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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

L.W.,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

ORANGE COUNTY SOCIAL SERVICES
AGENCY et al.,

Real Parties in Interest.

G053244

(Super. Ct. No. DP026204-001)

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, Gassia Apkarian, Judge. Petition denied.

Juvenile Defenders and Jessica Nerney for Petitioner L.W.

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

Yana Kennedy for the Minor.

* * *

L.W. (father) seeks extraordinary writ relief (Cal. Rules of Court, rules 8.450, 8.452) from the juvenile court's orders at the six-month review terminating reunification services concerning his daughter S.C. (born May 2015), and scheduling a Welfare and Institutions Code section 366.26 (all statutory references are to this code) selection and implementation hearing for June 29, 2016. Father challenges the sufficiency of the evidence to support the juvenile court's findings he received reasonable services and that he failed to participate or show substantive progress in the court-ordered treatment plan. Finding no basis to overturn the court's orders, we deny the requested relief.

I

FACTS AND PROCEDURAL BACKGROUND

In May 2015, the Orange County Social Services Agency (SSA) filed a petition alleging S.C. (born May 2015) came within the jurisdiction of the juvenile court (§ 300, subd. (b)). The petition alleged there was a substantial risk S.C. would suffer serious physical harm because of her parents' failure or inability to protect or provide for her because of their mental illness or substance abuse. Specifically, the petition alleged S.C. was born prematurely and underweight with methamphetamine metabolites in her system. S.C. was placed in the Neonatal Intensive Care Unit on a feeding tube. Mother, who did not participate in the case and has not petitioned this court for relief, admitted using methamphetamine during the pregnancy and shortly before the birth, which occurred two days after she was released from jail. Father admitted he began using methamphetamine with mother in May 2014.

The parents also had a history of domestic violence. In September 2014, father cut mother with a knife while she was pregnant. He asserted he took the knife from mother during an argument and she suffered the injury when she attempted to take it back. They continued to see each other in violation of an October 2014 restraining order against father. Father, in custody at the time of S.C.'s birth, "currently ha[d] six criminal cases pending with a total of 27 criminal charges," including several assault and drug offenses.

According to the detention report, father stated he was originally from England, and had operated successful businesses. Father met mother, a prostitute, around June or July 2014, and "became caught up in her world of drugs." Mother lived with a pimp and drug users and continued to engage in prostitution during the pregnancy. After the domestic violence incident, he initially wanted to assist mother and keep her from using drugs. He decided to leave her around November 2014, but changed his mind when she told him about her pregnancy. He took her to a probation drug test in March 2015, but found a small rock of methamphetamine in her purse, which he put in his pocket. Mother reported him to the police. He fled, but officers caught him and arrested him for possession of the drugs. Mother's probation officer reported father was a "violent guy" who beat up mother on the way to a health care agency appointment, and "had to be tasered to be brought down."

At the detention hearing, father, who was being held in jail on numerous charges, waived visits with S.C., but requested photos of her. The court detained S.C., and ordered SSA to provide reunification services.

According to the report prepared for the jurisdiction hearing, SSA placed S.C. in a foster home in early June 2015. Father described himself as a kind, generous, and loving person, and said he would "jump through hoops" and "do whatever it takes" to reunite with his daughter. Father stated the maternal grandmother's home was unsafe, and suggested Helene B., a nonrelated extended family member (NREFM), in Redlands

for placement. He also stated he would be marrying his fiancée within weeks, and wanted S.C. placed with her.

The social worker gave father a parent education workbook and a comprehensive referral packet containing information on counseling, parenting classes, domestic violence intervention, alcohol and drug abuse programs, and agency pamphlets explaining the dependency system. The social worker catalogued the efforts made so far, including case management, relative placement evaluation referral, visitation explanation, an interview with father, reviewing and providing father with dependency court information, referrals for counseling, referrals for parenting education, referrals for inpatient drug treatment, and referrals for outpatient drug treatment. Father signed an initial action plan (MAP). Social workers explained to father the reunification programs designed to remedy the issues that brought the child into protective custody, advised him additional services might be required and the importance of participating in the programs for successful reunification with his child. The social worker encouraged father to enroll in available programs while incarcerated.

