Filed 5/20/14 In re Jonathan C. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

In re JONATHAN C., CHRISTOPHER C., AND ISABELLA C., Persons Coming Under the Juvenile Court Law.	2d Juv. No. B248841 (Super. Ct. Nos. J1436394, J1436395, J1436396) (Santa Barbara County)
SANTA BARBARA COUNTY CHILD PROTECTIVE SERVICES, Petitioner and Respondent, vs. JONATHAN C, CHRISTOPHER C., and ISABELLA C., Appellants, KRISTY C., Objector Defendant and Respondent.	

Minors, Jonathan C., Christopher C., and Isabella C., appeal from a May 3, 2013 order granting their mother, Kristy C., reunification services after a contested

disposition hearing. (Welf. & Inst. Code, § 361.5, subd. (a).)[1] The trial court rejected the recommendation of Santa Barbara County Child Protective Services (CPS) to bypass reunification services, finding that CPS failed to show by clear and convincing evidence that mother had a history of extensive, abusive, and chronic use of drugs, and resisted court-ordered treatment during the three-year period preceding the filing of the dependency petition. (§ 361.5, subd. (b)(13).) We affirm.

Factual and Procedural History

Jonathan (age two), Christopher (age 21 months) and Isabella (age four months) were detained on February 26, 2013, after mother was arrested for probation violations and being under the influence of methamphetamine. On February 26, 2013, the criminal court ordered mother to enroll in an inpatient drug treatment program. Mother immediately went to Recovery Way, an inpatient treatment program, but was turned away because she tested positive for methamphetamine.

On February 28, 2013, CPS filed a petition for failure to protect (§ 300, subd. (b)) and no provision for support (§ 300, subd. (g)). At the March 1, 2013 detention hearing, the trial court ordered minors detained in foster care with supervised visits three times a week subject to the condition that mother test clean for drugs.[2]

At the contested jurisdictional/disposition hearing, CPS reported that mother was ordered to Proposition 36 substance abuse treatment (Pen. Code, § 1210.1) in September 17, 2009, after pleading no contest to one count of possession and one count of use of methamphetamine. On May, 20, 2010, the Proposition 36 drug diversion was terminated. CPS recommended that the trial court bypass reunification services because mother was a chronic substance abuser, was previously ordered to

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated. Santa Barbara County Child Protective Services has filed a "joinder" to minors' Opening Brief but did not appeal from the order.

[2] The whereabouts of Jonathan's and Christopher's alleged father, J. Arevalos, is unknown. Isabella's alleged father, Frank M. lives in San Bernardino County and was granted reunification services.

participate in substance abuse treatment, and resisted treatment by using drugs in 2013 as evidenced by her February 22, 2013 arrest. (§361.5, subd. (b)(13).)

The trial court sustained the jurisdiction allegations but found the bypass provisions were not established by clear and convincing evidence. CPS was ordered to provide reunification services.

Bypass of Services

An order granting reunification services will be affirmed if substantial evidence supports the order. (*In re Harmony B.* (2005) 125 Cal.App.4th 831, 839.) Services may not be bypassed under section 361.5, subdivision (b)(13) unless the trial court finds, by clear and convincing evidence, that the parent (1) has a history of extensive, abusive, and chronic use of drugs or alcohol, and (2) resisted prior court-ordered treatment during a three-year period immediately prior to the filing of the dependency petition. (Cal. Juvenile Dependency Practice (Cont. Ed. Bar, 2013) § 5.65, p. 369.) The trial court here found "there is certainly a preponderance of evidence that [mother] should not receive services, but I can't say by clear and convincing evidence that the burden has been met."

Minors claim that the trial court acted in excess of its jurisdiction because mother's chronic substance abuse, prior court-ordered treatment, and drug relapse are undisputed. The trial court found the evidence was not clear and convincing. Although jurisdictional findings can be established by a preponderance of the evidence, the denial of reunification services requires that extensive and chronic substance abuse be factually established clear and convincing evidence. (§ 361.5, subd. (b); *In re Ethan C.* (2012) 54 Cal.4th 610, 616-617; see e.g., *K.F. v. Superior Court* (2014) __ Cal.App.4th __, __ [2014 DJDAR 3752, 3757] [bypass of services based on section 300, subdivisio (e) severe physical abuse].) On appeal, we have no power to pass on witness credibility or reweigh the evidence. (*In re Cassey D.* (1999) 70 Cal.App.4th 38, 52-53.)

