Filed 8/5/15 In re Mariah H. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re MARIAH H., a Person Coming Under the Juvenile Court Law.	B263759 (Los Angeles County Super. Ct. No. DK01638)
LARRY H., et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Real Party in Interest.	

ORIGINAL PROCEEDING. Petition for extraordinary writ. (Cal. Rules of Court, rule 8.452.) Philip L. Soto, Judge. Petition granted.

Children's Law Center of California, (CLC 3), Patricia G. Bell and Kenneth Ichiroku, for Petitioner F.H.

Law Office of Timothy Martella, Rebecca Harkness and Thomas Pichotta, for Petitioner Larry H.

No appearance for Respondent.

Office of the County Counsel, Mary C. Wickham, Interim County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Jeanette Cauble, Senior Deputy County Counsel, for Real Party in Interest.

Children's Law Center of California, (CLC 2), and Angela Torres, for Minor.

F.H. (mother) and Larry H. (father) are the parents of minor Mariah H. Mother and father each petition for extraordinary relief pursuant to California Rules of Court, rule 8.452. They seek review of an order terminating reunification services and setting a permanent plan hearing under Welfare and Institutions Code section 366.26.[1] Both challenge the juvenile court's finding that returning Mariah to mother's or father's care would present a substantial risk of detriment to the child. We grant the petition.

FACTS AND PROCEDURAL HISTORY

This matter involves a young girl, Mariah H., born on July 18, 2013. She was detained from her parents when she was two months old after reports of domestic violence between mother and father. Mariah was placed with a paternal cousin, and later with foster parents. She currently remains in foster care.

The first account of domestic violence came just days after Mariah was born. Mother told a witness that father had pushed and punched her numerous times during her last two months of pregnancy. The witness remembered a bruise on mother's arm during that time. Mother stated that she had hit father as well. When the witness relayed that information to the Los Angeles County Department of Children and Family Services (DCFS) on July 22, 2013, a social worker responded to mother's home. Mother was living with father in his parents' home, apparently with Mariah. Mother and father were interviewed separately. Both denied any domestic violence. The social worker also spoke to father's mother, Mariah's paternal grandmother, who denied any domestic abuse

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

and observed that mother and father were good parents. Mariah's paternal grandfather said the same. Sheriff's deputies had never been called to the home for any reason.

At the time, mother was herself a dependent of the juvenile court because she had been physically abused by her mother. Though she was 18, mother's case had been left open. Mariah's social worker conferred with mother's social worker, mother's wraparound services therapist, and mother's foster mother about the situation. Each reported that mother described hitting and controlling behavior by father, though the social worker and the therapist were not sure if mother was telling the truth in light of a history of dissembling. Nor would mother provide details of the abuse if pressed. DCFS conducted a screening test for domestic violence, and mother's answers indicated it was possible. She was also deemed in need of individual therapy, family counseling and intensive parenting training. An assessment of father indicated he should be provided with in-home parenting training.[2]

On September 26, 2013, DCFS called a team decision meeting. When confronted with the information provided by third parties, mother and father admitted they sometimes argued. Father further acknowledged that fights could become physical. Mother thought she could benefit from anger management classes. Mother vehemently denied a report from her social worker that she had admitted feeling unable to leave the relationship with father. In the hours after the team decision meeting, mother and Mariah moved out of father's home. According to mother, there was no fight. Instead, mother's relatives, particularly her foster mother, had advised her to move out to protect Mariah, warning that DCFS might take the child. Mother returned to her foster mother's home, and was not sure if she would remain in a relationship with father.

Within a day mother went back to father. DCFS thereupon obtained a warrant to detain two-month-old Mariah, uncertain of whether she would be safe from domestic

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[2] Early reports by DCFS questioned the parents' mental state, particularly father's potential developmental delays. Because the issue was not pursued by DCFS and was not relied upon by the court in reaching the challenged decision, we will not discuss it further.

violence given the conflicting stories. DCFS further noted that mother was not compliant with her own case plan, as she had gone AWOL to live with father. There was also evidence that mother had become erratic in meeting with a home nurse who was assisting with pregnancy and infant care. Mariah was placed with a paternal cousin.

