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

MARINA F. et al.,
Petitioners,

v.

THE SUPERIOR COURT OF ALAMEDA
COUNTY,

Respondent;

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Real Party in Interest.

A147266

(Alameda County
Super. Ct. No. SJ14-023570)

In this consolidated juvenile writ proceeding, Marina F. (mother) and L.C. (father) seek extraordinary relief from the juvenile court order terminating mother's reunification services with respect to their young son, Andrew C. (born August 2014), and setting a permanency planning hearing pursuant to section 366.26 of the Welfare and Institutions Code.¹ Specifically, father argues at length: (1) that the jurisdictional findings in this case were not supported by substantial evidence; and (2) that the juvenile court therefore erred in denying him reunification services pursuant to subdivisions (b)(5) and (b)(6) of section 361.5. Mother joins in father's arguments, except to the extent that

¹ All statutory references are to the Welfare and Institutions Code unless otherwise specified. All rule references are to the California Rules of Court.

they suggest that she might have been the perpetrator of Andrew’s injuries. In addition, she claims that locking father out of the reunification process resulted in a failure to provide *her* with reasonable reunification services. We reject the parents’ contentions—the majority of which are not properly before us—and deny their petitions.

I. BACKGROUND

On September 23, 2014, the Alameda County Social Services Agency (Agency) filed a juvenile dependency petition pursuant to subdivisions (a), (b), (e), and (j) of section 300, alleging that one-month-old Andrew and his five-year-old half sibling, M.S., were at substantial risk of harm due to certain serious injuries that had been inflicted non-accidentally on Andrew.² Specifically, Andrew (minor) was admitted to the hospital on September 20, 2014, with injuries including a skull fracture, bi-lateral hematomas on both sides of the brain, diffused retinal hemorrhage in his right eye, and multiple old fractures of the ribs. According to Dr. Yered, one of the minor’s treating physicians, an MRI conducted on September 22, 2014, showed “devastating and irreversible” injuries to Andrew’s brain caused by “ ‘a lot of force.’ ” Further, medical opinion supported the conclusion that the injuries were the result of non-accidental trauma. Specifically, Dr. Kim, another treating physician, opined that the skull fracture was acute—that is, it had happened in the last 72 hours—and that Andrew’s injuries were of a type usually caused by blunt force trauma or shaking.

The parents reported that the minor was not left alone or around other caretakers and that they did not know how the injuries occurred. They did state that they noticed a bump on Andrew’s head on September 18, and a rash, bruising behind the minor’s ear, and some missing hair the next morning. The parents emailed a photograph of the minor’s head to Andrew’s pediatrician, but did not receive a reply. Mother finally

² M.S. was subsequently placed with her father, Jessie S., and is not involved in these writ proceedings. The juvenile court found no safety issues in her placement and thus indicated at the April 24, 2015, dispositional hearing its intention to dismiss her dependency once appropriate custody and visitation orders were developed. M.S.’s dependency was ultimately dismissed with joint legal custody, sole physical custody to M.S.’s father, and related visitation orders on May 27, 2015.

brought Andrew to the hospital on September 20. The minor was taken into protective custody while hospitalized on September 21, 2014. He was formally detained at the detention hearing on September 24, 2014, and ultimately placed with the maternal great-grandparents.

On that same date, September 24, mother informed the Agency that she had separated from father and was living elsewhere.³ On September 26, 2014, mother further reported to the Agency that father had confessed to her that he physically abused Andrew, apparently by expressing feelings of remorse about “ ‘what happened’ ” to the minor. In addition, the previous day—September 25, 2014—mother cooperated with the police in making and recording a telephone call to father in an attempt to get him to elaborate on the abuse incident (Pretext Phone Call).⁴

