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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re SERGIO G., A Person Coming Under the Juvenile Court Law.	B262160
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. TRACY G., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK29792)

APPEAL from orders of the Superior Court of Los Angeles County, Timothy R. Saito, Judge. Reversed in part, affirmed in part, and remanded.

Liana Serobian, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Mary C. Wickham, Interim County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Stephen D. Watson, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Tracy G. (mother) challenges the juvenile court's order removing her infant son, Sergio G., under Welfare and Institutions Code[1] section 361, subdivision (c)(1). Mother contends the court's removal order was not supported by clear and convincing evidence that her past drug addiction created a substantial current danger to Sergio, and that there were no other reasonable means to protect him. She also challenges the court's visitation order because it failed to specify a minimum frequency and duration of visits with Sergio.

We reverse the disposition order removing Sergio from mother's custody because the Los Angeles County Department of Children and Family Services (Department) did not show there was no reasonable alternative to removing Sergio or that it had made any reasonable effort to avoid removal. In doing so, we are mindful that mother has an extensive and troubling history of drug addiction and relapse, and that eight months have passed since the court entered its disposition order. Accordingly, we do not order Sergio immediately returned to mother's custody, but instead remand this matter with directions to hold a new dispositional hearing under section 361, subdivision (c). We also reverse the visitation order because it does not specify a minimum frequency or duration of visits. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

When her son Sergio was born in September 2014, mother had an 18-year history of substance abuse and related criminal and child welfare involvements. Since 2003, four of Sergio's siblings had been removed from her custody, and mother had failed to reunify with them. A fifth child was living with his father, and two additional children had been adopted at birth.

Mother had been convicted four times for possession of a controlled substance, most recently on May 7, 2014, while pregnant with Sergio. After the most recent

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

conviction, mother was placed on probation and incarcerated for three months. Upon her release, mother enrolled in a Department-approved residential treatment program for substance abuse. She is scheduled to remain on probation until August 2017.

Mother delivered a healthy baby boy, Sergio, on September 29, 2014. Mother tested negative for all illegal substances, but would not allow hospital staff to screen baby Sergio for drugs. While Sergio showed some initial signs of "being jittery," he was medically cleared for discharge within 24 hours.

An unidentified caller referred Sergio and mother to the Department on September 30, 2014. The reporting party alleged mother had used crack cocaine in March 2014, was in an outpatient substance abuse program, had a history of sexually transmitted infections, and had been incarcerated that summer. A Department social worker responded to the hospital on October 1, 2014 and took Sergio into custody.

On October 6, 2014, the Department filed a petition under section 300, subdivisions (b) and (j), alleging Sergio was at risk of harm due to mother's substance abuse. The Department asked the court to detain Sergio and deny mother family reunification services under section 361.5, subdivision (b). Later that day, the juvenile court detained Sergio under section 300, removed him from mother's custody under section 319, and ordered "monitored visitation."

On October 28, 2014, the Department filed a jurisdiction report indicating Sergio was residing in foster care in San Bernardino, developing appropriately, and mother had "maintained sporadic contact and visitation . . . . " The Department again asked the court to deny reunification services.

At the jurisdiction hearing on October 29, 2014, the emergency-response social worker testified that Sergio was a healthy baby, with jitters that had lasted for one day. Hospital staff placed him in the regular nursing center of the hospital rather than the intensive neonatal center, and had allowed mother to care for and breastfeed him. The social worker decided to detain Sergio based on mother's past substance abuse and related child welfare and criminal involvements, as well as her purported statement that she had last used drugs in May 2014. The social worker's testimony is inconsistent with

the detention report. According to the report, mother said she had last used drugs in *March* 2014. The record does not reveal whether mother, who would have been about six weeks along at the beginning of March, knew she was pregnant at the time. In any event, mother denied telling the social worker that she had used cocaine in March 2014 while pregnant with Sergio. She testified that she had been referring to March 2013, when she gave birth to Sergio's sister, Tracy H.; both mother and Tracy had tested positive for cocaine at the time.

On October 30, 2014, the court sustained the section 300 petition under subdivisions (b) and (j). The court ordered the Department to refer mother for weekly, random drug testing, and to allow mother to breastfeed upon the completion of one clean drug test. The court also ordered the Department to "use best efforts" to place Sergio in Los Angeles County. Under the terms of mother's probation, she could not leave Los Angeles; the Department had placed Sergio in San Bernardino, thereby preventing mother from seeing him.

While the Department complied with the court's order referring mother for weekly drug tests, it did not comply with the court's other orders. For example, despite six negative drug tests, the Department admitted it had "not arranged for mother . . . to breastfeed the child" as of December 17, 2014.[2] The Department also did not comply with the court's order that it "use best efforts" to move Sergio to Los Angeles County. Instead, the Department stated, "DCFS does not intend to separate child from his siblings or remove him from an adoptive home."