The detention was approved on October 4, 2013. Mother's dependency case was terminated. Six weeks later, on November 14, 2013, the juvenile court found jurisdiction over Mariah due to mother's and father's failure to protect her from domestic violence. Mother and father were ordered to participate in domestic violence and parenting programs, as well as individual counseling. Mother was further required to receive anger management counseling. Indeed, mother and father had already enrolled in parenting, domestic violence and anger management counseling. Each parent was allowed monitored visits with Mariah for three hours, three times a week, not to be done together.

In a report that had been prepared for the jurisdictional hearing, and again in a report prepared for the six-month review, DCFS noted that mother and father were diligent in attending their programs. Though father was not actually required to attend anger management, he did so voluntarily. After a slightly bumpy start, mother and father had also been visiting regularly and successfully with Mariah. In fact, over the first six months of reunification, DCFS had liberalized visits to six hours a week and was contemplating overnight visits. The reports also described the unsettled nature of mother's and father's relationship. Though mother and father would initially represent otherwise, third parties reported that in or about November of 2013, mother had again left father for approximately two weeks. According to mother's foster mother, it was because father had hit mother again, though mother, father and the paternal grandmother denied it. Mother had also contacted DCFS for referrals to domestic violence shelters, but when questioned about abuse denied there had been any. Mother eventually returned to father, and they entered a period of apparent calm.

A major setback occurred on the eve of the six-month review hearing, set for May 15, 2014. In a last-minute memorandum to the court, DCFS reported that another domestic violence incident had occurred on May 2, 2014. Father hit mother in the eye

during an argument over his allegedly texting other women. Mother contacted sheriff's deputies about the incident, and revealed there had been about 20 previous episodes of domestic violence. Deputies detained father, who denied intentionally hitting mother and concluded that he hit her accidentally when the two wrestled for control of a cell phone. Father further denied hitting mother in the past. DCFS would later report that mother had also bitten father.[3] A second last-minute memorandum indicated that the paternal cousin had been leaving Mariah with mother and father, together, for days at a time. If not with the parents, the paternal cousin had been leaving Mariah with other relatives, weary of the responsibility of caring for her. Unable to find another suitable relative, DCFS placed Mariah with a foster family and restricted visitation to monitored. It recommended that Mariah remain detained while parents received more family reunification services.

The juvenile court agreed. On May 15, 2014, the court found mother and father to be in partial compliance with their case plans, and continued services. It did not extend a two-week restraining order that had issued against father after the domestic violence incident because the court determined that both parties were aggressors. Mother had been residing with a friend or her foster mother since the domestic violence incident, so DCFS was ordered to help her find a stable placement. The more restrictive visitation arrangements were also affirmed, though DCFS was given discretion to liberalize, including to unmonitored.

All was quiet for another six months. In a report prepared for the 12-month review hearing, set for December 3, 2014, DCFS indicated that Mariah remained in her foster placement and was doing well. Mother and father had remained separated, recognizing it was best for Mariah and for themselves. Mother had entered extended foster care, apparently placed with her foster mother, and was receiving services in her own right. She had completed her programs and was attending individual counseling.

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[3] The record is conflicting as to whether Mariah was present. The sheriff's incident report stated that Mariah was not present. A later DCFS report indicates that the social worker spoke to the responding deputy by telephone, and learned that Mariah was there on a visit and was "left" with the paternal cousin.

Mother was also working toward obtaining her high school diploma, and was looking for a job. Mother visited Mariah successfully, and DCFS had liberalized visits to unmonitored, then to overnights that were monitored by the foster mother.

Similarly, father's visits had been successful, and his visits were liberalized to unmonitored, then overnights monitored by the paternal grandmother. He was still living in his parents' home. Father had completed his programs except for his 52-week domestic violence counseling, which was almost complete. Father admitted he engaged in domestic violence in the middle of that training, but claimed to have developed further techniques to prevent violence from happening again. He was also in counseling with a new therapist, who was helping with new calming and parenting methods.