During the Pretext Phone Call, father told mother: “You have to decide whether or not you think you can forgive me. . . . [Y]ou have to decide whether or not I’m an evil person at heart or whether or not people make mistakes and those mistakes are forgivable.” He elaborated: “I think I need to fully explain to you what happened and— and show you what I think happened and show you what I did and show you why I did what I did and . . . the pieces of the puzzle will all come together and everything will make sense and you’ll say okay, now I see why that happened.” Indeed, father offered repeatedly to “demonstrate what happened,” even offering to show mother “the exact motion” that caused Andrew’s injuries. When mother asked whether father was sleep deprived or stressed or whether she was not helping enough, father replied: “[M]aybe it was the stress, maybe it was his crying, maybe it was, um, mostly the sleep deprivation.” With respect to the earlier injuries to Andrew’s ribs, in contrast, father stated: “[T]hat part I don’t understand I don’t understand how—how it was just more than once.” He

³ Mother and father are not married. Father, however, has been declared the presumed father of Andrew, and the two were cohabiting at the time of the incident.

⁴ The Agency has requested that we augment the record to include the transcript of the Pretext Phone Call, which was admitted into evidence before the juvenile court, but is not otherwise part of the record on appeal. We grant this request. (Rules 8.410(b) & 8.155(a)(1)(A).)

confirmed: “Everything else was an accident but all these multiple injuries just don’t make sense to me.” Later, father acknowledged: “I need to beg for forgiveness from you and for—from (Andrew) and then I need to pray to God for—to be forgiven. . . . I’m sorry that I didn’t protect our son.”

As a result of the Pretext Phone Call, father was arrested on September 26, 2014, for violation of Penal Code section 273d, willful injury to a child. An amended petition was filed on October 7, 2014, adding, among other things, an allegation detailing the arrest. Nevertheless, both parents continued to deny causing Andrew’s injuries. In its initial jurisdictional and dispositional report filed the next day, the Agency recommended that both parents be offered reunification services. However, the matter was continued multiple times, and in an Addendum Report filed on December 3, 2014, the Agency changed its position, recommending that both parents be denied reunification services pursuant to subdivisions (b)(5) and (b)(6) of section 361.5. Pursuant to subdivision (b)(5), bypass of reunification is permitted where the minor was brought within the jurisdiction of the juvenile court under subdivision (e) of section 300 due to the conduct of the parent.⁵ (§ 361.5, subd. (b)(5).) Subdivision (b)(6) provides for reunification bypass if the child has been adjudicated a juvenile court dependent due to the infliction of severe physical harm and “the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent.” (§ 361.5, subd. (b)(6).)

The contested jurisdictional and dispositional hearing finally began on February 6, 2015, and continued through April 24, 2015. In an Addendum Report filed on February 5, 2015, the Agency reported that mother had reconciled with father and moved back in with him. Further, she had sought an outside medical opinion and as a result—despite father’s statements during the Pretext Phone Call—had concluded that Andrew’s injuries

⁵ Section 300, subdivision (e), supports juvenile court intervention where “[t]he child is under the age of five years and has suffered severe physical abuse by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the child.”

were the result of birth trauma. She claimed that when she worked with the police to obtain father's taped confession she had done so under duress.

During the hearing, the juvenile court heard testimony from three medical experts. Dr. Barnes testified that there could be a number of explanations for Andrew's injuries, including birth trauma, vitamin D deficiency, or vascular or bone fragility disorders such as Ehlers Danlos syndrome. He could not, however, rule out child abuse as a possible cause. Moreover, Dr. Barnes testified without reviewing all of minor's medical records, other than certain select radiology reports, and without viewing images of the infant's external injuries. Dr. Hyman testified that Andrew was not a victim of child abuse. Rather, he stated that the minor could have unrelated bone problems that mimicked the effects of child abuse. Finally, Dr. Albin, a pediatric intensive care physician and child abuse expert for Kaiser, consulted on Andrew's case at the request of his attending physician and testified that nothing other than non-accidental trauma could be responsible for Andrew's " 'collection of injuries.' " In particular, she found evidence that Andrew's head trauma—an " 'acceleration-deceleration' " injury that occurs when the brain slams into the skull—was unlikely to have been caused by a fall. Moreover, Andrew's head trauma and the injury to his ribs arose from different incidents. Dr. Albin specifically addressed and rejected the idea that the rib fractures were the result of birth trauma. She also ruled out underlying bone, metabolic, or genetic disorders.

