

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

FIRST APPELLATE DISTRICT

DIVISION THREE

In re S.T. et al., Persons Coming Under the
Juvenile Court Law.

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Plaintiff and Respondent,

v.

TIFFANY W.,

Defendant and Appellant.

A141921

(Alameda County
Super. Ct. Nos. OJ08010386,
OJ09013828)

Tiffany W., the mother of S.T., M.T. and T.W., appeals from orders terminating their legal guardianship, denying her request for reinstatement of reunification services, and referring the case for a permanency planning hearing under Welfare and Institutions Code section 366.26.¹ She contends the juvenile court abused its discretion when it denied her request for reinstatement of reunification services pursuant to section 366.3, subdivision (f). We conclude that Tiffany’s failure to file a timely petition for writ review of the referral order forfeited her claim, and that she has not shown that her failure to challenge the order by writ resulted from ineffective assistance of counsel. Accordingly, we dismiss the appeal.

¹Further statutory citations are to the Welfare and Institutions Code.

BACKGROUND

In *In re M.T./Alameda County Social Services Agency v. S.T.* (Aug. 9, 2011, A129097), this court affirmed an order establishing dependency jurisdiction over the children. We subsequently denied Tiffany's petition to vacate an order terminating reunification services and setting a permanent planning hearing under section 366.26. (*Tiffany W. v. Superior Court of Alameda* (Oct. 16, 2012, A135384) [nonpub. opn.].) Our background discussion in those opinions is incorporated here by reference.

The section 366.26 hearing was held between August 14 and November 8, 2012. Although the original goal was adoption, by the November 8, 2012 hearing it had changed to legal guardianship due to the caregiver's growing reservations about adopting. The children were doing well in their placement with R.B., which had been stable for about two years. However, "[a]fter much consideration of her family situation, age, and concern about the outcomes of the children's behaviors, the caregiver has decided that adoption is not right for her. Although her commitment to [the children] has remained consistent, her adult children [had] not been supportive of the plan of adoption, and the caregiver has no designated backup parent should something happen to her. The caregiver has expressed her [anxiety][concerns] about the children's future behaviors as they get older, and her ability to respond to them. She is concerned about how the children, particularly [S.T.], might regard her if she were to adopt them, and 'take them away from their mother.' She wants to maintain the relationship with [Tiffany] and is concerned that adoption would change that and impact the children's sibling relationships." On the other hand, legal guardianship was thought to provide the children with permanence with a safe and appropriate primary parent, while preserving the sibling relationship between all three children and a "harmonious and supportive relationship" shared by Tiffany and the caregiver.

The court ordered a permanent plan of legal guardianship with R.B. as the children's legal guardian. Unfortunately, by April 2013, R.B. had concluded she could

no longer care for both of the children due to their challenging behavioral issues.² The Agency recommended that they remain in R.B.'s care until it could locate an appropriate adoptive home. An addendum report described incidents of sexualized behavior between the minors. Tiffany requested a contested review hearing on visitation.

The contested review held on June 6 and July 30, 2013, focused primarily on three topics: the reports of the children's sexualized behavior both in R.B.'s home and during at least one overnight visit with Tiffany, whether Tiffany was being afforded and participating in the prescribed visitation, and the children's behavior after their visits. Tiffany objected to the Agency's recommendation to set a new section 366.26 hearing with the goal of terminating parental rights and adoption.

The children were removed from R.B.'s home on August 2, 2013. After an initial respite placement fell through due, again, to the children's behavior problems, they were placed with a couple who were willing to care for them until the Agency found a good home. By early September the children were adjusting to their new placement, engaging in better behavior and exhibiting fewer outbursts and tantrums. But, efforts to find an adoptive home proved fruitless because of the children's needs. The Agency determined that their mental health and behavior would have to stabilize before an adoptive home could be found.

On October 10, 2013, the court sustained a section 387 petition alleging that R.B. could no longer care for the children. Tiffany filed a request for additional reunification services. In December, 2013, the Agency opposed her request and recommended that the children remain with their current foster parents with a permanent plan of adoption. The children continued to struggle with behavior problems at home and in school. Tiffany was visiting them fairly consistently. The visits were going well and Tiffany was commended for her efforts and progress in obtaining employment.

