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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ERIN R.,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

ORANGE COUNTY SOCIAL SERVICES
AGENCY et al.,

Real Parties in Interest.

G047669

(Super. Ct. Nos. DP020545 &
DP020546)

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, Deborah J. Servino, Judge. Petition denied.

Frank Ospino, Public Defender, Michael Hill, Assistant Public Defender, Nithin B. Reddy and Dennis M. Nolan, Deputy Public Defenders, for Petitioner.

No appearance for Respondent.

Nicholas S. Chrisos, County Counsel and Karen L. Christensen, Deputy County Counsel, for Real Party in Interest Orange County Social Services.

Law Office of Harold LaFlamme and Linda M. O'Neil for Real Parties in Interest S.R. and J.R.

* * *

Mother Erin R. petitions for an extraordinary writ (Cal. Rules of Court, rule 8.452) in the dependency case of her children, S.R. and J.R. At a contested 24-month permanency review hearing (Welf. & Inst. Code, § 366.25, subd. (a)(1); Cal. Rules of Court, rule 5.722)¹ conducted in November 2012, the juvenile court refused to return the children to mother's care, terminated mother's reunification services, and scheduled a section 366.26 hearing for March 7, 2013. Because the court's orders are supported by substantial evidence, we deny mother's petition.

FACTS

Background

On November 10, 2010, the Orange County Social Services Agency (SSA) filed a juvenile dependency petition alleging that four-year-old S.R. and eight-month-old J.R. came within the jurisdiction of the juvenile court (§ 300, subd. (b)). Pursuant to a stipulated factual basis for the allegations, the court found the allegations of the petition to be true as to counts one and two: (1) "On or about November 7, 2010, the children's mother was arrested and incarcerated . . . and the mother is unavailable to provide

¹ All statutory references are to the Welfare and Institutions Code.

ongoing parental care and support for the children or make alternate arrangements for the children's care, thus placing the children at risk of harm and neglect"; and (2) "the mother left the children in the care of their maternal uncle and aunt, who are no longer able to provide ongoing care and support for the children, thus leaving the children without a caretaker and placing the children at risk of harm and neglect."

Mother's² legal and personal problems were rooted in her use of controlled substances. Mother started smoking marijuana when she was 13 years old, and has used cocaine and ecstasy on few occasions. Mother started using heroin at age 19. She used heroin on and off for approximately 10 years prior to this dependency action. At her period of heaviest use, prior to the birth of S.R., mother used heroin daily. Mother used methadone for approximately four years, between the time she found out she was pregnant with S.R. and after the birth of J.R. Mother claims she never used heroin during this four-year period (approximately 2006 to 2010). Mother stopped using methadone in July 2010 and relapsed (i.e., began using heroin again) in September 2010. Mother attributes her relapse to her mental state at the time: "I got complacent and kind of just gave up on everything."

Mother was arrested on November 7, 2010, for stealing \$10,000 of personal property from her aunt. Mother remained in county jail until March 2011. Mother was sentenced to prison on March 1, 2011, and was released from the Central California Women's Prison in Chowchilla, California, on March 27, 2012. Thus, mother was incarcerated for the majority of the dependency action.

Dependency Procedural History

On March 2, 2011, the court declared the children to be dependents under section 360, subdivision (d). The court vested custody with SSA and ordered

² We ignore factual and procedural history pertaining to the children's respective fathers because such information is irrelevant to the issues before us.

reunification services for mother. The court approved a visitation plan and a case plan for mother. Mother's case plan included substance abuse treatment, parenting education, counseling, vocational training, and substance abuse testing. At the six-month (§ 366.21, subd. (e)) and 12-month (§ 366.21, subd. (f)) review hearings, the parties stipulated to, and the court found, a substantial probability of the return of the children to mother, which resulted in a continuation of her reunification services.

At a contested 18-month review hearing (§ 366.22) held in May 2012, the court found the best interests of the children would be served by providing additional reunification services and continuing the dependency action to a 24-month review hearing. SSA recommended this outcome "as the mother was recently discharged from incarceration . . . and is making significant and consistent progress in establishing a safe home for the children." The court approved of SSA's case plan for mother and incorporated the case plan (which was not appealed at the time by mother) into its order. The ultimate goal of the case plan was for the children to return home by November 2012. The case plan tasked mother with meeting five general objectives: (1) obtain resources to meet the children's needs and provide a safe home; (2) demonstrate an ability and willingness to take custody of the children; (3) stay free from drugs and show an ability to continue doing so; (4) meet the children's physical, emotional, medical, and educational needs; and (5) stay sober and demonstrate an ability to continue doing so.