The contents of the Pretext Phone Call was also introduced into evidence. Additionally, mother testified at the hearing, attributing Andrew's injuries to birth trauma or a genetic condition. Father invoked his Fifth Amendment right against self-incrimination and so did not offer any evidence. The social worker then testified, explaining her recommendation that neither parent receive reunification services. Specifically, she stated that her recommendation changed from offering reunification to reunification bypass because the "level of cooperation" of the parents changed such that services, in her opinion, would not be likely to prevent re-abuse. The social worker believed that mother's decision to reconcile with father undermined her ability to protect Andrew without a safety plan, which mother showed no interest in developing.

At the conclusion of the hearing, the juvenile court found the allegations in the amended petition true, concluding that Andrew was a minor described by subdivisions (a), (b), and (e) of section 300. In particular, the juvenile court found Dr. Albin's testimony to be the most credible of the medical experts. In addition, the court found that father "virtually" admitted that Andrew's injuries were caused by his actions in the Pretext Phone Call and that the father's statements during that conversation demonstrated a "consciousness of guilt." It therefore concluded by clear and convincing evidence that Andrew had suffered severe physical abuse by father for purposes of subdivision (e) of section 300 and denied father reunification services. In contrast, since the court was unable to make a similar finding under subdivision (e) with respect to mother, it ordered that reunification services be provided to her. Both parents timely appealed from these jurisdictional findings and dispositional orders, and the case is currently pending before this court.

In an interim review report filed August 10, 2015, the social worker reported that mother had completed a parenting class, but was requesting a new referral for individual therapy due to scheduling issues. The social worker provided a referral to Earth Circles Counseling. Mother and father had been participating in couples counseling since the fall of 2014, however mother stated she would not sign a release so that the social worker could communicate with the therapist until she was able to discuss the matter with her attorney. Although mother stated that she was willing to do whatever was requested by the Agency to reunify with Andrew, she still believed his injuries were the result of birth trauma or a vitamin deficiency and therefore did not feel that father presented a risk to the minor. The social worker indicated the difficulties in recommending reunification under such circumstances. On October 5, 2015, mother filed a modification request under section 388, seeking a court order that the Agency refer both parents to the Hope Program for individual therapy, couples counseling, and development of a safety plan. The Agency opposed the request, noting that mother had already been referred to services designed to meet her case plan objectives, that reunification services had not been

ordered for father, and that mother's existing therapist and the social worker could assist her in the development of a safety plan.⁶

In advance of the October 2015 six month review, the Agency filed a report recommending termination of reunification services for mother and the setting of a hearing pursuant to section 366.26, so that a permanent plan of out-of-home placement could be developed for Andrew. The Agency was seeking an assessment for Andrew by the Regional Center for California's Early Intervention Program. Both parents, however, refused to consent to this referral. In addition, although the social worker told father that speaking to the couples therapist could be very helpful for the Agency if the parents wanted to reunify as a family—because there was a question about how they could provide a safe home for the minor—both parents also indicated that they would not sign releases for their couples therapist. Further, although mother had participated in an initial individual therapy appointment at Earth Circles, she told the therapist that Andrew was not a victim of abuse and that she was confident that his dependency matter would be dismissed. The social worker thereafter explained the status of the dependency action to the therapist and faxed him a copy of mother's case plan so that he would be aware of the Agency's expectations. Later, mother expressed dissatisfaction with the therapist, stating she was unable to understand him due to his accent. In response, the social worker told mother that she would assist her in requesting another clinician if necessary. The social worker reported that she was not recommending further reunification efforts with mother because, while mother had engaged in some services as well as supervised visitation, nothing had really changed since the dispositional hearing and mother had not demonstrated how she would keep Andrew safe if he was placed with her.