Review hearings were held in January, March and April 2014. The children continued to exhibit significant behavior problems including sexual activities by S.T. at

²R.B. was willing to care for M.T., but the Alameda County Social Services Agency (the Agency) determined that the siblings should not be separated.

school. Child welfare worker Emilissa P. testified that the children needed stability and permanence, that they were in a “great” placement with Mr. and Mrs. P., that she did not believe Tiffany should receive further reunification services, and that any additional services the court might order would be the same services Tiffany had previously been afforded. Tiffany was working full time and having two hour visits with S.T. and M.T. She had a stable three-bedroom Section 8 apartment. If the children were returned to her care, M.T. would sleep with her and S.T. would have his own room. Tiffany testified that she had grown up since the children were removed from her in 2008, that she had secured safe housing for the children, and that she would monitor them to prevent sexually inappropriate behavior. She would ensure that they attended school and therapy, and would quit her job if necessary for their welfare.

On April 10, 2014, the court denied Tiffany’s request for additional services. It ruled: “I have considered [Tiffany] as a potential custodian of the children and do not believe that return of these two children to her is appropriate at this time. [¶] On this record, [Tiffany] has not sufficiently established by a preponderance of the evidence that reunification is in the best—is the best alternative for these children, and similarly I do not find that [Tiffany] has met her burden to demonstrate that further efforts at reunification are the best alternative for these children. Thus the presumption that continued care serves the children’s best interest has not, in my view, been successfully rebutted and accordingly I do not order the Social Services Agency to provide family reunification, further family reunification or family maintenance services.” The court terminated the legal guardianship, committed S.T. and M.T. to the Agency for placement, and set a section 366.26 hearing for July 31, 2014.

The court admonished the parties that anyone seeking to preserve the right to appeal from its order must first seek a writ and must file a notice of intent to seek a writ with the clerk within seven days. On May 22, 43 days after the order setting the section 366.26 hearing, Tiffany filed a notice of this appeal.

DISCUSSION

I. Section 366.3

If a juvenile court orders a permanent plan of legal guardianship pursuant to section 366.26, it must retain jurisdiction over the child and hold a status review hearing every six months. (§ 366.3, subd. (a).) Pursuant to section 366.3, subdivision (f), “[u]nless their parental rights have been permanently terminated, the parent or parents of the child are entitled to receive notice of, and participate in, those hearings. It shall be presumed that continued care is in the best interests of the child, *unless the parent or parents prove, by a preponderance of the evidence, that further efforts at reunification are the best alternative for the child. In those cases, the court may order that further reunification services to return the child to a safe home environment be provided to the parent or parents up to a period of six months. . . .*” (Italics added.)

II. Analysis

Tiffany asserts that she proved further reunification services were the best alternative for the children, and, therefore, that the court abused its discretion when it denied her request. In light of her failure to file a timely writ petition, she maintains she must be allowed to challenge the ruling in this appeal due to her trial attorney’s allegedly ineffective assistance in failing to timely notice her intention to file a writ petition. (See §366.26, subds. (l)(1), (l)(2); Cal. Rules of Court, rule 8.450(e)(1)(A).) We disagree. “(1) An order by the court that a hearing pursuant to this section be held is not appealable at any time unless all of the following apply: [¶] (A) A petition for extraordinary writ review was filed in a timely manner. [¶] . . . (2) Failure to file a petition for extraordinary writ review within the period specified by rule . . . shall preclude subsequent review by appeal of the findings and orders made pursuant to this section.” (§ 366.26, subd. (l).) Tiffany has not shown that her counsel rendered constitutionally deficient service, so we are barred by statute from addressing the merits of her claim in this appeal. (§ 366.26, subd. (l)(2).)