Father's proposed case plan required outpatient substance abuse treatment and testing, counseling to address domestic violence, substance abuse, and any past trauma, and a twice-weekly 12-step (NA/AA) program. The visitation plan specified monitored visitation, two times a month while father was in local custody, but only if S.C. could travel to and from the visit without undue discomfort or interference with her daily schedule. The social worker promised to "provide . . . assistance in obtaining services identified in the service plan to the extent permitted by" correctional authorities. Father agreed to communicate monthly with the social worker to inquire about S.C.'s well-being and to report on his progress in obtaining and participating in programs.

The social worker mailed photos of S.C. to father on June 25. Paternity testing established father's biological relationship with S.C. in late July, and he was "very happy to hear the news." He again asked SSA to place S.C. with Helene in Redlands for

potential adoption if necessary, and suggested the possibility of his parents or brother in London taking the child. The social worker initiated an assessment of Helene's home.

On August 11, 2015, father waived his rights and submitted on the allegations of the petition. The court sustained the allegations, found S.C. to be a dependent child, took custody from the parents, and approved SSA's proposed case plan for reunification services. The court found father to be a presumed father, and scheduled a six-month review for January 25, 2016.

In October 2015, Helene was approved for placement, but declined and suggested her niece, D.R., for placement. Father's London relatives declined placement for financial reasons. Father requested D.R., and another acquaintance, J.Z., be considered for placement. D.R. was approved for placement, but informed SSA she would need to place S.C. in childcare because she worked full time.

S.C. was hospitalized for a week with a respiratory infection in July, and again hospitalized overnight for respiratory issues on August 25, 2015. S.C.'s pediatrician explained S.C. became more severely ill than other children her age because of her premature birth and advised keeping her out of childcare until her lungs matured, around 18 months of age. SSA made a decision not to move S.C. from her current concurrent planning foster home as she was on her fourth placement. S.C. had been in her current placement for two months, her needs were being met at an excellent level, and the current foster mother stayed at home and did not need to place S.C. in daycare.

In October 2015, the juvenile court granted the social worker's petition to modify the case plan to require father to complete an SSA-approved anger management program focusing on domestic violence. The social worker reported that in August 2015 father had been convicted of 12 felony counts, including cohabitant abuse and criminal threats and received a four-year prison sentence.

In her report for the six-month review, the social worker recommended terminating reunification services and scheduling a section 366.26 hearing. Although

father expressed a strong desire to reunify, SSA recommended terminating services because there was not a substantial probability either parent could reunite with S.C. within the next six months. The social worker described father's progress as minimal. She noted the prison reception center in Wasco, where father spent 120 days, did not offer programs that would satisfy the reunification plan. Authorities transferred father to the Sierra Conservation Center (SCC) in Jamestown in late November 2015. In early January, father's prison counselor reported father had just enrolled in a substance abuse, anger management, and parenting classes, as well as 12-step meetings. Father's official release date was early 2017, but might be moved to mid or late 2016 if certain issues were resolved. Father had not had any contact with S.C. because of his incarceration.

The social worker stated "[i]t is concerning that the father indicates he committed the crimes . . . to protect the child, and he would do it all over again if he needs to." She observed his letters to her displayed the typical "cycle of domestic violence" found in abusers: "tension building, explosion" followed by apologetic behavior. The social worker concluded this reflected "limited insight" and "even if provided additional services, it would not be likely for the father to change these behaviors within the period of time allowed to reunify"

Father contested the social worker's recommendation and the juvenile court continued the six-month review to early February 2016. The court ordered the social worker to bring S.C. to court to accommodate father's request for a contact visit.

