Filed 12/30/16 S.P. v. Superior Court CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

S.P.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Real Party in Interest.

B272394

(Los Angeles County Super. Ct. No. DK07180)

ORIGINAL PROCEEDINGS in mandate. Phillip L. Soto, Judge. Petition granted in part, denied in part.

Law Office of Pamela R. Tripp, Pamela Rae Tripp; and Ernesto Paz Rey for Petitioner.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Jacklyn K. Louie, Principal Deputy County Counsel, for Respondent.

No appearance for Real Party in Interest.

INTRODUCTION

S.P., mother of Chloe P., filed the instant petition for extraordinary writ challenging the juvenile court's ruling terminating reunification services for her and scheduling the selection and implementation hearing (Welf. & Inst. Code, § 366.26).[1] Mother contends the juvenile court's findings that return of Chloe to her care would be detrimental to the child (§ 366.22) and its order re-imposing supervised visitation are unsupported by the evidence. We conclude that that the order reinstituting monitored visits was an abuse of discretion. We grant the writ petition with respect to the visitation order but deny the petition with respect to the termination of reunification services.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Chloe's injuries*

By two months of age, Chloe's eating habits had changed significantly and she was suffering "unusual" and seizure-like symptoms. Mother and father, E.P., took the infant to the pediatrician and to a gastro-intestinal specialist. Even after viewing the parents' videotape of the unresponsive and shaking infant, the pediatrician was unable to make a diagnosis. Uncomfortable with that result, mother took the infant to the emergency room.

Chloe was admitted to the hospital in late August 2014 on suspicion of failure to thrive or seizure disorder. She had multiple brain bleeds of various ages, bilateral retinal hemorrhages, a subdural hematoma, subarachnoid bleeds, and

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

an intraventricular infarct. As she continued to suffer seizures, the hospital placed the baby on a ventilator and a brain monitor, and diagnosed her with "brain and seizure disorder."

The hospital's CARES, Genetics, Neurology, and Hematology Units conducted extensive medical workups of Chloe, and found " 'no apparent metabolic, hematologic or other underlying medical condition . . . [or] history of accidental trauma . . . [that would] adequately explain Chloe's injuries.' " The CARES Unit determined that the child's injuries were " '*compatible with abusive head trauma, such as, but not limited to, vigorous shaking of the infant*.' " (Italics added.) The multiple ages of the intracranial bleeding possibly indicated more than one episode of trauma to the baby's head. The hospital concluded that the injuries appeared non-accidental and were consistent with shaken baby syndrome that "would have to be 'significant, vigorous and violent.' "

The police also believed Chloe had been shaken. The parents denied dropping or harming her and explained that they were Chloe's only caretakers, other than on two occasions. The police took the baby into protective custody but did not arrest the parents.

Over the three weeks that Chloe was in pediatric intensive care, her condition worsened. Five brain MRIs showed progressive changes indicating serious and extensive brain disorder. Chloe was not tracking objects or people, and did not attempt to obtain eye contact or smile at caregivers. The baby appeared upset when she changed positions and cried when handled, changed, or held. At five months, she had minimal head control. Chloe was diagnosed with, inter alia, non-accidental

trauma, seizure disorder, and significant developmental delay, and must be fed through a gastronomy tube (g-tube).

County Public Health physician, Dr. Edward A. Bloch, opined that Chloe "*experienced non-accidental trauma . . . .*" (Italics added.) Seven months later, in June 2015, Dr. Bloch explained that Chloe's "profound global developmental delay was likely to persist indefinitely and, similarly, the *trauma-induced seizure disorder* now appears to be a chronic condition that is likely to continue to require anticonvulsant medications for many years."

Neighbors who babysat Chloe before she went to the hospital, reported no issues with the baby or altercations between the parents. They described the parents as "very even tempered" and " 'wonderful parents.' " The family's strengths, according to a Multidisciplinary Assessment Team (MAT), included knowledge of appropriate developmental milestones, stable housing and resources, employment, and the goal of reunifying with Chloe. The parents were able to soothe the baby and Chloe appeared calm and content with them.

The parents hired a board certified ophthalmologist and a pediatric neurologist, both of whom determined that child abuse diagnosis was unsupported. The ophthalmologist found "there are medical facts that can explain the retinal hemorrhages . . . without the need to invoke child abuse" and listed five possible explanations for the injuries, only one of which was intentional conduct. The neurologist concluded that Chloe's lengthy hospital stay and worsening brain injury during hospitalization indicated a "metabolic/genetic disorder." The multiple foci of infarction were the result of a small blood vessel or clotting disorder. The neurologist concluded that the baby had

a severe and progressive brain disorder that "[cannot] be the sole result of trauma."

