Filed 11/20/14 I.B. v.Super. Ct. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

I.B., Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Real Party in Interest.	B257832 (Los Angeles County Super. Ct. No. CK61052)

ORIGINAL PROCEEDING. Marguerite Downing, Judge. Petition denied.

Law Office of Timothy Martella, Rebecca Harkness and Layanie Johnson for Petitioner, Irving B., Father.

No appearance for Respondent.

Richard Weiss, Acting County Counsel, Dawyn Harrison, Assistant County Counsel, and Kimberly A. Roura, Deputy County Counsel for Real Party in Interest.

Irving B. ("father"), the father of A.W. ("child"), petitions for extraordinary relief from the juvenile court's orders sustaining a Welfare & Institutions Code[1] section 342 petition as to the child, removing her from his custody, denying him reunification services pursuant to section 361.5, subdivision (e), and setting a section 366.26 permanent plan hearing. We deny the petition for an extraordinary writ.

Combined Statement of Facts and Procedure

The child's mother ("mother") and father came to the attention of the Los Angeles Department of Children and Family Services ("DCFS") after mother testified positive for methamphetamine at the time of child's birth. Mother had previously lost custody of several other children due to her substance abuse and other issues. In October 2013, mother was denied reunification services for three of her children who were juvenile court dependents.

On January 2, 2014, three days after the child's birth, a DCFS social worker interviewed father at the hospital. The social worker observed tattoos on father's hands and wrists that appeared to reflect gang participation. Father stated that he was a member of the Pacoima gang. He said he had stopped his gang involvement when he found out he was going to be a father. He agreed to be drug tested the next day. The social worker explained to him that if he missed the drug test, it would be considered a positive test for drugs. Father said he would not miss the test.

Father said that he had used marijuana in the past. He denied other illicit drug use. He said he was on probation for a felony and was ordered as a condition of probation to drug test. He said he was in compliance with the terms of his probation.

Father said he was no longer in a relationship with mother. He said he lived with his parents and intended to have the child live with him and the paternal grandparents

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[1] All further statutory references in this opinion are to the Welfare & Institutions Code, unless otherwise noted.

(PGPs), due to the DCFS's involvement and mother's positive drug test. He said he had everything necessary to care for the child at his parent's home.

Mother informed the social worker that she had been living on the streets in a tent. She wanted the child to live with father and PGPs until she obtained an apartment with the child's maternal grandmother. She said father did not use drugs. She confirmed that they were no longer in a relationship. She opined that he would be a good father.

The social worker visited PGPs home. It was a one-bedroom apartment. It was neat and clean. Father had baby clothes, a baby seat and a car seat. PGPs said they were going to pick up a bassinet, formula, diapers, and additional clothes for the child.

PGPs stated that father had become more responsible in the last few months since finding out he was going to be a father. He had had problems in the past with fighting and being arrested. They were willing to help father raise the child and would allow father and the child to reside in the one-bedroom apartment with them. Paternal grandmother said she would be available to take care of the child while father worked.

The social worker checked father's criminal record and determined that he had an extensive criminal record, which included among other crimes, domestic violence, vandalism, battery against maternal grandmother, illegal possession of a firearm, and attempting to dissuade a witness.

The social worker confirmed with father's probation officer that he was in compliance with the terms of his probation, but he had not yet complied with his court-ordered drug tests. The probation officer did not have any concerns at that time with respect to father caring for the child.

On January 6, 2014, the child was discharged to father from the hospital. The next day, DCFS filed a section 300 petition alleging that the child was at risk due to mother's substance abuse problem. The juvenile court detained the child from mother and released her to father.

DCFS provided father with referrals to a variety of programs. Father did not participate in any of the services offered.

Father, who had agreed to on-demand drug tests on January 3, and again on February 3, 2014, failed to appear for either test. The probation officer reported that father had failed to submit to the court-ordered drug and alcohol testing and was thus in violation of the terms of his probation. After being reminded of his obligation to drug test by a DCFS investigator, father again failed to appear for drug testing on January 16, and 21, and February 5, 6,18, and 19, 2014. Father failed to submit to any drug test whether requested by the DCFS or as ordered by the criminal court.

At the jurisdictional hearing held on February 25, 2014, the juvenile court found father to be the child's presumed father. The court sustained the section 300 petition as to mother and denied her reunification services. The child was placed with father. The court ordered family maintenance services for father. It further ordered him to complete a parenting class and to submit to six random drug tests with the proviso that if any of those tests were missed or if he tested positive for illicit drugs, he would be required to complete a full drug program.

