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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re I.H., a Person Coming Under the  
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES  
AGENCY,

Plaintiff and Respondent,

v.

P.H.,

Defendant and Respondent;

I.H.,

Objector and Appellant.

G047209

(Super. Ct. No. DP020769)

O P I N I O N

Appeal from an order of the Superior Court of Orange County,  
Gary Bischoff, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Objector and  
Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Aurelio Torre, Deputy County Counsel, for Plaintiff and Respondent.

Marsha F. Levine, under appointment by the Court of Appeal, for Defendant and Respondent.

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### INTRODUCTION

I.H. was taken into protective custody in January 2011, several days after she was born. She had been one month premature, and both I.H. and her mother, P.H. (Mother), tested positive for amphetamines. The juvenile dependency petition included two counts: count 1 was for failure to protect under Welfare and Institutions Code section 300, subdivision (b) (further code references are to the Welfare and Institutions Code unless otherwise noted), and count 2 was for abuse of sibling under section 300, subdivision (j).

At the 18-month review hearing in July 2012, the juvenile court brought its own motion under section 350, subdivision (c) (section 350(c)). After giving the parties the opportunity to argue, the court granted the motion, found the Orange County Social Services Agency (SSA) failed to carry its burden under section 366.22, subdivision (a), and ordered that I.H. be returned to Mother's custody under SSA's supervision. I.H. appeals from this order. SSA has filed a letter brief stating it will not file a respondent's brief but does not oppose I.H.'s appeal.

Applying the relevant standard of review, described in detail in the discussion section, we conclude the juvenile court did not err by granting the motion under section 350(c) at the 18-month review hearing and ordering that I.H. be returned to Mother's custody. We therefore affirm. Because the only issue presented by this appeal is whether the juvenile court erred by granting the section 350(c) motion, we start with an explanation of that code section and other relevant law, provide an abbreviated

procedural history, and limit our recitation of the facts to the evidence presented at the 18-month review hearing.

### **RELEVANT LAW**

The juvenile court granted its own motion under section 350(c), which states: “At any hearing in which the probation department bears the burden of proof, after the presentation of evidence on behalf of the probation department and the minor has been closed, the court, on motion of the minor, parent, or guardian, or on its own motion, shall order whatever action the law requires of it if the court, upon weighing all of the evidence then before it, finds that the burden of proof has not been met. That action includes, but is not limited to, the dismissal of the petition and release of the minor at a jurisdictional hearing, the return of the minor at an out-of-home review held prior to the permanency planning hearing, or the termination of jurisdiction at an in-home review. If the motion is not granted, the parent or guardian may offer evidence without first having reserved that right.”

Section 350(c) allows a parent to test the sufficiency of the social services agency’s evidence before presenting his or her case. (*In re Eric H.* (1997) 54 Cal.App.4th 955, 968-969.) Section 350(c) permits the juvenile court to dismiss the dependency petition “when, upon weighing the evidence on behalf of the agency and the minor then before it, it finds that the burden of proof has not been met.” (*In re Eric H.*, *supra*, at p. 969.) A juvenile court may weigh the evidence and consider the credibility of witnesses in deciding a motion under section 350(c). (*In re Roberto C.* (2012) 209 Cal.App.4th 1241, 1252-1253.)

The juvenile court granted its section 350(c) motion following the 18-month review hearing. Section 366.22, subdivision (a) provides that following the 18-month review hearing, “the court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance

of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child.” The social worker has the burden of establishing detriment. (§ 366.22, subd. (a).) In making its determination, the juvenile court must review and consider the social worker’s report and recommendations, the report and recommendations of any child advocate, the efforts or progress demonstrated by the parent, and the extent to which the parent has availed himself or herself of services provided. (*Ibid.*)

“By authorizing the continued removal of a child from parental custody based on the risk of either physical detriment or emotional detriment, sections 366.21 and 366.22 focus on the child’s well-being at the time of the review hearing rather than on the initial basis for juvenile court intervention. [Citation.] Thus, while the court must consider the extent the parent has cooperated with the services provided and the efforts the parent has made to correct the problems which gave rise to the dependency [citation], the decision whether to return the child to parental custody depends on the effect that action would have on the physical or emotional well-being of the child.” (*In re Joseph B.* (1996) 42 Cal.App.4th 890, 899.)