In an addendum report, the social worker reported father had begun an anger management class on January 13, 2016. Concerning individual counseling, a prison doctor reported father met with mental health services, but declared he did not have any issues so "he was taken off of their services."

During a face-to-face meeting with the social worker on January 25, 2016, father initially "appeared agitated and spoke very fast." He expressed anger and frustration about the dependency case, and accused SSA of "blocking every move"

toward reunification. He expected to be released from prison in August or September 2016, and claimed he was participating in seven classes, including anger management and AA/NA. He obtained a certificate of completion from his self-awareness and recovery class, but declined to explain what he learned because the social worker might use his statements against him, and he preferred to talk about it in court. He initially did not sign the case plan because he believed it stated SSA was helping him to reunify. He then signed it and sent it to his attorney to review. Father asserted ““he [was] not the bad guy here,”” reiterated he saved S.C.’s life, and his only mistake was being with mother. At the end of the interview, father became quiet and tearful and expressed his gratitude for the care given to S.C. He wanted the social worker to know he loved S.C. and would do anything to get her back.

A prison employee stated father participated and “[spoke] up” during 12-step and anger management classes. Some of the programs lasted 12-weeks, others were ongoing.

At the six-month review in late February 2016, the social worker testified father’s case plan required counseling, drug testing, substance abuse outpatient treatment, a 12-step program, and a domestic violence program. Visitation was authorized while father was in custody only if the child could visit without a barrier, and only where travel was reasonable. She made several inquiries of prison officials to determine what services the prisons provided. She exchanged letters with father in custody, provided him with the case plan, and explained what programs were required. She encouraged him to seek out those services in prison. The Wasco reception center, where father spent his first 120 days, did not offer any services. Although parenting was not a component of the case plan, social workers sent father parenting materials, and he completed and returned a parenting packet. The social worker provided a reading list of parenting books, but did not know if father had access to a library. The social worker also sent 12-step worksheets, which father failed to return.

After father's transfer to SCC in late November 2015, the social worker learned what programs the prison offered, and advised father the prison offered several programs that met the requirements of his reunification plan. These included programs addressing substance abuse and anger management, AA/NA, a 12-step program, and a parenting program. Father enrolled in these programs, but declined to enroll in a counseling program. The social worker confirmed that father participated in the programs she recommended and that father had no disciplinary issues in prison.

The social worker testified father might be released around August or September 2016, but the 12-month review would be in July 2016. The social worker noted father had just begun the prison programs in January 2016, and given his methamphetamine abuse and domestic violence, SSA probably would refer him for programs after his release to assess his sobriety and ability to control his anger outside of the prison environment. The social worker also would request six months of drug testing and other services after father's release from prison. Father's only two visits with S.C. did not show father had the ability to parent and he would need to demonstrate his parental capabilities in visits after his release.

The social worker recommended terminating services because there was no substantial probability S.C. would reunify with the parents within six months. The social worker was concerned father had an anger problem, as evidenced by his letters and phone calls, and that he minimized his responsibility for his criminal behavior. She did not think these problems would resolve with the 12-week programs he recently started and to this point she had not "seen change or progress based on her interaction with" father. She acknowledged father had reason to be upset and displeased because of the social worker's recommendation and SSA's decision not to place S.C. with father's friend, D.R. Although D.R. had been approved for placement, she worked and would have to put S.C. in daycare, and S.C.'s pediatrician recommended no daycare until 18 months of age to allow her lungs to mature. The social worker did not know if SSA gave D.R. a chance to

resolve the daycare issue, but pointed out father had at times demanded that S.C. not be placed with D.R. because she was not qualified and experienced.

D.R., father's family friend, testified she requested placement around the second week of August. Although her home was approved, the placement social worker advised her in late September S.C.'s medical issues would prevent her placement with D.R.. No one advised her childcare was a problem, and she could have changed her schedule. She had now quit her job, lived with her aunt, and was willing to provide S.C. with permanency (adopt) if she was unable to reunify with father.

