

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

M. M.,

Petitioner,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Real Party in Interest.

B257869

(Los Angeles County
Super. Ct. No.CK96472)

ORIGINAL PROCEEDINGS in mandate. Akemi Arakaki, Judge. Petition granted.

Los Angeles Dependency Lawyers, Law Office of Marlene Furth, Melissa A. Chaitin and Julia Hanagan for Petitioner.

No appearance by Respondent.

Richard D. Weiss, Acting County Counsel, Dawyn R. Harrison, Assistant County Counsel and Peter Ferrera, Deputy County Counsel, for Real Party in Interest.

Petitioner M. M. (Mother) seeks reversal of the dependency court's 18-month review hearing order, terminating reunification services and setting a hearing to consider termination of parental rights over her son, Carter M., under Welfare and Institutions Code section 366.26.¹ The court found that although Mother had completed the court-ordered treatment programs required by the reunification plan, return of Carter to her custody would create a substantial risk of detriment to his physical or emotional well-being based solely on Mother's failure to visit more often than approximately once per month during the six-month period that preceded the hearing. We conclude substantial evidence did not support the court's finding of detriment and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. Detention and Jurisdiction

On November 9, 2012 Mother was pushing ten-month old Carter in his stroller down wet stairs when it slipped from her grasp. The stroller fell over and Carter, who had not been securely strapped in, fell out and hit his head.² Carter

¹ Undesignated statutory references are to the Welfare and Institutions Code.

² At the time of the incident, Mother was living in a motel with her boyfriend, Herbie W. Carter's alleged father, Willie T., was initially categorized as "whereabouts . . . unknown." He contacted the Department of Children and Family Services (DCFS) in January 2013. He was not provided reunification services, but was permitted monitored visits. He is not a party to this appeal.

was taken to a hospital emergency room for examination that night, but was released without having had a CT scan. Four days later, on November 13, Mother noticed swelling on the left side of Carter's head, and took him back to the ER, where a CT scan revealed he was suffering from a skull fracture.

The original petition alleged that jurisdiction was warranted under section 300, subdivision (a) (serious physical harm) because the injuries were "consistent with nonaccidental trauma" and would not have ordinarily occurred "except as a result of deliberate, unreasonable and neglectful acts by [Mother]."³ The court dismissed that allegation and found jurisdiction appropriate under subdivision (b) (failure to protect) supported by the finding that she had placed Carter in an "endangering situation" by "transport[ing] [him] in a stroller without properly securing [him], resulting in the child and the stroller rolling down a flight of wet stairs, causing the child to strike [his] head against the floor." Mother acquiesced to jurisdiction and stated she desired reunification services, including therapy, to treat her depression.

After his release from the hospital, Carter was placed in a foster home in the Antelope Valley where Mother, herself a former dependent child, had previously resided and where Mother's 16-year old sister still lived. Mother moved to a friend's home in Palmdale to be closer to Carter, and initially visited nearly every day. A multidisciplinary assessment team (MAT) meeting took place in December 2012. The MAT report recommended that Mother participate in counseling and

³ A DCFS caseworker investigated the November 9 occurrence and concluded it was accidental. The doctor who examined Carter on November 13 could not determine whether the injury was new or the result of the November 9 incident. Doctors who subsequently examined the boy concluded his condition was consistent with having been injured on November 9 in the manner described by Mother, and saw no evidence of physical abuse. DCFS advised the court in its January 2013 jurisdiction/disposition report that there was insufficient evidence to sustain the subdivision (a) allegation.

parenting classes and “continue to follow through with a consistent visitation schedule with Carter.” The report stated that Carter appeared happy and comfortable in Mother’s presence.

At the January 8, 2013 jurisdictional hearing, the court instructed DCFS to assist Mother to obtain appropriate housing, and gave DCFS discretion to walk on a request for a “home of mother” order. The court put off disposition, setting a dispositional and status hearing for January 28.

B. Disposition

Prior to the January 28, 2013 hearing, Mother left her Palmdale residence to reunite with Herbie, and was living with him in a shelter in Sylmar. Mother claimed to have contacted some of the housing programs to which she had been referred by the caseworker, but she had failed to report to the programs to be interviewed. The court continued the disposition to February 15, 2013, and instructed DCFS to prepare a supplemental report addressing Mother’s housing and the possibility of returning Carter to her.

Prior to the dispositional hearing, the caseworker told Mother she could not regain custody of Carter while living with Herbie because he refused to make himself available for a live scan and admitted having a criminal record. Mother said she would find a place on her own. At the February 15, 2013 hearing, the court entered a dispositional order removing Carter from Mother’s custody, instructing DCFS to continue to assist her in finding suitable housing, and permitting DCFS to walk on a request for a “home of mother” order when appropriate. The court-ordered treatment portion of Mother’s reunification plan consisted of parenting classes and counseling to address case issues. The court also granted Mother unmonitored visitation with Carter four times per week. A review hearing was set for August.