### **PROCEDURAL HISTORY**

I.H. was placed on a hospital hold on the day she was born, primarily due to Mother’s admitted substance abuse and positive toxicology test at I.H.’s birth. At a team decisionmaking meeting held four days later, Mother admitted her drug use and said she was ready for treatment.

The juvenile dependency petition was filed in January 2011. The juvenile court ordered that I.H. be detained and placed in SSA’s custody. Mother pleaded no contest to the dependency petition’s allegations at the jurisdictional hearing on April 14, 2011. The court found the allegations true by a preponderance of the evidence.

The dependency petition alleged Mother knowingly used methamphetamine while pregnant with I.H. and had a history of methamphetamine and cocaine use. The petition alleged that while pregnant with I.H., Mother failed to obtain prenatal care on a regular basis. The petition alleged that I.H.'s alleged father was "Mick," whose last name and whereabouts were unknown, and that Mick knew or reasonably should have known that Mother used methamphetamine while pregnant, but did not assist Mother in seeking treatment and did not provide for I.H.'s care, supervision, and support.

The petition alleged I.H. has two older half siblings, Mi. and Ma., who were declared dependent children in 2006 when Ma. was born with a positive test for cocaine. Mother failed to reunify with them. Mi. was adopted by the maternal grandmother and Ma. was adopted by her foster parents.

On July 11, 2011, following a contested dispositional hearing conducted over several days, the court declared I.H. a dependent child of the juvenile court and vested custody with SSA. Mother was offered reunification services and the court approved SSA's case plan for her. The case plan required Mother to complete a parenting program and an outpatient substance abuse treatment program, participate in substance abuse counseling and a 12-step program, submit to random drug testing, and participate in individual or group counseling to address depression. The case plan established goals for Mother of complying with court orders, cooperating with SSA, maintaining a relationship with I.H., staying sober, not breaking the law, knowing and understanding age-appropriate behavior for I.H., and obtaining and maintaining a suitable residence.

A contested six-month/12-month review hearing was conducted over several days in May 2012. The juvenile court found that return of I.H. to Mother would create a substantial risk of detriment to I.H. and "the court cannot trust the mother to protect the child." The court also found, however, a substantial probability that I.H.

would be returned to Mother's physical custody within two months. The court found that Mother had made substantial progress toward alleviating or mitigating the causes necessitating placement. The court approved SSA's new case plan presented in the SSA report addendum dated May 16, 2012.

### **THE 18-MONTH REVIEW HEARING**

The 18-month review hearing was conducted over several days in July 2012. At the hearing, the juvenile court received in evidence SSA's status review report dated July 17, 2012 (the Status Review Report) and SSA's addendum report dated July 17, 2012 (the Addendum Report). The court heard testimony from social worker Gina Diep, supervising social worker John Mannings, Mother, alleged father M.A., and foster parent K.B.

#### **I.**

#### **Evidence Presented at the 18-month Review Hearing**

##### *A. The Status Review Report and the Addendum Report*

The Status Review Report stated that Mother was living in a confidential residence, working full time as a trainee at a dental laboratory, and driving an automobile for transportation. She had 14 hours per week of monitored visits with I.H.

I.H. remained placed with foster parents K.B. and M.B.,<sup>1</sup> who had adopted I.H.'s half sister, Ma. K.B. reported that I.H. was having more temper tantrums. I.H. often woke up at night screaming and had to be held to be calmed down. K.B. reported that Mother had given I.H. two items (a zippered wallet and a beaded bookmark) that were potential choking hazards.