Father testified he felt SSA deliberately sabotaged reunification from the inception of the case. He tried "absolutely everything" to enter programs, but none were available at Theo Lacy or Wasco. He complained the social worker did not respond to his letters asking for programs other than the parenting materials and the 12-step worksheets. He arrived at SCC November 20, and started the programs around December 5 or 10. He could not have done anything to start the programs sooner, and he was told by prison employees he attended more programs than anyone else. He completed the 12-step program, which required a lot of reading and catching up because the program already had started when he arrived. He participated in AA and NA, self-awareness and recovery, the 12-step program, and only recently started the anger management program because he had to wait for an opening. He also was accepted into a responsible fatherhood class and bible study, held three jobs, and participated in fire training. He participated in some of these programs only for a few weeks before he had to return to court for the six-month review in late January 2016.

Father denied expressing anger in his letters to the social worker. He was shocked when the social worker advised him in October that S.C. had been hospitalized the day before he left for prison in August. He explained an earlier social worker told him in July 2015 if he wanted to reunify with S.C. he should not be incarcerated for more than 24 months. His criminal attorney told him he probably would win the case, but if he

lost he faced eight years in prison. He therefore took a deal and pleaded guilty to charges he did not commit so he could get out in time and reunify with S.C. With various credits, he expected to be released in August 2016. He vacillated in recommending placement options because social workers told Helene and another friend they would have to adopt S.C., and he “didn’t want anyone adopting her,” noting he “hadn’t even reached [the] six-month” review. He acknowledged S.C. had been with her current foster parents since July 2015, but he did not think changing S.C.’s placement would harm her because she was so young.

Father stated he had done everything to show SSA and the court he was not a failure. He admitted becoming addicted to methamphetamine and it “went bad for” him. He made a mistake, he was not a career criminal, and this was the first time he had been incarcerated. He did not dislike the social workers and wanted to work with them. They were “looking out for the best interest of” S.C. and he “love[d] them for it.” S.C. meant more to him “than life itself.”

The juvenile court found reasonable services were offered or provided, father failed to participate regularly and make substantive progress, and there was no substantial probability S.C. might be returned by the 12-month review date. The court terminated reunification services and set a section 366.26 hearing for June 29, 2016. The court ordered SSA to allow visitation and set a progress review for March 8.

II

DISCUSSION

A. Substantial Evidence Supports the Juvenile Court’s Finding SSA Provided Reasonable Reunification Services

Father challenges the sufficiency of the evidence to support the juvenile court’s finding SSA provided him reasonable reunification services. He complains the social worker early in the reunification period concluded it was unlikely father would reunite with S.C. He asserts “the social worker [] failed to look into what father’s

services [in prison] entailed” and “did nothing to facilitate visitation for father with [S.C.] or inquire if visitation was possible.”

Section 361.5 provides when the juvenile court removes a child from a parent’s custody, it typically must order the social worker to provide reasonable reunification services to the child and the child’s parents, even if a parent is incarcerated. (§ 361.5; cf. § 361.5, subd. (e)(1) [if parent is incarcerated the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child based on age of child, degree of parent-child bonding, length of sentence and other factors].) “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 . . . 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 earlier of the jurisdictional hearing or the date 60 days after the date the child was initially removed from the physical custody of his or her parent. (§ 361.5, subd. (a)(1)(B); § 361.49; see Seiser & Kumli, *Cal. Juvenile Courts Practice and Procedure* (2016) § 2.152[1], p. 2-530 (Seiser & Kumli). § 361.5, subd. (a)(3).)

