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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re NICOLE M., a Person Coming Under
the Juvenile Court Law.

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Plaintiff and Appellant,

v.

NICOLE M.,
Respondent.

A141874

(Alameda County
Super. Ct. No. HJ11017327)

This appeal concerns an order made by the Alameda County Juvenile Court which has the effect of directing the Alameda County Social Services Agency (Agency) to pay for non-minor dependent Nicole M. to stay at a residential mental health treatment facility. The Agency contends that the order must be reversed for a number of reasons, primarily because the facility did not qualify as a placement option for purposes of the Aid to Families with Dependent Children—Foster Care program. (Welf. & Inst. Code, § 11400 et seq.¹ (AFDC-FC)). This contention is entwined with a number of other contentions, which address antecedent issues of constitutional and jurisdictional import, issues that prove dispositive. We conclude the order must be reversed because it is

¹ Statutory references are to the Welfare and Institutions Code unless otherwise indicated.

premature, and presumes the eligibility of the facility as a recipient of AFDC-FC funds. But that issue of eligibility is not appropriate for judicial examination until it has been authoritatively and administratively determined by the Agency. As it has not, the juvenile court should not have intervened.

BACKGROUND

In her respondent's brief, Nicole states that, as allowed by California Rules of Court, rule 8.200(a)(5), and with certain additions, she "joins in and adopts by reference the Combined Statement of Case and Facts" set out in the Agency's opening brief. As there is no genuine disagreement as to the salient details, we adopt Nicole's narrative, with certain additions of our own.

Nicole has suffered from depression and anxiety, and was eventually diagnosed with Major Depressive Disorder, for which she was prescribed antidepressants. However, she preferred to try to manage her symptoms with over-the-counter medication. From 2000 to 2011, Nicole lived with her grandparents, who were her legal guardians. In August 2011, after leaving her grandparents, and one month before her 18th birthday, Nicole was declared a dependent of the juvenile court and placed in foster care.

In May 2012, Nicole entered into a Transitional Independent Living Plan & Agreement (TILP). She was described as well-organized and motivated to create positive changes in her life, but when she experienced a traumatic event in her life, such as the passing of her grandmother, it caused her to isolate and feel depressed. She was developmentally on-target in her desire to undertake tasks independently, but showed immaturity by at times shirking responsibility.

In December 2012, Nicole was adjudged a non-minor dependent (NMD) of the Juvenile Court. By the following June, she was ready to be transferred to a Supervised Independent Living Placement (SILP); however, she chose to exit the AB 12 program²

² "AB 12" is an abbreviation for Assembly Bill 12, a commonly used shorthand description of the California Fostering Connections to Success Act enacted in 2010 (Stats. 2010, ch. 559).

after the Agency refused to approve placement with her roommate. Juvenile court jurisdiction was terminated in October 2013.

In December 2013, Nicole filed a JV-466 Request to Return to Juvenile Court Jurisdiction and Foster Care and checked the box indicating she was in need of an immediate placement. Shortly before doing so, however, Nicole had entered Casa de la Vida, an adult residential facility and had taken out a personal loan to pay the monthly fee.

A hearing was held on February 24, 2014 and juvenile court jurisdiction was reinstated. At that time, the subject of Nicole's placement was addressed. Nicole advised the court that she was currently residing at Casa de la Vida, but hoped to find an alternative placement. Nicole's trial counsel indicated that there was currently some confusion in the law as to whether Casa de la Vida could be approved as a SILP, and asked the court to approve the placement until the uncertainty was resolved.

Counsel for Bay Area Legal Aid informed the court that Casa de la Vida had been approved in the past as a SILP, but that some confusion as to whether it could continue to be approved had recently arisen due to incorrect information provided on the State Department of Social Services' Web site.

The court stated it wanted payment for Casa de la Vida to be made through some source other than Nicole and continued the disposition hearing to March 10, 2014 in order for the parties to resolve the issue.

For the March 10, 2014 hearing, the Agency reported that according to All County Letter No. 11-77 (ACL 11-77), a SILP placement must be a licensed foster care facility and, therefore, an adult residential treatment facility, such as Casa de la Vida, could not be approved.³ The Agency suggested that SSI benefits be used to pay the costs Nicole had already incurred during her stay.