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<sup>1</sup> K.B. and M.B. were granted de facto parent status at the 18-month review hearing.

The Status Review Report described as “substantial” Mother’s cooperation with the case plan, and her efforts and progress made toward alleviating or mitigating the causes necessitating court involvement.

In March 2012, Mother had moved to transitional housing. There, Mother participated in drug testing and in counseling on relapse prevention and financial responsibility. Mother was following all of the rules of the program, including the rule against unauthorized visitors. Her case manager described her as “open and honest, focus[ed] on her case plan,” and “motivat[ed]” to regain custody of I.H. Mother twice weekly attended meetings of Alcoholics Anonymous/Narcotics Anonymous.

Mother had reenrolled in the perinatal program at the Orange County Health Care Agency and remained in full compliance with individual therapy, as well as drug testing, between May and July 2012. Mother had been “exited” from the dependency drug court in May 2012. In addition, Mother had commenced individual therapy with Beatriz Granja, and, by July, had attended six therapy sessions. Granja reported that “[Mother] seems to be doing well and appears very motivated to reunify with her child.”

From January 20 through June 29, 2012, Mother had 27 drug tests, two of which she missed but was excused, and the remaining were negative. Mother had a drug patch applied on May 17, 2012, and, from that date to June 21, 2012, patch tests were taken six times. All tests were negative.

Mother was consistent in visiting I.H. 14 hours every week (10 hours monitored by the maternal grandmother and four hours monitored by SSA staff). During visits, Mother played with I.H., read her books, fed her, changed her diaper, and tended to her needs. I.H. and Mother often cuddled. I.H. generally was happy during visits but had tantrums when she did not get her way. She appeared to be very comfortable with Mother and referred to her as “moma.” Mother appeared to be “very attentive and affectionate” toward I.H.

I.H. usually cried when being placed in her car seat to be transported to visits. Sometimes, when being handed from her foster mother to Mother, I.H. would scream, cry, and kick. Once, the social worker transported I.H. from K.B.'s home to a visit with Mother. When the social worker tried to place I.H. in the car seat, I.H. "began to arch her back" but within one minute fell asleep.

On May 22, 2012, Mother called the social worker, admitted that Mick and M.A. were one and the same person, and provided M.A.'s address. On June 20, Mother identified two ex-boyfriends, M.A. and L.L., as potential fathers of I.H. Mother described M.A. as "crazy" and stated L.L. used drugs. Mother told the social worker that she "is solely focused" on "being a good mother" and was not interested in having a relationship with M.A. or L.L.

Under assessment/evaluation, the Status Review Report stated: "To [M]other's credit, she has been compliant and cooperative with [SSA] and has complied [with] the case plan. To the knowledge of [SSA], she has not had any contact or interaction with persons not authorized by [SSA]. She continues to consistently visit her child and all visitation is reported to have gone well. She provides good care for her child during the visitation. [M]other is not residing in a state licensed or regulated residential treatment center and the residence is not considered to be a residential treatment center. Her current residence is considered to be a transitional living home (homeless facility). [M]other has demonstrated progress during these previous two months; however, it does not negate [M]other's actions and/or behavior[] from the previous eighteen months of services." SSA recommended that reunification services for Mother be terminated.

When the social worker informed Mother of this recommendation, Mother was "tearful" and asked for "additional time to reunify with the child." Mother told the social worker that she had received a couple of telephone calls from jail but did not respond to them.

In June 2012, K.B. reported that I.H.'s tantrums had been increasing. In July, K.B. informed the social worker that, for the previous month, I.H. had awakened "hysterical" every night about 10:30 p.m. K.B. reported: "For the last [ ]month, [I.H.] has been waking up around 1030p every night hysterical. We bring her to her bed and give her a bottle (water) until she eventually falls asleep. This takes hours sometimes. She wakes up again hysterical and we repeat the process. Starting July 7th evening [I.H.] . . . will not even let me put her in her crib—she cries hysterically. She has also started crying when I close her bedroom door when it's time . . . for me to read to her and her sister (part of our normal night time routine). When she does this, I lay her in my bed (by herself) and she goes right to sleep."

