Filed 3/14/12 In re Andre W. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re ANDRE W. et al., Persons Coming Under the Juvenile Court Law.	B233348 (Los Angeles County Super. Ct. No. CK 78545)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ANDRE W., SR., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Rudolph A. Diaz, Judge. Affirmed.

Neale B. Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and William D. Thetford, Deputy County Counsel, for Plaintiff and Respondent.

* * * * * *

Father appeals from the juvenile court's findings and orders of March 14, 2011, terminating his reunification services at the 18-month review hearing and ordering his sons, Andre (age 16) and Andrew (age 14), into a permanent plan of long-term foster care.[1] Father contends that (1) the juvenile court's finding it would be detrimental to place the children in his custody is not supported by substantial evidence, (2) the court failed to find that the Los Angeles County Department of Children and Family Services (DCFS) provided him reasonable services, and (3) the court erred in not finding services were unreasonable because conjoint counseling was never commenced.

We find substantial evidence to support the juvenile court's finding that it would be detrimental to Andre and Andrew to place them with father. Further, the record discloses the court did find reasonable services were provided father, and substantial evidence supports such a finding. In any case, failure to make a reasonable services finding at the 18-month review hearing would not preclude the juvenile court from terminating services and setting a Welfare and Institutions Code section 366.26[2] hearing or ordering the minors into long-term foster care. We therefore affirm the juvenile court's orders.

FACTS AND PROCEDURAL HISTORY

This is father's second attempt to reverse the juvenile court's orders made on March 14, 2011, at the 18-month review hearing. Father first challenged the orders by way of a petition for extraordinary writ under California Rules of Court, rule 8.452. This court dismissed father's writ petition with respect to Andre and Andrew because the juvenile court did not set a section 366.26 hearing for the boys when it terminated reunification services, and, therefore, the court's orders did not fall within the purview of rule 8.452. (*A.W. v. Superior Court* (July 5, 2011, B232063) [nonpub. opn.].) With respect to younger sister A., however, we affirmed the juvenile court's orders terminating

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1 Neither mother nor the boys' younger sister, A. (age 11), is a party to this appeal.

2 All further statutory references are to the Welfare and Institutions Code.

father's reunification services and setting a hearing pursuant to section 366.26. (*A.W. v. Superior Court, supra*, B232063.)

We quote from our prior opinion as relevant with appropriate modifications:

"Father and the mother of Andre, Andrew and A. were separated in August 1999. Father had no contact with mother, although he would at times visit the children. Father has an extensive criminal history, including a conviction for assault in 1992, a conviction for possession of marijuana in 1992, a conviction for possession of marijuana for sale in 2008, and numerous arrests for drug-related offenses, battery, and possession of a firearm. Father was released on parole in June 2009 and resided with mother until August 2009. . . .

"The dependency petition was filed in August 2009, and in October the juvenile court sustained a dependency petition alleging the children's mother had been diagnosed with major recurrent and severe depression and psychosis, which interfered with her ability to provide a safe and stable environment for the children, placing them at risk of harm. Mother believed others were stalking her, tapping her telephone and conspiring to harm her and steal the children, resulting in her becoming aggressive and erratic in attempting to defend herself and the children. As to father, the court sustained allegations that he knew or should have known of mother's erratic and aggressive behavior but failed to take steps to protect the children.

"The juvenile court ordered father to attend a parenting program and undergo conjoint counseling with the children once their therapist recommended it. Father was also ordered to undergo drug testing and complete a drug program if he tested positive or missed a test. The court ordered DCFS to give father referrals in Riverside County, where he resided. Father was allowed monitored visits. The children, who had initially been placed together in foster care in Los Angeles when detained in August 2009, were now separated, with Andre and Andrew in one home and A. in another.

"Father submitted to an on-demand drug test at the end of October 2009, and told the social worker that it would likely be positive as he had recently used marijuana. Nonetheless, he did not submit to regular drug testing until December 28, 2009, and did

not enroll in a drug treatment program until June 3, 2010. While father completed a 10-session parenting program by the end of April 2010, he missed two of nine drug tests, and tested positive for marijuana on a third test in February 2010.