Subsequent to the aforesaid hearing father continued to refuse to drug test. DCFS scheduled a team decision making meeting ("TDM") for April 14, 2014, to address father's noncompliance with the drug testing requirement and the consequences thereof. Father arrived several hours late to the meeting, which was then rescheduled for April 21, 2014. The social worker and supervisor met with father when he finally arrived to discuss his failure to comply with drug testing requirements. Father agreed to submit to an on-demand drug test that very day. However, father once again failed to appear for the test.

On April 21, 2014, the paternal grandmother came to the rescheduled TDM. She informed the DCFS that father was arrested on April 20, 2014, because he failed to attend his criminal court hearing.

Paternal grandmother stated that she suspected that father was using drugs due to his erratic behavior and mood swings. She reported that father was rarely home and had minimal interaction with the child. She stated that she cared for the child 24 hours per day. Father was not the primary caregiver and was not bonding with the child. She was

willing to do whatever needed to be done to protect the child, including having father move out of the apartment, and adopting the child.

Paternal grandmother further stated that father was heavily involved in his street gang, the Pacoima Flats, and she feared that it endangered the child's safety due to random and violent gang activity. Furthermore, father had been arrested twice, on March 14 and April 20, 2014, on felony vandalism charges.

Father also missed more random drug tests on February 20, March 5 and April 4, and 20, 2014, and the on demand drug test on April 14, 2014.

On April 20, 2014, DCFS filed a section 342 petition alleging that the child was at risk due to father's violation of the juvenile court's orders (and the criminal court's orders) by failing to comply with drug testing requirements.

On April 25, 2014, the juvenile court issued a removal order, and the DCFS detained the child from father and released her to the PGPs.

On April 28, 2014, the social worker spoke with father. Father stated that he was "never really" living with the PGPs. He would go to their home to shower, eat and sometimes "crash." He was no longer allowed to sleep at PGPs home. He stated that he did not have an address, because he would be staying at multiple residences between family and friends. He also did not have a contact telephone number.

At the section 342 hearing, the juvenile court ordered the child detained from father and placed with the maternal grandmother. The court also ordered monitored visits for father and referrals for weekly drug testing and a parenting class.

Thereafter, the dependency investigator was not able to locate father to interview him. The investigator left referrals and notices for father with paternal grandmother. He scheduled an appointment to meet with father, but father did not show up. Father's probation officer said on May 13, 2014, that he had not seen or heard from father for several weeks. Father had not drug tested for probation.

Father had only inconsistently visited with the child. He continued to ignore his commitment to drug test.

DCFS recommended six months of family reunification services for father and the child.

Father and the PGPs appeared at a juvenile court hearing on May 21, 2012. The court granted DCFS's requested continuance so that it could file an amended section 342 petition. It also ordered random drug tests for father.

Father was arrested again on May 27, 2014. He stated it was for driving a vehicle without the consent of the owner. His probation officer said that father was arrested for driving a stolen car, and was charged with a felony. He was obviously also in violation of the terms of his probation.

DCFS filed an amended section 342 petition on June 9, 2014, alleging that the child was at risk due to father's criminal history, his ongoing gang involvement, his recent arrests, his current incarceration on felony charges, and his failure to provide the child with the necessities of life.

Father appeared in the juvenile court, in the custody of the Sheriff's Department, on June 9, 2014. The juvenile court set an adjudication hearing for July 8, 2014.

On June 11, 2014, DCFS sent notice of the upcoming July 8, 2014 hearing to father by certified mail. The notice stated that their recommendation, which was highlighted, was for "No Family Reunification Pursuant to 361.5(b)." The notice also contained an explanation that DCFS might recommend that no reunification services be offered, and described the potential consequences of such an order.

On June 13, 2014, father's probation officer informed the dependency investigator that father's probation had been revoked and he had been sentenced to two years of incarceration.

On July 8, 2014, DCFS filed a last minute information report, which attached minute orders from the father's most recent criminal court proceeding. The report stated that DCFS recommended no reunification services for father. The criminal court minute

order listed father's criminal record for 2013 and 2014 to date.[2] On April 21, 2014, father was ordered to serve 90 days in county jail for a probation violation. On May 29, 2014, the criminal court sentenced father to two years of incarceration, less credits, on the new charge of taking a vehicle without the consent of the owner, and a concurrent term of two years for violating the terms of his probation on another case.

The juvenile court held the adjudication hearing on July 8, 2014; father was present in custody. After hearing from the parties, the juvenile court sustained the petition as alleged and a " Notice of Hearing on Selection of a Permanent Plan (Section 366.26)" was given. The juvenile court ordered the child removed from father's custody finding a substantial danger to the child if she were returned to father.

