Filed 9/25/14 L.H. v. Super. Ct. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

L.H., et al., Petitioners, v. SAN LUIS OBISPO COUNTY SUPERIOR COURT, Respondent; SAN LUIS OBISPO COUNTY DEPARTMENT OF SOCIAL SERVICES, Real Party in Interest.	2d Civil No. B256884 (Super. Ct. No. JV 51929) (San Luis Obispo County)

L.H. (mother) and G.H. (father) challenge an order of the juvenile court terminating reunification services and setting a permanent plan hearing regarding their minor child. (Welf. & Inst. Code, §§ 366.21, subd. (e), 366.26, subd. (c).)[1] We deny their petitions for extraordinary writ.

FACTUAL AND PROCEDURAL HISTORY

Mother and father, who are married, are the parents of H.H., who was born in September 2013. Mother suffered a traumatic brain injury when she was a child and

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

has significant mental delays, partial paralysis on one side of her body, impulse control problems, memory lapses, organizational difficulties, anger management problems, promiscuity issues and stress-induced "blackouts." Father's developmental delays are almost as severe, but without the anger management issues. When father is stressed, he vomits and sometimes escapes to his mother's home.

Both parents receive Social Security assistance due to their disabilities. They also receive intensive services through Tri-Counties Regional Center (Tri-Counties) to assist them in meeting their daily needs. Each parent has an assigned social worker. When mother became pregnant, concerns immediately arose regarding her ability to manage her prenatal care and to care for an infant. A public health nurse was appointed to monitor her pregnancy. Mother's obstetrician believed mother could not care for a newborn due to her low-functioning mental ability and diminished physical capabilities. The obstetrician noted that her abilities decrease "greatly" when she is without her social worker's assistance.

Voluntary Service Plan

After significant discussion among hospital staff and community service providers, including the Public Health Department, Tri-Counties, California Psychcare and the Child Welfare Services Division of the Department of Social Services (Department), H.H. was placed in protective custody at birth, but released to her parents under a voluntary service plan. The plan required that the parents cooperate with 24/7 supervision in the home by the infant's paternal grandmother and a family friend, Terry S., and with daily intervention from service providers. Notwithstanding this round-the-clock supervision, the parents had difficulty meeting their daughter's basic needs.

Over the next 10 days, the Department received seven referrals regarding H.H.'s welfare. The parents struggled with proper, consistent feeding and diaper changing. They failed to keep a log of the feedings and diaper changes, as instructed, and could not recall when the baby had last been fed, how much she had eaten and when her diaper had been changed. Mother resisted direction, particularly from the paternal grandmother. The baby lost weight, had untreated diarrhea and chafing, and was exposed

to breathing hazards, such as blankets pulled over her face. A service provider "reported that no matter how many times the parents are directed and prompts are given, [they] do not follow through with the proper care of [H.H.]." Another reported that the infant would be unsafe without 24-hour support.

During a visit with a service provider, the parents "did nothing but play[] on their phones." When H.H. started crying, the service provider told them the baby was hungry and needed to be fed. The parents went into their room, leaving others to feed the baby. At one point, mother went to the hospital because she was having a "break down."

Mother became increasingly upset that the paternal grandmother was "taking over" H.H.'s care. While the grandmother was holding the baby, mother pinned the grandmother against the wall, pulled her hair and bit her in the arm. Mother said she was protecting H.H. Although father was present, he was unable to separate the women. A similar altercation had occurred a few months earlier. Believing H.H.'s welfare was at risk, Department representatives removed her from the home, placing her in confidential foster care.[2]

Reunification Services

The juvenile court took jurisdiction of H.H., and detailed treatment plans were developed for both parents. The court informed the parents that their failure to participate regularly in reunification services or to make substantive progress in their case plan may result in termination of services at the six-month review hearing. They were granted supervised visitation at a minimum of twice per week.

Initially, parents cancelled several visits with H.H. because of their own health issues. When they did visit, they had difficulty determining when diaper changes were necessary and how to safely change their daughter's clothes. Father was reluctant to hold the baby. The parents could not independently determine when H.H. needed to be fed, how to mix her formula or when to burp her, although these details had been

[2] Placement with relatives was considered but ruled out for several reasons, including prior child welfare referrals, criminal histories and turbulent relationships with the parents.

explained and demonstrated during prior visits. When a service aide encouraged mother to work with the public health nurse about H.H.'s feeding schedule, mother responded that she did not need anyone telling her how to feed her child.

As mother continued to participate in her mental health services and individual counseling, she showed visible signs of improvement in her mood, focus and functioning. After a number of visits, the parents displayed some increased capacity to anticipate their child's basic needs, but still struggled with her actual care due to their own limitations. It was noted that H.H.'s natural growth and development were outpacing her parents' ability to learn about her needs and acquire the skills necessary to care for her. The public health nurse reported that although the parents love their child very much, they "are unable to make the judgments necessary to provide a safe and nurturing environment for her." She expressed "grave concerns about [H.H.'s] safety should she be left alone in her parents care."