"On February 19, 2010, A. reported to the social worker that she had not seen her father in a long time. Father did not appear for his first monitored visit until April 27, 2010, eight months after commencement of the case. During the visit, A. and father sat together on a sofa, but she sat as far away from him as she could. [The boys, however, appeared happy and comfortable in father's presence. As of April 2010,] A. was receiving individual counseling, but Andre and Andrew had yet to begin counseling because they had been relocated to Riverside County. [Soon after they were moved to Riverside,] Andre and Andrew were relocated back to Los Angeles County. [At this time, the children expressed a wish to return to mother, and mother wanted the children returned to her custody. Father also indicated a desire to have the children placed with him. DCFS thus recommended that the juvenile court provide reunification services for both mother and father.]

"At the six-month review hearing on June 4, 2010, the juvenile court found reasonable services were provided and that they continue. The court also ordered DCFS to find out from A.'s therapist whether conjoint counseling with father was appropriate, and to facilitate visitation for the parents. [The court found father's progress to be significant and ordered him to continue with his programs. The court further ordered DCFS to determine which minor would be ready to begin conjoint counseling with father. DCFS in addition was to report on why father's visits had not been liberalized.]

"By the time of the 12-month review hearing on October 25, 2010, father was in partial compliance with the case plan. He [provided the social worker with a certificate of completion of a drug awareness program, but he also] tested positive for marijuana in July 2010, and failed to appear for four drug tests. While A.'s therapist indicated she would benefit from conjoint counseling with the parents, the social worker had been unable to arrange conjoint counseling between the children and father because he lived in Riverside County. [The social worker reported that father had four monitored visits with

the children that went well with no issues or concerns.] The social worker discussed with the children the possibility of placement with the[ir] father. But they wanted to remain in the Los Angeles area and be returned to their mother.

"The juvenile court found the father's progress was partial (while mother's was minimal) and continued reunification services for both parents. The court ordered unmonitored day visits for Andre and Andrew with father and directed DCFS to 'make [its] best efforts to set up conjoint counseling for father . . . that does not unduly inconvenience anybody.'

"[Father restarted his visits with the children in December 2010, and he indicated he would visit the children once a month in the future. The boys expressed an interest in continuing to have visits with father.]

"For the 18-month review hearing, the social worker reported that father had completed random drug testing and drug counseling. But conjoint counseling had not begun because Andre and Andrew were residing in different foster homes and continued to have changes in their placement -- Andre had seven different homes while Andrew had six.

"Father expressed an interest in having custody of the children. But each of them said they did not want to live with him. Andre and Andrew ([then] 15 and 13 years old, respectively) said they did not have much of a relationship with father and did not want to leave their relatives, school, or friends in Los Angeles. They wrote letters to the social worker stating they did not want to be placed with father. [In their letters, Andre and Andrew explained why they did not want to be placed with father. Andre stated the school he attended was one of the best things that had happened to him and was preparing him for college. Andre stated he loved his parents and would be willing to return to either of them, but not if it meant moving from Los Angeles, his school and his family and friends. Andrew stated that he had lived in Riverside and the school there was not great and he did not feel good living there. Also, Andrew stated he did not believe he needed his parents.] A. ([then] 10 years old) said she didn't have a relationship with her father at all and wanted to remain with her foster mother in a plan of legal guardianship.

The social worker indicated A. had a very good relationship with her foster mother, had bonded well with her, and was making positive progress developmentally, academically, and emotionally.

"On February 14, 2011, the juvenile court terminated reunification services for mother, but continued the hearing with respect to father. At the continued hearing on March [14], 2011, DCFS recommended that father's reunification services be terminated. While father had completed counseling and drug testing, the children did not want to be placed with father. Counsel for DCFS further argued the children's relationship with their father was strained due to his lengthy criminal history and extended absences from them while incarcerated.