³ During the pendency of this appeal, we granted the Agency's unopposed request to take judicial notice of this document. A SILP Placement is described on pages six and seven as follows: "The SILP is an entirely new and flexible placement for foster care that was created for NMDs . . . [¶] The NMDs are responsible for finding their own SILP

Although Nicole had applied for SSI benefits, it was assumed that her application would be denied. The court indicated the “cruel irony” that Nicole was well enough that she did not qualify for SSI, yet she still needed her mental health issues treated, but there was no one to pay for it.

At the March 10, 2014 hearing, the parties again debated the issue of whether Casa de la Vida could be approved as a SILP placement. County Counsel’s position was that State and Federal regulations require a NMD to be placed in a foster care facility in order to receive extended foster care funds, and because Casa de la Vida is an adult mental, not a foster care, facility, it was not a placement option under section 11402. Nicole’s counsel argued that, according to 42 U.S.C. section 672, a SILP did not have to meet foster care licensing requirements, and that ACL 11-77 gave the court authority to order a SILP at Casa de la Vida. Bay Area Legal Services advised that it had been in communication with the author of ACL 11-77, who agreed there was no bar to utilizing an adult mental health facility as a SILP. Federal law was structured to give maximum flexibility for a SILP to be approved for Title IV-E funding.

The court then indicated it needed to read ACL 11-77 before making its decision, noticing further that it was sensitive to the fact that Nicole was already hundreds of dollars in debt to Casa de la Vida and needed to get her mental health issues treated. In

units; this is not a typical placement where the county places the individual in a home or facility that has already been designated as a licensed or approved placement facility. The NMDs may find an apartment close to school or work, or they may rent a room from a friend. Although the county does not ‘find’ the placement, it *must still be approved by the county*. To help ensure the safety of NMDs who are living in a SILP, a readiness assessment and *approval process for the SILP location is required* for these placements.” (Italics added.) On page nine, under the heading “Approving a SILP Unit,” there is the following: “The SILP Inspection checklist (SOC 157B) is required to be completed . . . *prior to approving a SILP unit*. The SILPs need to meet basic health and safety standards. Counties will approve a SILP unit for a NMD based on SOC 157B which is completed during a walkthrough of the site with the NMD.” (Italics added.) And on page ten: “The SILP Approval and Placement form (SOC 157A) with the attached SOC 157B is sent by the approving case managers to the Eligibility Workers for authorizing the payment and designating the payee. The NMD may be the payee . . . , but the NMD also has the option to request the check be sent to another party, such as the landlord.”

response to the Agency's claim that it did not have a SILP placement that would provide Nicole with the level of care she needed, the court directed the Agency to continue looking, and continued the hearing to March 18, 2014.

At the March 18 hearing the parties again debated the issue of whether Casa de la Vida could be approved as a SILP and whether the location had to meet licensing requirements. Counsel for Nicole and for East Bay Legal Services pointed out that the mental health facility was not the placement, the SILP was the placement, and a SILP is never licensed by the State. The court indicated it needed more information on Casa de la Vida before making its decision, and continued the matter to March 28.

Nicole was not present at the hearing and the court was informed that she had recently been accepted into Rising Oaks, a facility which accepts NMDs with mental health issues. Counsel for the Agency advised the court that Casa de la Vida was currently not approved by either the Agency or the state. The court indicated it would postpone making a decision until it was advised which location (Casa de la Vida or Rising Oaks) Nicole preferred. On April 4, the court entered its minute order, which reads as follows: "The permanent plan of a supervised independent living plan (SILP) with Casa de la Vida is approved and is so ordered. [¶] The Court directs the Agency to pay for the non-minor dependent's placement, including arrearages." The court also denied the Agency's motion for reconsideration and its request for a stay.