Six-Month Review Hearing

The Department recommended that reunification services be terminated at the six-month review hearing. The assigned social worker, Denise Waters, reported that "[b]oth parents have made concerted efforts, within their own acknowledged limited abilities, to address the issues that brought their child into protective custody." She concluded that even with all the services made available to them, they "remain only able to meet their own needs on a minimal level. They are not able at this time to care for [H.H.] safely." H.H.'s appointed counsel supported the recommendation. The hope was to find an appropriate adoptive home where the parents could have an ongoing relationship with their daughter.

At the contested hearing, Waters admitted that mother and the paternal grandmother had resolved the issues that led to the altercation prior to H.H.'s removal and now had a generally peaceful relationship. She testified that during supervised visits, the parents were unable to identify harmful situations or to correct the situations without prompting. She observed that H.H. appeared wary and uncomfortable around her parents, and that the child's increased mobility presented new challenges for them. Staff

at the parenting program they attended, which was provided through the Community Action Partnership of San Luis Obispo County (CAPSLO), reported that the parents were unable to utilize the information taught and to satisfy the course requirements.

Waters testified that the Department had increased visitation to three times a week "to give the parents every possible opportunity to benefit from reunification and care for their child." Waters stated that even though the parents tried to work together to meet H.H.'s needs, they still required significant prompting from service providers. She also noted that they did not always respond to the prompting.

Waters did not believe the parents' current network of providers was sufficient to keep H.H. safe if she were placed back in their care. She said there was no one who could be with them 24 hours a day. Waters spoke with the extended family regarding ways to help H.H. return to her parents' care, but the options were deemed insufficient because no one was available full time.

Terri S. testified she was available 24/7 to supervise the parents if H.H. was placed in her home. At the same time, she admitted she works as a registered nurse and will not retire for another five years. Terri S. stated that she and the adoptions social worker, Robyn Yakush, had discussed her possible adoption of H.H., but that she had not been approved by the Department.

Mother testified that it was a "little difficult" for her to physically keep up with H.H. now that she was crawling, but said she was trying to address this. She admitted having difficulty remembering certain parenting techniques or instructions, but expressed her willingness to take more classes. She said her current medication helped modify her mood swings and she was willing to receive help in caring for H.H. Father also believed he could learn more if he was able to take additional classes.

Following the testimony, the court requested information about Terri S. as a placement option and continued the hearing until the next day. Terri S. and her boyfriend, who lives with her, signed releases to allow Yakush to testify regarding her request to adopt H.H. The testimony was placed under seal.

Yakush, an adoptions expert, confirmed the Department had investigated Terri S.'s home. She testified that Terri S.'s history showed a marijuana conviction, a public reproval on her nursing license and multiple child welfare referrals when her children were teenagers. The referrals involved reports of underage drinking and use of illegal substances when Terri S. was not home. Yakush concluded it was "pretty clear" there was a lack of supervision in the home.

Yakush referenced an incident that occurred while H.H. was placed with her parents under the voluntary service plan. Mother reported that Terri S. and her boyfriend were drinking alcohol and using drugs in her home. As a result, the couple was no longer allowed in the home if they had either alcohol or drugs. Yakush also noted that the boyfriend has a history of child welfare referrals involving his children, as well as 10 criminal charges, including a child endangerment charge.

Deciding the issue was "collateral to the six-month hearing," the juvenile court denied the parents' request to cross-examine Yakush. It explained: "I think that the question about whether or not [Terri S. and her boyfriend] can serve as a concurrent plan is one that is not necessarily before the court now. The question is [whether I am] in a position to offer additional services to the parents were they to live with [them] in their home with [H.H.], and I understood the Department's concerns based upon Ms. Yakush's testimony and why that doesn't feel like a viable alternative at this point." The court clarified that it was not going to hold a trial about "the truth or lack of truth of the Department's concerns." It accepted those concerns as the basis for the Department's rejection of that option.

In issuing its decision, the juvenile court explained it was in a very difficult position because it admired both parents as individuals and was "very aware of [their] devotion and commitment to [their] daughter throughout this process." It determined the Department had provided reasonable services to both parents, and that they had participated regularly and had made progress. But the court found, by clear and convincing evidence, that the progress was not "substantive" and that there was no "substantial probability" that H.H. may be returned to their care by the 12-month review

hearing. The court stressed that the parents had demonstrated their desire to appropriately provide for H.H. but had not demonstrated an ability or capacity to provide for her on their own, even with additional services. The court found there was a "failure to make substantive progress in court-ordered treatment and also prima facie evidence that [H.H.'s] return would be detrimental."

