completed rehabilitation.

Hugo further testified he was unaware of mother’s criminal history or the agency’s prior involvement until he read its report. He said he found mother having seizures on the day she overdosed in May 2013 and he took her to the hospital, but he did not know that she overdosed or that she tested positive for drugs. He also said he did not know she was abusing her pain medication. He said he did not know what “drug-seeking” behavior was and that people could overdose on prescription medication. He said he had heard that people sometimes abuse prescription medication. Asked whether he was aware mother tried to commit suicide several times in the prior six months by overdosing on her medication, Hugo stated that he thought that was what happened.

Hugo further testified he did not initiate his services sooner because he was taking care of mother and did not know where or how to inquire about them. He said he had gained insight into mother’s drug problems and could keep Leanna safe in the future.

Hugo's attorney argued the juvenile court should return Leanna to Hugo's custody because Leanna was not removed because of Hugo's misconduct and because Hugo and mother had separated. Hugo's attorney also disputed Ms. Amoruso's testimony that only two weeks remained before the 12-month review of services. Instead, he argued, citing various dependency statutes, that November 10, 2013 marked the end of the 12-month period.

At the conclusion of the hearing, the juvenile court terminated Hugo's reunification services and set a section 366.26 hearing. This petition ensued.

## **DISCUSSION**

### **I. Setting Order**

Hugo contends the juvenile court's written order setting the section 366.26 hearing is defective because it misidentifies the judge who presided over the six-month review hearing as well as the attorney representing him (Hugo); identifies the district attorney and public defender by title rather than by name; and omits required findings, namely, whether it would be detrimental to return Leanna to his custody, whether he received reasonable services and whether there was a substantial probability Leanna could be returned to his custody by the 12-month review hearing.

Having reviewed the record, we note that the minute order and the reporter's transcript for the six-month review hearing accurately identify the juvenile court judge and counsel for the parties. In addition, the reporter's transcript records the juvenile court's findings it would be detrimental to return Leanna to Hugo's care and the department made reasonable efforts to facilitate Leanna's return home. Hugo is correct there is not an express finding with respect to substantial probability of return.

In essence, the record contains conflicting clerical information and lacks one required finding. However, neither undermines the juvenile court's rulings nor requires correction because we will harmonize any conflict in the record if possible. (*People v.*

*Smith* (1983) 33 Cal.3d 596, 599.) Further, we can infer a required finding if it is supported by substantial evidence. (*In re Corienna G.* (1989) 213 Cal.App.3d 73, 83-84.)

In this case, we can harmonize any clerical errors contained in the setting order by comparing it to the minute order and reporter's transcript to properly identify the presiding juvenile court judge and counsel for all parties. Further, the juvenile court's findings with respect to detrimental return and reasonableness of services appear in the reporter's transcript. Finally, as we discuss under the section addressing termination of reunification services, substantial evidence supports a finding there was not a substantial probability Leanna could be returned to Hugo's custody by the 12-month review hearing.

## **II. Removal Order**

Hugo contends the juvenile court erred in removing Leanna from his custody. He argues there were no allegations in the original petition alleging he harmed Leanna or posed a risk of harm to her and Leanna should have been placed in his custody at the outset of the proceedings or at the latest when he severed his relationship with mother.

The juvenile court ordered Leanna removed from Hugo's custody at the dispositional hearing in February 2013. "A dispositional order constitutes an appealable judgment. [Citations.] Appellate jurisdiction to review an appealable judgment or order depends upon a timely notice of appeal. [Citation.]" (*Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 811.) Since Hugo did not appeal from the dispositional order which is now final, he is foreclosed from challenging the juvenile court's removal order on this writ petition.

## **III. Detriment**

Hugo challenges the sufficiency of the evidence to support the juvenile court's order it would be detrimental to return Leanna to his custody. He refutes the juvenile court's finding he made "minimal" progress in his services plan, arguing instead he substantially complied with each component of his services plan and made significant

progress in each area. We conclude substantial evidence supports the juvenile court's detriment finding.

The juvenile court was required to return Leanna to Hugo's custody unless it found by a preponderance of the evidence that doing so would create a substantial risk of detriment to her safety, protection or physical or emotional well-being. In assessing detriment, the juvenile court considers the degree to which the parent participated and progressed in his or her court-ordered treatment program. Failure to regularly participate and make substantive progress is prima facie evidence of detriment. (§ 366.21. subd. (f).)

Assuming for the sake of argument, Hugo participated and progressed in his services plan to the high degree he claims, it does not mean that it would not be detrimental to return Leanna to his custody. It simply means there is not prima facie evidence of detriment. Ultimately, the juvenile court cannot return a child to parental custody unless it is safe to do so no matter how compliant the parent. (*In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1141-1142.)