To meet these objectives, SSA identified specific actions to be taken by mother. First, mother would provide all requested information to her social worker, keep all appointments with her social worker, and immediately inform her social worker of any difficulties in fulfilling her case plan. Second, mother would participate in general counseling and/or therapy to address the reason for the dependency case. Third, mother would successfully complete a SSA-approved parenting class. Fourth, mother would successfully complete a SSA-approved drug treatment program with "random, observed

drug testing. All drug tests are to be negative for drugs. A missed test is to be considered a positive test.”

Evidence at 24-month Review

The court conducted its section 366.25 “subsequent permanency review hearing” over the course of several days in November 2012. Evidence presented at the hearing included the SSA report, the social worker’s testimony, and mother’s testimony. The basic facts (as opposed to conclusions and recommendations) set forth in the SSA report were, for the most part, undisputed.

The children lived with their maternal uncle and his fiancée in a “well furnished” two-bedroom apartment in San Clemente. “The children have adjusted to their placement. The children appear to be happy living with the caretakers. The apartment has been clean when the [social worker] has visited. The children respond to the caretakers appropriately. [¶] The caretakers continue to provide for the needs of the children. The children attend school and have day care after school.” The children are in good mental and physical health. The uncle “is unable or unwilling to adopt the children because of exceptional circumstances that do not include an unwillingness to accept legal or financial responsibility for the children, but is willing and capable of providing the children with a stable and permanent environment through legal guardianship” The SSA report suggests it “would be detrimental to the emotional well being of the children” to remove them from the physical custody of their uncle.

Mother consistently participated in visitation, about 10 to 12 hours per week immediately after being released from prison and up to 48 hours per week by the time of the hearing. “The mother’s visits went unmonitored on August 28, 2012. The mother’s visits are reportedly going well. The visits occur on the weekends as the caretaker works. The visits are two times a week for 8 hours each visit. The mother went to overnight visits on October 20, 2012 and they take place at the caretaker’s home. The

mother lives close to the caretakers. The children enjoy being with the mother. The caretakers informed the [social worker] that they have no concerns regarding the mother's visits or the mother's ability to care for the children." Behavioral problems exhibited by S.R. improved after mother was able to increase her visits.

Mother's cooperation with the case plan and progress addressing the cause of the dependency was classified as "moderate" by the SSA report. Mother participated in random drug testing, but she missed nine scheduled tests. All of the tests actually taken by mother were negative. Mother attributed most of the missed tests to work conflicts and transportation issues. Mother also missed at least one test because she went to Yosemite for a vacation, which she did not inform her social worker about ahead of time. Mother received permission to go on her vacation from her probation officer and her sober living facility at the last minute, which prevented her from informing the social worker about the vacation in advance. Mother offered "no excuse for missing" tests in September and October; she thinks she "just got complacent" about calling in to check if she needed to test. The social worker had no indication mother was using drugs based on her interactions with mother and her communications with mother's probation officer. The missed tests did not cause the social worker to restrict visitation (as noted above, visitation became unmonitored and more extensive).

Mother completed some parenting coursework sent to her by the social worker while mother was incarcerated. According to her testimony, mother also (while in prison) completed a six-month drug program, participated in counseling, and completed a substance abuse program. After being released from prison, the SSA report indicates mother failed to show up for therapy services, with Ms. Yvette Kettering, set up by her social worker in May 2012. Mother testified that her work schedule did not mesh with Kettering's available hours. Mother was on two waiting lists for the "Perinatal Program" but had not actually started this program as of the time the SSA report was prepared. Mother started a parenting/counseling program (F.A.C.E.S.) in October 2012

after being referred by her social worker in September. The social worker felt like she has had to nag mother to work on her case plan. “The mother attends AA meetings two times a week. The mother has a sponsor, Denise.” “The mother will be receiving her 24 month chip soon.” Mother testified that she has completed her 12 steps.