The matter was continued for contest such that it ultimately became both a six- and twelve-month review. In its 12-month review report, the Agency again recommended termination of mother's reunification services. The social worker reported

⁶ The juvenile court subsequently denied mother's modification request without hearing on November 9, 2015, indicating that it did not state new evidence or changed circumstances as required by statute and was not in the best interests of the minor.

that the mother's relationship with her individual therapist had broken down after a disagreement over the diagnosis he included on forms requesting continued services for mother through Medi-Cal. According to the therapist, he met with mother only three times. The first session ended early because he initially thought there was little to address given mother's description of the case. The second session was 50 minutes, and the third session ended when mother left early after ten minutes. Given the situation, the therapist felt he could no longer work with mother. As a result, the social worker requested a new therapy referral on October 5, 2015, and both the social worker and the new provider left voicemails for mother on October 13 asking her to schedule an appointment. As of November 10, 2015, however, mother had failed to contact the new therapist. When the social worker left mother a voicemail asking about this, mother responded with a message indicating that she had secured her own therapist and that her attorney would provide the Agency with the contact information.

On December 11, 2015, in advance of the combined six- and twelve-month review, father filed a petition pursuant to section 388 seeking an increase in his supervised visitation from once a week to three times per week. The petition indicated that father had completed a parenting class, four hours of anger management training, and a cardiopulmonary resuscitation (CPR) class and had been engaged in therapy since December 2014 where he learned mindful-based stress reduction techniques. The review hearing took place on December 14 and 18, 2015, and included consideration of father's visitation issues. During the hearing, the social worker made clear that reunification was a possibility for mother, even if she stayed in a relationship with father. However, the social worker felt this was an issue that mother needed to address in therapy.

Specifically: "If the child's returned to her and she's living with the father, who is the individual who harmed the child, then you need to figure out how does your relationship with the significant other, the father of the child, figure into your ability to protect the child." As long as mother refused to believe that there was a safety issue, the social worker felt that it would be extremely difficult to ensure the minor's safety in the family home. If mother had been willing at least to accept that Andrew's injuries were non-

accidental, even without identifying father as the perpetrator, the social worker felt they could have made more progress in the development of a safety plan. In addition, couples counseling could have proved “very helpful” in this case with respect to the safety issue, but the social worker had never been granted access to the provider.

Mother testified that, since reconciling with father, she had never asked him what happened to Andrew. She further indicated that her only safety plan if Andrew was returned to her would be to seek appropriate testing and treatment for the minor’s possible genetic condition. Although mother claimed, herself, to have been diagnosed with Ehlers Danlos syndrome, she refused to release her medical records to the Agency.

The juvenile court announced its decision in this matter on January 5, 2016, terminating mother’s reunification services and maintaining father’s visitation at once per week. In particular, the court noted that mother’s participation in the case plan had been minimal in that she had essentially not participated in any meaningful therapy.

Moreover, the judge further opined: “If the mother doesn’t acknowledge what happened, doesn’t know what happened, doesn’t have at least a suspicion about what happened, how can she be expected to protect the child and to keep the child safe from the father. If she doesn’t know or care about what triggered the father to cause these injuries, how can she be expected to provide the child with a safe environment. [¶] Mother’s lack of insight or acknowledgement that significant changes need to be made directly contribute to her lack of progress in resolving the issues that led to and necessitated the removal of the child. [¶] So the mother has not made significant progress in this matter. She has not demonstrated an ability to keep the child safe.”

Both father and mother filed notices of their intent to file writ petitions which were deemed timely, and the petitions themselves were filed on April 27, 2016, and May 3, 2016. (Rules 8.450(e), 8.452.) By order dated April 5, 2016, we stayed the permanency planning hearing in this matter, which was scheduled for April 28, 2016, pending resolution of these writ proceedings.

