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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re J.G., a Person Coming Under the
Juvenile Court Law.

IMPERIAL COUNTY DEPARTMENT
OF SOCIAL SERVICES,

Plaintiff and Respondent,

v.

KIMBERLY V. et al.,

Defendants and Appellants.

D061007

(Super. Ct. No. JJP02284)

APPEALS from orders of the Superior Court of Imperial County, Diane B.

Altamirano, Judge. Affirmed.

Kimberly V., the mother of J.G., challenges an order suspending her visitation made by the juvenile court at the time it terminated reunification services and set the matter for the section Welfare and Institutions Code section 366.26¹ selection and

¹ Statutory references are to the Welfare and Institutions Code.

implementation hearing. Subdivision (l) of section 366.26 would ordinarily preclude our consideration of Kimberly's challenge because she did not first pursue extraordinary writ review of the order setting the section 366.26 hearing (the setting order). However, the juvenile court did not advise Kimberly of the requirement of filing a petition for extraordinary review to preserve any right to appeal. (§ 366.26, subd. (l)(3)(A).) Because the trial court did not fulfill its duties of advisement, Kimberly is entitled to pursue relief by way of an appeal. (*In re Cathina W.* (1998) 68 Cal.App.4th 716, 722-723.)

Daniel G., the father of J.G., appeals the court's order terminating his parental rights. Daniel, who has been incarcerated for all but two weeks of the dependency proceeding, contends that if Kimberly's appeal is successful, this court must reinstate his parental rights as well.

FACTS

In March 2010, Kimberly took J.G., then two years old, to Pioneers Memorial Hospital in Brawley to be treated for a fever and pink eye.² Hospital staff noticed numerous bruises on J.G.'s face, neck, shoulder and lower spine. Kimberly denied knowing how J.G. sustained the bruising. Hospital staff reported child abuse to police. The Imperial County Department of Social Services (Department) placed J.G. in protective custody. Subsequently, Kimberly told a social worker that she slapped J.G.

² At the time, Daniel was incarcerated at Centinela State Prison.

while feeding her dinner the previous evening because the child always threw up when she ate.

The Department filed a dependency petition on behalf of J.G., alleging, among other things, she had suffered serious physical harm that was inflicted nonaccidentally and severe physical abuse by Kimberly, and there was a substantial risk that J.G. will suffer serious harm because of Kimberly's failure to protect the child. (§ 300, subds. (a), (b) & (e).) Kimberly pled no contest to the allegations under section 300, subdivision (b). Daniel pled no contest to an allegation that he left J.G. without any provision for support because of his incarceration. (§ 300, subd. (g).) The juvenile court sustained the petition under section 300, subdivisions (b) and (g). At the disposition hearing, the court declared J.G. a dependent, removed her from Kimberly's custody and ordered reunification services for Kimberly, including anger management, counseling, parenting classes, substance abuse testing and supervised visitation. The court also found Daniel to be J.G.'s presumed father, ordered reunification services for him and directed Agency to make reasonable efforts to arrange visitation for him.

Two months later, Kimberly filed a section 388 petition to have J.G. returned to her custody with family maintenance services. Kimberly had completed parenting classes, participated in anger management counseling as well as individual therapy and had progressed to extended, unsupervised visits.

In August, the court granted Kimberly's section 388 petition. J.G. was returned to Kimberly's custody.

For the upcoming six-month review hearing on November 16, the court-appointed special advocate (CASA) reported that J.G. was healthy and "happy to be reunited" with Kimberly. The Department reported that Kimberly had completed parenting classes, anger management counseling, individual therapy and had a new child with her live-in boyfriend. The child was born in June.³ The Department also reported there was a domestic violence incident on November 1, in which Kimberly and the baby were in a car driven by her boyfriend. According to Kimberly, the boyfriend was verbally abusing her and had threatened to hit her. Kimberly jumped out of the car with the baby when the boyfriend stopped the car. Notwithstanding the incident, the Department recommended that jurisdiction be terminated and J.G. remain in Kimberly's custody without services. The Department noted that Kimberly had completed her case plan, shown "dedication" to J.G. and appeared to understand the dangers of domestic violence.

However, on November 11, Kimberly took J.G. to Pioneers Memorial Hospital because the child was having vomiting spells and complained of a headache. Kimberly falsely told hospital staff that J.G. fell backward while riding a tricycle and hit her head. Later, Kimberly told the social worker that she had left J.G. sleeping in the car, J.G. awoke while Kimberly was away and, when J.G. tried to leave the car, she fell out. The doctors diagnosed J.G. as sustaining nonaccidental trauma, a skull fracture and a subdural hematoma. J.G. was flown to Rady Children's Hospital in San Diego for treatment. Doctors there also noticed that J.G. had a patterned bruise on her neck that resembled

³ The child, I.R., is not a subject of this appeal.

strangulation marks and a bruise under her jaw line, which is not a common area for bruising in a child.