The juvenile court may schedule a permanency hearing at the six-month review hearing for children under the age of three if “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. . . . If, however, the court finds there is a substantial probability that the child, who was under three years of age on the date of initial removal . . . , may be returned to his or her parent . . . within six months or that reasonable services have not been provided, the court shall continue the case to the 12-month permanency hearing.” (§ 366.21, subd. (e)(3); Seiser & Kumli, *supra*, § 2.152[5][b], pp. 2-546 to 2-547 [before court may terminate services at six-month review the social services agency must prove it has offered and provided reasonable

reunification services and that parent did not participate regularly and make substantive progress in court's treatment plan].)

“We review an order terminating reunification services to determine if it is supported by substantial evidence. [Citation.] In making this determination, we review the record in the light most favorable to the court's determinations and draw all reasonable inferences from the evidence to support the findings and orders. [Citation.] ‘We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court.’ [Citation.]” (*Kevin R. v. Superior Court* (2010) 191 Cal.App.4th 676, 688-689.)

Substantial evidence supports the court's finding SSA made good faith reasonable efforts given father's incarceration. (*Fabian L. v. Superior Court* (2013) 214 Cal.App.4th 1018, 1022 (*Fabian L.*) [services for incarcerated parent reasonable where social worker sent father appropriate materials, investigated services available, and maintained consistent contact].) Social workers tailored an appropriate case plan, provided father with the case plan, investigated what services were available in prison, wrote the father monthly, and advised him to enroll in various programs. The assigned social worker sent father parenting materials and 12-step worksheets. She sent photos of S.C., and apprised him of the child's current health and circumstances. She investigated and assessed father's placement requests. Father apparently enrolled in all available programs relative to the issues involved in this case. Unfortunately, two of the three facilities (local jail and Wasco) did not offer any programs, and SCC did not offer others, such as drug testing, which was a required component of father's case plan. It is not SSA's fault jail or prison authorities offered only a few of the programs that would satisfy father's reunification plan. (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1363.) As for counseling, father told the mental health staff at SCC he did not need it.

Finally, SSA's failure to facilitate visitation in local custody and later at prison was not unreasonable given father's waiver of jail visits, S.C.'s fragile health, and

the prison's distant location. (Cf. *In re Precious J.* (1996) 42 Cal.App.4th 1463, 1477 [mother did not receive reasonable services where agency failed to facilitate visitation during incarceration where prison not “excessively distant”]; *In re Monica C.* (1995) 31 Cal.App.4th 296, 307.) As recounted above, the pediatrician stated S.C. should avoid daycare until the age of 18 months because of respiratory issues, and a five-hour trip to a distant prison clearly was not in her best interest. Finally, we cannot fault the social worker's recommendation not to extend services even if father had completed all his prison programs. This reasonably flowed from her view father would still need to demonstrate sobriety and anger management after his release from prison before S.C. could be returned to his care, and there was no possibility to accomplish this by the 12-month permanency hearing in July 2016.

B. Substantial Evidence Supports the Juvenile Court's Finding Father Failed to Participate Regularly and Make Substantive Progress in the Court-Ordered Treatment Plan

At the six-month review the juvenile court has discretion to terminate reunification services and schedule a section 366.26 hearing if the court finds by clear and convincing evidence the parent failed to participate regularly or make substantive progress in the court ordered treatment plan. (*Fabian L.*, *supra*, 214 Cal.App.4th at pp. 1030-1031; *Seiser & Kumli*, *supra*, § 2.152[5][b], p. 2-548 [if agency proves parent either failed to participate regularly or failed to make substantive progress, court must schedule section 366.26 hearing unless parent establishes substantial probability of return by 12-month permanency date].) Father contends the evidence was insufficient to support the court's findings he failed to regularly participate and make progress on his reunification plan.

Substantial evidence supports the juvenile court's finding father failed to make substantive progress in the court-ordered treatment plan. Father initially could not meet reunification requirements because his custodial facilities did not offer any

programs, and he could comply with parts of his plan only when he arrived at SCC, where he promptly tried to avail himself of services. But the record reflects father did not begin most programs until early January 2016, and had only completed a few classes in most of the programs by the date he was transferred to Orange County in late January 2016 for the six-month review. Under these conditions, “Father’s case plan was the best it could be given his location and the length of his prison sentence. Father, not SSA, created these circumstances.” (*Fabian L., supra*, 214 Cal.App.4th at p. 1032.)