II. DISCUSSION

A. *The Jurisdictional and Dispositional Findings*

Generally speaking, challenges to the jurisdictional or dispositional orders in dependency proceedings are appealable from the dispositional order in the case. (*In re Jennifer V.* (1988) 197 Cal.App.3d 1206, 1209; see also *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150 (*Meranda P.*) [the dispositional order in a dependency proceedings is the appealable “ ‘judgment’ ”].) All post-dispositional orders are also generally directly appealable. (*Meranda P., supra*, 56 Cal.App.4th at p. 1150.) And, a parent may not generally attack “ ‘the validity of a prior appealable order for which the statutory time for filing an appeal has passed.’ ” (*In re T.G.* (2010) 188 Cal.App.4th 687, 692.)

As an exception to these general tenets, however, “[a]ll orders issued at a hearing in which a section 366.26 hearing is ordered are subject to section 366.26, subdivision (l) and must be reviewed by extraordinary writ.” (*In re Tabitha W.* (2006) 143 Cal.App.4th 811, 817.) Thus, where reunification services are denied in a dispositional hearing at which a section 366.26 permanency planning hearing is set, claims involving the underlying jurisdictional findings and dispositional orders must also be raised through a petition for extraordinary writ. (*Anthony D. v. Superior Court* (1998) 63 Cal.App.4th 149, 153-156.) In contrast, where a dispositional order denying services is not accompanied by a *simultaneous* order setting a section 366.26 hearing, it (and the underlying jurisdictional findings) are immediately appealable and are not subject to later writ review. (*Joe B. v. Superior Court* (2002) 99 Cal.App.4th 23, 26-27 [appeal from denial of services preserved the right to challenge that order but did not provide father with “the right to present the same issues and arguments again . . . in a writ petition”]; see also *id.* at p. 27 [“ ‘[g]enerally the availability of an appeal constitutes an adequate remedy at law precluding writ relief’ ”]; *Wanda B. v. Superior Court* (1996) 41 Cal.App.4th 1391, 1393, 1395-1396.)

In this case, father’s entire writ is devoted to challenging the sufficiency of the jurisdictional finding that he harmed Andrew and the related dispositional order denying him reunification services pursuant to subdivisions (b)(5) and (b)(6) of section 361.5. These arguments, however, are not cognizable in this writ proceeding because they involve findings and orders that were not made at the January 2016 hearing during which the section 366.26 hearing was ordered. Rather, they were entered many months earlier as part of the jurisdictional and dispositional phase of this proceeding and were thus immediately appealable. Indeed, both father and mother have filed appeals from the jurisdictional findings and dispositional orders in this case, and that matter is currently pending before this court. Under such circumstances, father’s argument’s—and mother’s to the extent she has joined in father’s briefing—are not properly before us, and we decline to consider them here.⁷

B. Reasonable Services

Given our decision not to revisit the juvenile court’s jurisdictional findings and dispositional order in the context of this writ petition, the only viable argument remaining in either writ is mother’s contention that, because no reunification efforts were made with respect to father, the reunification services that *she* received were not reasonable. (See § 366.21, subd. (e) [the court “shall continue” a case to a 12-month permanency hearing if the court finds at the six-month hearing that reasonable services have not been provided]; *Id.*, subd. (g)(1) [continuance of services up to 18 months from date of initial detention permissible where “reasonable services have not been provided to the parent”].) Specifically, mother contends that “the juvenile court and the Agency, despite being aware that mother and father continued to cohabitate as a committed parenting couple, hamstrung the entire process by treating the father as a pariah, instead of allowing this family a path to reunification, notwithstanding the parents’ disagreement with the

⁷ Given this determination, father’s April 27, 2016, motion to take judicial notice of certain exhibits filed in connection with the jurisdictional and dispositional hearing is denied. As stated above, however, we have augmented the record at the Agency’s request to include the transcript of the Pretext Phone Call.

juvenile court and the Agency regarding whether father caused Andrew's injuries." We are not convinced.