C. Intermediate Review Hearings

In August 2013, the caseworker reported that Mother had had few visits with Carter since February. The report stated she had been provided transportation funds and encouraged by the caseworker and the foster mother to visit more often.⁴ The court continued the review hearing for a contest and specifically instructed DCFS to provide Mother transportation assistance.

In October and November 2013, the caseworker reported that Mother was living with her biological mother in Van Nuys and had begun visiting Carter more consistently.⁵ The report stated that when Mother missed a visit, she called to inquire about Carter's well-being.⁶ Carter was reportedly becoming very attached to his foster parents, but he was not resistant to going with Mother for visits. During November, the caseworker provided Mother with a specific housing referral to the Hope Gardens transitional housing program, helped Mother get accepted into the program and made arrangements for Mother to move in. At the last minute, Mother informed the caseworker that she was instead moving into an apartment in North Hollywood with Herbie. She told the caseworker there were "too many restrictions" at the housing project to which she had been referred. Mother did not provide her new address to the caseworker, and stopped contacting the caseworker for several months. Mother gave birth to her second child in

⁴ During this period, Mother began attending a parenting class and participating in individual counseling, which she successfully completed prior to the 18-month review hearing.

⁵ DCFS could not approve Carter being released to Mother's custody when she was living with the maternal grandmother due to the maternal grandmother's history of child abuse and criminal record.

⁶ During this period, Mother obtained a mental health evaluation that indicated no need for medication. She continued to attend therapy sessions.

December 2013. Between November and January, her visits with Carter again became sporadic.

At the January 2014 twelve-month review hearing, the court found that continued jurisdiction was necessary, that reasonable services had been provided to Mother, and that Mother was in partial compliance with the case plan, justifying provision of an additional six months of services.

D. 18-Month Review Hearing

The court held status hearings in March, April and May 2014. In April, the caseworker reported she had learned Mother's address and had visited Mother's North Hollywood studio apartment where she lived with her newborn baby. The caseworker found nothing inappropriate. The caseworker would not approve overnight visits for Carter, however, because she was concerned Mother's infrequent visitation in the preceding months had led to a "limited . . . bond[]" between them.⁷ The caseworker reminded Mother she was entitled to transportation funds to visit Carter, which Mother had not requested for many months. Mother said she would call, but failed to do so. DCFS recommended termination of Mother's reunification services because of lack of visitation. At a hearing in May 2014, the court instructed DCFS to arrange a visitation schedule for Mother and Carter. The caseworker subsequently reported she had called Mother on May 21, encouraged her to contact the foster mother to set up a visitation schedule, and offered transportation funds. Mother did not call to obtain transportation funds until June.⁸

⁷ The caseworker reported that Mother had visited Carter visited once each month from January through April 2014.

⁸ When the caseworker met with Mother to pay her the transportation funds, she noted that Mother's new baby appeared healthy.

At the July 10, 2014 contested 18-month review hearing, Mother testified she had had three visits with Carter in June and July. She took him to a park. He seemed excited to see her and sad when she left. He called her “mommy” and his new half-sibling “brother.” Mother explained that visiting Carter required a train and bus trip, and that her travel time was at least three hours each way. She testified she had not received transportation funds between November 2013 and May 2014. She had given birth to her second child in early December. She testified that when she could not visit, she called Carter or her sister to ask about Carter.

The caseworker testified that Mother’s residence, which the caseworker had visited in April, was appropriate for her and her children. She testified that Mother had been provided transportation funds in November 2013, but because she had not requested funds, she did not receive them in the months that followed.

In closing argument, counsel for DCFS stated that “the only portion of the case plan that [Mother] has not complied with[, in [counsel’s] eyes and the Department’s eyes, is the visitation,” and urged the court to find “lack of compliance [with the case plan] with respect to . . . visit[ing].” Counsel contended that the court could deny Mother custody of Carter by finding that Mother’s lack of regular visitation created a substantial risk of detriment to his safety, protection, and physical or emotional well-being. Minor’s counsel joined in the request, stating that there appeared to be no justification for Mother’s failure to visit more frequently, while acknowledging that apart from visitation, Mother was “in compliance with the case plan.”⁹

⁹ From the argument she made on the record, it appears that counsel for Carter mistakenly believed that Mother had not visited the boy at all in January, February or March 2014, and only two or three times thereafter.