The juvenile court, after hearing argument of counsel, and considering among other things: (a) the age of the child (under three years); (b) the length of father's present incarceration-two years; (c) the lack of father's bonding with the child, (d) father's failure to take advantage of services previously made available to him by the DCFS--including failing to take a single drug test, denied father reunification services under section 361.5 subdivision (e)(1). The court set a section 366.26 hearing to select a permanent plan for the child.

Father filed a notice of intent to file writ petition on July14, 2014. The "Petition for Extraordinary Writ" was thereafter filed on August 18, 2014.

Standard of Review

This court reviews the juvenile court's findings or order for substantial evidence. (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394,1400-1402; *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1341; *In re John V.* (1992) 5 Cal.App.4th 1201, 1212.) In reviewing the sufficiency of the evidence to support a juvenile court's finding or order, the reviewing court must determine whether the record as a whole contains any substantial evidence to support the lower court's conclusion. (*In re Savannah M.* (2005)

[2] A more extensive record of the defendant's criminal history is set forth in the adjudication petition, and on page 17 of the "Answer to Petition for Extraordinary Writ."

131 Cal.App.4th 1387, 1393-1394.) We resolve all conflicts in support of the determination of the juvenile court, examine the record in a light most favorable to the dependency court's findings and conclusions, and indulge in all legitimate inferences to uphold the court's order. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1379; *In re Tania S.* (1992) 5 Cal.App.4th 728, 733.)

"It is the trial court's role to assess the credibility of the various witnesses, to weigh the evidence and to resolve the conflicts in the evidence. We have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses or to resolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence. [Citation.] 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. [Citation.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.)

The juvenile court's rulings should not be disturbed appeal unless the trial court has made arbitrary, capricious, or a patently absurd determination. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) We determine that the juvenile court's rulings were all supported by substantial evidence.

Issues on Appeal

Father challenges both the juvenile court's jurisdictional findings and dispositional findings. We discuss each contention below.

1. *Jurisdictional Findings*

Father contends that substantial evidence was not presented to the juvenile court for it to have asserted jurisdiction over the child pursuant to section 300, subdivisions (b) and (g). This court, however, need not address the merits of father's claim, for mother did not contest the charges and did not appeal the finding of the juvenile court. It is not necessary for both parents to be offending parties for the juvenile court to assert jurisdiction over a child. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1491-1492.)

"[I]t is only necessary for the court to find that one parent's conduct has created circumstances triggering section 300 for the court to assert jurisdiction over the child. [Citations.] Once the child is found to be endangered in the manner described by one of the subdivisions of section 300, the child comes within the court's jurisdiction. . . . As a result, it is commonly said that a jurisdictional finding against one parent is 'good against both.' More accurately, the minor is a dependent if the action of either parent brings [the minor] within one of the statutory definitions of a dependent.' [Citations.]" For this reason, an appellate court may decline to address the evidentiary support for any remaining jurisdictional finding once a single finding has been found supported by the evidence.

Mother did not contest the juvenile dependency petition in which she was charged with having "a history of illicit drug use, and is a current abuser of amphetamine and methamphetamine, which renders the mother incapable of providing regular care [for] the child." We therefore decline to address petitioner's contentions that there was not substantial evidence to support the juvenile court's finding that the child was subject to the jurisdiction of the juvenile court. (*In re I.A., supra*, 201 Cal.App.4th at pp. 1491-1492; see also *In re Shelley J.* (1998) 68 Cal.App.4th 322, 330; *Randi R. v. Superior Court* (1998) 64 Cal.App.4th 67, 72.)

2. *Dispositional Findings*

Under section 361, subdivision (c)(1), a juvenile court may remove a child from a parent's physical custody where it finds by clear and convincing evidence, that there is a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the child, or there would be if the child were returned to the custody of her parent(s), and there are no reasonable means to protect the child without removal from the parent's or parents' physical custody. (§ 361, subd. (c)(1).)

Dependency law in general does not require a child to be actually harmed before DCFS and the juvenile court may intervene. (*In re Eric B.* (1987) 189 Cal.App.3d 996, 1002-1003 ["The state, having substantial interests in preventing the consequences

caused by a perceived danger is not helpless to act until that danger has matured into certainty"], citing, inter alia, *Wisconsin v. Yoder* (1972) 406 U.S. 205.)

