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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FIVE

JASON K.,

Petitioner,

v.

THE SUPERIOR COURT OF CONTRA  
COSTA COUNTY,

Respondent;

CONTRA COSTA COUNTY CHILDREN  
& FAMILY SERVICES et al.,

Real Parties in Interest.

A135817

(Contra Costa County  
Super. Ct. No. J11-01505)

Petitioner Jason K. is incarcerated, awaiting trial on homicide charges. In this dependency proceeding, he seeks writ relief from an order denying him reunification services with his daughter, Isabella K. We find no error and deny the writ.

**I. BACKGROUND**

Isabella was born in March 2011, and lived with her parents, Jason K. (Father) and Stephanie E. (Mother). Isabella's older half-sibling, John, was determined to be a dependent child in a prior proceeding initiated by the Contra Costa County Children & Family Services (Agency). John was removed from Mother's care in April 2010.<sup>1</sup> After

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<sup>1</sup> After more than a year of reunification services, the Agency recommended returning John home in October 2011, although it remained concerned about Mother's ability to manage her parenting responsibilities and viewed Mother as emotionally

Isabella was born, the Agency received referrals for domestic violence between Mother and Father in May and June 2011. In a June incident, Father reportedly pushed Mother to the ground while she was holding Isabella. Couples counseling was unsuccessful and Father moved out in August 2011. Mother obtained a restraining order against Father on behalf of Isabella and herself. In September 2011, Father surrendered himself to police on a homicide charge. It is alleged that Father, his older brother, and a third person conspired to murder a member of a rival gang. He remains incarcerated awaiting trial.

On October 31, 2011, Mother was stopped by police for making unsafe lane changes while John and Isabella were in the car. Officers found a gun in Isabella's diaper bag and bullets in Mother's purse, which Mother said she possessed for protection from Father's girlfriend. Police wrote that Mother was uncooperative and seemed emotionally unstable. A further investigation disclosed that the gun belonged to Mother's then-current boyfriend (not Father) and had previously been stored in Mother's and Isabella's residence.

On November 2, 2011, the Agency filed a juvenile dependency petition on behalf of Isabella under Welfare and Institutions Code section 300, subdivisions (b) (failure to protect) and (g) (failure to support).<sup>2</sup> The petition alleged: "b-1 Despite the provision of ongoing services to address domestic violence and mental health issues, [Mother] placed [Isabella] at risk of serious physical harm by carrying a gun and ammunition with her while the child was in her care. [¶] b-2 [Mother's] . . . ongoing mental health issues . . . impair[ed] her judgment, placing [Isabella] at risk of physical harm. [¶] b-3 [Father] has engaged in serious domestic violence against [Mother] in the presence of [Isabella], as recently as June 2011 . . . , placing the child at risk of harm. [¶] . . . [¶] g-1 [Father] is incarcerated for gang-affiliated activity and homicide related charges and is unable to

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unstable. The incident that gave rise to this dependency petition apparently caused that recommendation to be withdrawn.

<sup>2</sup> All statutory references are to the Welfare and Institutions Code unless otherwise noted.

care for [Isabella].” Isabella was detained and Father was recognized as Isabella’s presumed father.

At the jurisdiction hearing, Mother pled no contest to an amended petition and Father submitted without presenting evidence. The court sustained the petition. The allegations involving Father (b-3 & g-1) were sustained without amendment.

In a February 2012 disposition report, the Agency recommended denial of reunification services for both parents. As to Mother, the Agency recommended bypass pursuant to section 361.5, subdivision (b)(10) because the juvenile court had recently terminated services in John’s case and Mother had not made a reasonable effort to treat the problems that led to John’s removal. As to Father, the Agency recommended bypass of services pursuant to section 361.5, subdivisions (b)(9) (abandonment) and (e)(1) (incarceration) (hereafter, sections 361.5(b)(9) and 361.5(e)(1)). The district attorney’s office reported that Father remained in custody, his preliminary hearing was scheduled for May 2012, a likely trial date was sometime in 2013, the case against Father was strong, and if all charges and enhancements were sustained Father faced a sentence of between 25 years in prison and 50 years to life in prison. “Based on the current charge of homicide with the enhancements, it is clear that reasonable services offered to the father would be detrimental to the child as the child is only 10 months old and the father reports that he has not seen the child since September of 2011. There has been little degree of parent-child bonding to consider and the nature of his crime suggests the process by which he may mitigate the charges against him will far exceed 6 months . . . .”

At the initial disposition hearing on February 1, 2012, Father disputed the allegations made against him in the disposition report and argued that he should be presumed innocent of the criminal charges that were pending against him. He initially denied that he was contesting the bypass recommendation, but then joined Mother’s request for a contested hearing “so that services are provided to him.” The matter was continued for a contested disposition hearing in May.

A May 2012 supplemental report stated that Mother alleged three crimes had been committed against her in February and April by females associated with Father’s gang

and friends of Father's former girlfriend: burglary of her home, arson of her car, and a physical attack. Mother was in the process of seeking a restraining order against some of the alleged perpetrators. The supplemental report extensively discussed a request by Father's mother for relative placement of Isabella and recommended against placement because Father's mother had a difficult relationship with Mother, because of the grandmother's own extensive criminal history (prohibiting placement without an exemption) and dependency history, and because placement would separate Isabella from her brother, with whom she had established a sibling bond.