The court informed the parents that it "believe[d] the goal of the Department is the correct goal, that you are to remain in this young girl's life, and I'm hopeful that we can continue to work with you with that in mind." The court set a hearing for October 2, 2014, to decide whether to terminate parental rights. Mother and father each petition this court for an extraordinary writ vacating the court's order and granting reunification services. Father joins in mother's petition.

DISCUSSION

Standard of Review

We review findings made under section 366.21 for substantial evidence. (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1020.) "We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or evaluate the weight of the evidence. Rather, we draw all reasonable inferences in support of the findings, view the record most favorably to the juvenile court's order, and affirm the order even if other evidence supports a contrary conclusion. [Citation.] The appellant has the burden of showing the finding or order is not supported by substantial evidence." (*In re Megan S.* (2002) 104 Cal.App.4th 247, 251.)

The juvenile court's decision regarding whether to extend reunification services to the 12-month hearing is reviewed under an abuse of discretion standard. (*M.V. v. Superior Court* (2008) 167 Cal.App.4th 166, 179-180.) The court's exercise of discretion will not be disturbed in the absence of an arbitrary, capricious, or patently absurd determination. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

Termination of Reunification Services

Father contends the juvenile court applied the wrong legal standard when it terminated their services at the six-month hearing. He argues the court erroneously

believed it lacked discretion to extend their services. He points to the court's statement: "I'm not able to return [H.H.] to your care, and I cannot find that the additional time will make that return possible. And I believe that that is my obligation, and I don't believe that it is a matter of discretion. I do believe that I have to make very specific findings in order for us to continue services in this case, and I'm not in a position to make those findings."

The presumptive rule for children under the age of three is that reunification services shall not exceed six months from the date the child entered foster care. (§ 361.5, subd. (a)(2); *In re Christina A.* (2001) 91 Cal.App.4th 1153, 1160-1161.) The rule recognizes that the unique needs of very young children regarding attachment and development "justif[y] a greater emphasis on establishing permanency and stability earlier in the dependency process in cases with a poor prognosis for family reunification. [Citation.]" (*M.V. v. Superior Court, supra*, 167 Cal.App.4th at p. 175.)

Consequently, if the court finds at the six-month review hearing that the parents have failed to participate regularly and make substantive progress in a court-ordered treatment plan, it may terminate services and schedule a section 366.26 hearing to terminate parental rights *unless* it also finds a substantial probability the child may be returned to the parents within the next six months. (§ 366.21, subd. (e).) If the court makes the latter finding, it must continue the case to the 12-month review hearing. (*Ibid.*; *M.V. v. Superior Court, supra,* 167 Cal.App.4th at pp. 179-180.) If the court finds the parents have failed to make substantive progress and there is no substantial probability the child may be returned to the parents within six months, it has discretion to terminate services and hold a section 366.26 hearing within 120 days. (§ 366.21, subd. (e); see Cal. Rules of Court, rule 5.710(b)(4); *M.V.*, at p. 179; *S.T. v. Superior Court* (2009) 177 Cal.App.4th 1009, 1015-1016.)

Here, the juvenile court found that the parents had made progress -- but not substantive progress -- in their court-ordered treatment plan and that there was no substantial probability H.H. would be returned to them within six months. Shortly before the court made these findings, father's counsel asked the court "to exercise its discretion

under [section] 366.21 to allow this family six more months of services." The court denied that request. Although the court's remarks regarding its discretion are somewhat confusing, they do not establish the court did not understand it had discretion to continue services. A reasonable interpretation, based on the record as a whole, is that the court believed it would be an abuse of discretion to extend services in this case.

The purpose of reunification services is to place the parents in a position to gain custody of the child. (*In re Karla C.* (2010) 186 Cal.App.4th 1236, 1244.) While the court commended the parents' desire to provide for their daughter's safety, protection, and physical and emotional health, it found they lacked the capacity to care for her on their own. Substantial evidence supports this finding. It also supports the finding that additional services would be futile because the only way H.H. could safely return to her parents is if they had 24/7 support available in their home. In other words, H.H. would have to be effectively placed in the full-time care of someone other than her parents. As the court explained, "that's not what the law is intending in providing reunification services."

In light of these findings, continuation of reunification services would have been pointless. The juvenile court appropriately expressed concern about giving the parents an unrealistic hope of a different outcome. When mother raised her hand and asked the court to allow them another six months with supervision, the court responded: "[I]f I had believed that would cause a change, I would have made that order. You need to know -- and I'm confident that you do know -- that I considered that very seriously."

