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

DANIEL T.,

Petitioner,

v.

THE SUPERIOR COURT OF KERN COUNTY,

Respondent;

KERN COUNTY DEPARTMENT OF HUMAN
SERVICES,

Real Party in Interest.

F068830

(Super. Ct. No. 129560)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Louie L. Vega, Judge.

Rory E. McKnight, for Petitioner.

No appearance for Respondent.

Theresa A. Goldner, County Counsel, and Jennifer E. Feige, Deputy County Counsel, for Real Party in Interest.

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

Daniel T. seeks an extraordinary writ from the juvenile court's orders issued at a contested six-month review hearing (Welf. & Inst. Code, § 366.21, subd. (e))¹ terminating his reunification services and setting a section 366.26 hearing as to his 23-month-old son, Gabriel. We deny the petition.

PROCEDURAL AND FACTUAL SUMMARY

In November 2012, the juvenile court adjudged then six-month-old Gabriel its dependent after sustaining allegations that his mother Nicole's drug use placed him at a substantial risk of harm. Nicole has three other minor children who then ranged in age from three to six years old and who were in legal guardianship with their maternal grandmother until they were detained in October 2012.

Nicole identified Daniel as Gabriel's alleged father. Daniel has a significant juvenile and adult criminal history involving drug-related offenses. When these proceedings were initiated, Daniel was on parole, which required him to drug test. He denied using drugs except marijuana, which he said he smoked three years before. According to the record, however, he was required to register as a drug offender in 2005 for use of methamphetamine.

Daniel appeared at the initial dispositional hearing as to Gabriel in December 2012 and requested paternity testing. The juvenile court continued the hearing and conducted it in May 2013.

Meanwhile, the juvenile court declared Daniel to be Gabriel's biological father and ordered supervised weekly visitation. The juvenile court terminated the maternal grandmother's guardianship over Gabriel's three half siblings (siblings) and the Kern County Department of Human Services (department) placed the children together in foster care. Daniel visited Gabriel and the visits went well.

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

In March 2013, Daniel's parole officer informed the department that Daniel was tested for drugs monthly at random and that he had not violated his parole by testing positive. In April 2013, however, Daniel tested for the department and tested positive for marijuana.

In May 2013, the juvenile court conducted a dispositional hearing as to Gabriel and his siblings. The department recommended the court deny Daniel's requests for placement and reunification services because of Daniel's drug-related criminal history and inability to provide Gabriel a stable home. The department also recommended the court deny Nicole services because she was still using methamphetamine.

Daniel testified that he used marijuana recreationally but then was prescribed medicinal marijuana to treat dry eyes. In February 2013, he threw his medicinal marijuana card away and had not used marijuana since. He was willing to abstain from the use of marijuana.

Following Daniel's testimony, the juvenile court ordered him to participate in reunification services. His services plan required him to abstain from the use of illegal substances and/or the use of controlled substances unless prescribed by a doctor and submit to random, unannounced drug and alcohol testing. It stipulated that failure to appear for a scheduled drug test, or a refusal or inability to submit to a requested test would be considered a positive test. Upon receipt of a positive drug test result for an illegal substance or nonprescription controlled substance, Daniel would complete alcohol abuse counseling. The juvenile court set the six-month review hearing for November 2013.

The juvenile court denied Nicole reunification services, ordered the siblings removed from their maternal grandmother, and set a September 2013 section 366.26 hearing as to them.

In January 2014, the department filed its report recommending the juvenile court terminate Daniel's reunification services because he tested positive for marijuana and did

not enroll in substance abuse counseling. In addition, he was unavailable to drug test and visit Gabriel in July and August, claiming he was working out of town. The department advised the juvenile court the children's caregivers were willing to adopt them if Daniel failed to reunify with them.

Daniel testified at the six-month review hearing that he trained on an offshore rig in July and August 2013. During that time, he returned to shore four times to complete paperwork and attend an orientation. Each time he was onshore no longer than an hour, leaving him insufficient time to visit Gabriel. Daniel further testified that just before entering the job training program, he started smoking marijuana for back pain and dry eyes. He purchased the marijuana through a vendor and smoked it at night when he had pain and could not sleep. He said he obtained a recommendation to use marijuana in October 2012. It was valid for a year and he renewed it in October 2013.