On November 12, J.G. was released from the hospital in "good condition" and placed in protective custody. The Department reversed its recommendation that jurisdiction be terminated and filed a section 387 supplemental petition to remove J.G. from Kimberly's care and provide reunification services. According to the Department, J.G.'s injuries could have been avoided if Kimberly had provided better supervision of J.G. The Department planned to put a safety plan in place to ensure J.G.'s safety. The court sustained the supplemental petition.

Kimberly enrolled in a second parenting class and was participating in domestic violence counseling. At the dispositional hearing on December 30, the court continued J.G. as a dependent child, returned the child to Kimberly's custody and ordered family maintenance services.

On February 17, 2011, Daniel was released from prison. Daniel was arrested for attempted murder on March 3 and has remained incarcerated since then.

On March 23, 2011, Kimberly took J.G. to El Centro Regional Medical Center. J.G. had a swelling forehead, swelling on her left temple, a split lip with abrasions in her mouth and a bruise over her left eye.⁴ Kimberly told the hospital staff that J.G. had (1) fallen off the arm of a couch at the home of her boyfriend's grandparents four days earlier, (2) tripped and fallen on the cement, injuring her lip two days earlier, and (3)

⁴ J.G. also had multiple bruises on her chest and abdomen and a scratch on her neck. Kimberly was unable to explain how J.G. acquired the bruises.

fallen off a high chair while she was feeding her. The Department detained J.G. in protective custody.

On March 25, the Department filed a second section 387 supplemental petition to remove J.G. from Kimberly's custody and have reunification services reinstated. According to the Department, J.G.'s injuries were preventable and Kimberly was not taking personal responsibility for poor supervision. The court sustained the allegations of the second section 387 supplemental petition and ordered supervised visitation for Kimberly.

In its report for the dispositional hearing on May 19, the Department noted that Kimberly's boyfriend had been arrested after a recent domestic violence incident and she had obtained a temporary restraining order against him. The Department recommended that Kimberly be provided reunification services and supervised visitation.

The CASA, however, recommended termination of services, noting J.G. had suffered severe head trauma on multiple occasions while in Kimberly's care. The CASA reported J.G. did not ask about Kimberly and was not excited about visiting with her. When the CASA last visited J.G., the child told her "[M]y mom hits me . . . she hits me a lot." J.G. told the foster mother that at her last visit, Kimberly had hit her "while in the play area where no one can see." Counsel for J.G. supported the CASA's position.

Kimberly's counsel submitted on the Department's recommendation and asked for liberalized visitation, including overnight visits.

At the hearing, the court terminated reunification services for Kimberly as well as Daniel. The court stated, "I'm not going [to] order family reunification for the mother.

This is the third failure in this case, so I'm going to terminate family reunification"

The court found, by clear and convincing evidence, "it's detrimental to place the children with the mother and it's necessary to remove physical custody [because of the] substantial danger." The court also terminated visitation for Kimberly. The court did not make a detriment finding with respect to its visitation order.

Three months later on August 22, Kimberly filed a section 388 petition to have reunification services reinstated. The petition alleged Kimberly had been continuing with services on her own and it would be in the child's best interest because of a shared bond. Both the Department and J.G.'s counsel opposed the petition.

After an evidentiary hearing, the court denied Kimberly's section 388 petition.

At the review hearing on November 15, Kimberly's counsel requested she receive "at least supervised visitation." J.G.'s counsel opposed the request. The court denied Kimberly's visitation request "based on the child's safety."

At the section 366.26 hearing on November 29, the court terminated parental rights and ordered adoption as J.G.'s permanent plan.

DISCUSSION

I. *Right to Appeal*

Kimberly contends she can appeal an order setting a section 366.26 hearing, which is ordinarily not appealable, because the juvenile court did not advise her of her right to review the order by means of an extraordinary writ. The Department concedes Kimberly is correct.

In setting a hearing under section 366.26, the court must orally advise all parties present that if a party wishes to preserve any right to review on appeal the order setting the hearing, the party must seek an extraordinary writ. (§ 366.26, subd. (l)(3)(A); Cal. Rules of Court, rule 5.695(h)(18) & (19).) A court's failure to discharge its duty to give timely, correct notice of the writ remedy constitutes good cause for an appellate court to excuse a parent's failure to seek writ review. (*In re Cathina W.*, *supra*, 68 Cal.App.4th at p. 722.)