2. *The jurisdictional and dispositional hearing, January 2015*

Presented with the conflicting evidence of causation, the juvenile court sustained the petition filed by the Department of Children and Family Services (the Department) finding true the allegations that Chloe suffered from serious neurological injuries that were in different stages of healing. The parents "gave no explanation" for how the baby sustained her injuries, which injuries "*are consistent with non-accidental trauma"* and *"would not ordinarily occur except as a result of deliberate, unreasonable and neglectful acts by the child's parents who had care, custody and control of the child*." (§ 300, subds. (a) [serious physical harm], (b) [failure to protect], (e) [severe physical abuse], italics added.)

Against the Department's recommendation to deny reunification services, the juvenile court ordered the parents to undergo a 52-week parenting program, and to participate in therapy "to address case issues." The court also ordered the Department to notify the parents of all of Chloe's medical appointments to enable them to attend and learn what kind of services and treatment would be provided. The court awarded the parents monitored visits and gave the Department discretion to liberalize visitation. Mother did not appeal from this ruling.[2]

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[2] It appears that father filed an appeal from the jurisdiction and disposition order, but his appeal was dismissed for failure to file an opening brief. (B261336.)

3. *The six-month review period (§ 366.21, subd. (e))*

The Department has always acknowledged, and it is undisputed, that mother complied with the elements of her case plan.

Shortly after the juvenile court took jurisdiction, the children's social worker informed mother's therapist that the Department did not know which parent caused Chloe's injures "*as neither of* [*the parents has*] *come forward with this information and it is a goal to gain insight as to who caused these injuries to the child during the therapeutic process*." (Italics added.) The social worker sent the therapist the court's orders so that the case issues would be clear.

Mother regularly attended therapy where she was "forthright, open, cooperative and responsive." She was experiencing enormous grief over Chloe's medical condition and "the loss of her parental rights." The therapist believed that mother was committed to doing whatever was needed to help Chloe and that her first priority was the child's needs. Thus, mother would be vigilant about ensuring that the baby received the best possible medical care. "I have no hesitation about recommending that she be granted unsupervised, expanded visitation," the therapist wrote.

Mother was diligent about implementing what she learned in counseling where she made " 'especially remarkable' " strides. She ceased working full time to be available for Chloe, devised " 'therapeutic strategies to deal with Chloe's disabilities,' " and learned everything possible about Chloe's condition, including how to assist with physical therapy. Mother did not suffer from psychopathy or mood instability; but was possibly suffering "a version of Post-Traumatic Stress Disorder based on

aforementioned factors,' " which included that mother experienced a "difficult" labor and delivery that lasted three days, causing her to lose use of her lower body for a while, and persistent discomfort. Mother was "overprotective." It was the therapist's impression that mother did not injure the child.

The Department acknowledged in July 2015 at the six-month mark (§ 366.21, subd. (e)), that mother was in compliance with her case plan, had positive visitation, and consistently addressed case-related issues in therapy. Mother promptly completed the required 52-week parenting class, and g-tube and CPR/AED training. During visits, mother did stretching exercises with Chloe that she had learned in physical therapy. Her interaction was appropriate and she was affectionate with Chloe. Mother handled the child gently and with care. No safety concerns were reported.

However, in the social worker's view, mother's therapist did not believe that Chloe's injuries were perpetrated by a parent, despite having received all court reports outlining the child's diagnosis. The Department concluded that the parents "continue to be in denial of the cause of the child's injuries and neither have accepted responsibilities for" those severe injuries. The Department recommended that the court terminate family reunification services because "Chloe, is not considered safe in the home of mother . . . and father . . . as the parents have not provided an explanation of the child's injuries" that is consistent with her injuries.

At the six-month review hearing in July 2015, the juvenile court allowed unmonitored visitation to progressively increase in duration, with Departmental discretion after 90 days to allow overnight visits. The court pointedly explained it had made the

finding that "something was done wrong by the parents," which finding was not overturned on appeal. The court stated, "[*i*]*f you sit down and have a heart to heart with the* [*social*] *worker and say, 'you know, we understand there's a problem that we are responsible for. And we are working to try and solve that*,' " then the Department would be more likely to recommend that Chloe be returned to the parents' custody. (Italics added.) The court continued reunification to the 12-month date.

4. *The 12-month review period (§ 366.21, subd. (f))*

Mother continued to participate regularly in therapy and was "very aware of Chloe's developmental delays." Mother was working to provide Chloe with physical stimulation, affection, and basic care. As Chloe loved physical contact, mother gave her passive muscle stretching and strengthening, and tried to stimulate focused eye movement to facilitate tracking. When mother held Chloe's left hand, the child stroked mother's arm. According to mother's therapist, Chloe seemed to enjoy the physical interaction and cried when visits ended.