On May 16, the Agency filed a timely notice of appeal from the amended order.⁴

⁴ The Agency's notice was filed on May 16. Though the front of the Judicial Council form notice states that "Rule 8.406 says that to appeal from an order or judgment, you must file a written notice of appeal within **60** days after rendition of the judgment or the making of the order being appealed," counsel for the Agency purported to appeal from orders far older than 60 days, i.e., orders dated "5/1/14, 3/28/14, 3/18/14, 3/10/14, 2/24/14, 1/6/14, 10/21/13." However, the Agency states in its opening brief that it "seeks relief from the March 28, 2014 [order] (and as amended on April 1 [sic], 2014, without hearing) by Respondent juvenile court directing the Agency (1) to permanently place the non-minor dependent . . . at Casa de la Vida and (2) to pay for said placement including arrearages. The Agency also seeks relief from the May 1, 2014 order . . . denying [the Agency's] Motion for Reconsideration of the previous orders." The Agency's motion for reconsideration was made pursuant to Code of Civil Procedure

REVIEW

A recent decision by our colleagues in Division Five provides the beginning of our analysis.

“Agency’s appeal raises purely legal issues based on undisputed facts, making our standard of review *de novo*. (*In re Darlene T.* (2008) 163 Cal.App.4th 929, 937 (*Darlene T.*)) Though the facts on which the arguments are based are relatively straightforward, the underlying statutory scheme is not.

“By way of background, the federal government offers financial support to foster care providers by making block grants to the states through the AFDC–FC program. (42 U.S.C. §§ 622(a), 670.) California receives AFDC–FC block grants, supplements the federal grants with state funds, and distributes the money through the State Department of Social Services and county social services agencies. (§ 11460;)

“Due to concerns about youths ‘aging out’ of foster care before gaining the skills necessary to become productive members of society, the federal government in 2008 enacted the Fostering Connections to Success and Increasing Adoptions Act (Pub.L. No. 110–351), which allows certain youth in foster care to continue receiving assistance payments after turning 18 and requires that states implementing its programs provide assistance to youths before they age out of foster care. [Citation.] Effective January 1, 2012, and consistent with federal law, our state Legislature enacted the California Fostering Connections to Success Act [citations].

section 1008, and this court was among the first to conclude that the denial of such a motion is not appealable. (*Crotty v. Trader* (1996) 50 Cal.App.4th 765, 771.) Moreover, effective January 1, 2012, that statute was amended to expressly prohibit appeal from such orders. (Code Civ. Proc., § 1008, subd. (g).) Because the amended order of May 1 substantially modified the April order by adding the language obligating the Agency to pay, only the former is appealable. (See *Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222 [when amended judgment results in a substantial modification of a previous judgment, the amended judgment supersedes the original and becomes the one final appealable judgment]; *CC-California Plaza Associates v. Paller & Goldstein* (1996) 51 Cal.App.4th 1042, 1048–1049 [same].) This is the only appealable order within the 60-day-period which the Agency actually contests. Therefore, the Agency’s purported appeal from the other orders will be dismissed.

“The federal and state AFDC–FC statutes and the benefits they provide are complementary but not coextensive. For example, children placed under a guardianship rather than in foster care are not eligible for federal funds [citation], but under California law, a minor who is placed in the home of a nonrelated legal guardian is eligible for state AFDC–FC. (§ 11402, subd. (d);) Regardless of the state’s ability to receive reimbursement from federal sources, social services agencies are obligated to work with eligible persons to help them receive the aid (state or federal) to which they are entitled. (§ 10500.)

“There are two categories of nonminors who may be eligible for extended AFDC–FC payments under state law: ‘nonminor dependents’ and ‘nonminor former dependents.’ A nonminor dependent is defined as ‘a foster child . . . who is a current dependent child or ward of the juvenile court . . . who satisfies all of the following criteria: [¶] (1) He or she has attained 18 years of age while under an order of foster care placement by the juvenile court, and is not more than 19 years of age on or after January 1, 2012 [¶] (2) He or she is in foster care under the placement and care responsibility of the county welfare department [¶] (3) He or she is participating in a transitional independent living case plan . . . as described in Section 11403.” (§ 11400, subd. (v);) Nonminor dependents who satisfy at least one of five educational and vocational conditions listed in section 11403, subdivision (b) are eligible to receive financial support until they reach 19, 20 or 21 years of age. [Citation.] An individual who was under the juvenile court’s jurisdiction as of January 1, 2012, and whose case was subsequently dismissed may file a petition under section 388, subdivision (e) seeking to reenter foster care and become a nonminor dependent for the purpose of receiving extended financial assistance.

