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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

M.P.,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

ORANGE COUNTY SOCIAL SERVICES
AGENCY et al.,

Real Parties in Interest.

G047453

(Super. Ct. Nos. DP021349,
DP022042)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Jacki C. Brown, Judge. Petition denied.

Donna P. Chirco for Petitioner.

No appearance for Respondent.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Jeannie Su, Deputy County Counsel, for Plaintiff and Respondent.

Law Office of Harold LaFlamme and Yana Kennedy for the Minors.

The mother contends the juvenile court erred when it terminated reunification services and set the matter for a hearing under Welfare and Institutions Code section 366.26. (All further statutory references are to the Welfare and Institutions Code.) We find no error.

I

FACTS

On March 1, 2011, R.B., the father and M.P., the mother, were caught “on a burglary spree,” according to the police report. They went to three different Target stores and stole from each. The father ran from the police and was subsequently arrested. Present with them was three-year-old T.B. The mother was not arrested because she was pregnant and had T.B. with her.

Eleven months earlier, in February 2010, it was reported the parents were trying to steal merchandise from a store while T.B. was in a stroller. In August 2010, T.B. was outside, unattended, with a dog on a leash. When questioned, all she responded was to say “daddy sleeping.” Neighbors telephoned police on another occasion when then two-year-old T.B. was walking down the street alone. A neighbor escorted the child home and was informed by a man in the home that he was sleeping. In October 2010, the mother and father committed a burglary at a Costco, with T.B. in tow. Both parents were arrested and charged with burglary and conspiracy.

The mother’s criminal history includes 11 convictions for various crimes, primarily theft crimes. The father has been convicted of crimes seven times.

In March 2011, T.B. was taken into custody and placed in a foster home. At the time, the mother was “a fugitive running from the law.” In April T.B. was declared a dependent of the Juvenile Court of Riverside County.

In June 2011, the mother delivered baby boy L.B., in Garden Grove. Within 24 hours, the baby demonstrated difficulties. He was hypertonic, had a high pitched cry, runny stool, vomiting, a low heart rate and was irritable, showing classic signs of

withdrawal from Benzodiazepines. The court denied the parents' request to release L.B. into their custody. Orange County Social Services Agency (SSA) substantiated severe neglect of L.B. by both parents.

The Orange County Juvenile Court found the allegations involving neglect of L.B. to be true. The court also determined the parents' address was in Riverside County, and ordered proceedings transferred there. A November 17, 2011, minute order of the Riverside Juvenile Court indicates the father was incarcerated. The juvenile court ordered proceedings transferred to Orange County.

On February 10, 2012, the Orange County juvenile court judge ordered visitation at any Orange County jail facility for the father to visit with T.B and L.B. On May 4, 2012, both parents were arrested. When the social worker visited the mother in jail on May 8, the mother admitted she was taking Vicodin and oxycodone. At the Orange County men's jail, the father said his arrest was a mistake when the social worker visited him there. On August 9, 2012, the juvenile court ordered jail visitation for the mother to visit with T.B. and L.B.

A September 17, 2012 addendum report from SSA states: "The mother, who continues to be incarcerated, continues to show positive effort in maintaining her sobriety. She has completed several classes and continues to take additional ones upon availability. As of this writing she is to have a phone interview with Heritage House so that hopefully upon release she can immediately enter the program. If she is able to transfer immediately into an in-treatment facility, such as Heritage House, it is hoped that the program will help her to maintain her sobriety, and that she would focus on the fact that she has to continue working towards providing and maintaining a safe and stable environment for her children."

At the combined 12-month review hearing for T.B. and the six-month review hearing for L.B., the court described the main controversy was whether or not the court would continue reunification services. The father's lawyer argued he should be

given more services because “he has been in custody since March of last year until the end of May . . . of this year. . . . I’m going to present evidence that he has, through the social worker, completed a series of programs while he was in custody including parenting education.” The attorney for the children requested that a permanency hearing be set for both children, pointing out to the court the parents had both been incarcerated, and “testing positive” when they were out of custody.

The juvenile court heard the testimony of the social worker, and the mother. The social worker testified the mother had over 18 months of services on T.B.’s case and over a year of services on L.B.’s case. She said the father admitted to her earlier that day that he was taking oxycodone, Xanax and Norco.

The following questions and answers were asked by mother’s counsel and answered by the social worker:

“Q: Okay. And have you discussed with the mother what she’ll do when she’s released from custody?

“A: Yes.

“Q: What have you discussed with her?

