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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

B.C.,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

ORANGE COUNTY SOCIAL SERVICES
AGENCY et al.,

Real Parties in Interest.

G053090

(Super. Ct. No. DP025415-002)

O P I N I O N

Original proceedings; petition for a writ of mandate/prohibition to challenge an order of the Superior Court of Orange County, Caryl Lee, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.)Petition denied.

Sharon Petrosino, Interim Public Defender, Laura Jose, Assistant Public Defender, Julia M. Walde, and Dennis M. Nolan, Deputy Public Defenders for Petitioner.

No appearance for Respondent.

Leon J. Page, County Counsel, Karen L. Christensen and Aurelio Torre, Deputy County Counsel, for Real Party in Interest Orange County Social Services Agency.

Law Office of Harold LaFlamme and Yana Kennedy for Minor.

* * *

At the six-month review hearing in this juvenile dependency proceeding, counsel for minor's mother indicated a desire to cross-examine the social worker who had prepared the Social Services Agency (SSA) report in anticipation of the hearing. But mother's counsel had not served a subpoena on the social worker, and, so far as the record discloses, had not even informally requested the social worker's presence. Mother's counsel relied on a vague custom and practice of SSA making social workers available as witnesses and requested a continuance to secure the social worker's presence. The court denied the continuance and terminated reunification services. By this petition, mother seeks a writ of mandate compelling the court to vacate its order and enter a new order granting the continuance.

We deny the petition for two reasons. First, we do not have an adequate record to establish any particular custom and/or practice of SSA, particularly one in which the social worker is expected to attend a review hearing *without a request*. Second, even if mother had adequately invoked a custom and/or practice requiring the social worker's attendance, any error in denying the continuance was not prejudicial. The social worker's report painted a damning picture of a disinterested mother with an unresolved substance abuse problem that provided overwhelming support for the trial

court's order. Mother's counsel did not indicate that she could disprove the bulk of what was asserted in the report, and any tinkering at the margins would not have altered the outcome of the proceeding. Moreover, mother herself — had she bothered to appear at the hearing — could have taken the stand to contradict the social worker's report, but that did not happen. Nor did mother's counsel present any other witnesses to contradict the social worker's account. Accordingly, we deny the petition.

FACTS

At the time of minor's birth, minor tested positive for methamphetamines. Mother admitted using methamphetamine within one week of minor's birth. As a result, a hospital hold was placed on minor, and minor's four half-siblings were detained. Shortly thereafter, SSA filed a dependency petition pursuant to Welfare & Institutions Code section 300, subdivisions (b) (substantial risk of serious harm) and (j) (sibling has been abused or neglected and there is a substantial risk the minor will be as well).¹ Regarding subdivision (j), SSA alleged mother's parental rights had previously been terminated as to two other children due to physical abuse, domestic violence, and substance abuse. At the detention hearing, the court detained minor from mother and released minor to father. Father, in turn, voluntarily placed minor with his brother and his brother's wife, who lived next door. We will refer to the paternal aunt and uncle as the "foster parents."

At the October 2014 jurisdictional hearing, the court found the allegations of the petition true by a preponderance of evidence. The dependency petition detailed minor's drug exposure, mother's unresolved substance abuse problems, her history of domestic violence with the father of minor's half-siblings, and mother's prior failure to

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All statutory references are to the Welfare and Institutions Code.

reunify with the two earlier children. Father maintained custody, with mother granted twice-weekly visits. The court also apparently adopted SSA's recommendation that mother be denied reunification services (which is not the order at issue in this writ petition; the order at issue pertains to a supplemental petition, as detailed below). The court instead provided "enhancement services," which required mother to participate in an outpatient substance abuse program, general counseling, parenting education, 12-step meetings, and random drug testing.

In April 2015 SSA produced a report in anticipation of the six month review hearing set for May 13, 2015. Minor had continued to live with the foster parents and was described as "normal and healthy." SSA had lost track of father, who had not played a central role in minor's life, nor visited the child regularly. Efforts to contact him were unavailing. He did not, as he had previously represented, live next door to minor, and never had.

Mother's compliance with her family maintenance case plan was described as "minimal." As of the end of 2014, mother had completed six out of 10 parenting classes. She set an appointment to enroll in the four remaining classes but missed the appointment. As of the April report, mother had not completed the remaining classes. Mother had been discharged from her drug treatment program due to poor attendance and lack of participation. The social worker set an appointment for mother to enroll in a new drug treatment program, but mother missed multiple appointments. Mother later had an appointment to enroll at an inpatient drug treatment program, but when a space opened up, she was a no show. Mother also failed to attend a 12-step program.

Mother began drug testing in September 2014. Between then and the end of December 2014, she tested positive for amphetamines on nine occasions. She tested negative three times. But the majority of tests she simply missed. Though she was entitled to one hour of daily visits with minor, she took advantage of them only

sporadically, visiting for a total of only 11 hours during the six month period.² And she had not visited at all since mid-January 2015. SSA concluded its report by recommending the court maintain the current custody arrangement and set the matter for a 12-month review hearing.