*B. Witness Testimony*

*1. Social Worker Gina Diep*

Gina Diep, the social worker assigned to the case, testified she was recommending that reunification services be terminated even though Mother had participated in all required services, had complied with her case plan, and had received positive reports from service providers. Diep believed the program at the transitional home where Mother resided was "sufficient" because it offered case management services, drug testing, and 12-step meetings, and maintained strict guidelines for visitors.

Diep testified that Mother was visiting I.H. for 14 hours per week. Diep made no changes to visitation because she believed the court order prevented making changes. Diep might have considered supervised and unmonitored visits if she could make such changes.

When asked whether Mother had complied with her case plan, Diep testified that Mother "needs . . . to be honest." Diep had no information to suggest Mother had been dishonest during the previous two months, but believed Mother needed more time "to demonstrate that we can be able to trust her in . . . being truthful." Diep

believed Mother had not been truthful about I.H.'s potential father and had provided "confusing" information about whether "Mick" and M.A. were the same person.

Diep believed Mother had the ability to meet I.H.'s needs and had no concerns over Mother's ability to care for I.H. When asked what risk there would be if I.H. were returned to Mother's custody, Diep testified that she wanted to slowly transition Mother to unmonitored visits, but insufficient time remained to do so. Diep also testified: "I feel comfortable that the child can be safe in the house, but I don't know what's going to happen after or if [Mother]—whether she's meeting somebody or taking the child with her—I don't know—outside of the home environment."

Diep's primary concern was that Mother was engaging in inappropriate relationships or was in contact with men of whom SSA did not approve. Diep had no evidence that Mother was engaged in such relationships or contacts.

SSA rested at the conclusion of Diep's testimony. The rest of the witnesses were called by counsel for I.H. (Minor's Counsel).

## *2. Supervising Social Worker John Mannings*

John Mannings was Diep's supervisor. He testified he consulted with Diep regarding the recommendation to terminate reunification services and agreed with it because Mother "has run out of family reunification time."

Mannings was concerned about permitting Mother to have unmonitored visits with I.H. because Mother's past behavior suggested that Mother would allow I.H. to be exposed to criminals and drug users. He testified that during the prior two months, Mother had done "really, really well" and had done "everything she's needed to do." However, he testified, "when you counterbalance that across a consistent period of 18 months, I think the 18 months holds heavier weight than these previous two months."

Mannings was concerned that Mother was not being entirely truthful with SSA and that her residence did not offer supervision for 24 hours a day. Mannings had no evidence that Mother had contact with any inappropriate people in the last two months

and acknowledged that her service providers all gave good reports. He testified his “only concern” was that Mother had provided “inconsistent information” about the father’s identity.

### 3. *Mother*

Minor’s Counsel called Mother as a witness under Evidence Code section 776. While Mother was on the stand, she was examined by her own counsel as part of her case-in-chief. The juvenile court did not consider Mother’s examination conducted by her counsel, and, therefore, we do not consider it.

On cross-examination, Mother testified she had been sober since the day I.H. was born. Mother acknowledged she had a problem with drugs and alcohol and was “still in recovery” and “working on my sobriety.” Mother testified that before she was sober, “I didn’t care about anybody. I do all kind[s] of stuff just to get my dope. I didn’t care about my mom, my family, my kids and I lied.”

Mother also acknowledged she had a problem with lying. She admitted she lied when she testified at the last hearing, but she was not lying “at this time.” She had not lied since the previous May, when she had falsely testified that Mick and M.A. were different people. Mother had lied because she was afraid of M.A. After I.H. was born, Mother accepted rides from M.A. and had lived with him at the beginning of the dependency case.