“A: She will either go to Heritage House. She told me of a particular title, I don’t recall, that will allow her to go there, and she won’t have to pay. [¶] And if that program doesn’t work or if and when she starts the program, I would rerefer her to prototypes because I’m familiar with that program, and I think she would do well.

“Q: So you discussed with her going into a treatment facility upon release?

“A. Correct.

“Q: And does that seem like something that mother is in agreement with doing?

“A: Yes.

“Q: And do you think that that — those additional services would aid mother in addressing the problems which led to the initial removal of the children?

“A: Yes.

[¶] . . . [¶]

“Q: With the programs that mother has completed, though, and if she does follow through with what you’ve discussed with her of going into a treatment facility, did you think that she could easily have the kids returned to her care in the next six months?

“A: Yes.”

At the outset of setting forth its findings, the juvenile court stated: “I will note that the tender age of both children made it imperative that substantive progress had to be made by both parents in a consistent fashion in order for the children to be able to be returned.” The court found: “I do find that by a preponderance of the evidence the showing that a substantial risk of detriment has been made as to both children.”

Regarding the mother, the juvenile court found her “progress has been minimal noting however she has made an awful lot of efforts in the last two months; but that is not sufficient in the court’s mind to note the moderate, or substantial progress overall in the last six months.” The court also stated: “I will note that the mother had failed to obey court orders, failed to stay free of drugs, failed to test by the social worker, failed to accept responsibility in terms of her very most recent incarceration. [¶] And even though she had represented back in January 2012 in the case plan that she would do whatever she needed to do to get her children returned to her she did nothing to progress towards that goal until she’s back in custody in June 2012. [¶] Even though she was out of custody from January through May, she failed to ever test; which was an absolute prerequisite to any substantive progress towards controlling and eliminating the drug abuse in her life. [¶] She failed to enroll in the perinatal program as ordered by the social worker. And even though she had participated in the Mariposa Women’s Center, although she ended up being required to leave it, she failed to enroll in the perinatal program; which is the program that her social worker pointed out to her which then contained all of the ingredients required under the case plan. [¶] In addition, she has no

concrete release date at the present time. And she's presented herself as if she has a potential release date from Orange County jail in October; however she has two other holds. Neither one of which anyone know what is going to happen with."

Regarding the father, the court stated: "I will find also that although the social worker based upon her examination of the case found that there have been substantive progress made by the father in court ordered treatment, I do not find the actual facts support that conclusion." Later the court said as to the father: "I will find that he has made statements of a nature that would indicate a real sincere desire for the return of his children; however he has failed to do what he needed to do in order to meet that. [¶] He has failed to ever test. . . . He's failed to inform the social worker of many of the points that were specifically delineated in the case plan that he was required to keep the social worker aware and informed. [¶] He failed to until just the last appearance to inform the social worker that he was taking prescriptive drugs. Then he failed to provide any verifications except as to a prescription for one. [¶] More importantly, he has never provided medical verification for the need for those prescriptive drugs, or even had a condition, or illness for what it was that had prompted the medical attention for those drugs. [¶] He has made indication through repeatedly acts to the social worker about his residence. And even though the social worker gave him referrals, based upon his professed desire to move to Orange County he never followed through on any of them. [¶] When . . . the social worker ordered him to enroll in one of four programs he failed to do that. . . . He was terminated from therapy due to his un-excused absences. [¶] And both parents have failed to regularly and consistently report to the social worker. The father reported, but apparently when he chose to report; not when the social worker directed him to report. [¶] He got terminated from therapy due to his own absences. And has never tested either with the social worker, or with the programs that the social worker told him to do testing with. [¶] And he has never provided proof of his 12-step program as ordered by the social worker."

On September 26, 2012, the juvenile court found “neither parent has substantially complied with the directors of the case plans” and “by a preponderance of the evidence I find that any return would constitute a substantial risk of detriment to the children.” The juvenile court also ordered that a hearing under section 366.26 be held on January 15, 2013.

II

DISCUSSION

The mother contends the juvenile court erred in terminating reunification services. The court reviews a denial of continued reunification services for substantial evidence. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 456.)