Because the court failed to advise Kimberly of her right to seek writ review of the order setting the section 366.26 hearing, she may challenge the setting order on appeal.

II. *Termination of Visitation*

Kimberly contends the juvenile court abused its discretion by terminating her visitation with J.G. and unconstitutionally denied her a meaningful opportunity to raise the beneficial parent-child relationship exception to adoption (§ 366.26, subd.

(c)(1)(B)(i)) at the selection and implementation hearing.

A visitation order is reviewed for abuse of discretion. (*In re Brittany C.* (2011) 191 Cal.App.4th 1343, 1356, but see *In re Mark L.* (2001) 94 Cal.App.4th 573, 581, fn. 5, [standard of review is substantial evidence].) " "[A] reviewing court will not disturb [the order] unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

Visitation between a parent and child is basic to the dependency system.

"Visitation is a necessary and integral component of any reunification plan. [Citations.]

'An obvious prerequisite to family reunification is regular visits between the noncustodial parent or parents and the dependent children "as frequent[ly] as possible, consistent with the well-being of the minor." ' ' (*In re S.H.* (2003) 111 Cal.App.4th 310, 317; see also *In re Brittany C.*, *supra*, 191 Cal.App.4th at p. 1356 [visits should be as frequent as possible as long as they do not interfere with child's well-being]; § 362.1, subd. (a)(1)(B) ["No visitation order shall jeopardize the safety of the child."].) The juvenile court may terminate or suspend visitation if it finds visits would be detrimental to the child. (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1138; *In re Luke L.* (1996) 44 Cal.App.4th 670, 679; § 366.22, subd. (a).) Detriment includes harm to the child's physical or emotional well-being. (*In re Brittany C.*, at p. 1357.)

After reunification efforts have ended, "the focus shifts to the needs of the child for permanency and stability." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Family reunification is no longer an issue unless the parent can demonstrate changed circumstances sufficient to revive the issue. (*Ibid.*) Nonetheless, the law requires ongoing visits between parent and child pending the section 366.26 hearing unless the court finds that visitation would be detrimental to the child. (§ 366.21, subd. (h).) "Even after family reunification services are terminated, visitation must continue unless the court finds it would be detrimental to the child." (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1504.)

Here, we are concerned with the denial or suspension of visitation following the May 2011 termination of reunification services and pending the section 366.26 hearing. Although the juvenile court failed to make an explicit detriment finding related to visits

when it suspended visitation, we do not find that failure fatal. The court expressly made it clear that it found visits between Kimberly and J.G. would be detrimental to the child at the subsequent review hearing when counsel for Kimberly asked for supervised visitation. In stating it was denying the request "based on the child's safety," the court made the requisite detriment finding it had not articulated earlier.

With respect to challenged factual findings, a reviewing court will affirm " 'if there is any *substantial* evidence to support the trial court's findings,' i.e., 'if the evidence is reasonable, credible and of solid value' [Citation.]" (*In re Baby Girl M.* (2006) 135 Cal.App.4th 1528, 1536.) Substantial evidence supported the court's detriment finding. This case started when hospital staff discovered numerous bruises on J.G.'s face and on other parts of her body. Kimberly belatedly admitted she slapped then two-year-old J.G. while feeding her dinner the previous evening because the child threw up when she ate. Eight months later, J.G. is back at the hospital with a skull fracture and other serious injuries. Again, Kimberly initially lied about how J.G. sustained the injuries by saying the child fell backward off a tricycle. Kimberly later admitted she had left J.G. asleep in a car and when the child awoke, she opened the door and fell out of the car. J.G.'s third trip to the hospital took place four months later. J.G.'s forehead and left temple were swollen, her lip was split, there was a bruise over her left eye and there were numerous bruises on her chest and abdomen. Kimberly told the hospital staff that J.G. had fallen three times in recent days. Thus, the first emergency room visit was related to physical abuse by Kimberly, and the next two—viewing the evidence favorably toward Kimberly—were caused by her neglect or failure to properly supervise J.G.

Moreover, the CASA reported J.G. did not ask about Kimberly and was no longer excited about visiting with her. When the CASA last visited J.G., the child told her "[M]y mom hits me . . . she hits me a lot." Also, J.G. told the foster mother that at her last visit Kimberly had hit her "while in the play area where no one can see."⁵

Given this risk of harm to J.G. while in Kimberly's presence—whether or not the visit was supervised—the court did not abuse its discretion in ordering no visitation.