Mother acknowledged receiving a telephone call from the jail on July 11. She did not know who from the jail had called her. She had recognized the telephone number as being from the jail because she had friends who had been in jail sometime in 2011, and she had received telephone calls from them.

At transitional housing, Mother lived in a two-bedroom apartment with another woman and her children. A “house mom” checked on Mother every day to make sure she followed the rules. Mother participated in relapse prevention every other week, met with her case manager weekly to address budgeting, savings, and planning for her

future, and attended Alcoholics Anonymous/Narcotics Anonymous meetings. Mother was also participating in individual therapy and the perinatal program, and was employed.

On recross-examination by Minor's Counsel, Mother again acknowledged she had lied when she testified in May that Mick and M.A. were not the same person. Mother testified that she often lied "before," but now she was "trying to change" and was "not lying any more." Mother had had no contact with M.A. for "[a] long time." Mother testified she had changed her ways in that "I know how to pray every day and ask God to give me guidance and I want to live in the way that pleases God." She "did not think of these things" before. Mother also testified that in addition to M.A. and L.L., one other man could be I.H.'s father.

#### 4. *M.A.*

M.A. testified that about two years previously he had a sexual relationship with Mother. The relationship lasted three to four months. He had not seen Mother for over a year and a half.

At some point, Mother led M.A. to believe he was I.H.'s father. M.A. did not believe Mother because he had "trust issues" with her and she had spent time with other men. When Mother informed M.A. he was the father of I.H., he "brushed it off as though she was lying to me" because "she wasn't an honest person with me." Earlier in the dependency proceedings, M.A. had signed a document denying he was I.H.'s father and declining to participate in the dependency proceedings.

#### 5. *K.B.*

I.H. had been in K.B.'s care since I.H. was six days old, except for a 60-day visitation with Mother. Since May 16, 2012, K.B. had dropped off I.H. for visits with Mother some 12 times. On each occasion, when K.B. handed I.H. to Mother, I.H. would arch her back, scream, and cry. I.H. appeared happy when returned to K.B.'s care.

K.B. testified that Mother gave I.H. a wallet that had very small beads attached to it. K.B. was concerned because she believed the wallet was a choking hazard. K.B. saw the maternal grandmother hand I.H. some keys and was concerned because Mother did not intervene to take them away.

K.B. testified that I.H. and her half sister, Ma., who had been adopted by K.B. and M.B., were very close. When Mother's 60-day visitation period began, Mother promised Ma. that I.H. would visit her. K.B. contacted Mother weekly to arrange a visit, but Mother did not respond and no visits occurred.

## **II.**

### **THE JUVENILE COURT'S RULING**

On July 24, 2012, when Minor's Counsel rested, the juvenile court asked the parties to be prepared the next day to present argument on section 350(c). On July 25, after hearing argument, the juvenile court found that SSA had not met its burden of proof under section 366.22, subdivision (a), granted the section 350(c) motion, and ordered that I.H. be returned to Mother's custody under SSA's supervision. The court did not modify the de facto parent status of K.B. and M.B.

The juvenile court stated its findings and reasons at length on the record. The court's finding can be summarized as follows:

1. Mother had been sober for 18 months and had maintained her sobriety "despite very tumultuous times."
2. Mother's therapists fully supported Mother and believed she had made "substantive progress."
3. Mother had not exposed I.H. to people with "active drug problems" who posed a substantial threat to I.H.'s well-being and safety. There was "no evidence that [Mother]'s associat[ing] with anyone she wasn't supposed to associate with."

4. Although one of Mother's major "coping mechanisms" had been to lie, the court was encouraged to believe Mother was trying to change her ways. Soon after the last hearing, when Mother falsely testified that Mick and M.A. were different people, Mother had gone to SSA and confessed that Mick and M.A. were the same person. Also, Mother had voluntarily informed the social worker about receiving telephone calls from the jail.

5. Mother obtained employment, was obeying the rules at her residence, and maintained visitation with I.H. with "clockwork" regularity.

