Filed 3/28/13 In re Madison M. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

In re MADISON M., a Person Coming Under the Juvenile Court Law.	B240344
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. R. H., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK78709)

APPEAL from orders of the Superior Court of Los Angeles County, Albert J. Garcia, Juvenile Court Referee. Affirmed.

Lisa A. Raneri, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Stephen D. Watson, Associate County Counsel, for Plaintiff and Respondent.

INTRODUCTION

R. H., mother of Madison M., appeals from the orders of the juvenile court that terminated her reunification services and appointed Madison's paternal grandparents legal guardians of the child. She contends the juvenile court utilized the incorrect legal standard in terminating her services and that there is no evidence that she failed to comply with her plan. We conclude the juvenile court here utilized the same standard mother advocates and the evidence supports the court's finding that mother did not comply with her case plan and that return of Madison to mother's custody would create a substantial risk of detriment to Madison's safety and emotional well-being. (Welf. & Inst. Code, § 366.25, subd. (a).)[1] Accordingly, we affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The dependency*

Department of Children and Family Services (the Department) detained then three-year-old Madison from her father in 2009 because of father's substance abuse[2] and placed her with her paternal grandparents, the M.s, where she has resided ever since. At the time, mother's whereabouts were unknown but father, who described mother as a suicidal drug addict, reported mother was in a drug-rehabilitation program outside of California. The parents were finalizing their dissolution and had agreed that father would have physical custody of Madison and mother would have visitation three times a week.

Mother was located outside California and told the Department that she began using drugs at age 16, eight years earlier. She stated she was addicted to cocaine, drank, used methamphetamines, and had periods of sobriety but relapsed. Twice, mother was hospitalized after ingesting a lethal combination of drugs and alcohol causing respiratory failure. During one of those stays, she was diagnosed with post-partum depression and

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[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

[2] Father is not a party to this appeal.

had suicidal thoughts. In another stay, the hospital put mother on a section 5150 hold.[3] After the second hospitalization, mother left California and enrolled in a 27-day drug-rehabilitation program in Florida. Her priority was to remain sober and so she did not plan to return to Los Angeles in the near future. She stated she loves her daughter but wanted to be able to stand on her own before she reunified with Madison.

The juvenile court sustained a petition in February 2010 and declared Madison a dependent pursuant to section 300, subdivisions (b) and (g). The court awarded mother reunification services to include parenting classes, individual counseling to address substance abuse, domestic violence and mental health, and substance abuse counseling with testing.

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

Madison was bonded with her paternal and maternal grandmothers, who worked together to support the child. Madison was a very sociable and friendly child. She spoke with mother by Skype, and visited mother in July 2010 for five days when mother, who had moved to New York, came to Los Angeles. Mother declared she was "happy" with Madison's living arrangement. She noted Madison had become more relaxed, open and loving.

Mother did not commence any of her court-ordered services by July 2010, stating she did not feel ready to begin individual therapy and parenting classes because she was not yet prepared to face her demons. She thought she would be ready by then. Informed that the reunification period would run out in about a year, mother stated she was happy Madison was being cared for, and agreed with the social worker there was no reason to

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3 Section 5150 reads in relevant part: "When any person, as a result of mental disorder, is a danger to others, or to himself or herself . . . a peace officer, member of the attending staff . . . of an evaluation facility designated by the county . . . or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Social Services as a facility for 72-hour treatment and evaluation."

keep her case open. At the six-month review hearing, the court found mother was in partial compliance with her case plan and extended reunification services for six months.

3. *The 12-month review period*

The social worker described Madison as a "well-rounded and well adapted child" and a "normal, happy and loved little girl." With court permission, Madison visited mother in New York for five days in early October 2010 and "loved every minute of it." Madison appeared to be happy in all of the photographs. Otherwise mother and child had regular contact on the computer.

Between October 2010 and January 2011, mother produced seven negative drug tests, and began sessions with a psychologist and a substance abuse program. Mother did not enroll in an appropriate domestic violence program and did not complete any departmentally-approved parenting education program. Finding mother was in partial compliance with her case plan, the juvenile court scheduled the 18-month review hearing (§ 366.22) for February 24, 2011.