Kimberly asserts her due process rights were violated because the lack of visits in the six months before the section 366.26 hearing prevented her from establishing the beneficial parent/child relationship exception to adoption. (§ 366.26, subd. (c)(1)(B)(i).) We disagree.

It has long been recognized that a parent's interest in the companionship, care, custody and management of his or her children "is a compelling one, ranked among the most basic of civil rights." (*In re Marilyn H.*, supra, 5 Cal.4th at p. 306, citing *In re B.G.* (1974) 11 Cal.3d 679, 688.) The statutory procedures for terminating parental rights satisfy due process requirements because of the demanding requirements and multiple safeguards built into the dependency scheme during the early stages of the proceedings. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 256; *In re Marilyn H.*, at pp. 307-308.) But after the parent's reunification services have been terminated, the child's

⁵ J.G.'s statement supports the court's decision denying supervised visitation. Kimberly downplays J.G.'s statement because the Department did not "investigate[] the allegation, nor even take it seriously enough to merit a change in its recommendation to continue with supervised visitation." We are not persuaded. The court could properly consider the information supplied by the CASA, including J.G.'s statements, and give it whatever weight the court believed was justified.

interest in permanency and stability "takes priority." (*In re Marilyn H.*, at p. 309.) At this stage of the proceedings, section 388 provides a statutory " 'escape mechanism,' " that is, "a means for the court to address a legitimate change of circumstances while protecting the child's need for prompt resolution of his custody status." (*Ibid.*) Section 388 protects the parent's due process rights. (*Id.* at pp. 307-310.)

We reject Kimberly's due process argument because she could have sought the reinstatement of visitation in a timely fashion through a section 388 petition. After reunification services were terminated, Kimberly filed a section 388 petition to have the services reinstated, but the issue of visitation was not litigated at the evidentiary hearing. A parent who files a section 388 petition bears the burden of proof. (§ 388; *In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

Moreover, as the Court of Appeal in *In re Richard C.* (1998) 68 Cal.App.4th 1191, 1196 explained: "The kind of parent-child bond the court may rely on to avoid termination of parental rights under the exception provided in [former] section 366.26, subdivision (c)(1)(A), does not arise in the short period between the termination of services and the section 366.26 hearing."⁶ At the time the court terminated services and visitation, Kimberly and J.G. had been in the dependency process for 14 months. By this time, " 'the nature and extent of [Kimberly's and J.G.'s] relationship should be apparent.' " (*In re Richard C.*, at pp. 1196-1197, quoting *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

⁶ Former section 366.26, subdivision (c)(1)(A) is now section 366.26, subdivision (c)(1)(B)(i).

In this case the lack of visits pending the section 366.26 hearing was not prejudicial. Kimberly has failed to show that if visitation had not been suspended it was reasonably probable the result would have been more favorable to her—that is, that she could have established the beneficial parent/child relationship. (*In re Celine R.* (2003) 31 Cal.4th 45, 59-60; *Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 119 [parent seeking reversal of order must show prejudice].)

Section 366.26, subdivision (c)(1)(B)(i) requires the parent to show not only that she maintained regular visitation and contact with the child, but also that the child would benefit from continuing the relationship. In order to come within the beneficial parent/child relationship exception to the statutory preference for adoption, "[a] parent must show more than frequent and loving contact or pleasant visits. [Citation.] 'Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from the day-to-day interaction, companionship and shared experiences.' [Citation.] The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment between child and parent." (*In re Mary G.* (2007) 151 Cal.App.4th 184, 207, fn. omitted.) "The juvenile court may reject the parent's claim simply by finding that the relationship maintained during visitation does not benefit the child significantly enough to outweigh the strong preference for adoption." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) We are convinced even under the more stringent beyond a reasonable doubt standard associated with the deprivation of constitutional rights that Kimberly could not

meet the requirements of this exception to adoption, regardless of the suspension of visitation.

Kimberly's reliance on *In re Monica C.* (1994) 31 Cal.App.4th 296 and *In re Precious J.* (1996) 42 Cal.App.4th 1463 is misplaced. Those cases involve incarcerated parents who were not provided visitation and issues not relevant here.

Kimberly has not demonstrated reversible error.⁷

DISPOSITION

The orders are affirmed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.

⁷ Daniel's sole contention is that if we reverse Kimberly's termination of parental rights, we must also reinstate his parental rights. (*In re DeJohn B.* (2000) 84 Cal.App.4th 100; Cal. Rules of Court, rule 5.725(a)(2).) Since we are affirming the termination of Kimberly's parental rights, there is no ground for reversing the termination of Daniel's parental rights.