There is no question the decision to terminate reunification services in this case is "heart-wrenching." (*San Joaquin Human Services Agency v. Superior Court* (2014) 227 Cal.App.4th 215, 225.) But "in order to prevent children from spending their lives in the uncertainty of foster care, there must be a limitation on the length of time a child has to wait for a parent to become adequate." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308; see *Daria D. v. Superior Court* (1998) 61 Cal.App.4th 606, 612 [termination of services proper where "prognosis for overcoming the problems leading to the child's dependency is bleak"].) The reality is that notwithstanding their best efforts and devotion

to their daughter, the parents lack the capacity and ability to complete the objectives of the case plan and to provide for her safety, protection and well-being. (See § 366.21, subd. (g)(1).) As one service provider aptly observed, H.H.'s natural growth and development outpace her parents' ability to learn and to make the changes necessary to ensure her safety. The court did not abuse its discretion by declining to extend services.

Purported Failure to Provide Reasonable Services

Father contends that reunification services should have been continued to the 12-month review hearing because reasonable services were not provided. (See § 366.21, subd. (g)(1)(C) [section 366.26 hearing may not be set "unless there is clear and convincing evidence that reasonable services have been provided or offered"].) Specifically, he claims the Department failed to provide services tailored to meet his special developmental needs.

The Department responds that father forfeited his right to raise this issue by not addressing the matter in the juvenile court. Not only did father neglect to address the issue in the trial court, but mother's counsel conceded that reasonable services had been provided. Ordinarily, we "will not consider challenges based on procedural defects or erroneous rulings where an objection could have been but was not made in the trial court." (*In re Wilford J.* (2005) 131 Cal.App.4th 742, 754.)

Even if the issue is properly before us, father has not shown the Department failed to provide reasonable services. He correctly asserts that "[a] developmentally disabled parent is entitled to services responsive to the family's special needs in light of the parent's particular disabilities, such as utilizing regional centers that are specifically designed to provide services to such individuals." (*San Joaquin Human Services Agency v. Superior Court, supra,* 227 Cal.App.4th at p. 224.) But, as the Department points out, those are precisely the services that were provided here. Since the day H.H. was born, the parents have received extensive services and assistance from a support team comprised of their physicians, H.H.'s pediatrician, Tri-Counties' social workers, California Psychcare staff, a public health nurse, the Department's social workers and a network of family and friends.

When the parents were unable to successfully complete the parenting class offered through CAPSLO, the Department determined there was no classroom instruction available to meet their special needs. "[T]o give the parents every possible opportunity to benefit from reunification and care for their child," the Department increased their visitation with H.H. and provided one-on-one parenting instruction. The court determined this was sufficient, stating "the Department did a good job in trying to find alternatives by increasing [the parents'] visitation, increasing the hands-on support to see if [they] would work with [H.H.]." Substantial evidence supports this finding.

Cross-Examination of Adoptions Social Worker

Mother complains her due process rights were violated when the court refused to allow the parents' counsel to cross-examine the adoptions social worker regarding the Department's rejection of Terri S.'s adoption application. Father contends the court should have accepted Terri S.'s proposal to serve as a 24/7 live-in supervisor of the parents. The Department responds that placement issues are irrelevant at the six-month review hearing and that due process does not require that the parents be allowed to cross-examine a witness on an ancillary issue. We agree.

The sole issue at the six-month hearing was whether to continue the parents' reunification services.[3] The court terminated services and set a permanent plan hearing. It made no determinations regarding H.H.'s placement, and made no findings as to "the truth or lack of truth of the Department's concerns" regarding Terri S.'s home as a placement option. In an effort to give the parents every benefit of the doubt, the court allowed testimony on that option; but, as the court noted, the issue was collateral to the one before the court.

The court's obligations at the six-month review hearing are defined by statute. As previously discussed, the court must assess whether the parents have participated regularly and made substantive progress in their court-ordered treatment plan. (§ 366.21, subd. (e).) Depending on its findings, the court may opt to return the

[3] The parents did not request that H.H. be returned to their sole custody. Their focus was on a continuation of services to the 12-month review hearing.

child to the parents' custody, to continue services for another six months or to terminate services and schedule a permanent plan hearing. (*Ibid.*; *M.V. v. Superior Court, supra,* 167 Cal.App.4th at pp. 179-180.) The parents cite no authority suggesting the court had the option, particularly over the Department's objection, of conditionally returning H.H. to her parents' custody or of placing her with Terri S. to supervise the parents' care of H.H. until the 12-month hearing. When it realized these options were not viable, the court terminated questioning. The parents have not demonstrated an abuse of discretion. Nor have they shown that allowing additional questioning would have altered the result.

The petitions for extraordinary writ are denied.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Linda Hurst, Judge

Superior Court County of San Luis Obispo

Gerald C. Carrasco for Petitioner G.H.

J. Barry Smith for Petitioner L.H.

No appearance for Respondent.

Rita L. Neal, County Counsel, Leslie H. Kraut, Deputy County Counsel, for Real Party in Interest.