The adequacy of a reunification plan and the reasonableness of the reunification efforts made by a child welfare agency must be judged according to the circumstances of each case. (*Robin V. v. Superior Court* (1995) 33 Cal.App.4th 1158, 1164.) In particular, to support a finding that reasonable services were offered or provided, "the record should show that the supervising agency identified the problems leading to the loss of custody, offered services designed to remedy those problems, maintained *reasonable* contact with the parents during the course of the service plan, and made *reasonable* efforts to assist the parents in areas where compliance proved difficult (such as helping to provide transportation and offering more intensive rehabilitation services where others have failed)." (*In re Riva M.* (1991) 235 Cal.App.3d 403, 414.) We review a reasonable services finding for substantial evidence. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 762.)

In the present case, the juvenile court's decision whether or not to provide father with reunification services was appropriately made separate and apart from its decision regarding services with respect to mother. Indeed, pursuant to subdivision (b)(5) of section 361.5 and subdivision (e) of section 300, the juvenile court expressly found by clear and convincing evidence that Andrew, who was under the age of five, suffered severe physical abuse inflicted by father. Under such circumstances, the juvenile court was *not permitted* to provide father with reunification services unless it could find, "based on competent testimony, those services are likely to prevent re-abuse or continued neglect of the child or that failure to try reunification will be detrimental to the child because the child is closely and positively attached to that parent." (§ 361.5, subd. (c).) Given Andrew's young age at the time of removal, it seems unlikely that an argument for close and positive attachment could be made. Thus, the focus of the juvenile court's inquiry was not on whether providing reunification services to father would help mother's reunification efforts, but on whether the provision of such services to father would be likely to prevent re-abuse. The social worker opined that such services would

not be likely to prevent re-abuse given the parents' "level of cooperation" at the time of disposition. While this seems a reasonable basis for the juvenile court's determination given the parents' situation at the time, the validity of the juvenile court's dispositional orders is not currently before us. Rather, assuming the father's denial of services to be well supported by the evidence, we must determine if mother could have nevertheless been provided with reasonable services.

We conclude that she could and she was. Clearly, when crafting a reunification plan for mother designed to remedy the problem in this case—Andrew's severe physical abuse—the presence of father in the family home was an important factor for the social worker to consider. (Compare § 361, subd. (c)(1)(A) & (B) [allowing for removal of the offending parent from the family home as an option for protecting the minor short of full removal; allowing non-offending parent to retain custody as long as that parent "presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm"]; § 361.5, subd. (c) [fact that a parent "is no longer living with an individual who severely abused the child may be considered in deciding that reunification services are likely to be successful"].) Importantly, however, the social worker expressly testified that father's presence in the home and continued relationship with mother was not a complete bar to reunification. Rather, under such circumstances, mother's participation in individual therapy became even more important. Specifically: "If the child's returned to her and she's living with the father, who is the individual who harmed the child, then you need to figure out how does your relationship with the significant other, the father of the child, figure into your ability to protect the child." This was something "in counseling that she absolutely needed to address."

Unfortunately, although mother was referred to several potential individual therapists during the reunification period, she failed to engage with any of them and thus, as the juvenile court found, "had no meaningful therapy" during the 12-month reunification period. Moreover, although the social worker suggested that the parents' progress in couples therapy could be very helpful in terms of determining whether Andrew could be safely returned to the family home, mother refused to sign a release so

that the social worker could talk to the couples' therapist. Rather, at the time of the review hearing, mother's only plan to protect Andrew involved seeking appropriate testing and treatment for the minor's potential genetic condition. Thus, as the juvenile court found, mother had manifestly not demonstrated her ability to keep the child safe.

On this record, we conclude that the evidence supports the finding of reasonable services. Contrary to mother's assertion, she was given a path to reunification. Sadly, she simply refused to walk that road.

III. DISPOSITION

The petitions are denied on the merits. (See § 366.26, subd. (1)(1)(C), (4)(B).) This opinion is final as to this court immediately (rules 8.452(i), 8.490(b)(2)(A)), and the stay of the permanency planning hearing issued by this court on April 5, 2016, is hereby lifted.

REARDON, J.

We concur:

RUVOLO, P. J.

RIVERA, J.