It is true that mother was ordered into Proposition 36 substance abuse treatment on September 17, 2009, after pleading no contest to possession and use of methamphetamine. (*D.B. v. Superior Court* (2009) 171 Cal.App.4th 197, 204 [court ordered treatment includes orders in criminal proceedings].) Mother was released from custody and ordered to report to the drug treatment program. On September 18, 2009, the next day, mother was arrested for commercial burglary. Mother pled no contest to the burglary charge on May 20, 2010, was granted probation with 300 days county jail, and awarded 150 days credit for time served.

Mother denied ever being in an inpatient treatment program and acknowledged that she started a jail Proposition 36 treatment program but "maxed out her time in jail . . . ." Mother did not attend jail group sessions because she was pregnant with Jonathan and suffered morning sickness.

The evidence shows that mother has a history of sobriety which negates the finding that her drug abuse was both extensive and chronic. (§ 361.5, subd. (b)(13).) Minors are four months, 21 months, and two years old. They were all conceived and born during the three-year time period preceding the filing of the section 300 petition. Mother told the case worker that "I did not use [drugs] while pregnant . . . ." This supports the implied finding that mother refrained from using drugs during the 27 months she was pregnant, which is more than half of the three-year time period prescribed in section 361.5, subdivision (b)(13). A reasonable trier of fact could find there was no clear and convincing evidence that mother's drug use was extensive and chronic from 2010 to 2013.

With respect to the second prong of section 361.5, subdivision (b)(13), minors argue that mother resisted court-ordered treatment by again using methamphetamine which resulted in her 2013 arrest and conviction. "Resisting treatment" occurs where the person fails to participate in court-ordered drug treatment or begins using drugs after participating in drug abuse treatment. (*D.B. v. Superior*

Court, supra, 171 Cal.App.4th at pp. 205-206; *In re William B.* (2008) 163 Cal.App.4th 1220, 1230.)

CPS failed to show, by clear and convincing evidence, that mother resisted court-ordered treatment during the three-year period preceding the filing of the section 300 petition. It is uncontroverted that the September 17, 2009 court-ordered Proposition 36 drug treatment was outside the three-year period preceding the February 28, 2013 dependency petition.

On February 26, 2013, two days before the dependency petition was filed, the criminal court ordered mother to enroll in an inpatient drug treatment program. Mother immediately went to Recovery Way but was turned away because she had methamphetamine in her system. Mother persisted and entered the inpatient treatment program on April 4, 2013. By the time of the May 3, 2013 disposition hearing, mother had successfully completed a month of treatment. Suzanne Newman, the Recovery Way program manager, testified that mother was participating in all aspects of the program, had tested clean for drugs, was attending 12-step meetings and had a sponsor, and was developing clear and sober support outside her treatment program.

CPS failed to show, by clear and convincing evidence, that mother resisted court-ordered treatment before the section 300 petition was filed. The trial court found that "the babies have just been removed recently" and that mother is motivated and in treatment. "I'm going to give her credit, she's in a court-ordered drug program. She's been clean for a month." The trial court concluded that mother was making an honest effort to address her substance abuse problem and warned "you have a very tall mountain to climb. . . . [¶] . . . [¶] I'm giving you an opportunity that is once in a lifetime, because . . . if you mess up in the next six months, your kids are going to be adopted out." Minors make no showing that the trial court abused its discretion in ordering services or that it would be fruitless to provide reunification services at this point in time. (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 382.)

"The juvenile court has broad discretion to decide what means will serve the child's best interest and to fashion a dispositional order accordingly. [Citation.] Its determination will not be reversed absent a clear abuse of that discretion." (*In re Corey A.* (1991) 227 Cal.App.3d 339. 346.)

The judgment (order for reunification services) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:\

GILBERT, P.J.

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PERREN, J.

Denise de Bellefeuille, Judge

Superior Court County of Santa Barbara

Darlene Azevedo Kelly, under appointment by the Court of Appeal, for Appellants.

Denise A. Marshall, County Counsel, County of Santa Barbara, Gustavo E. Lavayen, Chief Deputy, for Petitioner and Respondent.

Roni Keller, for Kristy C., Respondent.