"The attorneys for all three children joined with DCFS and also asked that father's reunification services be terminated. Counsel for A. explained that A. did not have a relationship with father, did not want to be returned to him, was doing well in her current school, and was thriving with her foster mother, with whom she has a very close relationship. Therefore, removing A. from her foster mother and placing her with father would create a substantial risk of detriment to her emotional well-being. [Counsel explained that although in some of the documents Andrew talked about not wanting to leave Los Angeles and his school and friends, she believed Andrew's position was the same as A.'s. Andrew just had not had a relationship with father over the years. He had several placements, but counsel stated she was hopeful that the current placement with his brother in a home with a male foster parent would be a good thing for Andrew. Counsel for Andre argued her client was thriving at a foster home and school that he enjoyed and in which he preferred to stay. She believed Andre had not bonded with father over the 19 months of reunification services, and he would not feel comfortable even doing short-term overnight visits with father. The children's counsel expressed a belief that it would be detrimental to their clients' emotional well-being if they were placed with father.]

"Father's counsel argued DCFS had failed to provide him with reasonable services because it did not comply with the juvenile court's directive concerning conjoint

counseling. Counsel further asserted DCFS had failed to show returning the children to his custody created any risk of detriment, and therefore the court should either put the children in his care or extend reunification services.

"The juvenile court found the children were not ready to be returned to father and that doing so at that point in time would be detrimental to them. The court terminated father's reunification services and ordered Andre and Andrew into a permanent plan living arrangement. The court set a permanency planning hearing for A. pursuant to section 366.26. The court indicated that its decision was without prejudice to father because 'things will continue to develop.' The court ordered visitation to continue and directed DCFS to assist father to participate in conjoint counseling with the children."

This timely appeal followed.

DISCUSSION

1. Substantial Evidence Supports the Juvenile Court's Finding That It Would Be Detrimental to the Minors to Place Them with Father

Father contends that the finding of detriment and order for long-term foster care for the boys "bordered on the absurd." He argues there was no evidence return of either minor to father would be detrimental to their physical or emotional well-being, and it was reversible error for the juvenile court to make such a finding. We disagree.

We review the juvenile court's determination of whether a substantial risk of detriment prevented the return of a minor to his or her parent for substantial evidence. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) "In the presence of substantial evidence, appellate justices are without the power to reweigh conflicting evidence and alter a dependency court determination." (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 705 (*Constance K.*).)

Father was a noncustodial parent when the children were removed from mother's custody. Placing the children with him at that time was, therefore, governed by section 361.2. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 453-454). Subdivision (a) of section 361.2 requires the juvenile court to place a dependent child with a noncustodial presumed

father who requests custody unless "placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child."

Initially, father did not seek custody of his children. Instead, he advised DCFS he was focusing on his new family and having the children in his custody would be problematic for him because mother and his new girlfriend did not get along. Because father did not seek the children's custody, the court properly could have denied father reunification services. (§ 361.5, subd. (b)(14); *In re Adrianna P.* (2008) 166 Cal.App.4th 44, 57.) The court nevertheless granted father services so that he could reunify with his children. It was not until October 2009 that father first expressed an interest in receiving custody, and then he indicated he was only interested in pursuing custody of the boys' sister, A. In April 2010, DCFS reported that father indicated an interest in having custody of Andre and Andrew.