Based solely on the infrequency of Mother’s visitation, the court found that “return of the child to the physical custody of [Mother] would create a substantial risk of detriment to the safety, protection, physical or emotional well-being of the child”¹⁰ The court agreed with DCFS’s counsel that it could not find that Mother had complied with the case plan because “the case plan includes visitation.” The court observed that Mother’s progress toward alleviating or mitigating the problems necessitating assertion of jurisdiction had been “substantial,” but that visitation was “part of the case plan,” and that Mother’s failure to visit more regularly was “something that the court cannot overlook.” The court terminated reunification services and set a section 366.26 hearing. Mother appealed.

DISCUSSION

At the 18-month review hearing, the juvenile court “shall order the return of the child to the physical custody of his or her parent . . . unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent . . . would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child.” (§ 366.22, subd. (a).) Mother contends substantial evidence does not support the court’s determination at the July 2014 review hearing that Carter could not be safely returned to her custody. We agree.

The burden is on DCFS “to establish . . . that releasing [a child] to [a parent’s] custody would ‘create a substantial risk of detriment to the safety protection, or physical or emotional well-being of the child.’” (*David B. v.*

¹⁰ The court ordered DCFS to continue to provide Mother transportation funds, expressed hope that Mother would be able to see Carter more frequently now that the baby was “a little bit older,” and stated it would be “more than happy to entertain a [section] 388 [petition].”

Superior Court (2004) 123 Cal.App.4th 768, 789, quoting § 366.22, subd. (a).) “That standard . . . [is] a fairly high one. It cannot mean merely that the parent in question is less than ideal, did not benefit from the reunification services as much as we might have hoped, or seems less capable than an available foster parent or other family member.” (*David B. v. Superior Court*, *supra*, at p. 789.) The evidence presented by DCFS did not meet the requisite standard.

From the beginning of this dependency proceeding, the court recognized that being in Mother’s care, at least for day visits, would not be hazardous to Carter. The basis for assertion of jurisdiction was a single negligent incident, not likely to recur, leading to an injury for which Mother twice sought medical attention.¹¹ At the dispositional hearing, the court allowed Mother unmonitored visitation and indicated it was prepared to release Carter to the custody of Mother, but for Mother’s lack of suitable housing. It is true that Mother’s transient lifestyle went on for far too long, largely due to her refusal of offers of public housing, which she found too “restrict[ive],” and her initial insistence on maintaining a relationship with a man who did not appear to be a suitable caretaker for her children. However, even when involved in dependency proceedings, adults are free to choose where to live and with whom to associate, as long as they keep their children safe. By the time of the 18-month review hearing, Mother had been living for several months in a suitable residence, which the caseworker had visited and approved. She had been caring for a second child, who displayed no evidence of

¹¹ We note that the caseworker who first investigated the incident saw no basis for assertion of jurisdiction. DCFS became concerned only because it was not clear until Carter was thoroughly examined that he had not suffered a second head injury when he was brought to the ER a second time.

neglect or abuse. At that point, there was no basis to refuse to return Carter to her custody.¹²

We find support for our conclusion in *David B. v. Superior Court*, *supra*, 123 Cal.App.4th 768, where the Orange County Social Services Agency claimed that a father, who had been absent from his infant daughter’s life for a year but sought custody after dependency proceedings began, was not sufficiently “bonded” to his daughter after 18 months of visitation. (*Id.* at p. 773.) The court stated that whether the child “felt bonded” to her father was “simply not the relevant inquiry” at the six-, 12-, and 18-month review hearings: “Until services are terminated, reunification is the goal and [the father was] entitled to every presumption in favor of having [his daughter] released to his custody.” (*Id.* at p. 788.) The law’s preference for “maintaining family relationships” did not depend “upon [the father’s] ability to make [his daughter] feel bonded to him The issue . . .

¹² Indeed, as soon as Mother’s housing was approved in April 2014, DCFS should have begun the process of transitioning Carter with overnight visitation, so that he would have been prepared to return to Mother’s custody at the 18-month review hearing. The caseworker claimed that the “limited . . . bond[]” between Carter and Mother and his increasing attachment to his foster family precluded that option, but some loosening of the parent/child bond is an inevitable result of taking custody of a young child from a parent for six to 18 months. If that rationale were sufficient to deny custody, no parent of a young child removed from his or her custody would ever regain it. The fallacy in the caseworker’s reasoning is illustrated by *Rita L. v. Superior Court* (2005) 128 Cal.App.4th 495, where the Court of Appeal found that the juvenile court had “improperly considered the quality of the relationship between [the child] and . . . his de facto parents, in reaching its decision to terminate reunification services.” (*Id.* at p. 507.) The court explained: “[T]he focus during the prepermanent planning stages is preserving the family whenever possible [citation]” [¶] “It is only after the court terminates services and orders a hearing pursuant to section 366.26, that attention turns to assessing the quality of the child’s relationships with his or her guardians, or prospective adoptive parents. . . . [¶] In this case, the court jumped the gun a bit. It considered [the child’s] relationship with his de facto parents as *part of* its decision to terminate services and refer the matter to a section 366.26 hearing. That was improper.” (*Rita L. v. Superior Court*, *supra*, at p. 507, quoting *In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1788.)