“A nonminor *former* dependent ‘means, on and after January 1, 2012, either of the following: [¶] (1) A nonminor who reached 18 years of age while subject to an order for foster care placement, and for whom dependency . . . jurisdiction has been terminated, and who is still under the general jurisdiction of the court. [¶] (2) A nonminor who is over 18 years of age and, while a minor, was a dependent child . . . of the juvenile court

when the guardianship was established pursuant to Section 360 or 366.26 . . . and the juvenile court dependency . . . was dismissed following the establishment of the guardianship.” (§ 11400, subd. (aa).) A nonminor former dependent who was the subject of a guardianship cannot reenter foster care as a nonminor dependent under current law (§ 11403, subd. (c)), but may be entitled to extended AFDC–FC payments under section 11405, subdivision (e).

“Section 11405, subdivision (e)(1) provides: ‘On and after January 1, 2012, a nonminor youth whose nonrelated guardianship was ordered in juvenile court pursuant to Section 360 or 366.26, and whose dependency was dismissed, shall remain eligible for AFDC–FC benefits until the youth attains 19 years of age, effective January 1, 2013, until the youth attains 20 years of age, and effective January 1, 2014, until the youth attains 21 years of age, provided that the youth enters into a mutual agreement with the agency responsible for his or her guardianship, and the youth is meeting the conditions of eligibility, as described in paragraphs (1) to (5), inclusive, of subdivision (b) of Section 11403.’ Under section 11403, subdivision (b), ‘Effective January 1, 2012, a nonminor former dependent child . . . who is receiving AFDC–FC benefits pursuant to Section 11405 . . . shall be eligible to continue to receive aid as long as the nonminor is otherwise eligible for AFDC–FC benefits under this subdivision. This subdivision shall apply when one or more of the following conditions exist: [¶] (1) The nonminor is completing secondary education or a program leading to an equivalent credential. [¶] (2) The nonminor is enrolled in an institution which provides postsecondary or vocational education’ ” (*In re A.F.* (2013) 219 Cal.App.4th 51, 54–57, fns. omitted (*A.F.*.)

The adult minor in *A.F.* had a guardian who died. Division Five concluded that the juvenile court’s power to appoint a new guardian did not expire when the minor turned 18. (*A.F.*, *supra*, 219 Cal.App.4th 51, 57–59.) And the court continued:

“Having concluded the juvenile court had the authority to modify the order of guardianship and appoint a successor guardian for the purpose of facilitating AFDC–FC payments under section 11405, subdivision (e)(1), we consider the contents of the order actually made by the trial court: ‘1. The Court retains general jurisdiction over A.F. in

order to fulfill the purposes of her original permanency plan in accordance [with] §§ 303(a) [court retains jurisdiction over child found to be dependent until dependent turns 21] and 366.4(a). [¶] 2. Regardless of whether A.F. satisfies the definition of a “nonminor dependent,” A.F. remains eligible for AFDC–FC benefits, as the nonminor former dependent of a juvenile-court-appointed non-related legal guardian. [¶] 3. . . . A.F. has fulfilled the vocational and educational requirements under . . . § 11403(b) Essentially, the court found A.F. eligible for extended AFDC–FC benefits and ordered Agency to designate a substitute caregiver who could receive those benefits on A.F.’s behalf.

“The problem with the court’s order is twofold. . . . [¶] The second defect in the court’s order is that it purports to adjudicate A.F.’s eligibility for AFDC–FC payments, a function that rests with Agency as part of the executive branch of government. (*Darlene T.*, *supra*, 163 Cal.App.4th at pp. 938–939.) The courts do not have the authority to order a social services agency to make AFDC–FC payments without an administrative determination of eligibility for those payments, and judicial review of eligibility determinations is ordinarily limited to the consideration of a petition for writ of administrative mandate of the eligibility decision. (*Id.* pp. 939–940; § 10950 et seq.) Nothing in the record suggests A.F. sought administrative review of Agency’s decision to deny her AFDC–FC benefits.” (*A.F.*, *supra*, 219 Cal.App.4th 51, 59–60.)