Substantial evidence was presented to the juvenile court showing that the child would be at risk of harm if she were released to the custody and care of father. Such evidence included the following:

1. Father was refusing to drug test.

2. Father was "running" with his street gang.

3. Father was not spending any time with the child.

4. Father was failing to engage in any of the services made available to him by the DCFS.

5. Father was using illicit drugs.

6. Father was failing to provide financial assistance for the child.

7. Despite his assurances to the juvenile court father was not residing with the PGPS.

8. On October 8, 2013, father was found guilty of vandalism.

9. On March 7, 2014, a bench warrant was issued for father's arrest for failure to appear at a probation violation hearing.

10. On March 17, 2014, father was found to have violated the terms of his probation and was sentenced to county jail with credit for time served.

11. On April 18, 2014, a bench warrant was issued for father's arrest for failure to appear at a probation violation hearing.

12. On April 21, 2014, father was found to have violated the terms of his probation and was sentenced to 90 days in the county jail.

13. On May 29, 2014, father was arrested for taking a vehicle without the consent of the owner. He was sentenced to two years in the county jail with credit for 22 days served. He was also found to be in violation of his probation and was sentenced to two years of incarceration with credit for 180 days served. The sentences were to be served concurrently.

14. Father's criminal history also included: (a) a 2007 conviction on a dangerous weapon charge; (b) a 2008 arrest for possession of a controlled substance; (c) a 2008 conviction for of underage possession of alcohol; (d) a 2008 conviction of illegal possession of a firearm; (e) in 2009 and 2010 he had two parole violations; (f) a 2012 conviction of battery; (g) a conviction of fighting in public and a 2012 conviction of domestic violence; and (h) a 2013 conviction of felony vandalism.

Father's argument against removal assumes that the only basis for removal was father's incarceration, citing cases analyzing jurisdiction based exclusively on a parent's failure to provide for the child. However, as discussed above, the risks father presented to the child went well beyond his incarceration and failure to provide for the child.

Father's behavior while the child was in his custody clearly demonstrated the need for her removal. Father continued his criminal lifestyle, [he was arrested several times for an alleged felony, and for several probation violations and was eventually ordered incarcerated on three cases for a total concurrent sentence of two years]. He was heavily involved with his criminal street gang and was abusing illicit drugs. He did not provide for the child's necessities of life, though he claimed to be employed, instead requiring paternal grandmother to go on welfare to obtain funds necessary to provide for the child's needs. He also did not maintain contact with paternal grandmother, often leaving her unable to contact him.

Father's reliance on *In re Christopher M.* (2014) 228 Cal.App.4th 1310 is misplaced. In that case the appellate court found that by the time of the jurisdictional hearing, the father was no longer incarcerated, was employed, was seeking custody of his child, was in an anger management program and individual counseling, and was willing to pay for conjoint counseling with his child. All of this demonstrated that the child was not currently at risk from the father's failure to provide. The father had never been the custodial parent and disposition was not an issue on appeal. (*Id*. at pp. 1319-1320.)

In the present case, unlike in *Christopher M.*, *supra*, the juvenile court properly removed the child from the custody of the father based on a variety of risk factors

(discussed above) in addition to father's failure to provide. Moreover, none of father's issues had been resolved by the time of the jurisdiction/disposition hearing. Father was remanded to custody for crimes and probation violations committed while he had custody of the child. He had not participated in any of the programs offered by the DCFS, he was involved in street gang activities, he was abusing illicit drugs, and he was spending little or no time with the child. He was making *no* efforts to become a responsible parent.

For all of these reasons, substantial evidence supported the juvenile court's determination that the child was at substantial risk of harm in father's custody, which risks could not be sufficiently resolved by reasonable means if she were released to father.

Father also maintains that the juvenile court erred in denying him reunification services. We do not agree.

Section 361.5, subdivision (e)(1) provides: "If the 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. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime . . . the degree of detriment to the child if services are not offered, . . . the likelihood of the parent's discharge from incarceration . . . within the reunification time limitations described in subdivision (a), and other appropriate factors."

Under section 361.5, subdivision (a), reunification services are to be provided for a child under age of three "for a period of six months from the dispositional hearing . . . but not longer than 12 months from the date the child entered foster care. . . ." (§ 361.5, subd. (a)(1)(B).) Reunification services can be extended to 18 months from the child's removal from the parent's physical custody, but only if the juvenile court can find at that time "that there is a substantial probability that the child will be returned to the physical custody of his or her parent within the extended time period. . . ." (§ 361.5, subd. (a)(3).)

Here, the child was only about one month old at the time of the detention hearing, and approximately six months old at the time of the jurisdiction/disposition hearing. She

had not significantly bonded with father as of the date of the jurisdiction/disposition hearing, as father wasted his time over the prior six months engaging in nefarious activities with his fellow gang members, and then by incarceration for crimes committed when he could and should have been with his daughter. Instead, paternal grandmother became the child's 24-hour-a-day caretaker.