“The dependency scheme sets up three distinct periods and three corresponding distinct escalating standards for the provision of reunification services to parents of children [or a sibling group containing a child] under the age of three. During the first period, which runs from roughly the jurisdictional hearing (§ 355) to the six-month review hearing (§ 366.21, subd. (e)), services are afforded essentially as a matter of right (§ 361.5, subd. (a)) . . . [with a few exceptions not applicable in this case]. (§ 361.5, subd. (b).) During the second period, which runs from the six-month review hearing to the 12-month review hearing (§ 366.21, subd. (f)), a heightened showing is required to continue services. So long as reasonable services have in fact been provided, the juvenile court must find “a substantial probability” that the child may be safely returned to the parent within six months in order to continue services. (§ 366.21, subd. (e).) During the final period, which runs from the 12-month review hearing to the 18-month review hearing (§ 366.22), services are available only if the juvenile court finds specifically that the parent has “consistently and regularly contacted and visited with the child,” made “significant progress” on the problems that led to removal, and “demonstrated the capacity and ability both to complete the objectives of his or her treatment plan and to provide for the child’s safety, protection, physical and emotional

well-being, and special needs.” (§ 366.21, subd. (g)(1)(A)-(C).) [Citation.]” (*A.H. v. Superior Court* (2010) 182 Cal.App.4th 1050, 1057-1058.)

“(1) Family reunification services, when provided, shall be provided as follows: [¶] (A) Except as otherwise provided in subparagraph (C), for a child who, on the date of initial removal from the physical custody of his or her parent or guardian, was three years of age or older, court-ordered services shall be provided beginning with the dispositional hearing and ending 12 months after the date the child entered foster care as defined in Section 361.49, unless the child is returned to the home of the parent or guardian. [¶] (B) For a child who, on the date of initial removal from the physical custody of his or her parent or guardian, was under three years of age, 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 defined in Section 361.49 unless the child is returned to the home of the parent or guardian. [¶] (C) For the purpose of placing and maintaining a sibling group together in a permanent home should reunification efforts fail, for a child in a sibling group whose members were removed from parental custody at the same time, and in which one member of the sibling group was under three years of age on the date of initial removal from the physical custody of his or her parent or guardian, court-ordered services for some or all of the sibling group may be limited as set forth in subparagraph (B). For the purposes of this paragraph, ‘a sibling group’ shall mean two or more children who are related to each other as full or half siblings.” (§ 361.5, subd. (a)(1).)

“At the review hearing held six months after the initial dispositional hearing, but no later than 12 months after the date the child entered foster care . . . the court shall order the return of the child to the physical custody of his or her parent . . . unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent . . . would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden

of establishing that detriment. At the hearing, the court shall consider the criminal history . . . of the parent . . . subsequent to the child's removal to the extent that the criminal record is substantially related to the welfare of the child or the parent's . . . ability to exercise custody and control regarding his or her child The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental. In making its determination, the court shall review and consider the social worker's report and recommendations and the report and recommendations of any child advocate . . . and shall consider the efforts or progress, or both, demonstrated by the parent or legal guardian and the extent to which he or she availed himself or herself to services provided, taking into account the particular barriers to an incarcerated or institutionalized parent or legal guardian's access to those court-mandated services and ability to maintain contact with his or her child. [¶] . . . [¶] 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." (§ 366.21, subd. (e).)

At the 12-month hearing, "the court shall order the return of the child to the physical custody of his or her parent . . . 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 physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment. . . . 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." (§ 366.21, subd. (f).)

Here T.B. was taken under protection in early March 2011 and the juvenile court ended reunification services in late September 2012, a period of almost 19 months, and mother received services for over 18 months on T.B.'s case. Services regarding L.B.

were ended 15 months following the time he was taken into protective custody after the mother received more than 12 months of services on his case. The court found mother did not substantially comply with court-ordered treatment programs and that return of T.B. and L.B. to her would constitute a substantial risk of detriment to the children.

The juvenile court stated it did consider the barriers faced by parents who are in custody. It noted that whatever efforts were made by both parents, were actually made while they were in custody in this instance. With regard to considering the social worker's recommendation, the juvenile court disagreed with mother's counsel's characterization that "the social worker's testimony show[s] that mother has made substantial progress" and that mother should have the children returned within six months. Instead of adopting that characterization, the court specifically found the mother had made only minimal progress overall.

We note the court disagreed with the social worker's recommendation, but that county counsel agrees substantial evidence supports the juvenile court's findings. We also note that numerous times during the social worker's testimony, she responded in ways that could have revealed an unfamiliarity with the specifics of this case or a general hesitancy to commit to details with such responses as "I believe so," "I'm not sure," "I don't recall," "I don't believe so," and "I don't think so." When asked about a particular program, she was unable to explain what it was, and said "I think that's drug counseling." We are not going to engage in weighing the evidence ourselves and instead defer to the juvenile court to decide the weight and credibility to be given to a witness's testimony. (*In re Lana S.* (2012) 207 Cal.App.4th 94, 103.)

Under the circumstances we find in this record, we find no error. We conclude substantial evidence supports the juvenile court's orders.

III

DISPOSITION

The petition for writ of mandate is denied.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.