The Court of Appeal rejected an almost identical claim in *In re Arturo A.* (1992) 8 Cal.App.4th 229, 242–243. In an appeal from a section 366.26 judgment, the mother

asserted that her attorney rendered ineffective assistance in failing to file a timely writ petition to challenge orders made at the section 366.22 hearing. (*Id.* at p. 237.) Electing to review the appeal as if it were a writ petition, the appellate court concluded the mother's claim was deficient. It explained:

“The establishment of ineffective assistance of counsel most commonly requires a presentation which goes beyond the record of the trial. It is of course possible that the incompetency of counsel will be so gross as to jump out of the record and require no supplemental explanation. Such is not the usual case, however. Action taken or not taken by counsel at a trial is typically motivated by considerations not reflected in the record. It is for this reason that writ review of claims of ineffective assistance of counsel is the preferred review procedure. Evidence of the reasons for counsel's tactics, and evidence of the standard of legal practice in the community as to a specific tactic, can be presented by declarations or other evidence filed with the writ petition. [Citation.] [¶] In appellant's paperwork we are favored by no such evidence. The alleged error of counsel . . . was the failure to initiate a timely writ petition to challenge errors made at the 366.22 hearing. We are all aware, however, of the various reasons why appellate review is not sought as to specific orders. Many grounds might exist in this case, theoretically, for electing not to file a writ petition. The most common of these would be the lack of authority from the client to do so. The burden is on the writ petitioner to demonstrate conduct falling below the standard of care of the legal practitioner. This burden is not met because we have no evidence in the record suggesting the reason for counsel's failure to file a review petition. We cannot assume that the decision was the result of negligence, when it could well have been based upon some practical or tactical decision governed by client guidance.” (*In re Arturo A.*, *supra*, 8 Cal.App.4th at p. 243; see Cal. Rules of Court, rule 8.450(e)(3) [notice of intent to file writ must be authorized by the party].)

While an ineffective assistance claim may be reviewed on direct appeal “when there is no satisfactory explanation for trial counsel's act or failure to act” (*In re N.M.* (2008) 161 Cal.App.4th 253, 270; *In re Arturo A.*, *supra*, 8 Cal.App.4th at p. 243), this,

like *Arturo A.*, is not such a case. One obvious possible explanation for why Tiffany's counsel did not file a writ petition is that Tiffany did not timely supply the required authorization to do so. (See *In re Cathina W.* (1998) 68 Cal.App.4th 716, 724 & fn. 8 [parent must sign notice of intent to file a writ petition unless good cause is shown, and a writ petition signed by the attorney must be dismissed if the parent did not expressly authorize its filing].) We are aware of and respect Tiffany's longstanding participation in these proceedings and her desire to have her younger children returned to her care. But we cannot speculate on what was in her mind during the week following the section 366.3 hearing. Perhaps she had decided to stop fighting what must have felt like a losing battle. Perhaps she had concerns that further dependency proceedings could threaten her custody of her oldest child, T.W. Perhaps not. But, in the absence of evidence to the contrary, we cannot conclude that she authorized her attorney to pursue a writ from the section 366.3 within the time permitted by statute. (*In re Arturo A.*, *supra*, 8 Cal.App.4th at p. 243.) Therefore, she has not shown that her trial counsel provided ineffective assistance by not filing a writ petition.

Although not necessary to the resolution of this appeal, we also observe that Tiffany has not shown a reasonable probability a timely-filed writ petition would have been granted. (See *In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1711 [parent must show both defective representation and reasonable probability of a different outcome to prevail on ineffective assistance claim].) The question such a petition would have presented is whether the record supported the court's rejection of her claim that giving her six more months of reunification services was the best alternative for the children. (§ 366.3, subd. (f); see generally *James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1021 [substantial evidence standard of review].) Unfortunately, where Tiffany does not simply ignore the evidence that supports the court's ruling, she invites us to reweigh it and to second-guess matters of witness credibility. Such arguments have no place in appellate review for substantial evidence. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 762; *James B. v. Superior Court*, *supra*, 35 Cal.App.4th at p. 1021.)

Our careful independent review of the record confirms that the challenged order was

supported by substantial evidence and, hence, would have survived a timely challenge by extraordinary writ.

DISPOSITION

The appeal is dismissed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.