Following testimony, Daniel's attorney argued Daniel's use of marijuana did not constitute illegal use or use of a controlled substance without a prescription because he was medically authorized to use it. Therefore, he was not required to enroll in substance abuse counseling. He further argued there was no evidence Daniel's marijuana use made him a substance abuser or that he posed any harm to Gabriel. Daniel's attorney asked the juvenile court to either place Gabriel with Daniel under family maintenance or find there was a substantial probability Gabriel could be returned to his custody and continue reunification services.

The juvenile court requested briefing on the issue of whether Daniel's marijuana use constituted substance abuse under *In re Drake M.* (2012) 211 Cal.App.4th 754 (*Drake M.*) and set a date for its ruling. The court in *Drake M.* reversed a juvenile court's jurisdictional finding as to a father who used medicinal marijuana, concluding there was insufficient evidence he was abusing marijuana or that his use placed his child at substantial risk of serious physical harm or illness. (*Id.* at pp. 768-769.) County counsel submitted points and authorities, arguing Daniel's marijuana use posed a risk of

detriment to Gabriel under the rationale of *Drake M.* Daniel's attorney did not file briefing on the issue.

The juvenile court found it would be detrimental to Gabriel to place him in Daniel's custody, Daniel was provided reasonable reunification services but made minimal efforts to utilize them and there was not a substantial probability Gabriel could be returned to Daniel's custody if reunification services were continued. The court set a section 366.26 hearing. This petition ensued.

DISCUSSION

Daniel contends the juvenile court erred in requiring him to participate in drug counseling and in terminating his reunification services. He seeks an order granting him custody of Gabriel and continued reunification services.

We first address Daniel's contention with respect to drug counseling and conclude he is precluded from raising it on appeal. The juvenile court set forth the terms of Daniel's reunification services as part of its dispositional orders in May 2013. Dispositional orders, including the content of a reunification plan, are appealable. Failure to challenge the plan content on appeal constitutes a forfeiture. (*In re S.B.* (2009) 46 Cal.4th 529, 532.) Daniel did not appeal from the dispositional order. Consequently, he cannot now claim the juvenile court's inclusion of drug counseling in his services plan was unreasonable or inappropriate.

With respect to custody, section 366.21, subdivision (e) (subdivision (e)) governs the proceedings at the six-month review hearing and required the juvenile court to place Gabriel in Daniel's custody unless the court found that doing so would be detrimental to Gabriel. Subdivision (e) provides as relevant here:

“[T]he court shall order the return of the child to [parental custody] unless the court finds, by a preponderance of the evidence, that the return of the child ... would create a substantial risk of detriment to the safety, protection, or ... well-being of the child The failure of the parent ... to participate regularly and make substantive progress in court-ordered

treatment programs shall be prima facie evidence that return would be detrimental”

Daniel contends the juvenile court’s finding of detrimental return was erroneously based on its conclusion that his use of marijuana was drug abuse rather than medicinal use. The record however does not support his contention. The juvenile court considered Daniel’s marijuana use as one factor “weighed with all the other factors.” Consequently, there is no evidence the juvenile court considered him a drug abuser based on his marijuana use or decided it was detrimental to place Gabriel in his custody based solely on his marijuana use. Further, other evidence supports the juvenile court’s finding of detrimental return. Daniel did not visit Gabriel or drug test for two months. On that evidence, the juvenile court could reasonably find prima facie evidence he failed to regularly participate and make substantive progress in his court-ordered services.

Further, having found prima facie evidence of detrimental return, the juvenile court had discretion under subdivision (e) to terminate Daniel’s reunification services and set a section 366.26 hearing unless it found there was a substantial probability Gabriel could be placed in Daniel’s custody after an additional period of reunification services.² In this case, the juvenile court found there was not a substantial probability of return.

In determining whether there is a substantial probability of return, the juvenile court “should consider the following factors along with any other relevant evidence: [¶]

² Subdivision (e) provides as relevant:

“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); italics added.)

a. Whether the parent ... has consistently and regularly contacted and visited the child; [¶]
b. Whether the parent ... has made significant progress in resolving the problems that led to the removal of the child; and [¶] c. Whether the parent ... has demonstrated the capacity and ability to complete the objectives of the treatment plan and to provide for the child's safety, protection, physical and emotional health, and special needs.” (Cal. Rules of Court, rule 5.710(c)(1)(D)(i).)

In this case, Daniel's failure to maintain regular contact and visitation with Gabriel and submit to random drug testing, coupled with his history of abusing marijuana and methamphetamine, provided substantial evidence supporting the court's finding that it was not substantially probable that Gabriel could be placed in his custody following a continued period of services. Accordingly, we find no error in the juvenile court's orders terminating Daniel'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.