The social worker wrote and spoke to the parents to relay the court's statements about "taking responsibility as to who caused the child's injuries," and reiterated that only with such an admission could the Department recommend returning Chloe to her parents. The social worker confirmed that the Department was looking for an admission of guilt, to which father responded that the parents would need to speak with their attorneys.

The parents took Chloe to a genetics specialist at UCLA. According to Chloe's in-home nurse who accompanied them, the parents were told that Chloe's condition was not caused by genetic abnormality. The county also conducted testing in early 2016, for glutaric aciduria Type 1, a genetic explanation for

Chloe's condition. The genetic test results were still pending at the 18-month review hearing (§ 366.22).

For the 12-month hearing, the Department, along with Chloe's attorney, recommended that reunification services be terminated. They reasoned it was unsafe to place Chloe in her parents' care where neither parent admitted responsibility for Chloe's injuries and because they were not feeding the child properly. The caregiver was interested in being Chloe's legal guardian and would encourage monitored visitation, although at a reduced frequency.

At the hearing held in January 2016, the juvenile court stated that the question for it to resolve was whether Chloe could be safely returned to her parents' care, "regardless of whether or not somebody does or does not admit some kind of wrongdoing." The court gave the parents more time to work with the occupational therapist on feeding and to participate in therapeutic appointments so they could demonstrate their ability to properly care for and feed Chloe. Hence, the court expanded the parents' unmonitored visitation to include overnight visits on Saturdays, encouraged the Department or Chloe's counsel to make unannounced visits, and continued reunification services to the 18-month drop-dead date (§ 366.22).

5. *The 18-month review period (§ 366.22)*

In an unannounced visit, the social worker found that the parents were very engaged with Chloe, playing on the floor, holding her, and working on various exercises to strengthen her muscles and help her development. Mother kept logs documenting medication, feeding, medical appointments, and visitation. Chloe appeared to be happy, appropriately dressed, and played with her parents. The child was making progress

with respect to her developmental milestones. The Department opined that the parents were meeting Chloe's needs and the social worker had no concerns of abuse or neglect during the visit.

Mother regularly attended all of Chloe's medical appointments. The occupational therapist reported that sessions with mother were "most productive." Mother had also prepared a parenting plan for Chloe's return consistent with the care Chloe received in her foster home, that included employing a licensed vocational nurse.

Mother's therapist reported in April 2016 that she read the sustained petition and understood that the court found one of the parents injured Chloe, but that "[*w*]*hile all case issues have been extensively addressed during the course of therapy since its inception* [mother] *has never disclosed inflicting any injury to Chloe*." (Italics added.)

Still, the Department was chary. Asked what originally happened to Chloe, father replied " 'It was not child abuse. We would never hurt our child.' " Recognizing that mother was meeting Chloe's needs and caused no concern about visits, the Department nonetheless wrote: "the issues surrounding child safety still remain. Given the nature of the child's injuries which occurred over a period of time at the hand of an unknown perpetrator while under the care and supervision of her parents," and given Chloe is a non-verbal, medically fragile child with special needs, who cannot report abuse, the Department opined that the child "is at high risk for future physical abuse" and it could not recommend returning Chloe to her parents' care.

At the contested section 366.22 hearing, by which time Chloe was nearly two years old, both parents' therapists testified that the parents posed no safety concerns. Mother's therapist

testified that mother had worked extensively on case issues and discussed what led to Chloe's injuries and how she would protect the child and prevent her injuries from recurring. Sincere and cooperative in therapy, mother indicated no culpability for Chloe's injuries and her therapist had the impression that mother was not responsible.

The juvenile court examined the supervising children's social worker, Lawrence Moch. The court was troubled by the fact that the parents had done everything they could to be good parents, including completing all of their programs and progressing to successful unmonitored visits. Yet, the Department continued to believe the child was at high risk if returned to her parents' care "because . . . the parents have not provided an explanation of the child's injuries that's consistent with the nature of the injuries." Moch acknowledged that the parents had followed all court orders and had had successful unmonitored visits, and hence had "gone over and above" to regain their child. However, he explained, if the factual difference was that a parent admitted to having personally injured Chloe, then the risk of harm to the child would decrease. Once having recognized the injuries' cause, the parents could work on it in counseling.

The juvenile court terminated reunification services. The court had found Chloe's injuries were non-accidentally inflicted and happened while she was in the parents' care. While no one was required to confess to actively injuring Chloe, the parents had to admit that they failed to protect her, an admission they never made. The court rejected mother's offer to testify about taking responsibility for the injuries, explaining that she should have done so in therapy where she could have worked on it.