But two days before the review hearing, SSA filed a supplemental petition, alleging, essentially, that minor's father had abandoned minor. In an addendum report, SSA noted there had been "instances of domestic violence" between him and mother. Given father's violent tendencies, mother's therapist expressed concerns about father's access to minor. The next day, the court ordered minor detained. At a jurisdictional hearing on the supplemental petition in June 2015, the court found the allegations to be true, adopted the SSA's recommendation that reunification services be provided to both parents, and set a six-month review hearing for December 15, 2015.

In an interim report, SSA observed that out of the 136 total hours of visitation allotted to mother between May and August 2015, mother had visited for a total of only 2.5 hours. The foster parent had reported that when mother visited, she held minor but then gave minor back to foster parent when minor would cry, stating, "He loves you a lot, take him." Also, the foster parent reported mother would instruct father to do things like change a diaper, hold the child, feed him, and change him, "so that the caregiver could report he did these things" to the social worker. In August 2015 mother reported she had last used methamphetamines four weeks earlier, but had not completed a drug treatment program, had not attended 12-step meetings, and had not completed counseling. She had submitted to only two out of 25 drug tests, resulting in two negative tests and 23 missed tests.

On December 4, 2015, SSA filed its status report in anticipation of the 6-month review hearing. The report once again described mother's compliance with her

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It is not clear in the record how her visitation rights went from two hours twice weekly as reflected in the court's jurisdictional order, to daily visits for one hour.

case plan as “minimal.” Mother’s attendance at parenting education and counseling had been sporadic, with her ultimately being terminated from counseling “due to no contact with the therapist.” She ultimately completed six out of 20 counseling sessions and had six no shows. She made similarly little progress in drug treatment programs, being kicked out of an outpatient program due to excessive absences, and failing to show up when referred to an inpatient program. She failed to attend the required 12-step programs. And mother had missed 26 out of 27 drug tests since the prior report. Finally, since the prior report, mother had visited minor for a total of five out of a possible 44 hours.

Minor was having his medical and dental needs met in the foster parents’ home. The social worker that observed minor stated he “appears to be well-adjusted in the home and does not appear to exhibit any mental or emotional concerns.” The social worker noted the foster parents “provide a safe, stable, and caring environment for the child,” and were willing “to provide permanency through adoption should reunification fail.”

Ultimately, SSA recommended that the court terminate reunification services and schedule a permanency hearing pursuant to section 366.26 (.26 hearing). The parents indicated a desire to contest SSA’s recommendation, so the court set a contested six-month review hearing for January 14, 2016.

The contested hearing was held as scheduled. Mother failed to appear, but her counsel requested that the matter proceed without her. At the hearing, mother’s counsel stated, “I’m ready for the hearing, your honor. But it is my position that the parents’ attorney has the right to explore the reasonable service that the parent was offered to cross-examine the social worker who prepared the reports that are going to be admitted into evidence about the statements that are contained in the reports. [¶] And I’m requesting that the agency make the social worker available because the agency’s offering reports into evidence.”

Counsel for SSA responded by acknowledging “[t]here’s no question that they do have a right to cross-examine,” but “[t]his matter was set, contested on December 15, 2015. Parents’ counsel had more than one month to subpoena the social worker.”

Mother’s counsel countered: “It’s my understanding that — from [what] I heard from my colleagues — it’s the practice and custom of this courthouse to make available the social worker when the agency’s offering more counts into evidence and they did not make the social worker available, that I’m entitled to a continuance under *In re Cory* [A. (1991) 227 Cal.App.3d 339] to sub the social worker.”

The court denied the requested continuance: “Well, custom and practice is very fine and dandy. [¶] But bottom line is, if you know you’re going to need someone, you subpoena them, period. If they make the person available, which does happen, I agree. However, you have to anticipate and you just have to subpoena people when you know something’s going to trial. [¶] And without that subpoena, right now there’s no good cause. This has been going on since at least December. There is minimal effort on behalf of the parents to participate. They’re not here. It’s nearly 10:30, two hours after they were supposed to be here. And there’s no good cause to continue at this point.”

Per SSA’s recommendation, the court terminated reunification services and set a .26 hearing. Mother filed a notice of intent to file a writ petition on January 26, 2016, and filed her actual petition on March 3, 2016.

DISCUSSION

Mother contends the court abused its discretion in denying her request to continue the hearing to give her time to subpoena the social worker. We disagree.

“The juvenile court may continue a dependency hearing at a parent’s request for good cause shown. [Citations.] Courts have interpreted this policy to be an express discouragement of continuances. [Citation.] The court’s denial of a request for a

continuance will not be overturned on appeal absent an abuse of discretion.” (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 585.) “Continuances should be difficult to obtain.” (*Jeff M. v. Superior Court* (1997) 56 Cal.App.4th 1238, 1242.)