DCFS concedes father eventually complied with most of the court-ordered case plan. However, it points out that father did not attend conjoint counseling or regularly visit the children, and both components of the reunification plan were necessary to address the lack of a relationship between the children and father and to transition the children into father's home.[3] Moreover, DCFS notes, compliance with the court-ordered case plan is not the sole concern when considering returning a child to a parent at the section 366.22 hearing. (*Constance K., supra*, 61 Cal.App.4th at p. 704.) The juvenile court may also consider factors including the child's stability and relationship with the foster parent, a parent's limited awareness of the child's emotional and physical needs, the failure of the child to have lived with the parent for long periods of time, the manner in which the parent has conducted himself or herself in relation to a minor in the past, as well as other factors. (*Id.* at pp. 704-705.) The detriment justifying continued removal, moreover, need not be the same as that which caused the child to be removed in the first

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[3] DCFS does not argue that the lack of conjoint counseling was due to any fault on father's part but attributes the failure of conjoint counseling to the boys' numerous placements and administrative complications arising from that circumstance.

place. (*In re Joseph B.* (1996) 42 Cal.App.4th 890, 899.) Whether a child should be returned to parental custody is dictated by the well-being of the child at the time of the review hearing. (*Id.* at p. 900.)

The record shows no indication that father acted as a parent to his children for any extended time. Mother and father separated in 1999, when Andre was four years old and Andrew two years old. Mother stated that father had visited the children following their separation. However, other than a two- or three-month period from June 2009 to August 2009, when father apparently lived with the family after being released from prison, his contact with the children over the 10-year period before the commencement of these proceedings is unknown. When the proceedings began, father's whereabouts were unknown. When father was located and informed the children were in foster care, he did not come forward to seek custody. He chose to have his visits monitored rather than submit to a drug test and enter a drug program. Father did not begin drug testing until the end of December 2009, and his first monitored visit occurred in April 2010, eight months after the case began. He tested positive for marijuana in February and July 2010, and he also missed six drug tests between December 2009 and September 2010. As a result, father's visits remained monitored up to October 2010.

Father also did not take every opportunity to visit and become acquainted with the children. From May 2010 to October 2010, father had only four monitored visits, and Andrew refused to attend one of those visits. Father did not visit with the children again until December 2010, when he chose to begin visiting only once a month. During the 19 months of reunification services, father visited with the children less than a dozen times, and only three visits at the most were unmonitored. There is no indication that either Andre or Andrew had ever been to father's home or had met his new family.

DCFS concedes there was no evidence placement with father would subject the children to a risk of physical harm; however, DCFS notes there was ample evidence that placement with father would be detrimental to their emotional well-being and, contrary to father's claim, such detriment was not the type that could be eliminated by in-home services. From the record presented, the juvenile court could infer that the boys did not

know father, had not lived with him for any appreciable time over the prior 10 years and had no relationship with him. Substantial evidence therefore supported the juvenile court's finding of detriment if the boys were placed in father's care.

Any claimed prejudice to father resulted, not from the juvenile court's detriment finding, but from father's lack of involvement in his children's lives and his failure to establish a parental relationship with them over the 19 months during which he received reunification services.[4]

2. The Juvenile Court Properly Terminated Father's Reunification Services

Father alternatively contends that he was not offered or provided with reasonable reunification services because conjoint counseling was never commenced as ordered by the juvenile court. He also asserts that the juvenile court erred by not extending his services beyond the 18-month period. We disagree.

A. A Finding That Reasonable Services Were Offered and Provided Was Not a Prerequisite to Terminating Reunification Services at the 18-month Review Hearing

Father contends DCFS had the burden of proving the provision of reasonable services by a preponderance of evidence at the 18-month review hearing. (See Evid. Code, § 115; *Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594 (*Katie V.*).) The record reflects that the juvenile court in this case in fact made an express finding at each review hearing, including the 18-month hearing, that DCFS provided reasonable reunification services to meet the needs of the minors.