Still, DCFS categorized mother and father as posing a moderate risk of abuse or neglect to Mariah. It recommended extending reunification services further. Mother and father requested a contested hearing, so the 12-month review was continued from December 3, 2014, to January 26, 2015. In the interim, new information surfaced that mother and father were dating again. In fact, mother wanted her extended foster care services to include an independent living plan based in father's home. Father even hinted that the two had visited with Mariah together. While father and the foster mother characterized the relationship as romantic, mother denied any romance, stating only that she was in contact with father. Regardless, within three weeks mother had broken from father again and refocused on Mariah. She requested that her independent living plan be approved in a placement with a third party, presumably a roommate. Though she had dropped out of school, mother also planned to re-enroll.

At the contested hearing on January 26, 2015, the juvenile court ordered continued reunification services. It further modified mother's and father's case plans to include conjoint counseling. That was the only contact the two were to have. The court extended visitation to two overnights per week for each parent, with DCFS making unannounced home visits. A further review hearing was set for the fast-approaching 18-month date, April 1, 2015.

Thereafter, visits continued to go well. Mother kept Mariah for several days while Mariah's foster parents went out of town. In fact, both parents had their overnight visits increased to three per week. In the two months available to obtain conjoint counseling, however, mother and father only managed to schedule one therapy session, in part because of difficulties documenting the order for their therapist, and that session did not go forward because father either did not attend or was late. When questioned about their "romantic relationship," mother stated she did not know and father stated he wanted to work on it. Both wanted to see Mariah returned to mother's care, with father having joint custody.

The 18-month review came on for hearing on April 1, 2015. However, it was continued for three weeks to allow mother to contest the issues. First, the court gave mother and father a choice. If they made a clear statement to DCFS that they would not reunite, then the order for conjoint counseling would be dissolved and a home of parent order would be the likely recommendation. If they did not want to commit to remaining separate, then the conjoint counseling requirement would stand. Mother and father were further given permission to meet and arrange a visitation plan, apparently meaning a joint custody arrangement, that was acceptable to both of them, to be communicated to DCFS.

DCFS's follow-up report did not make it clear whether mother and father agreed upon a final visitation schedule as directed. Instead, DCFS reported that mother's and father's operative visitation schedule was for alternating Thursday through Monday visits, supplemented by weekday visits for the parent who did not have Mariah over the weekend. Under that schedule, Mariah was spending six days and four nights of every week with one of her parents, all unmonitored. As for a commitment to remain separated, DCFS did not obtain any statement from mother. It did question father, who indicated he was unsure whether he and mother would reunite but guessed it was possible. DCFS further claimed that mother and father were again visiting with Mariah together, in violation of court orders. Additionally, DCFS was concerned that father had never provided proof he completed his domestic violence program. In light of that information, DCFS recommended termination of services, concluding that mother and

father had failed to address the domestic violence issue that brought the matter within the juvenile court's jurisdiction.

The final review hearing went forward on April 22, 2015. The court admitted DCFS's reports into evidence and accepted stipulated testimony from mother and father. Each would confirm that they were not in a relationship, had no intention to pursue one, and only wished to co-parent. Father would further explain that the social worker had pressed him on whether a future relationship was possible, and that is why he guessed it was. Nevertheless, the court found that mother and father had not truly committed to remaining separate, and so had failed to comply with their case plan, apparently referring to the conjoint counseling requirement. Therefore, the circumstances that gave rise to jurisdiction had not been resolved, and a substantial risk to Mariah remained, particularly given her young age. The court acknowledged that mother "doesn't want to get back with him," and that "it takes two to tango," but the court believed father was a "pretty convincing person," so it did not "know whether or not he isn't going to convince mother to do just that." The court concluded the cycle of violence in the relationship would therefore start again, mirroring the larger cycle of abuse and neglect that the court perceived in the dependency system as a whole. A hearing under section 366.26 was set to consider terminating parental rights, and DCFS was instructed to initiate a permanent plan for Mariah. Even so, the court noted that if mother and father could commit to parenting separately, Mariah might be returned to their joint custody at a future hearing. Visitation was continued, and mother and father were ordered to participate in conjoint counseling.