The court held a contested disposition hearing on February 5 and 6, 2015. Mother provided proof that she had completed parenting and anger management programs, and had completed 30 of 52 substance abuse treatment sessions. Her

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[2] At Sergio's one-month check-up on November 7, 2014, the doctor indicated, "Its [sic.] not recommended to be breastfeed [sic.] by his mom IF her complete Medical History including Medication or drugs taken are not reviewed by M.D." There is no evidence in the record that the Department notified mother of this requirement or made any effort to follow up on this recommendation.

treatment center reported perfect attendance at three sessions per week, "excellent/extremely active" participation, and "significant progress," which included "aggressively working toward goals outlined in Treatment Plan." Mother had also completed 17 negative drug tests. Though she missed random tests on December 9 and 10, 2014, she tested clean on both December 1, 2014 and December 11, 2014. Mother's home was clean, appropriate, well-furnished, and child-proofed. She had a crib and other baby items for Sergio.

Although the Department commended mother for "her progress and participation in drug treatment," it asked the court to sustain the petition, remove Sergio from mother's custody, bypass reunification services to mother under section 361.5, subdivisions (b)(1), (11), and (13), and set a permanency planning hearing. The Department argued denial of reunification services was appropriate because such services had been terminated in the past with mother's other children. It asked the court not to return Sergio to mother's custody "based on mom's very long substance abuse history and her relatively, in comparison, short period of sobriety." The Department asked the court to consider the missed tests on December 9 and 10, 2014 to be positive, but did not address the negative test on December 11, 2014. The Department also noted that mother had maintained long periods of sobriety in the past, but had always relapsed.

At the disposition hearing, Sergio's attorney emphasized mother had made substantial progress "correct[ing] the issues with her drug abuse." Counsel therefore asked the court to order family reunification services, but "believe[d] that at this point [return] would be premature" based on mother's history of drug abuse. Counsel concluded, "[s]o even though I would commend mother for, you know, doing well the last couple of months and really putting in her efforts to participate in the programs and being consistent, I think that I would like to see a couple more months of negative tests, no no-shows, and consistent progress in her substance abuse program before it's safe to have Sergio returned home to her." In turn, mother asked the court to dismiss the petition, and at minimum, place Sergio in her care under the court-supervised family maintenance plan.

At the close of the hearing on February 6, 2015, the court declared Sergio a dependent of the court and removed him from mother's custody. The court ordered family reunification services and monitored visits for mother. The court again ordered Sergio to be moved to Los Angeles County if possible.

Mother filed a timely notice of appeal.[3]

CONTENTIONS

Mother contends the court's disposition order removing Sergio from her physical custody is not supported by substantial evidence under section 361, subdivision (c). She also challenges the court's visitation order, which she contends impermissibly delegated the court's discretion to the Department. Mother does not challenge the jurisdiction order or the declaration of dependency.

DISCUSSION

1. *The Evidence Was Insufficient to Justify Removing Sergio from Mother's Physical Custody under Section 361, subdivision (c)*

A. *Legal Principles*

After declaring a child a dependent of the juvenile court, the court must determine whether he may remain with the custodial parent or whether he must be removed from the home. (§ 361, subd. (c).) The court may not remove the child unless the Department proves by clear and convincing evidence that there is "a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home," *and* that even with the provision of services, there is no other reasonable way to protect him. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248; § 361, subds. (c), (d).)

"Due process requires the findings underlying the initial removal order to be based on clear and convincing evidence." (*In re Henry V.* (2004) 119 Cal.App.4th 522, 530.) Clear and convincing evidence "requires 'a high probability, such that the

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[3] Sergio's father is not a party to this appeal.

evidence is so clear as to leave no substantial doubt. [Citation.]' " (*In re C.M.* (2014) 232 Cal.App.4th 1394, 1401.) " 'The high standard of proof by which this finding must be made is an essential aspect of the presumptive, constitutional right of parents to care for their children.' " (*In re A.E.* (2014) 228 Cal.App.4th 820, 825.) It reflects "the Legislature's recognition of the rights of parents to the care, custody and management of their children, and further reflects an effort to keep children in their homes where it is safe to do so. [Citations.] . . . By requiring clear and convincing evidence of the risk of substantial harm to the child if returned home and the lack of reasonable means short of removal to protect the child's safety, section 361, subdivision (c) demonstrates the 'bias of the controlling statute is on family preservation, *not* removal.' [Citation.] Removal 'is a last resort, to be considered only when the child would be in danger if allowed to reside with the parent.' [Citation.]" (*In re Hailey T.* (2012) 212 Cal.App.4th 139, 146.)