According to the SSA report, “[t]he mother is doing well since being released from prison. The mother has had challenges working her case plan. There have been delays in completing the case plan as the mother was working a job that had different shifts. The mother’s shift would change constantly. This made it difficult to set up counseling and parenting classes.” Mother testified that it was difficult for her to obtain a job because of her criminal history, which explained her willingness to work under these conditions. In September 2012, “mother moved from Anaheim to Mission Viejo and is living with the caretaker’s sister. The mother turned in her application for the Tustin Family Campus Prototypes housing for women and children. The mother has an interview October 23, 2012 at 12:00 [p.m.] The mother was working at a hospital and her shift was never consistent. The mother had difficulty in attending services due to her work schedule. The mother has stopped working so she can concentrate on her case plan requirements. . . . [¶] The mother’s significant relationships are with her children, brother and extended family members. The mother denies having a boyfriend. [¶] The mother has not had any known law enforcement involvement during the reporting period.”

Although the social worker (who met with mother at least once per month) believed mother was working on her case plan, she was “unable to recommend continued reunification services” and therefore recommended “terminating services and scheduling a Permanency Hearing.” The social worker would have liked to have started a 60-day trial return of the children to mother in about two months, but did not think mother had made sufficient progress on her case plan to move forward with a trial return yet. The social worker lamented the fact that the process did not allow for additional time to

provide reunification services. Counsel for SSA, on the other hand, was more emphatic in pointing to mother's alleged shortcomings in demonstrating her recovery from heroin addiction over the eight months since her release from prison. Counsel for the children agreed with SSA's position. Mother testified that she loves her children and is willing to do whatever the court wants to reunify with them. Counsel for mother asked the court to consider mother's progress since November 2010 and her challenges after being released from custody.

Ruling at 24-month Review

The court found, pursuant to section 366.25, subdivision (a)(1), that the return of the children to mother would "create a substantial risk of detriment to the safety, protection, or physical or emotional well being of the [children]." The court also found reasonable services were provided to mother.

Pursuant to section 366.25, subdivision (a)(2), the court specified the factual basis for its decision orally: "The court has considered among other things [mother's] failure to participate regularly and make substantive progress in the court-ordered treatment program, as well as the efforts and progress as demonstrated; [¶] and to the extent to which the mother availed herself of the services, the social worker testified" "that she had to nag mother. She's been released for roughly seven months. She made moderate progress, but she hasn't completed the Perinatal, her parenting class. She missed tests and some of those testings [mother] admitted that it was due to her complacency. [¶] The court recognizes that [mother] did complete a program while she was at [the women's prison] and, according to [mother], she's been two years sober, but the problem is there isn't anything for the court to rely on as far as completing those court-ordered treatment programs."

"She turned down Prototypes. She was terminated from counseling with Miss Kettering, and [mother] has a substantial history of substance abuse. And the

problem is we don't have a proved successful completion of the substance abuse treatment program. That was the original problem, and that she left her kids with her brother without support while incarcerated. That's what the court has to look at in considering whether there is a substantial risk of detriment to the safety and protection and the physical and emotional well-being of the children if they were returned." "The court finds that the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement by the mother has been moderate."

Pursuant to section 366.25, subdivision (a)(3), the court terminated reunification services and set a section 366.26 hearing on March 7, 2013 to determine whether adoption or long-term foster care was the most appropriate plan for the children.

DISCUSSION

Mother raises two arguments in her petition. First, she claims the court erred by determining that returning children to mother posed a substantial risk of detriment to the children. (§ 366.25, subd. (a)(1).) Second, mother asserts the case plan ordered by the court and implemented by the social worker was inappropriate.

Substantial Risk of Harm

The petition challenges orders issued by the court at the 24-month "subsequent permanency review hearing." (§ 366.25, subd. (a)(1).)³ At such a 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

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Pursuant to section 366.22, subdivision (b), if a child is not returned to a parent's custody at the 18-month review hearing, the court may order additional reunification services, but must set a subsequent permanency review hearing "within 24 months of the date the child was originally taken from the physical custody of his or her parent or legal guardian."

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. . . . 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. 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 appointed pursuant to Section 356.5; shall consider the efforts or progress, or both, demonstrated by the parent . . . and the extent to which . . . she availed . . . herself of services provided; and shall make appropriate findings pursuant to subdivision (a) of Section 366." (§ 366.25, subd. (a)(1).) One factor listed in section 366, subdivision (a), is "[t]he extent of progress that has been made toward alleviating or mitigating the causes necessitating placement in foster care." (§ 366, subd. (a)(1)(E).)