These timely petitions followed. Counsel for Mariah purported to join the petitions by way of a letter brief, though she never filed a predicate notice of intent to file a petition challenging the court's ruling. (Cal. Rules of Court, rule 8.450(e).) We take the letter as a statement of support for mother's and father's petitions.

DISCUSSION

Mother and father challenge the juvenile court's finding that a substantial risk of detriment to Mariah would be presented by returning her to their care. A juvenile court's

finding that substantial risk exists is reviewed for substantial evidence. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 763.) That is, the record must reflect evidence of a credible and solid nature to support the finding. (*In re E.D.* (2013) 217 Cal.App.4th 960, 966.) In determining whether such evidence supports the juvenile court's determination, the appellate court will not reweigh the evidence or exercise independent judgment regarding the ruling, and will view the record in the light most favorable to the judgment below. (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.)

There is a statutory presumption that a dependent child will be returned to his or her parent's care at the end of the reunification period. (§ 366.22, subd. (a); *In re E.D.*, *supra*, 217 Cal.App.4th at p. 965; *In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1400.) Section 366.22, subdivision (a) provides, "the court *shall* order the return of the child to the physical custody of his or her parent . . . unless the court finds, by a preponderance of the evidence, that the return . . . would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (§ 366.22, subd. (a), italics added.) The burden of establishing a substantial risk of detriment is placed on the social worker. (*Id*.)

While cases have acknowledged that the term "substantial risk" is vague, they have nevertheless agreed it enunciates a "fairly high" standard. (E.g., *In re E.D.*, *supra*, 217 Cal.App.4th at p. 965; *David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 789.) Even if a parent is not perfect, or has not benefited from reunification efforts as much as hoped, no substantial risk is stated if the child will not be placed in some danger. (*In re E.D.*, *supra*, at p. 965; *In re Yvonne W.*, *supra*, 165 Cal.App.4th at p. 1400.) To determine if there is a danger, the court must consider the case as a whole, the parent's participation in reunification services, and his or her progress in eliminating the conditions that led to the child's removal. (*Rita L. v. Superior Court* (2005) 128 Cal.App.4th 495, 505; *In re Yvonne W.*, *supra*, at p. 1400.)

As applied to this case, those authorities require that there be solid, credible evidence that Mariah will be in actual danger of physical or emotional harm should she be returned to mother's or father's custody. Our review of the record reveals no such

evidence. We begin with the juvenile court's reasoning. The court did not specify what evidence it was relying on to find a substantial risk to Mariah. Instead, it found there was a risk because mother and father failed to convince the court that they would not reunite in the future. The only reason the court was not convinced was because father had recently stated he was unsure of whether he and mother would reunite, but guessed it was possible. In the court's estimation, father was a persuasive person, so even though mother did not wish to reunite and "it takes two to tango," the relationship would resume and domestic violence would follow.

What is initially striking about that reasoning is that it effectively shifted the burden of proof to mother and father to show there was no substantial risk to Mariah in order to regain custody of their child. In fact, it was up to DCFS to prove that some danger existed, which was difficult given its liberalizing visits for mother and father to the point that Mariah spent most of her time with them on an unmonitored basis. Indeed, the evidence showed that at the time of the 18-month review, mother and father were separated. They had been for almost a year -- since the May 2, 2014, domestic violence incident that involved sheriff's deputies, a watershed event that triggered mother's and father's lasting separation. Though at one point mother considered reunifying with father and establishing her independent living plan in his home, within weeks she decided against that course of action. Instead, she established a separate living plan with a roommate. That is, mother engaged in the very behavior the juvenile court wished to see from her. Mother and father then offered stipulated testimony confirming that they were not in a relationship, had no desire to pursue a relationship, and intended only to co-parent. And, of course, there had been no domestic violence in a year, and Mariah had never been harmed. Given that evidence, it is difficult to see what more the juvenile court wanted the parents to do to demonstrate that they did not pose a risk to Mariah, or more accurately, how DCFS satisfied its burden of establishing a risk.

