Filed 5/31/18 In re A.R. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 the Matter of A.R. et al.,

Minors.

ZOILA M.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN LUIS OBISPO COUNTY,

Respondent;

SAN LUIS OBISPO DEPARTMENT OF SOCIAL SERVICES,

Real Party in Interest.

2d Civil No. B288840
(Super. Ct. No. 15JD-00303)
(San Luis Obispo County)

Zoila M., the biological mother of girls, A.R. and E.R., seeks extraordinary writ relief from a March 9, 2018 order terminating family maintenance services and setting the matter for a permanent placement hearing. (Cal. Rules of Court, rule

8.452; Welf. & Inst. Code, §§ 387, 366.26.)[1] Appellant contends that the trial court abused its discretion in removing the girls and not extending services. We deny the writ petition.

Factual and Procedural History

On March 9, 2018, the trial court terminated services after appellant received 24 months of family reunification services and more than four months of family maintenance services, but was unable to provide the girls a stable and safe home. Appellant had a long history of physical abuse and parental neglect dating back to 2003. In 2010, a dependency petition was filed with respect to the girls' step-brother, S.M. (JV50390.) Appellant received approximately three years of services, including extensive WRAP program services, before the matter was dismissed in 2013.

On September 11, 2015, San Luis Obispo County Department of Social Services (DSS) filed a new dependency petition for failure to protect (§ 300, subd. (b)) after appellant left the girls with their step-brother. When appellant returned home, S.M. was naked in bed with the older girl and a pornographic movie was playing on the television. Outraged, appellant hit S.M., pulled his hair, and told him to leave. Appellant claimed that S.M. ran away. DSS received reports that appellant knew that S.M. had acted inappropriately with the girls but continued to leave the girls alone with S.M.

S.M. told a social worker that he was a danger to the girls and that "'it could happen again, I can't control myself.'" The older girl, A.R., reported that S.M. was mean to her, that he bangs his head against the wall when he gets in trouble, and that

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

he recently threatened to kill himself. The younger girl, E.R., told the social worker that appellant was at her boyfriend's house when the molestation occurred. When appellant found S.M. naked in bed with the girls, S.M. "'went crazy,'" stole money, and left the house.

Two months before the molestation, DSS received a referral that appellant was drinking and physically abusing the children. Appellant shoved a sock in S.M.'s mouth, squeezed his neck, threatened to kill him, and hit him with an electrical cord. Appellant also physically abused the girls, pulling their hair and dragging them on the floor.

The girls' father, R.V., knew that appellant was unable to care for the girls and said he would protect them. The girls briefly resided with R.V. until an incident occurred between R.V.'s girlfriend and the girls. R.V. returned the girls to appellant, allowing further abuse to occur.

The trial court sustained the petition, placed the girls in foster care, and ordered services and visitation. The step-brother, S.M., was placed in a group home and provided therapy. The girls were angry and defiant and the younger girl, E.R., feared the family was slipping away from her.

In 2016, appellant refused services, was homeless and unemployed, and pregnant with her fourth child. The doctors warned appellant that it was a high-risk pregnancy and not to over-exert herself or be in stressful situations. Appellant's friend told the older girl, A.R., to stop upsetting appellant and "'if the baby dies, it will be your . . . fault.'" Appellant was not able to provide the girls safe housing and had criminal charges pending for child cruelty.

In May 2016, appellant refused to accept housing assistance because it would require her to follow the rules. Appellant "'want[ed] to be free'" and said that she had done parenting classes three times and would not do it again. When the oldest girl, A.R., refused to go on an overnight visit because appellant's boyfriend drank, appellant broke down crying. In an angry voice, appellant said "'[i]f she [A.R.] doesn't stay [the night], I don't want to see her [A.R.] anymore. Cancel my visits on Fridays because I don't want them [A.R. and E.R.] if this is how it's going to be."