Having failed to admit complicity to their therapists, the parents had not dealt with the cause of the dependency. They did not believe the court's jurisdictional finding and continued to look for a genetic cause. Thus, the court found that the Department carried its burden under section 366.22 to show by a preponderance of the evidence that returning Chloe to the parents would pose a substantial risk of detriment to the child's safety, or emotional or physical well-being, as neither parent took responsibility for *failing to protect Chloe* from the severe harm she suffered.

The court re-instituted supervised visitation "for the safety of the child to make sure that everything is tak[en] care of as necessary" and awarded the Department discretion to liberalize. Mother filed her timely petition for extraordinary writ relief.

CONTENTIONS

Mother contends that there was no substantial evidence to support the juvenile court's order terminating reunification or re-imposing visit supervision.

DISCUSSION

1. *No juvenile court error in terminating reunification services*

At the 18–month mark, the juvenile court must order the return of the child to the physical custody of 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. The burden of establishing detriment is on the Department. (§ 366.22, subd. (a).) We review this finding for substantial supporting evidence. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 763.)

As for detriment, section 366.22 provides, "[t]he failure of the parent or legal guardian to participate regularly *and make substantive progress in court-ordered treatment programs shall be* prima facie evidence that return would be detrimental. In making its determination, the court shall . . . consider the *efforts or progress, or both*, demonstrated by the parent or legal guardian and the extent to which he or she availed himself or herself of services provided, taking into account . . . ability to maintain contact with his or her child." (§ 366.22, subd. (a)(1), italics added.)

Mother argues that the evidence does not support the juvenile court's conclusion that returning Chloe to mother's care would be detrimental to the child's safety, protection, or physical or emotional well-being. She points to her compliance with the court-ordered case plan.

There is no dispute that mother has complied with all aspects of her reunification plan in that she completed all of her required classes and underwent therapy. In fact, the record shows mother's participation in her court ordered plan was exemplary and far more extensive than that normally expected. Mother was certified in g-tube feeding and CPR, attended most of Chloe's many doctors' appointments, actively participated in training with Chloe's occupational therapist, reduced her workload to part-time to accommodate Chloe's needs, devised a care plan, and kept a log of feeding, medication, visitation, and doctor's appointments. There is no disagreement that mother diligently visited Chloe and graduated to unmonitored overnight visits, during which mother acted appropriately, was warm, attended to the child's numerous special needs, and succeeded in eliciting a happy connection with Chloe who is brain damaged

and requires special attention and care. Mother is to be commended.

Yet, simply complying with the reunification plan by attending the required therapy sessions and parenting classes, and visiting the child does not guarantee return of the child. (*In re Dustin R.* (1997) 54 Cal.App.4th 1131 1143; *In re Joseph B.* (1996) 42 Cal.App.4th 890, 899-901.) While a pertinent consideration at the section 366.22 hearing is compliance with the case plan, it is not the sole concern for the juvenile court, nor is it determinative. (*In re Dustin R.*, at pp. 1139–1140; *In re Joseph B.*, at pp. 899-901.) "The purpose of the plan is to overcome the problem that led to removal in the first place. [Citation.]" (*Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1748.) Thus, under section 366.22, "the court must also consider progress the parent has made towards eliminating the conditions leading to the [child's] placement out of home," along with "the parents' progress and their capacity to meet the objectives of the plan" (*In re Dustin R.*, *supra*, at pp. 1141-1142 & 1143), and "the effect such return would have on the child." (*In re Joseph B.*, at p. 901.) "[O]therwise the reasons for removing the children out-of-home will not have been ameliorated." (*In re Dustin R.*, at p. 1143.)

Here, the fact that Chloe's injuries occurred when she was in the sole custody and care of her parents has been the central reason for her removal from home. On conflicting evidence, the juvenile court found that Chloe's injuries were intentionally caused, and occurred while the baby was in the parents' custody, care, and control. This finding was not reversed on appeal and so it is binding on the parents, the Department, and on us. Immediately after the case plan was instituted, the social worker

instructed both therapists that the therapeutic goal was to gain insight about the cause of the injuries. Early in this case, and repeatedly, the court emphasized to the parents that they needed to understand in therapy that Chloe's injuries were non-accidental and that they were responsible for failing to protect her. Through therapy, the parents could work to prevent the harm from recurring.