4. *The 18-month review hearing (§ 366.22)*

In February 2011, the Department filed a report indicating that Madison continued to thrive living with her paternal grandparents. Mother remained in New York but visited Madison once, when she came to California in January for the 12-month review hearing. The two communicated via Skype.

Since enrolling in her substance-abuse program in January 2011, mother was an "active member" and had not missed any sessions. By February 2011, mother was in "early full remission." She produced three negative drug tests in three months. Mother did not miss any individual counseling sessions between late October 2010 and February 2011 and by March 2011 had completed another month of sessions. However, the Department repeatedly expressed its concerns that because mother had put off participating in her case plan for nearly eight months, she had only just begun to address her issues in the last five months. Also, mother did not complete a departmentally-approved parenting class.

At the 18-month review hearing on March 25, 2011, the juvenile court found that mother had not made significant progress in resolving the problems that led to Madison's removal and there were no circumstances justifying extending the reunification period. The court reasoned that there had been nothing preventing mother from doing what she needed to do. Had she started on her program right away, she would be further along in her compliance. Instead, the court found, mother ignored her case plan and had only been verifiably sober for a brief period. The juvenile court terminated family reunification services and set the permanency planning hearing for July 22, 2011.

5. *The juvenile court reinstates reunification*.

Three months later, in June 2011, mother filed a section 388 petition seeking to have Madison returned to mother's custody, or in the alternative to reinstate reunification services and grant mother unmonitored visits. Circumstances had changed, mother asserted because, among other things, she had completed her drug-treatment program and parenting classes, continued to attend therapy, tested negative 20 times since October 2010, and maintained frequent computer contact with Madison.

At the hearing on July 22, 2011, which was held to consider both mother's section 388 petition and the permanent plan for Madison under section 366.26, the juvenile court granted mother's section 388 petition in part by awarding mother reunification services to include drug testing and individual counseling, and awarded mother unmonitored visits in Los Angeles. It ordered the Department to refer Madison to counseling to deal with issues relating to reunifying with mother and adjustment to unmonitored contact with mother. The court commended mother on her progress. Noting the case was headed "possibly" toward reunification, the court ordered an interstate compact assessment with a view toward placing Madison with mother in New York.

The Department requested, because mother would be getting an additional six months of reunification, and because the case had already reached the 18-month mark, that the juvenile court limit the added reunification period to six months and set the permanent planning hearing (§ 366.26) six months in the future. The court agreed to continue the section 366.26 hearing for six months.

6. *The March 16, 2012 hearing*

The paternal grandparents wrote to the juvenile court to "express that one day we would like to see [Madison] have a normal relationship with her parents, when the time is right, however *we feel that to do that right now would NOT be in Madison's best interest*." (Italics added.) The grandparents requested they be appointed Madison's legal guardians.

The Department's status review report for the hearing indicated that Madison, who was in kindergarten, was reading at a third or fourth grade level. The social worker observed Madison to be "extremely lovable to paternal grandparents and often expressed how much she loves them by telling them aloud." Madison's therapist reported that the child was " '[t]hriving in her present placement and appears to be intellectually gifted,' " was " '[h]appy as a [c]lam,' " and " 'very comfortable' " with her grandparents. The therapist *recommended the child remain with the paternal grandparents for one to two more years as* "*it would be traumatic to remove her*." (Italics added.) The therapist was disappointed that mother had not inquired about Madison's wellbeing and treatment. Asked to draw a picture of her family, Madison did not include mother. In fact, whenever the social worker mentioned mother, Madison quickly changed the subject and did not want to discuss mother.

Mother stopped attending individual counseling on a regular basis. Her therapist had not seen mother since December 2011, and before that, only once " 'every couple of weeks.' " Although she did produce negative drug tests, mother was not attending any drug treatment aftercare such as N/A or A/A meetings and had not arranged for a sponsor to prevent relapse. This caused the Department some concern as mother had been unsuccessful in remaining sober after previous drug-rehabilitation programs. The Department recommended the court appoint the grandparents Madison's legal guardians.