Division Five’s citations to pages 938 through 940 of the *Darlene T.* opinion is instructive. The Court of Appeal there stated:

“DCFS’s [the Los Angeles County Department of Children and Family Services] position that the juvenile court’s order requiring it to make retroactive AFDC-FC payments to Adela T. [the dependent’s grandmother] violated the law is based on two arguments: first, that the court’s action violated the doctrine of separation of powers, and second, that Adela T. . . . was required to exhaust her administrative remedies before the juvenile court could consider the issue.

“ . . . DCFS notes that DSS [the State Department of Social Services] is part of the executive branch of government. [Citations.] In administering and enforcing the AFDC-

FC program, DSS and DCFS exercises the powers given to them by the Legislature. The judicial branch of the government, therefore, has no authority to interfere with the performance of these duties, except as allowed through statute and by the administrative process. [Citations.]

“In addition, DCFS explains that title 42 of the United States Code, section 671(a)(12), requires a state plan that provides for ‘an opportunity for a fair hearing before the State agency to any individual whose claim for benefits available pursuant to this part [42 U.S.C. §§ 670 et seq.] is denied or is not acted upon with reasonable promptness.’ Consistent with this federal requirement, California has adopted a system for a fair hearing, codified at Welfare & Institutions Code section 10950 et seq. and Government Code section 11500 et seq. Welfare and Institutions Code section 10950 specifically provides a request for a hearing, upon the filing of a request with DSS, if an application for benefits is made and denied.

“The hearing afforded by Welfare and Institutions Code section 10950 is conducted by an administrative law judge or the director of DSS. (Welf. & Inst. Code, §§ 10055; 10953.) If the applicant receives an adverse decision, he or she may request a rehearing within 30 days of the decision. The director is required to grant or deny the request for rehearing within 15 days; the failure to act is deemed a denial. (Welf. & Inst. Code, § 10960.)

“Judicial review of the director’s final decision is governed by Welfare and Institutions Code section 10962, which allows applicants to file a writ petition with the superior court requesting review of the proceedings. The Supreme Court has held that when a hearing under Welfare and Institutions Code section 10950 results in a decision adverse to the applicant, the exclusive remedy is to file an action for writ of administrative mandate in the superior court pursuant to Code of Civil Procedure section 1094.5. (*Green v. Obledo* (1981) 29 Cal.3d 126, 143, fn. 12.) DCFS cites *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 293, for the proposition that ‘exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts.’ DCFS further cites *In re Joshua S.* (2007) 41 Cal.4th 261, (*Joshua S.*), as authority for its

position that a juvenile court does not have the authority to order DCFS to make AFDC–FC payments without an administrative determination of eligibility.” (*Darlene T.*, *supra*, 163 Cal.App.4th 929, 938–939.)

Joshua S. was not just a make-weight citation by the *Darlene T.* court: “[R]espondents argue that a juvenile court has the right to liberally construe the law to carry out its purposes, including procuring for the children the custody, care and discipline ‘as nearly as possible equivalent to that which should have been given by his or her parents.’ (Welf. & Inst. Code, § 202, subd. (a).) Further, respondents argue, the Legislature intended for the juvenile courts to have the power to make any orders necessary to ensure the well-being of any child removed from his or her home because of abuse or neglect. In support of this position, respondents cite Welfare & Institutions Code section 362, subdivision (a), which provides that ‘[w]hen a child is adjudged a dependent child of the court . . . the court may make any and all reasonable orders for the care, supervision, conduct, maintenance, and support of the child.’ [¶] This argument was specifically rejected in *Joshua S.*, *supra*, 41 Cal.4th at page 273, where the Supreme Court held that the Court of Appeal ‘erred in finding that section 362, subdivision (a), gives the juvenile court “authority to order the department to make [AFDC–FC] payments” without an *administrative* determination of the children’s eligibility for those payments.’ (Original italics.)” (*Darlene T.*, *supra*, 163 Cal.App.4th 929, 941.)