[was] whether placing [the daughter] in her father's care represent[ed] some danger to her physical or emotional well-being." (*Ibid.*)

Here, the court and DCFS were understandably concerned over the irregularity and infrequency of Mother's visitation. The court relied on this as its sole basis for concluding that return to Mother would be detrimental and for setting the section 366.26 hearing. DCFS contends in its brief, as its counsel argued below, that section 366.22 "directs the court to consider the parents' participation in their reunification plan, which here included visitation [citation], when it determines whether it would be detrimental to return the child to parental custody at the eighteen-month hearing [citation]." It is true that "[v]isitation is a necessary and integral component of any reunification plan [citations]." (*In re S.H.* (2003) 111 Cal.App.4th 310, 317.) And while the travel time and the birth of her second child might explain Mother's failure to take full advantage of the visitation permitted by the court, her proffered reasons for failing to visit Carter more often were less than persuasive. In light of the efforts of the court and caseworker to ensure transportation funds were made available upon her request, a determination that Mother had not visited as often as she could was supported by the record.

Nevertheless, the statutory provisions do not permit denying a parent custody of his or her child solely for failing to visit or complete a "reunification plan." All three provisions governing review hearings, including section 366.22 governing the 18-month review hearing, state that "[t]he failure of the parent . . . to participate regularly and make substantive progress *in court-ordered treatment programs*" can constitute "prima facie evidence that return would be detrimental." (§ 366.22, subd. (a); see also § 366.21, subds. (e) and (f), italics added.) As all parties acknowledged, Mother completed the programs ordered by the court.

The only reference to lack of visitation as justification for termination of reunification services and setting a section 366.26 hearing is found in section

366.21, subdivision (e), which provides “[i]f the child was removed initially under subdivision (g) of Section 300 and the court finds by clear and convincing evidence that the whereabouts of the parent are still unknown, or the parent has failed to contact and visit the child, the court may schedule a hearing pursuant to Section 366.26 within 120 days.” The Supreme Court has held that the provision applies where the juvenile court “finds by clear and convincing evidence that the parent has failed to contact and visit the child for six months after reunification services have begun, whether or not jurisdiction was originally asserted under section 300, subdivision (g).” (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1017.) Appellate courts have held that nominal visitation or contact, such a single visit and/or telephone call during the six-month period, is insufficient to place a parent beyond the bounds of this provision. (See, e.g., *S.W. v. Superior Court* (2009) 174 Cal.App.4th 277, 283; *In re Tameka M.* (1995) 33 Cal.App.4th 1747, 1754.) Here, the record reflects that in 2014, Mother visited Carter on at least seven times: January 3, February 17, March 8, April 4, June 13, June 22, and once in July. Prior to that, she had visited regularly from the fall of 2013 until she gave birth in early December. Mother’s visitation during the period prior to the 18-month review hearing was thus more than nominal.

In sum, other than the incident that led to the assertion of jurisdiction, Mother had taken satisfactory care of Carter, and since then had been taking satisfactory care of his younger sibling. DCFS failed to present evidence that returning Carter to Mother’s custody would create a substantial risk of detriment to his safety, protection, or physical or emotional well being. Accordingly, we reverse the July 10, 2014 order. We cannot, however, simply direct the court to transfer custody to Mother after remand. “[W]hen an appellate court reverses a prior order of the trial court on a record that may be ancient history to a dependent child, the trial court must implement the final appellate directive in view of the

family's current circumstances and any developments in the dependency proceedings that may have occurred during the pendency of the appeal.” (*In re Anna S.* (2010) 180 Cal.App.4th 1489, 1501; accord, *In re Ryan K.* (2012) 207 Cal.App.4th 591, 597.) We therefore direct the court to reconsider custody, and return Carter to Mother unless present circumstances establish that it would create a substantial risk of detriment.

DISPOSITION

The petition is granted. The court's July 10, 2014 order terminating reunification services, setting a section 366.26 hearing, and finding that return of Carter to the physical custody of Mother would create a substantial risk of detriment to his physical or emotional well-being is reversed, and the hearing scheduled pursuant to section 366.26 is vacated. The matter is remanded for further proceedings consistent with the views expressed in this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.