At the close of the contested hearing held two years after the dependency commenced, the juvenile court found mother was not in full compliance with her case plan. By a preponderance of the evidence, the court found return of the child to mother's physical custody would create a substantial risk of detriment to Madison's physical or

emotional well being and terminated services. Turning to the section 366.26 hearing, the court found Madison was not likely to be adopted, and that "upon the signing of the orders, the court will make other orders with respect to the actual legal guardianship having been granted." The court continued the hearing to March 19, 2012 for a section 366.26 hearing "re: guardianship." (Capitalization omitted.) Mother filed her appeal from the March 16, 2012 order.

CONTENTIONS

Mother contends she substantially complied with the case plan and there is no substantial evidence that returning Madison to her custody would place the child at a substantial risk of detriment.

DISCUSSION

1. *This appeal is not moot.*

Preliminarily we address the motion brought by the Department to dismiss this appeal as moot on the ground that three days after mother filed her notice of appeal from the order discontinuing her reunification services, the juvenile court appointed the paternal grandparents legal guardians and terminated its jurisdiction.[4] As the juvenile court no longer has jurisdiction to act, the Department reasons, we are unable to provide mother with any effective relief.

If the juvenile court orders jurisdiction terminated and no appeal is taken from that order, the appellate court has no power to act on any interim juvenile court order appealed from. (*In re Michelle M*. (1992) 8 Cal.App.4th 326, 329.) Once juvenile court jurisdiction is ended, either by the termination of parental rights or by judgment, no direct relief can be granted with respect to an interim order because the juvenile court no longer has jurisdiction and the appellate court is only reviewing that court's rulings. (*Id*. at

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[4] We took judicial notice of the minute order from that March 19, 2012 hearing showing that the juvenile court appointed the M.s guardians of Madison and terminated its jurisdiction as of that date.

p. 330.) As the Department notes, mother did not appeal from the order terminating juvenile court jurisdiction.

However, at mother's request, we treat her notice of appeal from the March 16, 2012 order terminating her reunification services as a premature notice of appeal from the March 19, 2012 order terminating jurisdiction. (Cal. Rules of Court, rule 8.406(d).)[5] Although challenges to the termination of reunification services are only available by petition for extraordinary writ review (§ 366.26, subd. (*l*)), there is no indication in the record that mother was given notice of her writ obligations when reunification was terminated the second time and so she is excused from this procedure. (*In re Athena P*. (2002) 103 Cal.App.4th 617, 625.) Accordingly, we deny the Department's motion to dismiss and address the merits of mother's appeal.

2. *The juvenile court applied the correct legal standard at the March 16, 2012 hearing, which standard is the same one mother advocates for on appeal*.

Mother contends that at the March 16, 2012 hearing -- as the result of the additional reunification services pursuant to her section 388 petition -- she was entitled to "every presumption in favor of returning Madison to her custody" and the burden fell to the Department to justify termination of those services. The Department counters that mother had the burden to prove Madison should be returned to her custody under section

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[5] California Rules of Court, rule 8.406(d) entitled, "Premature notice of appeal" reads: "A notice of appeal is premature if filed before the judgment is rendered or the order is made, but the reviewing court may treat the notice as filed immediately after the rendition of judgment or the making of the order."

366.3, subdivision (f).[6] We agree with mother but conclude that the juvenile court applied exactly the legal standard mother seeks in this appeal.[7]

The Department argues section 366.3, subdivision (f) governed the March 16, 2012 hearing because the juvenile court had already made a finding that returning Madison to mother's custody would create a substantial risk of detriment to the child at the 6, 12, and 18-month review hearings and so the case was no longer in reunification. We disagree. By its terms, section 366.3 is not applicable until *after* the juvenile court has ordered a permanent plan. (*In re Jacob P.* (2007) 157 Cal.App.4th 819, 829.) Here, the juvenile court terminated reunification, and then reinstated the case plan with a view toward reuniting mother and child, but had not ordered a permanent plan for Madison under section 366.26 by the time of the March 16, 2012 hearing. Therefore, section 366.3 was not triggered. *In re Jacob P.* upon which the Department relies is distinguished as the parent there filed a section 388 petition requesting additional reunification services *after* the juvenile court had held a section 366.26 hearing in which it ordered the twins into a long term guardianship. (157 Cal.App.4th at pp. 823-825.)