A juvenile court's findings are reviewed under the deferential substantial evidence standard. (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1401.) "Under the substantial evidence rule, we must accept the evidence most favorable to the order as true and discard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 53.) As the petitioner, mother has the burden of showing there is no evidence of a sufficiently substantial nature to support the court's finding. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

Here, there is substantial evidence supporting the court's findings. Mother did not comply with her drug testing regimen. Mother took a vacation without consideration of the effect it might have on the dependency case, leading to one missed test. Mother admittedly grew complacent about testing in September and October 2012. That same complacency could lead to a relapse, as it has in mother's past. Mother did not complete the therapy and treatment prescribed in her case plan; indeed, mother did not begin some of her assigned tasks until a month before the review hearing. We

certainly appreciate the challenges faced by mother, a heroin addict and convicted felon, and applaud her efforts to turn her life around. We sympathize with the difficulties of juggling an unpredictable work schedule, overcrowded therapy programs (some of which had waiting lists), random notices to go to drug testing, AA meetings, and visiting one's dependent children. But with that said, returning children to the custody of mother would require even more of mother than what she tackled with only "moderate" success in the reunification period. Ultimately, the question is not whether mother's failure to fully comply with her case plan was understandable or excusable. The question before the court was whether the return of children to mother "would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of" the children. (§ 366.25, subd. (a)(1).) The evidence in the record supports the court's order.

Service Plan

"If the child is not returned to a parent . . . at the subsequent permanency review hearing, the court shall order that a hearing be held pursuant to Section 366.26 in order to determine whether adoption, . . . guardianship, or long-term foster care is the most appropriate plan for the child. . . . The court shall also order termination of reunification services to the parent or legal guardian. The court shall continue to permit the parent or legal guardian to visit the child unless it finds that visitation would be detrimental to the child." (§ 366.25, subd. (a)(3).) In accordance with this subdivision, the court terminated reunification services and set a section 366.26 hearing.

Appended to the end of section 366.25, subdivision (a)(3), is the following command: "*The court shall determine whether reasonable services have been offered or provided to the parent or legal guardian.*" (§ 366.25, subd. (a)(3), italics added.) The statute provides no explanation as to what should occur if the court were to find reasonable services were not offered or provided, given that the court is required at the 24-month review to either return the child to its parent or set a section 366.26 hearing.

(Compare § 366.22, subd. (b) [providing that, in certain circumstances, “court shall continue the case [if] reasonable services have not been provided to the parent”].) It is unclear what remedy, if any, would be available to mother were we to find reasonable services were not provided to mother between the 18-month and 24-month review hearings.

Regardless, our review of the reasonableness of the services provided is subject to the substantial evidence standard of review. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) “SSA must make a ““good faith effort”” to provide reasonable services responsive to the unique needs of each family. [Citation.] “[T]he plan must be specifically tailored to fit the circumstances of each family [citation], and must be designed to eliminate those conditions which led to the juvenile court’s jurisdictional finding. [Citations.]” [Citation.] An effort must be made to provide reasonable reunification services in spite of difficulties in doing so or the prospects of success.” (*Earl L. v. Superior Court* (2011) 199 Cal.App.4th 1490, 1501.)

Here, mother does not so much take issue with SSA’s efforts to provide her with services, but instead contends that much of the service plan imposed on her at the 18-month review hearing was unnecessary and/or inappropriate. In essence, mother claims she should not be held accountable for failing to follow through on her service plan because it was unreasonable for SSA to impose the regimen prescribed at the 18-month review. Mother cites her completion of therapy and educational programs while in prison as obviating the need for some aspects of the case plan. Mother’s specific attack is untimely, as she should have appealed the court’s orders at the 18-month review to make this argument. (See *In re S.B.* (2009) 46 Cal.4th 529, 531-532.)

Putting aside the shortcomings in mother’s argument, there is substantial evidence supporting the need to impose mother’s case plan and there is substantial evidence supporting a finding that reasonable services were in fact provided to mother. It is eminently reasonable to require a heroin addict, who lost custody of her children

because she spent the preceding year-and-one-half in state prison, to participate in drug therapy, drug testing, and parenting classes. The social worker met regularly with mother and assisted in providing mother with opportunities to satisfy the requirements of the case plan.

DISPOSITION

The petition for extraordinary relief is denied.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.