Although not quoted by the *Darlene T.* court, what the Supreme Court in *Joshua S.* went on to say is also relevant: “[Section 362] also provides that a juvenile court ‘has no authority to order services *unless it has been determined through the administrative process of an agency* that has been joined as a party, that the child is eligible for those services.’ (§ 362, subd. (a), italics added.) The plain language of this provision establishes that a juvenile court may not order the Department [of Social Services] actually to make AFDC-FC payments—i.e., to provide services—unless the administrative process is invoked *and* it is determined through that process that the children are eligible for AFDC-FC payments.” (*Joshua S.*, *supra*, 41 Cal.4th 261, 274.)

There does not appear to be any dispute that Nicole herself comes within the scope of the AFDC-FC program. But the issue here is not her eligibility, but that of the institution where she resided without Agency approval. Nicole may be able to choose her own residence, but she does not have the unilateral power to make the Agency pay for it. (See fn. 3, *ante*.) The Agency argues that “the juvenile court did not have the authority to order a social services agency to adjudicate eligibility for AFDC-FC payments by making a placement at Casa de la Vida.” The Agency reasons that in order to be eligible for AFDC-PC, a nonminor dependent must be placed in a statutorily specified type of home. (§ 11402.)⁵ The Agency submits that “Nicole failed to exhaust her administrative remedies” under section 10950 to challenge the Agency’s determination that Casa de la Vida did not qualify as a statutorily specified type of home.

By determining that AFDC-FC benefits should be paid by the Agency to Casa de la Vida, and that the Agency would be financially responsible for any arrearages incurred by Nicole, the court was in plain effect deciding that Casa de la Vida was a qualified “home” under section 11402. That implicit decision violated the separation of powers by trespassing upon the joint executive domain of the Agency and the State Department of Social Services. This was one of the points decided in *Darlene T.*, where the Court of Appeal held that the issue of the eligibility of Adela T. to receive AFDC-FC payments remained administratively unresolved. Another point decided in *Darlene T.* was that a

⁵ In an addendum reported dated March 10, 2014, the Agency explained that it “was advised that adult residential treatment facilities & adult board and care facilities are not allowable placements for Non Minor Dependents. The issue being the placement must be a licensed foster care facility. The agency has not placed at Casa de la Vida, even as a SILP because of this reason. [¶] According to ACL-11-77 [see fn. 3, *ante*], Non Minor Dependents are not ready for a SILP placement if they have indications that the Non Minor Dependent is unable to care for their person without assistance due to a serious medical or mental health condition. Because Casa de la Vida is licensed as an Adult Residential Treatment Facility, it is not an eligible placement for extended foster care funds. State and Federal AFDC-FC payments require that a Non Minor Dependent be placed in an eligible foster care facility, either approved or licensed, as defined in W&IC 11402. An adult residential facility would not be considered an eligible placement option.”

juvenile court was likewise unable to order a non-minor dependent's arrearages to be paid by a county social services agency while the issue of eligibility remained unresolved at the administrative level.

The status of Casa de la Vida is no different. While it seems clear that the Agency has not accepted Casa de la Vida as AFDC-FC qualified, it appears equally clear—and there is no representation to the contrary by Nicole—that Nicole has not pursued an exhaustive administrative challenge to the Agency's decision. Until then, *A.F.*, *Darlene T.*, and *Joshua S.* leave no doubt that the juvenile court, although doubtless with the best motives, was powerless to short-circuit the established administrative and legal processes. Contrary to Nicole's belief, the broad language of section 362 provides no warrant for judicial action in these circumstances. (See *Joshua S.*, *supra*, 41 Cal.4th 261, 273–274.)

DISPOSITION

The amended order of April 4, 2014 is reversed. The purported appeals from all other orders are dismissed. (See fn. 4, *ante.*)

Richman, J.

We concur:

Kline, P.J.

Miller, J.