Most significantly, his statements to the social worker and his testimony suggested he had not made substantive progress by gaining insight into the problems that brought S.C. into the dependency system. He refused to accept responsibility for his criminal conduct, suggested he would engage in similar behavior in the future if he deemed it necessary, and came across as angry and controlling in some of his communications with the social worker. He blamed SSA for his predicament, and his request to have S.C. moved from her longstanding foster placement showed a lack of insight into her best interests. (See *Fabian L., supra*, 214 Cal.App.4th at p. 1029 [noting father’s substantial compliance with his case plan must not be confused with the requirement a parent make substantial progress towards reunification within the statutorily prescribed time period of six months].)¹

¹ Notwithstanding our conclusion the record supports the juvenile court’s finding father did not make substantive progress in the court-ordered treatment plan, the record does reflect father loved his daughter, showed great desire in reunification, and participated in the prison programs in the short time available to him. (See *Fabian L., supra*, 214 Cal.App.4th at p. 1029 [“father clearly exhibited a strong commitment to his daughter regardless of the barriers he faced as an incarcerated parent”].) But the Legislature has specified short reunification timelines for very young children to protect their psychological and emotional well-being. (*In re Jesse W.* (2007) 157 Cal.App.4th 49, 59 [shortened reunification period meant to give juvenile court flexibility in meeting the needs of young children in cases with a poor prognosis for family reunification and represents a legislative determination efforts to continue reunification services do not serve and protect a child’s interest]; *Daria D. v. Superior Court* (1998) 61 Cal.App.4th 606, 610 [limitation on service period for young children constitutional].) Unfortunately,

C. Substantial Evidence Supports the Juvenile Court's Finding There Was Not a Substantial Probability S.C. Might be Returned to Father by the 12-Month Permanency Hearing

If the court finds a substantial probability the child may be returned to the parent by the 12-month permanency hearing, it must continue the case to that date. (*M.V. v. Superior Court* (2008) 167 Cal.App.4th 166, 181 [“[I]terally, the statute commands the court to determine whether there is a strong likelihood of a *possibility* of return”]; Seiser & Kumli, *supra*, § 2.152[5][b], p. 2-549.) Here, substantial evidence supports the juvenile court’s finding there was not a strong likelihood of a possibility the court would return the child by the date of the 12-month review in July 2016. Father testified he expected release no earlier than August 2016. This was a best case scenario, it depended on various contingent factors, and father’s prison counselor provided a later date. The social worker testified father should undergo an additional six-month period of services after father’s release to ascertain whether father could safely parent S.C. Given the gravity of the factors that brought S.C. before the juvenile court, the social’s worker’s estimate was reasonable. Father admitted addiction to methamphetamine and would need to demonstrate a substantial period of sobriety after his release. His criminal record reflected a propensity for violent conduct, and therefore he also would need to show he could control his anger. Father had never had S.C. in his care and custody. He had visited her only twice, in court, during the six-month review proceedings. A substantial period of monitored visitation was a certainty before SSA possibly could place S.C. into father’s custody. Because there was no possibility S.C. would be returned to father’s care

father’s incarceration diminished the prospects he could successfully reunify with S.C. (See *In re Monica C.* (1995) 31 Cal.App.4th 296, 308 [noting dependency law allows limited avenues for avoiding loss of a young child when parent is sentenced to an extended term of incarceration].)

by the 12-month date, the court did not err in failing to continue the case to a 12-month permanency review.

III

DISPOSITION

L.W.'s petition seeking extraordinary relief from the juvenile court's order terminating reunification services and setting a section 366.26 selection and implementation hearing is denied, as is the request for a stay of the section 366.26 hearing.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.