Filed 4/7/16 In re C.C. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re C.C., et al., Persons Coming Under the Juvenile Court Law.	B264279 (Los Angeles County Super. Ct. No. DK03285)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. LYNN G. Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Annabelle G. Cortez, Judge. Affirmed.

Linda J. Vogel, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

Lynn G. (mother) appeals from findings and orders made at a six-month review hearing conducted pursuant to Welfare and Institutions Code section 366.21, subdivision (e).[1] Mother contends it was structural error for the dependency court to deny her request to continue the hearing. She also contends there was insufficient evidence to support the court's decision to keep her two children suitably placed. We reject mother's contentions and affirm the court's findings and orders.

FACTS AND PROCEDURAL HISTORY

This dependency case arose in January 2014 while mother and father[2] were in the process of divorcing, based on alleged emotional abuse of the children, ages 7 and 10. Custody and visitation remained consistent with family law orders, and both parents were required to undergo weekly drug testing. In June 2014, the Los Angeles County Department of Children and Family Services (Department) filed an amended petition, based on mother's history of addiction to prescription drugs and recent positive drug tests for hydrocodone and methamphetamine. The court ordered the children placed with father, with monitored visits for mother. Mother was to participate in individual counseling, parenting and co-parenting classes, random drug testing every other week, a drug and alcohol program, and a 12-step program. In September 2014, father died of a heart attack, and the court sustained a supplemental petition filed under section 387, placing the children with relatives. At the time, the Department reported that mother had been compliant with random drug testing, but had yet to enroll in any parenting classes or a drug and alcohol program, and had not started individual or conjoint counseling.

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

[2] Father died of a heart attack while the dependency case was pending.

According to the Department, mother had ceased contact with the children, and the children had asked not to be placed with her.

According to the Department's February 20, 2015 status review report, mother had 10 dates for drug testing between September 2014 and January 2015. She tested positive for amphetamine and methamphetamine once, negative four times, and failed to appear for testing five times. Mother began an outpatient alcohol and drug treatment program in November 2014. Mother had monitored telephone contact with the children, but refused to see them in a therapeutic setting. The Department recommended that the children remain suitably placed, with continued reunification services for mother. It also recommended increasing the frequency of mother's drug testing to weekly.

At the scheduled six-month status review hearing in February 2015, the court continued the hearing to June 2015 for mother to contest the Department's recommendations.[3] The court ordered mother to provide the Department documentation about her compliance with court-ordered programs by April 30, 2015, and advised her that her drug tests would be conducted through Pacific Toxicology. By May 20, 2015, the Department was to file a report on mother's visits, participation in court-ordered programs, therapeutic contact, and mother's drug and alcohol test results.

On May 20, 2015, the Department filed a last minute information report summarizing mother's visits with the children, her compliance with court-ordered programs, and the Department's ongoing investigation into possible placement with paternal grandparents in Arizona. Mother had made great progress, but had a number of no-shows for drug tests and one positive test in April for amphetamine and methamphetamine. The Department recommended that mother continue to receive reunification services. Proofs of service verified that the report was provided to mother's counsel by fax and to mother by mail.

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[3] Mother filed a notice of appeal from the court's February 20, 2015 findings and orders. That appeal was later consolidated with mother's appeal of the findings and orders from the contested six-month review hearing in June 2015.

At the June 2015 contested hearing, the court received various reports and exhibits into evidence and the parties stipulated that mother's visits with the children were appropriate and she was in technical compliance with her case plan. Mother's counsel asked for a continuance, because mother did not receive the Department's last minute information report until the day of the hearing and was not prepared to go forward. The court denied the request.

Mother's counsel called two witnesses: mother and the program director for mother's drug treatment program. She also offered into evidence negative drug test results from mother's drug treatment program. Minor's counsel explained that the children would like to go home, but under section 317, subdivision (e), it was not in their best interests because mother's circumstances, while in the process of improving, still posed substantial risk. Mother's counsel asked for the children to be placed with mother, and alternatively sought unmonitored visits or overnight visits. She argued that although mother had one positive drug test, mother refuted the accuracy of that test and the program director for mother's drug treatment program testified she found mother to be credible.

The court concluded that the children could not return to mother, given her lengthy history of no-shows for drug tests, as well as three positive test results for methamphetamine, the most recent being April 8, 2015. It ordered an additional six months of reunification services. Mother appealed.[4]

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[4] We take judicial notice of the fact that the children were returned to mother's custody at an uncontested 12-month status review hearing on March 10, 2016. (Evid. Code, §§ 452, subd. (d)(1), 455, 459.) We exercise our discretion to examine the substance of mother's contentions on appeal.

DISCUSSION

Denial of continuance

Mother contends the dependency court committed structural error by denying her request for a continuance, arguing that she did not receive the Department's May 20, 2015 last minute information report ten days before the hearing, as required by statute and rule of court. (§ 366.21, subd. (c); Cal. Rules of Court, rule 5.708, subds. (c)(1) and (2).)