Rather, as the result of her successful petition for modification (§ 388) and the restoration of services for mother, this case was returned to the reunification period and had reached the 24-month drop dead date. During reunification, the applicable burdens and proof are those of the status review hearings held before the section 366.26 hearing *is*

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[6] Section 366.3, subdivision (f) reads in relevant part: "*It shall be presumed that continued care is in the best interests of the child, unless the parent or parents prove, by a preponderance of the evidence, that further efforts at reunification are the best alternative for the child*. In those cases, the court may order that further reunification services to return the child to a safe home environment be provided to the parent or parents up to a period of six months, and family maintenance services, as needed for an additional six months in order to return the child to a safe home environment." (Italics added.)

[7] We reject the Department's assertion that mother forfeited her standard-of-proof contention by failing to object below. The issue was hotly disputed during the hearing on March 16, 2012 and so the issue was not forfeited.

completed. (§ 366, subd. (a) [status of all dependent children in foster care are reviewed periodically at least once every six months until the hearing described in section 366.26 "is completed"].) Sections 366.22, subdivision (a)[8] and 366.25, subdivision (a)[9] govern the review hearings at the 18-month stage and the 24-month stage, respectively, and thus govern the period before the section 366.26 hearing "is completed." Under these sections, the juvenile court must order children returned to their parents "unless the court finds, by a preponderance of the evidence, that the return of the child . . . would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (§§ 366.22, subd. (a) & 366.25, subd. (a).) This statute imposes on *the Department* the "burden of establishing that detriment." (*Ibid.*)

Here, the juvenile court applied exactly the legal standard mother advocates and so her contention that the court applied the incorrect legal standard is unavailing. At the

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8 Section 366.22, subdivision (a) reads in relevant part: "When a case has been continued pursuant to paragraph (1) or (2) of subdivision (g) of Section 366.21, the permanency review hearing shall occur within 18 months after the date the child was originally removed from the physical custody of his or her parent or legal guardian. After considering the admissible and relevant evidence, the court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment. . . . The 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 review and consider the social worker's report and recommendations . . . ; shall consider the efforts or progress, or both, demonstrated by the parent . . . and the extent to which he or she availed himself or herself of services provided, . . . and ability to maintain contact with his or her child; and shall make appropriate findings pursuant to subdivision (a) of Section 366."

9 Section 366.25 contains the same standard and burdens of proof, but applies "When a case has been continued pursuant to subdivision (b) of Section 366.22 [i.e., to the maximum 24-month deadline], the subsequent permanency review hearing shall occur within 24 months after the date the child was originally removed from the physical custody of his or her parent or legal guardian." (§ 366.25, subd. (a)(1).)

March 16, 2012 hearing, the juvenile court parroted section 366.25, subdivision (a) by finding: "The court finds, by a preponderance of the evidence, that return of the child to the physical custody of the parents would create a substantial risk of detriment to the physical or emotional well-being of the child. And reunification services for the mother . . . those services are ordered terminated, and I'm going to proceed to the .26 hearing." (Cf. § 366.22, subd. (a).) Mother has not demonstrated juvenile court error.

3. *The evidence supports the juvenile court's findings at the March 16, 2012 hearing.*

Mother next contends that there is no evidence to support the juvenile court's findings that mother was not in compliance with her case plan and that Madison was at substantial risk of detriment if returned to mother's custody. At the hearing on March 16, 2012, the juvenile court found, "from what I read, the mother is not in full compliance with court orders and case plan. That's what I read. No matter what she says and what she's talking about, that's my finding on it. She's not in full compliance."