At the May 2012 contested disposition hearing, the Agency withdrew its recommendation that Father be denied services under section 361.5(b)(9). Father "submitted" on the issue of the Agency's bypass recommendation and presented no evidence at the hearing.<sup>3</sup> Mother presented evidence contesting the recommendation that she be denied services. Father participated in the hearing only with respect to his mother's request for relative placement, which he supported and both Mother and the Agency opposed. The only comment made during closing arguments about bypass for Father was the Agency's comment that "there's really not been any evidence with regard to father who appeared to probably be incarcerated for quite some time." Father expressly waived formal reading of the court's findings and recommendations. A hearing under section 366.26 to terminate parental rights and to determine a permanent placement for Isabella was scheduled for September 19, 2012. Both parents filed a notice of intent to file a writ petition. Mother failed to file a petition and is not a party to this proceeding.

## **II. DISCUSSION**

Father argues there was insufficient evidence to support the trial court's denial of reunification services pursuant to sections 361.5(b)(9) or 361.5(e)(1). We affirm the court's bypass order.

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<sup>3</sup> As the Agency notes, Father asked no questions of the social worker at the hearing on either direct or cross-examination.

As a preliminary matter, the Agency argues Father forfeited or waived any challenge to the bypass order because he “submitted” at the disposition hearing without offering evidence or argument on the issue. We disagree. Although a party who submits on an agency’s *recommendation* for disposition essentially endorses the recommendation and thereby waives any right to challenge it, a party who submits on the *record* simply “acquiesces as to the state of the evidence yet preserves the right to challenge it as insufficient to support a particular legal conclusion.” (*In re Richard K.* (1994) 25 Cal.App.4th 580, 589–590.) Here, Father simply “submitted on that issue, your Honor, the bypass.” At the February 2012 hearing, he made clear that he was contesting the bypass recommendation. The Agency appeared to understand his submission as on the record and not on the recommendation. In closing argument at the bypass hearing, the Agency’s counsel did not state that Father had agreed to the bypass recommendation; rather, it noted that no evidence had been presented on the issue at the hearing and then reiterated the basis for its bypass recommendation, that Father likely would be incarcerated for a long time. We conclude Father’s submission is most reasonably construed as a submission on the record, not a submission on the Agency’s recommendation. Therefore, the sufficiency of the evidence issue is not forfeited or waived.

Although Father argues the bypass order was not supported by section 361.5(b)(9), that issue is irrelevant because the Agency withdrew its recommendation for bypass under section 361.5(b)(9) and the court’s order was clearly premised on section 361.5(e)(1). Father claims that the record is “bereft of clear and convincing evidence that the alleged bypass provisions of [section 361.5(e)(1)] apply to [Father].

We have no difficulty in concluding that substantial evidence supports the court’s bypass order under section 361.5(e)(1).<sup>4</sup> “In juvenile cases, as in other areas of the law,

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<sup>4</sup> Father erroneously contends that the juvenile court failed to make required findings of detriment to Isabella in the order denying reunification services. The finding of detriment to the minor are set forth in the court’s written order. As noted *infra*, Father

the power of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination as to whether or not there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact. All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the verdict, if possible. Where there is more than one inference which can reasonably be deduced from the facts, the appellate court is without power to substitute its deductions for those of the trier of fact. [Citation.]” (*In re Katrina C.* (1988) 201 Cal.App.3d 540, 547.)

Section 361.5(e)(1) provides in relevant part: “If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered . . . , the likelihood of the parent’s discharge from incarceration or institutionalization within the reunification time limitations described in subdivision (a), and any other appropriate factors. . . . Reunification services are subject to the applicable time limitations imposed in subdivision (a).”

Here, Isabella was just over one year old at the time of the May 2012 disposition hearing. Father had not lived with Isabella since August 2011, and he had not even seen her since September 2011, when she was only six months old. Indeed, he was enjoined from seeing her through August 2014 by court order. There was no evidence that Isabella had a strong bond with her Father, and a more than reasonable inference is that she did not. Moreover, evidence of Father’s prior domestic violence and Mother’s testimony that she had been attacked by persons associated with Father’s gang (possibly with Father’s mother’s involvement) supported an inference that Father had ongoing violent

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waived reading of the findings on the record, and the court adopted the findings of the Disposition Report “as written.”

proclivities and associations that could directly or indirectly expose Isabella to violence should he remain involved in her life.

Additionally, our legislature has recognized that time is of the essence in establishing permanence for children under three years of age. (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 846–847.) Because of Isabella’s young age, the presumptive time limit on reunification services was six months, and the outer time limit absent exceptional circumstances was 12 months. (See § 361.5, subd. (a)(1)(B).) Based on uncontested information provided to by the district attorney’s office, Father was incarcerated on charges of gang-related homicide, the trial for which would not begin until 2013 at the earliest, and for which he faced a sentence of at least 25 years if convicted. As the Agency’s disposition report noted, “There has been little degree of parent-child bonding to consider and the nature of his crime suggests that the process by which he can mitigate the charges against him will far exceed 6 months at minimum.” Thus, it was extremely unlikely if not entirely impossible that Father would be able to reunify with Isabella within the statutory time provided.

In sum, the court could reasonably find by clear and convincing evidence that granting reunification services to Father would be detrimental to Isabella because their parent-child bond was not strong, associating with Father tended to expose Isabella to violence, and reunification was virtually impossible. Based on this detriment finding, the court properly denied Father reunification services under section 361.5(e)(1).

### **III. DISPOSITION**

The writ petition is denied on the merits. The request for a stay is also denied. Because the section 366.26 hearing is set for September 19, 2012, our decision is final as to this court immediately. (Cal. Rules of Court, rules 8.452(i), 8.490(b)(3).)

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Bruiniers, J.

We concur:

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Jones, P. J.

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Needham, J.

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