In January 2017, appellant gave birth to a baby boy. After the 18-month review hearing, appellant entered into a mediation agreement to place the girls with their father and have weekend visitation. The agreement fell apart when the older girl, A.R., refused to visit appellant and appellant failed to seek appropriate housing. DSS provided WRAP services and agreed to a finding of extraordinary services in order to continue the matter to the 24-month review hearing. Appellant began to show interest in the case plan, got a part-time job, rented a room to share with the girls and the baby, and then regressed.

On January 9, 2018, DSS filed a section 387 supplemental petition to terminate family maintenance and remove the girls. Appellant had been evicted, was homeless with the girls, and was not communicating with DSS. Appellant refused to accept services and did not want a safety plan. Appellant said, "'You can take the girls but you can't take [the baby infant], he has a Dad he can go with.'" Appellant would not prioritize the girls' needs above her own and was offered a motel voucher, but declined to fill out the housing voucher application. Appellant refused to apply for Cal-WORKS to receive cash aid,

housing assistance, and child support. Appellant complained that if she applied for the program, her boyfriend would have to pay child support for the newborn infant. Appellant refused to say where the girls were staying but eventually gave an address. DSS found the girls and removed them to foster care.

At the hearing on the section 387 petition, social worker Valerie Amador stated that the girls "have been exposed to domestic violence, neglect, physical abuse, . . . verbal abuse, and sexual abuse . . . . They are traumatized children, and the fact that mom's unwilling to take advantage of services to help support them is a concern, and left untreated is a safety risk to the children." Appellant had already received "wraparound services [which] is the most intensive program that we can offer families to help better their situation. . . . I don't believe any additional services can benefit the family."

The trial court sustained the section 387 petition, finding there was a substantial danger to the girl's emotional well-being if the girls were returned to appellant's care. The girls had witnessed the physical and emotional abuse of their step-brother, were traumatized by appellant and their step-brother, and feared being left unsupervised. The trial court terminated family maintenance services and set the matter for a section 366.26 permanent placement hearing.

Substantial Evidence

Section 387 supplemental petitions are used to move a child to a more restrictive level of placement when the previous placement order has not been effective in protecting the child. (See § 387, subd. (b); *In re Javier G.* (2006) 137 Cal.App.4th 453,

460-462.)[2] Mother argues that the evidence does not support the removal because there was no substantial risk of harm to the girls' emotional well-being. We review the trial court's jurisdictional and dispositional findings for substantial evidence. (*In re F.S.* (2016) 243 Cal.App.4th 799, 813.) Evidence is substantial if it is reasonable, credible, and of solid value, such that a reasonable trier of fact could make such findings. (*Id*. at pp. 811-812.) Appellant bears the burden to show there is no evidence of a sufficiently substantial nature to support the order. (*Id*. at p. 811.)

Removal orders are proper where the parent lacks the ability to provide proper care for the child and there is potential detriment to the child. (*In re T.W.* (2013) 214 Cal.App.4th 1154, 1163.) The trial court may consider the parent's past conduct as well as present circumstances. (*In re N.M.* (2011) 197 Cal.App.4th 159, 170.) The focus of the dependency law is on averting harm to the child and there is no

[2] The hearing on a section 387 supplemental petition is a bifurcated proceeding. (Cal. Rules of Ct., rule 5.565(c).) At the jurisdictional phase, DSS had the burden of showing by a preponderance of the evidence that the factual allegations in the petition were true. (*In re H.G.* (2006) 146 Cal.App.4th 1, 11.) After the trial court found the factual allegations were true, it proceeded to the dispositional phase and determined, based on clear and convincing evidence, that the previous disposition was no longer effective in protecting the girls and removal was required because of the substantial danger to the girls' safety and emotional well-being. (§ 361, subd. (c)(1); *Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1077.)

requirement that the child actually be harmed before removal is ordered. (*Id*. at pp. 169-170.)[3]

Appellant argues that homelessness and poverty is not enough to remove the children. (See, e.g., *In re Cheryl E.* (1984) 161 Cal.App.3d 587, 607 & fn. 4.) But there is more. Appellant refused services as basic as a housing voucher and refused to tell DSS where the girls were staying or who was supervising them. In the words of the trial court, "there was serious violence in the underlying petition" and appellant periodically left "the children overnight unsupervised. That's where the sexual abuse allegation popped up because she had gone out and left the children without supervision."