Before a status review hearing, the social worker must file a report with the court summarizing "the services provided or offered to the parent or legal guardian to enable him or her to assume custody and the efforts made to achieve legal permanence for the child if efforts to reunify fail . . . ; the progress made; and, where relevant, the prognosis for return of the child to the physical custody of his or her parent . . . ." (§ 366.21, subd. (c).) In addition, the social worker must recommend a disposition, and if the recommendation is not to return the child to the parent, the report "shall specify why the return of the child would be detrimental to the child." The social worker must "provide the parent or legal guardian, counsel for the child, and any court-appointed child advocate with a copy of the report, including his or her recommendation for disposition, at least 10 calendar days prior to the hearing." (*Ibid.*) "Errors in notice of dependency proceedings do not automatically require reversal; instead, we assess such errors to determine whether they are harmless beyond a reasonable doubt. [Citations.]" (*In re Sabrina H.* (2007) 149 Cal.App.4th 1403, 1419.)

Mother argues that under *Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 546 (*Judith P.*), the court's refusal to continue the hearing is structural error requiring reversal. That argument ignores both the significant factual differences between the present case and *Judith P.*, as well as later case law from the California Supreme Court that calls into question the continued viability of the reasoning used in *Judith P.* (See *In re James F.* (2008) 42 Cal.4th 901, 915-919 (*James F.*) [criticizing case law that applied

doctrine of structural error in dependency cases susceptible to harmless error analysis]; *In re Celine R.* (2003) 31 Cal.4th 45, 59-60 [criticizing practice of analogizing criminal cases to dependency cases].)

In *Judith P.*, neither mother nor her attorney received the social worker's report 10 days before the hearing. As a result of the delayed notification, they were unable to present any evidence and the court terminated reunification services for mother. (*Judith P.*, *supra*, 102 Cal.App.4th at pp. 542-544.) After a lengthy analysis, the appellate court concluded that the trial court's failure to continue the hearing was a structural error requiring reversal per se, rather than a trial error subject to the harmless error standard of review. (*Id*. at pp. 553-555.) The facts of the case before us differ from those in *Judith P.* in a number of significant ways: (1) the Department's recommendation to keep the children placed with their grandparents and continue reunification services had not changed since its original status review report dated February 20, 2015, (2) mother's attorney received the Department's report more than 10 days before the June 1, 2015 hearing, (3) the court conducted a full evidentiary hearing, including two witnesses presented by mother's counsel, and (4) the court ordered the Department to continue providing reunification services to mother. In addition, our review of the record revealed a proof of service indicating that the Department mailed a copy of the May 20, 2015 last minute information to mother in a timely manner. This highlights the fact that there was no evidence to support mother's motion to continue, undermining her contention on appeal that the Department failed to fulfill its statutory duty. On the record before us, we not only reject mother's argument that a finding of structural error is required under *Judith P.*, we conclude that the court committed no error in denying mother's requested continuance.

Even if we were to find error, we agree with more recent case law that applies harmless error analysis to late notice in a dependency proceeding. In *In re A.D.* (2011) 196 Cal.App.4th 1319 (*A.D.*), the mother was not given proper notice or a copy of the agency's report for a 12-month review hearing at which the court terminated reunification services and selected a permanent plan of long-term foster care for the minor. (*Id.* at pp.

1323–1324.) Relying heavily on our Supreme Court's decision in *James F.*, *supra*, 42 Cal.4th at pp. 915-919, the appellate court rejected the mother's contention that the agency's failure was structural error and thus reversible per se, and held that the case was amenable to a harmless error analysis. (*A.D.*, *supra*, at pp. 1325–1327.) Mother offers no explanation for how delayed receipt of the report caused her any prejudice. Her attorney had received the report more than 10 days before the hearing and had adequate time to arrange witnesses and mount a defense against the Department's recommendation to keep the children placed with their grandparents. Mother has not identified any prejudice suffered by the denial of a continuance, and so even if the court's order was in error, it was plainly harmless. Because we conclude that there was no prejudicial error, we decline to consider the arguments made in respondent's brief and appellant's reply brief about the applicability or constitutionality of section 366.05.

Detriment finding

Mother next contends substantial evidence failed to support the dependency court's finding that returning the children to mother would create a substantial risk of detriment to their safety, protection, or physical or emotional well-being. We disagree.

The court must return a child to parental custody unless the Department proves by a preponderance of the evidence that returning the child "would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (§366.21, subd. (e)(1).) We review the court's decision against returning the children to mother's custody for substantial evidence. (*In re B.S.* (2012) 209 Cal.App.4th 246, 252.) In doing so, "we look to see if substantial evidence, contradicted or uncontradicted, supports [it]. [Citation.] In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations[.]" (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.) Issues of fact and the credibility of witnesses are questions for the trial court. (*In re Carmaleta B.* (1978) 21 Cal.3d 482, 495.) The

pertinent inquiry is whether substantial evidence supports the finding, not whether a contrary finding might have been made. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

Mother had a lengthy history of drug use and abuse, as documented in the Department's earlier reports. Our review of the record shows that between March 2014 and April 2015, mother had 30 drug test dates with Pacific Toxicology. Of those, mother failed to show for nine test dates, and tested positive for methamphetamine three times, and positive for hydrocodone once. In other words, mother tested positive or failed to show for a test more than a third of the time, with her most recent positive drug test occurring on April 8, 2015. This track record constitutes substantial evidence for the dependency court to find on June 2, 2015 that the children remained at substantial risk of detriment, were they to be returned to mother's care.

DISPOSITION

The June 1 and 2, 2015 findings and orders are affirmed.

KRIEGLER, J.

We concur:

TURNER, P.J.

BAKER, J.