In this case, the detriment Hugo posed to Leanna's safety was his emotional attachment to mother and his inability or unwillingness to recognize the danger her drug use posed to Leanna. The juvenile court explained:

“The [c]ourt believes that [Hugo] is an honest man, a decent man who loves his daughter. However, it's clear from all the evidence ... that it would clearly [*sic*] be detrimental to [Leanna] to return [her] to his custody within the twelve months, which is allowed by law, or even within the foreseeable future.

“[Hugo] lives his life at a subsistence level. The [c]ourt finds that he has virtually no comprehension of the risk that the mother ... presents to [Leanna]. He was totally blind to her serious drug abuse while she was in his home, even though she overdosed ....”

Without some assurance that Hugo would protect Leanna from mother, the juvenile court could not safely return Leanna to Hugo's custody.

#### **IV. Termination of Reunification Services**

Hugo contends the juvenile court miscalculated the statutory limit on reunification services and therefore prematurely and erroneously terminated his reunification services. We disagree.

When a child is removed from parental custody, the age of the child at removal generally dictates the duration of reunification services. Where, as here, the child was under the age of three when initially removed from the parent's physical custody, section 361.5, subdivision (a)(1)(B) provides: "court-ordered services shall be provided for a period of six months from the dispositional hearing as provided in subdivision (e) of Section 366.21, but no longer than 12 months from the date the child entered foster care as provided in Section 361.49 ...." Under section 361.49, a child is deemed to have entered foster care on the earlier of the date of the jurisdictional hearing or the date that is 60 days after the date on which the child was initially removed from the parent's physical custody.

In this case, Leanna was removed from mother's physical custody on September 7, 2012, 60 days from which was November 6, 2012. The jurisdictional hearing was conducted on November 15, 2012. Consequently, Leanna entered foster care on the earlier date of November 6, 2012, making November 6, 2013 the 12-month limitation on reunification services.

Hugo contends the juvenile court relied on Ms. Amoruso's testimony that the ending date for services would occur in two weeks rather than on his attorney's estimate that it should occur on November 10, 2013. He further contends, citing *Dawnel D. v. Superior Court* (1999) 74 Cal.App.4th 393, 399 (*Dawnel D.*), that the juvenile court could have even continued reunification services up to 18 months from the date Leanna was initially removed from mother's custody. Had the juvenile court properly considered

the additional time in which he had to reunify, Hugo contends, it would have continued his services. Hugo's contentions are not legally sound or supported by the record.

First, the California Supreme Court held in *Tonya M. v. Superior Court* (2007) 42 Cal.4th 836 (*Tonya M.*) that "At the six-month review hearing, the juvenile court has no authority to extend services beyond the 12-month review hearing ...." and disapproved *Dawnel D.* on that point. (*Tonya M.*, at p. 848.)

Further, the juvenile court did not specify how much time remained of the 12-month reunification period and did not refute Hugo's attorney's argument that Hugo had until November 10, 2013. Therefore, one could infer that the court relied on Hugo's attorney's calculation rather than Ms. Amoruso's as to when the 12-month review hearing would have to be set.

Finally, the juvenile court properly terminated Hugo's reunification services because it found he was provided reasonable services and because it could not find there was a substantial probability Leanna could be returned to his custody. Section 366.21, subdivision (e), the operable statute at the six-month review hearing, allows this result.

Section 366.21, subdivision (e) provides in relevant part:

"If the child was under three years of age on the date of the initial removal ... and the court finds by clear and convincing evidence that the parent failed to participate regularly and make substantive progress in a court-ordered treatment plan, the court may schedule a hearing pursuant to Section 366.26 within 120 days. If, however, the court finds there is a substantial probability that the child, who was under three years of age on the date of initial removal ... may be returned to his or her parent ... within six months or that reasonable services have not been provided, the court shall continue the case to the 12-month permanency hearing." (§ 366.21, subd. (e).)

We review the juvenile court's finding there is not a substantial probability of return for substantial evidence. (*Kevin R. v. Superior Court* (2010) 191 Cal.App.4th 676, 688-689.) Whether the juvenile court made the correct decision upon its findings of fact

is reviewed under the abuse of discretion standard. (*In re Brequia Y.* (1997) 57 Cal.App.4th 1060, 1068.)

Here, the juvenile court did not believe Hugo was capable of complying with his case plan and did not foresee significant improvement much less a likelihood Leanna could be returned to his custody. The court stated:

“The [c]ourt finds that [Hugo] was and continues to be incapable of complying with the [c]ase [p]lan on his own. He wasted more than half of the six months the law allows him to reunify. I don’t think he did that deliberately or intentionally. I think ... it just reflects on the level of which he functions. I don’t see any hope for significant improvement any time soon.”

We conclude substantial evidence supports a finding there was not a substantial probability Leanna could be returned to Hugo’s custody by the 12-month review hearing. We further conclude the juvenile court did not abuse its discretion in terminating Hugo’s reunification services and setting a section 366.26 hearing.

#### **DISPOSITION**

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