A disposition order removing a child from his parent's custody is " 'a critical firebreak in California's juvenile dependency system' (citation), after which a series of findings by a preponderance of the evidence may result in termination of parental rights." (*In re Henry V., supra,* 119 Cal.App.4th at p. 530, quoting *In re Paul E.* (1995) 39 Cal.App.4th 996, 1001.) The Department's significant evidentiary burden is the "linchpin of the . . . statutory scheme" and fundamental to due process. (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1829.) Therefore, at the disposition stage, there is a strong statutory presumption that the child will be returned to parental custody. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308.)

On appeal, "[w]e review the record in the light most favorable to the court's order to determine whether there is substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that placement [with his parents] would be detrimental to the child. Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt. [Citation.]" (*In re Patrick S.* (2013) 218 Cal.App.4th 1254, 1262; see also *In re Michael G.* (2012) 203 Cal.App.4th 580, 589 ["On review, we determine whether the record contains

substantial evidence from which the juvenile court could find clear and convincing evidence."].) The record before us does not meet this high burden.

B. *There Was Insufficient Evidence that Removal Was the Only Reasonable Way to Protect Sergio*

Before the court may order a child physically removed from his parent's custody, it must find by clear and convincing evidence that there are no reasonable means, short of removal, to protect the child. (§ 361, subd. (c).) Section 361, subdivision (d) provides, "The court shall make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her home[.] . . . The court shall state the facts on which the decision to remove the minor is based." Here, the court stated, "agency has complied with the case plan by making reasonable efforts", but did not "state the facts" supporting such a conclusion. At oral argument, counsel for the Department asserted that in cases like this one, the Department need not comply with this statutory requirement. Our research reveals no statutory or legal basis for this assertion.

To aid the court in determining whether "reasonable means" exist for protecting the children, short of removing them from their home, the California Rules of Court require the Department to submit a social study that "must include" among other things: "A discussion of the reasonable efforts made to prevent or eliminate removal[.]" (Cal. Rules of Court, rule 5.690(a)(1)(B)(i).) In this case, the Department's reports contain no such discussion. The October 6, 2014 detention report contains the following boilerplate: "Reasonable Efforts were made to prevent or eliminate the need for the child(ren)'s removal from the home. The following Pre-placement Preventative Services were provided but were not effective in preventing or eliminating the need for removal of the child from the home." The Department then identified the following "reasonable efforts": First, the Department reviewed mother's history with the Department and determined she had "been offered Family Reunification services in the past with her other children." Second, "CSW attempted to interview mother. She

declined to speak with CSW and referred her to her lawyer Ms. Wallace." Third, the Department submitted a request for mother's rap sheet, which was still pending.

Significantly, all of these "reasonable efforts" were dated October 1, 2014, when Sergio was two days old. Though the disposition hearing was not held until four months later, there is no evidence the Department made any further efforts to avoid removal. For example, the October 28, 2014 jurisdiction/disposition report contains no additional information about what, if any, reasonable efforts the Department had considered; it merely refers the reader to the detention report. The Department's two additional submissions—"last minute information" filed forms on December 17, 2014 and February 5, 2015—are likewise silent on this subject. This lack of effort is particularly troubling in light of the Department's disregard of the court's orders that the Department move Sergio to Los Angeles and allow mother to breastfeed him—both of which would have allowed mother to bond with Sergio, and would have allowed the Department to evaluate her present ability to care for him.

"[O]ur dependency system is premised on the notion that keeping children with their parents while proceedings are pending, whenever safely possible, serves not only to protect parents' rights but also child[]'s and society's best interests." (*In re Henry V.*, *supra*, 119 Cal.App.4th at p. 530.) "The requirement for a discussion by the child welfare agency of its reasonable efforts to prevent or eliminate removal[,] (citation) and a statement by the court of the facts supporting removal (citation), play important roles in this scheme. Without those safeguards there is a danger the agency's declarations that there were 'no reasonable means' other than removal 'by which the [children's] physical or emotional health may be protected' and that 'reasonable efforts were made to prevent or to eliminate the need for removal' can become merely a hollow formula designed to achieve the result the agency seeks." (*In re Ashly F.* (2014) 225 Cal.App.4th 803, 810.)

Here, despite the Department's failure to make reasonable efforts, it argued there were no reasonable means to protect Sergio short of removal. The Department contended the court should remove Sergio because in 2009, mother had made progress

in overcoming her addiction, but had then relapsed in 2010. At that time, she lost contact with the Department. Therefore, the Department theorized, "at this stage there is no reason to think that that same pattern won't repeat itself." The Department insisted it "would have no way to ensure that the mother similarly wouldn't relapse" and speculated that this time, she might even kidnap Sergio. Counsel's speculation was insufficient to support a finding that Sergio was at substantial risk of future harm. (*In re Steve W.* (1990) 217 Cal.App.3d 10, 22 [speculation about possible future conduct cannot support a finding of dependency].)