Yet, mother has steadfastly denied knowledge of the origins of the child's injuries, and continues to search for a genetic explanation. Without an understanding of her failure to prevent the non-accidental harm, mother cannot begin to learn how to correct the problem and to safely parent. Thus, the evidence supports the court's finding mother has made no progress towards eliminating or ameliorating the condition that led to Chloe's removal from home, and has not met the objectives of the case plan. (*In re Dustin R.*, *supra*, 54 Cal.App.4th at pp. 1141-1142 & 1143; *In re Joseph B.*, *supra*, 42 Cal.App.4th at p. 901.)

Mother contends that "the juvenile court erroneously required that Chloe's parents admit having abused the child and inflicting her injuries." Not so. The court stated: "I *don't agree* that they have to admit . . . that they physically did something to injure this child. . . . *They have to admit that there's a problem that has to be dealt with that has to deal with failure to protect this child*." (Italics added.)[3]

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[3] Mother also argues that the juvenile court had specifically removed the requirement that the parents admit to injuring the child as a condition of returning Chloe to her parents. Actually, what the court said was "[t]he law doesn't say you have to admit wrongdoing in order to get services."

For this reason, mother's reliance on *Blanca P. v. Superior Court*, *supra*, 45 Cal.App.4th 1738 is misplaced. There, the juvenile court assumed, but never made a finding that, the father was a child molester. (*Id.* at p. 1747.) The parents denied the father sexually abused their daughter. (*Ibid.*) In reversing the order terminating reunification services (§ 366.22), the appellate court rejected the idea that the father's denial that he was a child molester was proof that he did it. (*Blanca P.*, at pp. 1752-1753.) Unlike *Blanca P.*, the juvenile court here weighed the conflicting evidence and found at the jurisdictional stage that Chloe's injuries were non-accidental and so the court never relied on mother's denials as evidence that she actively harmed her daughter.[4]

2. *The visitation order was an abuse of discretion.*

After reunification services are terminated, visitation is mandatory absent a finding of detriment. (§ 366.22, subd. (a)(3); *In re D.B.* (2013) 217 Cal.App.4th 1080, 1094-1095.) The focus post-reunification is on promoting the child's "long-term well-being and stability." (*In re D.B.*, at p. 1095.)

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[4] *In re E. H.* (2003) 108 Cal.App.4th 659, cited by mother is unavailing. There, the court held that to sustain a petition under section 300, subdivision (e), the evidence need not show that parents "actually *knew*" the child was being injured by someone else. The only requirement is that the parents "reasonably should have known." (*In re E. H.*, at p. 670.) This case is long past the jurisdictional stage where the juvenile court sustained the petition alleging the injuries "would not ordinarily occur except as a result of . . . *neglectful* acts by the child's parents who had care, custody and control of the child." We are bound by that finding.

Mother contends that substantial evidence does not support the juvenile court's order for monitored visitation. "We review an order setting visitation terms for abuse of discretion." (*In re Brittany C.* (2011) 191 Cal.App.4th 1343, 1356.) Under the deferential abuse of discretion standard, the juvenile court's factual findings " ' "are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." [Citations.]' [Citation.]" (*In re Maya L.* (2014) 232 Cal.App.4th 81, 102.)

Here, the juvenile court did not terminate visitation; it reimposed supervision. However, the record is utterly devoid of evidence that Chloe's long-term well-being and stability would be undermined by allowing unmonitored visitation. Rather, mother had had more than a year of unmonitored visits, including three months of overnight visits, without a single negative incident. The social worker found that mother was very engaged and was meeting the child's needs and *reported no concerns about abuse or neglect during the unsupervised visits*. Moreover, mother had attended every medical, and physical and occupational therapy appointment and had been very engaged with the child. The record shows that mother had a relationship with Chloe who appeared to enjoy visits and cried when they ended. Interference with mother's relationship with Chloe could erode all meaningful relationship between the two and hence prejudice mother's interests at the section 366.26 hearing. (Cf. *Christopher D. v. Superior Court* (2012) 210 Cal.App.4th 60, 70 [denying visitation].) In the absence of any evidence to support a finding that unmonitored visitation would be detrimental to Chloe by undermining her long-term well-being and stability, the trial

court's order for monitored vistation was an abuse of discretion. (*In re Maya L.*, *supra*, 232 Cal.App.4th at p. 102.) Accordingly, the writ petition is denied in part and granted in part.

DISPOSITION

Let a peremptory writ issue commanding the respondent court to vacate that portion of its May 3, 2016 order re-imposing monitored visitation. The writ petition is denied insofar as it challenges the termination of reunification services. The stay of the section 366.26 hearing, issued by this court on August 8, 2016, is vacated. Our decision is immediately final as to this court. (Cal. Rules of Court, rules 8.452(i), 8.490(b)(2)(A).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.