Father was sentenced to two years of incarceration on a new offense and two years for a probation violation. These sentences were to be served concurrently. Notwithstanding how the trial court computed father's custody credits, it is extremely unlikely that father will be out of custody within 12 months from the date of the detention hearing or six months from the disposition hearing, which in either instance is sometime in February of 2015. Reunification services could in the discretion of the juvenile court be extended for up to 18 months upon a finding "that there is a substantial probability that the child will be returned to the physical custody of his or her parent . . . within the extended time period. . . ." (§ 361.5, subd. (a)(3).) However, based upon the evidence presented to the juvenile court, though the child being returned to father's custody is a possibility under the code, it definitely is not even a remote probability. After review of father's aforesaid conduct when he did have custody of the child pending the jurisdiction hearing, there is just nothing to say on the father's behalf which would justify such a finding.

Father argues, however, that the DCFS was "required" to inform the juvenile court of what services were available to father before the court could make the determination of whether to offer services. However, the statute's discussion of the DCFS documenting the services available to a parent only applies if the juvenile court actually orders reunification services be provided. If services are not being provided, the court need not "determine the content of reasonable services," or document "barriers to an incarcerated parent's access to those court-mandated services." (§ 361.5, subds. (e)(1), (e)(1)(D).)

Father also argues that his past failure to participate in services offered by the DCFS is not a listed factor for the court to consider when determining whether to order reunification services. (§ 361.5, subd. (e)(1).) However, section 361.5, subdivision

(e)(1), allows the juvenile court to take into account "any other appropriate factors" in determining whether to order reunification services. Father's very recent failure to participate in any services, beginning with his refusal to drug test from early January 2014, and continuing until his incarceration following his last arrest on May 27, 2014, provided strong evidence of father's total lack of motivation to participate in services and to make the necessary changes in his life to take custody of the child. This history showed that ordering reunification services would only prolong the uncertainty of the child's placement with the only people she has ever known as parent figures.

The child's best interest requires that she establish a stable, permanent home with her caregivers. (See *In re Jasmon O.* (1994) 8 Cal.4th 398, 419; *In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) The juvenile court had substantial evidence to find that ordering reunification services for father would be detrimental to the child.

Parties, including parents in dependency cases, are not permitted to raise issues for the first time on appeal that could have been raised in the trial court. "[A]ny other rule would permit a party to trifle with the courts" by "deliberately stand[ing] by" and "thereby permit[ting] the proceedings to reach a conclusion in which the party could acquiesce if favorable and avoid in unfavorable." (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338-1339.) It is unfair to the trial court and the other parties for an appellate court to consider a defect that could have been presented to the trial court and cured. (See *In re Cheryl E.* (1994) 161 Cal.App.3d 587, 603.) Moreover, when a party invites for strategic reasons, expressly agrees to, or acquiesces in an action by the trial court, that party has waived the right to complain of any error in that action on appeal. (*County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1118; *Sperber v. Robinson* (1994) 26 Cal.App.4th 736; *Nevada County Office of Education v. Riles* (1983) 149 Cal.App.3d 767, 779.)

Father claims that the juvenile court erred in denying his "request for a continuance" of the disposition hearing. A search of the record, however, reveals that father never requested a continuance. When the disposition hearing turned to the issue of reunification services, father's counsel stated, "I would object as this recommendation, no

reunification services, is only coming today, the date of the adjudication. If the court is going to proceed, I would ask the court to grant father reunification services." Father's counsel then proceeded to argue in favor of reunification services. No request for a continuance was ever made by father's counsel. Thus, his contention that disposition hearing should have been granted has been forfeited.[3]

Disposition

The Petition for an Extraordinary Writ is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MINK, J.[*]

We concur:

TURNER, P. J.

KRIEGLER, J.

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[3] We would also note that on June 11, 2014, DCFS sent notice of the July 8, 2014 hearing to father by certified mail. The notice stated the social worker's recommendation was for "No Family Reunification Pursuant to 361.5(b)." The lines containing this recommendation were highlighted. The notice also contained an explanation that DCFS might recommend that no reunification services be offered, and described the potential consequences of such an order. On July 8, 2014, DCFS filed a last minute information report, which attached minute orders from father's most recent criminal court proceeding. The report stated that DCFS had recently learned that father was sentenced to two years of incarceration and that DCFS recommended no reunification services for father. Father does not contend that his counsel was not provided with a copy of this report prior to the commencement of the hearing. He had an opportunity to discuss its contents with father.

[*] Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.