In any case, at the 18-month hearing, the court is not required to extend services even if it finds reasonable services have not been provided. Section 366.22, subdivision (a) provides that the 18-month hearing must occur within 18 months after the child's

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4 At the 12-month hearing, the juvenile court had warned father he needed to take a more active part in the children's lives if he wished to reunify with them, stating, "I'm really not clear exactly why father hasn't been visiting. I know he lives in a different county, but I don't understand what the problem has been to set up visits. He certainly needs to be visiting more often, and I think father is going to need to be much more proactive and make sure [he gets] regular visits."

removal from the parent's custody; if the child is not returned to the parent at that hearing, the court must order a section 366.26 hearing except in circumstances not applicable here. (§ 366.22, subd. (a).) At the 18-month hearing, services *may* be continued by the court for an additional six months for only two narrow categories of parents: parents "making significant and consistent progress in a court-ordered residential substance abuse treatment program" and those "recently discharged from incarceration or institutionalization and making significant and consistent progress in establishing a safe home for the child's return . . . ." (§ 366.22, subd. (b); see also *Earl L. v. Superior Court* (2011) 199 Cal.App.4th 1490, 1502-1504; *Denny H. v. Superior Court* (2005) 131 Cal.App.4th 1501, 1511-1512; *Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1015-1016.) Father does not argue he fell within one of the exceptional circumstances necessary for the juvenile court to extend reunification services past the 18-month date.

B. The Reunification Services Were Reasonable Under the Circumstances

Even if a finding of reasonable services arguably might be deemed a prerequisite to ordering a section 366.26 hearing (see *In re Daniel G.* (1994) 25 Cal.App.4th 1205, 1214-1215), the juvenile court's reasonable services finding is supported by substantial evidence. "In reviewing the reasonableness of the services provided, this court must view the evidence in a light most favorable to the respondent. We must indulge in all legitimate and reasonable inferences to uphold the verdict. If there is substantial evidence supporting the judgment, our duty ends and the judgment must not be disturbed. [Citations.]" (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) A social services agency must make a good faith effort to address a parent's problem through services, to maintain reasonable contact with the parent during the course of the plan, and to make reasonable efforts to assist the parent in areas of difficulty. (*Katie V., supra,* 130 Cal.App.4th at p. 598.) In most cases, more services might have been provided and the services provided are often imperfect; thus, the appropriate standard is not whether the services provided were the best that might be provided in an ideal world, but whether the services were reasonable under the circumstances. (*Id.* at pp. 598-599.)

Here, the children were detained on August 19, 2009. The 18-month date therefore fell on February 19, 2011. Father complains only that he was not provided conjoint counseling as ordered by the juvenile court. Although the record does not fully explain why the conjoint counseling never materialized, the order for conjoint counseling was for DCFS to "make [its] best efforts to set up conjoint counseling for father . . . that does not unduly inconvenience anybody." Even while making such an order, the juvenile court expressly found that DCFS had made reasonable efforts with regard to father.

Contrary to father's assertion, the record supports the court's finding that DCFS made reasonable efforts to address the problems that resulted in the children's detention. Counsel for DCFS argued that DCFS had maintained monthly contact with father, either face to face or by telephone; in those contacts, the social worker confirmed that father was able to see the children, and the worker would arrange the meetings. DCFS's counsel noted in the last six months father had completed his programs, and, apart from conjoint counseling, there were no further services to give him. That the children were located in Los Angeles and father in Riverside appeared to be a significant factor that had impeded conjoint counseling. Moreover, conjoint counseling could not be started without the child's therapist making a determination that the child was ready for such counseling. Andre's counsel noted the children had very few visits with father, and Andre was out of therapy for a period, because he had been moved and chose to be out of therapy. Conjoint therapy could not take place during the time individual therapy was suspended. Further, Andrew and A.'s counsel indicated that Andrew's placements continued to fail, and he was placed on waiting lists for therapy each time he was moved. Andrew's counsel also indicated the children needed to achieve a certain level of progress before they could be ready for conjoint counseling. Counsel explained that although A., unlike her brothers, always had the same placement, father was virtually a stranger to A.

Based on all the facts and circumstances, substantial evidence supports the juvenile court's finding that DCFS provided reasonable services to father.[5]

DISPOSITION

The orders are affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.

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[5] We note that even though the court terminated reunification services at the 18-month hearing, the court ordered father to continue with conjoint counseling and directed DCFS to assist father in providing opportunities for such counseling.