The juvenile court appears to have rejected mother's and father's stipulated testimony and disregarded their recent behavior in light of earlier, more equivocal statements they made about their relationship. When asked about rekindling a romance,

mother stated that she did not know and father said he was unsure. When asked if it would be possible, father guessed so. Those statements were made against a background of mother and father hiding domestic violence, mother's early reputation for evasiveness, and months of mother's and father's on-off involvement. Even so, the most those statements currently show is that father might possess a unilateral hope of further engagement with an ambivalent mother. That simply does not amount to solid, credible evidence to support a finding that mother and father would not only return to one another, but would then pose a risk of danger to Mariah.

Indeed, mother and father completed or substantially completed all of their programs. Both were in individual counseling. Both stated that they had learned from their classes and from therapy. There had been no domestic violence in almost a year. Though disregarded by the juvenile court, that suggests mother and father made progress in eliminating the risk that brought Mariah into dependency in the first place. It is true that father never provided proof he completed his domestic violence program, but the last indication was that he was within three sessions of doing so. And rather than simply quitting on those final sessions, the record shows father encountered difficulties in paying for the course, so was warned he could be dismissed on that basis. There is no information as to what occurred thereafter, or whether DCFS undertook efforts to assist father with completion. While father may not have been letter-perfect in completing his case plan, that fact alone does not establish that he learned nothing, and would continue to pose a risk to Mariah if she was returned to his care. (*Rita L. v. Superior Court*, *supra*, 128 Cal.App.4th at p. 505.)

Moreover, visitation was unquestionably a success. Mother and father consistently and increasingly visited with Mariah to the point that she spent most of her days and nights with a parent. The record indicates she grew to be a happy, healthy child in mother's and father's care. There is no evidence that Mariah has ever been harmed. In fact, even after it found there would be some risk to Mariah in mother and father's custody, the juvenile court directed that the same visitation schedule continue, leaving Mariah in the very situation the court thought would be detrimental to her.

The only truly unfulfilled element of mother's and father's case plans was the conjoint counseling requirement. But that requirement was added with just two months of reunification left to go. If conjoint counseling was necessary to a finding that mother and father had eliminated the risk to Mariah, then it should have been required from the outset of the case, when father and mother were still living together. Instead, the requirement was added at the last minute, and then used as leverage to obtain a promise from mother and father to remain separate. Nevertheless, when mother and father made that pledge, it was rejected, and the court discounted mother's and father's efforts to comply with their case plans because no conjoint counseling had been accomplished. That left mother and father in an impossible situation, unable to recover custody of their child despite their best efforts. In the circumstances, we cannot view any failure by mother and father to complete conjoint counseling as substantial evidence that they failed to eliminate a risk of harm to Mariah.

In rejecting mother's and father's statements that they did not intend to reunite, the juvenile court may have been influenced by mention of mother's and father's violating court orders by visiting with Mariah together. But there was no indication that DCFS ever investigated whether that information was true, or that it reacted in any way to the intelligence. To the contrary, DCFS continued to rapidly liberalize mother's and father's visitation schedules. By the end of the reunification period, Mariah spent most of her time with mother or father, safely. Thus, any violation of court orders was overlooked by the social workers with the burden of establishing some risk to Mariah, and cannot now be counted as substantial evidence that they pose a danger to her.

We appreciate that the juvenile court wanted an assurance the conditions that led to Mariah's removal would not be repeated, and was frustrated by seeing families cycle through the dependency process. But the relevant inquiry was whether solid, credible evidence demonstrated a substantial risk of detriment to Mariah should she be returned to mother's or father's care. Conjecture that mother and father might not just return to their relationship but also to domestic violence does not constitute substantial evidence that such a risk exists. Moreover, shifting the burden to mother and father to prove they

would not pose a risk ran contrary to the statutory mandate. The burden was on DCFS to prove that Mariah would be in danger should she return to her parents' care. It did not.

DISPOSITION

The petition for extraordinary relief is granted. The juvenile court is directed to vacate its order setting a hearing under section 366.26, and instead enter a home of parent order for mother and father in accordance with section 366.22. Nothing in this opinion precludes the entry of appropriate joint custody or maintenance orders. (See *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 311–312.) This opinion shall become final immediately upon filing. (Cal. Rules of Court, rule 8.490(b)(2)(A).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

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ASHMANN-GERST, J.

We concur:

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BOREN, P. J. HOFFSTADT, J.