6. Although I.H.'s behavior when handed from K.B. to Mother was "disturbing," the court took into account I.H.'s age and the fact I.H. likely viewed K.B. as her mother. The court attributed I.H.'s behavior to "known separation anxiety."

7. Mother acted appropriately during visits with I.H. Aside from the "poor associations" and decisions that Mother made during the 60-day visitation period, there was no evidence that Mother was not "parenting [I.H.] appropriately or that there were any other dangers." The court was "mindful" of the dangers posed by the keys and beaded wallet that Mother gave to I.H., but believed K.B. and Mother responded "exactly the same way."

8. Mother had complied with her case plan, removed undesirable people from her life, "re-engaged" with her family, and "has started to proceed in a fashion that indicates that she is capable of caring for [I.H]."

## **DISCUSSION**

In reviewing an order made following an 18-month review hearing, we usually determine whether substantial evidence supports the juvenile court's findings. (*Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1340, 1345.) In this case, in which the juvenile court granted a section 350(c) motion, the standard we apply is somewhat modified. "[The substantial evidence] test is typically implicated when a

defendant contends that the plaintiff succeeded at trial in spite of insufficient evidence. In the case where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. This follows because such a characterization is conceptually one that allows an attack on (1) the evidence supporting the party who had no burden of proof, and (2) the trier of fact's unassailable conclusion that the party with the burden did not prove one or more elements of the case [citations]. [¶] Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' [Citation.]" (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) We agree with this formulation of the standard of review.

At the 18-month review hearing, SSA and Minor's Counsel had the burden of establishing that the return of I.H. to Mother would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of I.H. (§ 366.22, subd. (a).) In granting the section 350(c) motion, the juvenile court expressly found that SSA did not meet its burden. Thus, the question for us is whether the evidence at the 18-month review hearing *compelled* a finding in favor of SSA and Minor's Counsel that, as a matter of law, the return of I.H. to Mother would create a substantial risk of detriment to I.H.'s safety, protection, or physical or emotional well-being.

The answer is no. There was evidence presented at the 18-month review hearing of risk of detriment if I.H. were returned to Mother's custody. In particular, there was evidence that Mother might expose I.H. to undesirable people, that Mother had a problem in the past with telling the truth, and that I.H. would benefit from a continued

relationship with Ma. But this evidence did not *compel* a finding of substantial risk of detriment.

To the contrary, evidence supported the juvenile court's extensive express findings, among which were the findings that Mother was successfully working toward changing her ways, had not exposed I.H. to undesirable people, had maintained her sobriety, had complied with her case plan, and had displayed appropriate parenting skills. The Status Review Report described as "substantial" Mother's cooperation with the case plan and stated that to SSA's knowledge, Mother was consistent in visiting I.H. and provided good care for I.H. during the visits. Mother's therapist and case manager noted her progress.

The primary concerns of SSA and Minor's Counsel expressed at the 18-month review hearing were that Mother had not been truthful about the identity of I.H.'s father and that Mother associated with inappropriate people. The juvenile court was entitled to weigh the evidence and assess witness credibility. (*In re Roberto C.*, *supra*, 209 Cal.App.4th at p. 1252.) The juvenile court reviewed the Status Review Report and the Addendum Report and observed Mother testify. The Status Review Report noted that to SSA's knowledge, Mother had not had any contact with persons not authorized by SSA. Mother testified she was "trying to change" and was "not lying any more." Based on the weight of the evidence and an assessment of Mother's credibility, the juvenile court could find that Mother was striving toward being honest and had had no contact with inappropriate people. For the same reason, the juvenile court could properly conclude that I.H.'s behavior when passed from K.B. to Mother was normal separation anxiety, and not grounds for denying Mother custody of I.H.

The juvenile court did not err in returning I.H. to Mother's custody under the supervision of SSA.

**DISPOSITION**

The order granting the section 350(c) motion and ordering that I.H. be returned to Mother's custody under SSA's supervision is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.