Moreover, the Department plainly failed to explore alternatives to removal based on current information. Instead, the Department relied, primarily, on its findings from the 2013 dependency proceedings involving Sergio's sister, Tracy; determined mother was a lost cause; and decided not to consider whether removal was the only way to protect Sergio. In the detention report, prepared days after Sergio was taken into custody, the Department was already taking the position that reunification services should be denied under section 361.5. Though the jurisdiction/disposition report was prepared less than a month later, and though it contained no new information, the Department asked the court to schedule a permanency planning hearing under section 366.26. When the court resisted this proposal, the Department did not reevaluate its view or gather more evidence to support it. Instead, it simply disregarded the court orders it did not like.

Indeed, the only current information before the trial court reflected well on mother, her efforts, and her prospects. Considered in the light most favorable to the judgment, the evidence showed mother had been sober since at least May 2014. May 7, 2014 was also when mother was arrested for drug possession and incarcerated until August 4, 2014. Immediately upon her release, mother enrolled in a Department-approved substance abuse treatment program, New You Center. Mother received excellent reviews from her service providers and was active and open in treatment sessions. She completed parenting education and anger management courses, tested negative for drugs, and had 22 sessions left to complete the substance abuse

component. Mother's home was also clean, appropriate, well-furnished, and child-proofed. She had a crib and other baby items for Sergio.

Not only was mother in compliance during the four months between the detention hearing and the jurisdiction hearing in this case, but she also tested negative for drugs approximately 15 times during this period. While mother had missed tests on December 9 and 10, 2014, she tested clean on December 2, 2014 and December 11, 2014. And importantly, the court did not believe the missed tests, on their own, were sufficient to justify removal.

Furthermore, neither the court nor the Department mentioned alternatives to out-of-home placement. Reasonable means of protecting Sergio that should at least have been considered include unannounced visits by the Department, public health nursing services, in-home counseling services, a drug-monitoring ankle bracelet, and hair follicle tests to evaluate drug use over the previous 90 days. (*In re Ashly F., supra*, 225 Cal.App.4th at p. 810.) Mother not only had a social worker to supervise her compliance, but also saw service providers at her thrice-weekly classes. There is no evidence such options were unreasonable or insufficient.

Because we find the Department did not make reasonable efforts to avoid removal, and because neither the court nor the Department considered alternatives to removal, we find there is insufficient evidence to support the court's conclusion that there were no reasonable means, short of removal, to protect Sergio. (§ 361, subd. (c).) Because we reverse on this basis, we do not reach mother's additional contention that there was insufficient evidence that her past drug addiction created a substantial *current* danger to Sergio. We acknowledge, however, that mother has an extensive, troubling history of addiction and relapse. We are also mindful that eight months have passed since the court entered its dispositional order, and thus there may be new information and evidence available to the parties and the court. We therefore remand this matter to the juvenile court with directions to hold a new dispositional hearing under section 361, subdivision (c). We express no opinion as to the outcome of that hearing. Further, nothing in this opinion should be construed to prevent the court from considering new

evidence or changed circumstances arising during the pendency of this appeal. To the contrary, we urge the parties to marshal the evidence that was lacking at the prior hearing, to consider in detail any available alternatives to removal, and to consider whether mother has remained drug-free, or has relapsed during the pendency of this appeal.

2. *The Juvenile Court Improperly Delegated its Visitation Authority*

Mother contends the court impermissibly delegated its discretion over visitation to the Department when it ordered, "Monitored visitation. Discretion to liberalize." The Department concedes the court did not specify a minimum frequency or duration of visits, but contends mother forfeited the claim by failing to object below, and in any event, the order was a reasonable delegation of time, place, and manner. Although we agree mother failed to object to the visitation order below, we exercise our discretion to consider the issue. (See, e.g., *In re M.R.* (2005) 132 Cal.App.4th 269, 272 [exercising its discretion to address the visitation order despite the mother's failure to object to the order in the juvenile court].) Here, the court's visitation order failed to give any indication about the frequency of the visits, effectively delegating to the Department discretion to decide whether visitation would actually occur. We conclude this delegation was an abuse of discretion and reverse the visitation order. Any new visitation order must specify a minimum frequency and duration of mother's visits with Sergio. (*In re Rebecca S.* (2010) 181 Cal.App.4th 1310, 1314-1315.)

DISPOSITION

The disposition and visitation orders are reversed. The matter is remanded to the juvenile court to hold a new disposition hearing under section 361, subdivision (c).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

ALDRICH, J.