Subdivision (a) of section 366.22 provides that "[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." (Italics added.) The Department's reports in the record show that in March 2011, at the 18-month review hearing, the juvenile court found that mother had not complied with her case plan. Mother's added services comprised of only two elements, drug testing and individual counseling. But, as mother acknowledges, her participation in counseling "waned in early 2012." In fact, the evidence shows that mother had not been regularly attending her individual counseling on a weekly basis. Her counselor stated in January 2012 that mother had been seeing her therapist " 'every couple of weeks.' " Mother skipped counseling altogether from before the Christmas holidays 2011 through mid-January 2012. Then mother did not see her therapist between January 30, 2012 and March 13, 2012. The juvenile court was entitled to believe the Department's reports and we may not reweigh that finding. (*In re Casey D*. (1999) 70 Cal.App.4th 38, 52.) In

short, the court's finding mother was not in compliance with her case plan is supported by the evidence.

The failure to participate in the case plan is only part of the equation. Simply complying with the reunification plan is a factor to be considered, to be sure, but it is not determinative. Even a parent's successful completion of a case plan does not guarantee return of the child. (*In re Joseph B.* (1996) 42 Cal.App.4th 890, 899-901.) Under section 366.22, subdivision (a), "the court must also consider progress the parent has made towards eliminating the conditions leading to the children's placement out of home." (*In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1141-1142.) Additionally, the court must "consider the parents' progress and their capacity to meet the objectives of the plan; otherwise the reasons for removing the children out-of-home will not have been ameliorated." (*Id*. at p. 1143.) And, "the court must consider the effect such return would have on the child." (*In re Joseph B., supra*, at p. 901.)

In re Joseph B., supra, 42 Cal.App.4th 890 rejected the argument that determining whether to return a child to parental custody is governed solely by whether the parent has corrected the problem that required court intervention. There, the child was removed from the parents' custody because of physical abuse. Although the parents completed their court-ordered plan, the juvenile court found that returning the child would have a detrimental impact on the child's emotional well-being. (*Id*. at p. 903.)

Likewise, here, even assuming mother is correct that she technically complied with the two specific requirements of her added services -- a conclusion we do not reach -- the record supports the juvenile court's finding that returning Madison to mother's physical custody would create a substantial risk of detriment to Madison's safety, protection, and emotional well-being. (§ 366.22, subd. (a).) This dependency was instituted because of mother's long history of drug abuse and psychological issues. By the time of the hearing, mother had only undergone six months of outpatient drug treatment and was not attending any drug treatment aftercare, such as N/A or A/A meetings, and had not arranged for a sponsor. Mother's lack of participation caused the Department concern because these programs are designed to prevent relapse, as mother

has struggled with drug and alcohol abuse for more than half of her life, and has a history of relapsing, including after rehabilitation programs. Mother's lack of participation raises questions about her capacity to meet the objectives of her case plan and the extent to which she has eliminated this cause of the dependency.

Mother's failure to adequately comply with the individual counseling component of her case plan also supports the juvenile court's detriment finding. Mother was hospitalized twice for taking a lethal combination of drugs and alcohol and was even put on a section 5150 hold, and after that, she agreed to give father full custody of Madison and went to Florida. Her spotty participation in counseling put into question her ability to meet the objectives of her case plan and eliminate the conditions leading to Madison's placement.

The record also supports the juvenile court's finding that return of Madison to mother now would create a substantial risk of detriment to Madison's *emotional* well-being. (§ 366.22, subd. (a).) Mother has visited Madison very seldom, as she lives 3,000 miles away in New York, and what physical visits she had were always supervised. Otherwise, mother's contact with Madison was by computer. Mother never inquired with Madison's therapist about the child's treatment or wellbeing. Madison's grandparents wrote that it was premature to return the child to mother and the child's therapist opined "*it would be traumatic to remove*" Madison from her current placement where she has developed a very strong bond with her grandparents. (Italics added.) As the record supports the juvenile court's finding that returning Madison to mother's custody would pose a substantial risk of detriment to the child, we conclude that the Department carried its burden under section 366.22, subdivision (a) and the orders terminating reunification services and appointing the paternal grandparents legal guardians was not error.

DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.