That was not the first incident. In the prior dependency action (JV50390), there were serious allegations of abuse. Appellant could not handle the step-brother, S.M., and was provided three years of services. The trial court found that it was important because the girls witnessed the abuse. "So that brings us to the 2015 [dependency] case, and here we go again." In July 2015, appellant was drinking and physically abusive. Appellant put a sock in S.M.'s mouth, squeezed his neck, and struck him with an electrical cord. Appellant disciplined the girls by pulling their hair and dragging them on the floor.

The trial court found that "going from October 2015 forward, it was a rocky road." Appellant was not following the

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[3] Appellant asks why DSS did not remove appellant's newborn infant after the girls were detained. The record shows that appellant thought the infant and infant's father (appellant's boyfriend) were more important than the girls. When it came to the girls, appellant refused to follow the case plan, rejected services, and was confrontational when she learned that the girls preferred to stay in foster care.

case plan and was "'homeless and doesn't want assistance in locating stable housing,'. . . [T]he same theme rears its head in January 2018, and during this period of time both of the children are expressing fear and anxiety about returning to the care of their mother." The trial court found "that the girls hav[e] been bounced around with a history of trauma, with trauma that was inflicted by their mother, . . . [and] their brother, and [are in] . . . fear of being left unsupervised." Substantial evidence supports the finding that "the girls [will] experience substantial emotional harm and there's a danger, a true danger of it if they were returned to their mother's care."

Section 366.26 Placement Hearing

Appellant argues that the trial court erred in referring the matter to a section 366.26 permanent placement hearing. After the trial court finds the allegations in the section 387 petition to be true, it generally proceeds to disposition to determine whether removal from custody is appropriate. (See Cal. Rules of Ct., rule 5.565(e)(2); *In re T.W.*, *supra*, 214 Cal.App.4th at p. 1161.) But if the child has been returned to the parent at the 12-month or 18-month review hearing, or at an interim review hearing before the 12 and 18 months, and is removed again after a section 387 petition is sustained, the trial court "*must set a hearing under section 366.26* unless the court finds there is a substantial probability of return within the next 6 months or, if more than 12 months had expired at the time of the prior return, *within whatever time remains before the expiration of the maximum 18-month period*." (Cal. Rules of Ct., rule 5.565(f), italics added.)

This rule governs cases where the parent has exhausted reunification services and no permanent plan has been

selected yet for the child. (*In re G.W.* (2009) 173 Cal.App.4th 1428, 1438.) It is known as the "only option" rule and applies here. (*D.T. v. Superior Court* (2015) 241 Cal.App.4th 1017, 1038.) Appellant had received more than 24 months of services and the time for further extensions had run out. The only option left for the trial court was to proceed to section 366.26 selection and implementation hearing as required by California Rules of Court, rule 5.565(f). (*In re G.W.*, *supra*, at p. 1441.)[4] The evidence clearly shows that the girls' emotional well-being was at risk and that additional services would not help. The trial court did not err in ordering a section 366.26 permanent placement hearing.

Disposition

The petition for extraordinary writ relief is denied.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

[4] Appellant's case citations are inapposite and involve dispositional orders from section 300 petitions or section 387 supplemental petitions wherein there was no prior removal of the child. (*In re R.T.* (2017) 3 Cal.5th 622, 625 [§ 300 petition]; *In re Joaquin C.* (2017) 15 Cal.App.5th 537, 540 [same]; *In re Paul E.* (1995) 39 Cal.App.4th 996. 999-1000 [§ 387 supplemental petition].)

Charles S. Crandall, Judge

Superior Court County of San Luis Obispo

Theresa G. Klein for Petitioner.

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