Mother bases her argument almost entirely on dicta from *In re Corey A.*, *supra*, 227 Cal.App.3d 339 (*Corey A.*). There, the mother appealed from an order at a dispositional hearing removing her one-year old child from her custody. She argued her due process rights were violated when the court admitted a social worker’s report without the author being available for cross-examination. (*Id.* at p. 342.) At the relevant hearing, the mother objected to admission of the report based on hearsay, but she did not object based on her inability to confront witnesses, nor did she request a continuance to obtain the social worker’s presence. (*Id.* at p. 344.) On appeal, the court held the report was admissible because, unlike section 355, which pertains to jurisdictional hearings and requires that the author of the report be available to testify before receiving the report in evidence, section 358, subdivision (b), states the court *shall* receive the report in evidence with no requirement that the author be available to testify. (*Corey A.*, at pp. 346-347.)

In *Corey A.*, for the first time on appeal, the mother argued her constitutional right to confront the social worker had been violated, but the court held there was no violation because the mother had the ability to request the presence of the social worker: “[The mother] had the ability to, but made no effort to, subpoena the original social worker, nor did she ask the court or DSS to insure her presence. Moreover, although county counsel represented the social study preparer was merely ‘in the field,’[the mother’s] counsel did not ask for a delay to secure her presence. Indeed, [the mother] never objected to the admission of the social study on this ground. Now, however, without supporting documentation, [the mother] argues she was entitled to rely on the customary practice in which the preparing social worker appears at dispositional hearings without any defense request. Because she relied on this custom, her failure to insure the social worker’s presence is understandable, and in any event, the burden or

producing that witness should be on county counsel. Finally, she argues, because the witness was not present, that social worker was ‘unavailable’ so that [the mother] could not avail herself of the right of confrontation. [¶]Accepting [the mother’s] representation she could reasonably rely on the local juvenile court practice to expect the preparing social worker to be present at the dispositional hearing, the failure of county counsel to insure that presence here was not a denial of any constitutional due process right. As we have stated above, there is no legal requirement that the DSS lay any foundation through the social study preparer’s admissibility of the report, and no testimony from that person is necessary to sustain the DSS’s burden of proof. While we agree due process insures a parent the right to cross-examine any testifying witness, and the right to examine persons whose evidence is compiled within a social study received in evidence, there is no showing that this right was not available to [the mother]. *Assuming the accepted practice is as [the mother] describes, the court would be required to accommodate her reasonable request to delay its decision until the social study preparer was present for examination.* Contrary to [the mother’s] representation on appeal, this person was not shown to be unavailable to be produced as a witness, only not to have been present in court. Absent an objection to proceeding without [the social worker’s] examination and with no request even at the hearing for her production, [the mother] has not been deprived of her right of confrontation.” (*Corey A.*, *supra*, 227 Cal.App.3d at pp. 347-348, italics added.)

Seizing on the portion we have italicized, mother argues that because she *did* request a continuance, the court was required to grant it. Not so. The *Corey A.* dicta was based on an assumption: that the court’s practice was to require the social worker’s presence *even absent any request*. Not only was there no evidence of such a practice in *Corey A.*, there is no evidence of such a practice in the record here either. Rather, the only record evidence we have is mother’s counsel’s unsworn hearsay statement that her colleagues had told her “it’s the practice and custom of this courthouse to make available the social worker when the agency’s offering more counts into evidence and they did not

make the social worker available” It is not at all clear what counsel had in mind in referring to “the agency’s offering more counts into evidence,” but even if we view that as an opaque reference to offering the report into evidence, the only stated custom was that the social worker be made available. What is not clear is whether that means SSA would, *upon informal request*, insure the social worker’s presence at the hearing, or whether SSA would bring the social worker to every hearing as a matter of course even without a request. The court did not seem to think such a custom existed. The court’s response was, essentially, that sometimes SSA makes a witness available without a subpoena, but it is always the attorney’s responsibility to subpoena a witness to insure the witness’s presence. On this record, we cannot find the court abused its discretion in denying a continuance.

Moreover, even if we had found the court erred, the error was harmless under any standard. (*See In re James F.* (2008) 42 Cal.4th 901, 915-918 [holding due process errors in a juvenile dependency case are not structural error and thus require a prejudice analysis, but not deciding harmless error standard to be applied].) The court’s task was to determine whether “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.” (§ 366.21, subd. (e)(1).) “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 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 of services provided” (*Ibid.*)

Given the evidence in this case, there is no chance mother could have avoided the termination of reunification services. Mother does not claim the content of the social worker’s report was untrue. Mother sought to cross-examine the author, but did not say what facts she intended to elicit. Moreover, to the extent mother felt the

report — which is chalk full of facts that support the court’s ruling — was filled with lies, the natural response would be to have witnesses testify to the portions that were false. Mother, however, did not even appear at the hearing, much less indicate she intended to testify, and mother’s counsel offered no other witnesses. On this record, we are persuaded a continuance would not have affected the outcome below.³

DISPOSITION

The petition is denied.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.

³ Petitioner’s opposed application to furnish postjudgment evidence is denied.