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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CAROLYN BUNYARD,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

MICHAEL BUNYARD,

Real Party in Interest.

D062223

(San Diego County
Super. Ct. No. D513181)

PROCEEDINGS in certiorari or habeas corpus after the superior court entered a judgment of contempt. Robert Longstreth, Judge. Relief granted; judgment annulled.

Petitioner Carolyn Bunyard (mother) has petitioned for writ of certiorari or alternatively habeas corpus challenging a family court contempt judgment finding her

guilty of three counts of contempt and sentencing her concurrently to three days in custody for each of the three counts. The family court suspended execution of sentence and placed mother on three years probation on specified conditions, including that she complete three days (18 hours) of community service and that father, real party in interest Michael Bunyard, be permitted specified custody of their minor child to compensate for time he missed assertedly due to mother's violation of their custody order. Mother contends the family court's adjudication of contempt must fail because the court's order does not cite specific facts, it does not accurately reflect the family court's findings at the contempt hearing, father's motion did not cite valid orders, and father did not establish the elements of contempt beyond a reasonable doubt.

For the reasons set forth below, we conclude the family court improperly adjudged mother guilty of contempt, and that the contempt order must be annulled.

FACTUAL AND PROCEDURAL BACKGROUND

The parties are parents of and share joint legal custody of a minor child, A. On October 26, 2010, the family court filed findings and an order after a hearing that took place on June 24, 2010. The October 26, 2010 findings and order attach a purported prior order stemming from the same June 24, 2010 hearing, which itself incorporated a June 2, 2010 family court services (FCS) recommendation, among others, that "[t]he child shall continue to participate in counseling with a licensed mental health practitioner or agency" and that "[t]he parents shall cooperate and participate in the child's therapy at the discretion of the therapist." The June 2, 2010 FCS recommendation also addresses the parties' shared parenting, and recommends in part that if all parties reside in San Diego

County, the child "shall be with the father during the first full weekend, second, and fourth weekends of the month from 5:30 p.m. Friday until 5:30 p.m. Sunday. [¶] . . . [¶] . . . [and] shall be with the mother at all times not otherwise specified including the third and any fifth weekends of the month."

In August 2011, the parties participated in a hearing in family court that in part addressed the issue of the child's counseling and treatment with Rachel Ireland, M.D., a psychiatrist. Father's counsel complained about the parties' inability to move forward with their stipulations regarding counseling. The family court stated it would enter an order for therapy, and mother's counsel confirmed mother would comply with any such order.

In October 2011, the parties stipulated to designate a new therapist, Dr. Steven Tess, to treat their child. In part, the stipulation provides that "each party shall schedule an individual 'parent intake' appointment with [Dr. Tess] prior to [the child's] first appointment. Thereafter, and subject to the parties 'mutual' agreement of date/time prior to scheduling same, [mother] shall schedule [the child's] first appointment with Dr. Tess. Both parties then may attend their child's first appointment." The stipulation to designate Dr. Tess, which incorporated a court order, was signed and filed in the superior court on November 8, 2011.

In December 2011, father filed a Judicial Council form order to show cause and affidavit for contempt, asserting that mother had willfully disobeyed and violated three

orders: (1) An order relating to a June 23, 2011 FCS report¹ stating "[t]he parents shall follow through with all recommendations from the child's medical providers regarding the child's treatment and/or medication regarding his diagnoses of Attention Deficit Hyperactive Disorder"; (2) the order issued on November 8, 2011, described by father as "Stipulation Re: Therapy for Minor Child, Paragraph 2, requires 'mutual' agreement of date/time for minor child's first session with Dr. Tess and opportunity for both parents to attend first appointment" and (3) the October 26, 2010 custody and visitation order, incorporating the June 2, 2010 FCS report designating father's parenting weekends as the first full weekend, second, and fourth weekends of the month from 5:30 p.m. Friday until 5:30 p.m. Sunday.

The contempt proceedings took place on February 24, 2012, during which both father and mother testified. As to count 1, father testified that A. began seeing Dr. Ireland in February 2011. In May 2011, he and mother met with Dr. Ireland, who recommended that A. begin a regimen of stimulant medication for certain diagnosed conditions. According to father, mother rejected the recommendation and asked that A. be treated homeopathically. Father met with Dr. Ireland again on October 6, 2011, at which time she wrote a prescription for stimulant medication for A.'s symptoms. Father

¹ A Judicial Council form "affidavit of facts constituting contempt" was the means by which father identified the order, gave the date the violated order was issued, and recited "how the order was violated, and when the violation occurred." Father initially typed that the first order issued on November 9, 2011, but the affidavit in the record shows that someone struck that date and handwrote in, "Aug. 11, 2011" as the date the order issued. Father then typed: "FCS Report, June 23, 2011, Paragraph 9(F), Page 15, requiring Citee to follow recommendations of Dr. Ireland prescription medication regimen."

began administering the medication, but did not know whether mother was doing so as well. Father testified Dr. Ireland terminated her services on November 7, 2011, following a meeting with father and mother, in which mother questioned Dr. Ireland's diagnoses and professionalism, lost her temper, and "stormed" out of the office. Dr. Ireland ended her services and the child's medication regimen that day. On cross-examination, father stated that the reason for his charge was not that mother did not administer A.'s medication, but that she "undermined the process" and "alienat[ed]" the doctor, which resulted in the doctor dropping them and ending A.'s medication regimen. He testified it was implicit in the order that mother should cooperate with the doctor, father, and A., and confirmed he had "no idea" whether or not she administered A.'s medications. He agreed mother's emails concerning the matter did not state she was not giving A. the prescribed medications.

As to count 2, father testified that at the end of November, after he and mother had met with Dr. Tess, he discovered during a scheduling call with Dr. Tess that on November 15, 2011, mother had already taken A. for the child's first visit without father's knowledge. On cross-examination, father confirmed he was not a party to the telephone conversations between mother and Dr. Tess.

With regard to count 3, father testified he was denied access to A. on the weekend of January 14, 2011, which he had calculated to be the second week of the month. Father appeared at the normal visitation time, but mother was not there. Father testified he thereafter filed a visitation violation report through the police department.

Mother denied ignoring Dr. Ireland's recommendations, and testified she gave A. 10 milligrams of medication every day as prescribed. According to mother, after she and father had their first appointments with Dr. Tess, Dr. Tess contacted her and let her know he was ready to see A., and told her that November 14, 2010, was convenient. She could not recall when Dr. Tess had contacted her; she could only say it was sometime before November 14, 2010. Mother testified she told Dr. Tess that it was important that father be there, and he responded that he had spoken with father and assured her that "he's okay with this." According to mother, Dr. Tess also told her it was not a good idea for both she and father to be present at A.'s appointment. Mother assumed that Dr. Tess had already spoken with father because he had seen father last. Mother brought A. to the appointment on November 15, 2010. She did not confirm the appointment with father, and she testified she was surprised he was not there but did not say anything to Dr. Tess about it. She testified that her prior conversation with Dr. Tess made her feel that it was not something she should worry about. She assumed Dr. Tess had set the appointments up that way because he did not think it was a good idea for mother and father to be there at the same time with A.

As for the parties' parenting schedule underlying the count 3 citation, mother testified that after their hearing setting up visitation, she was not clear what the first full weekend, second, and fourth weekend meant. She testified that both parties' attorneys discussed it and agreed that the weekend of December 31, 2010, would be the fifth weekend, but she claimed she did not understand that the following weekend, that of January 8, 2011, would then be the first weekend in January. She stated that father was

out of the country for the following weekend, which would have been his weekend for visitation. Mother stated that he was also out of town the next weekend of January 14, 2011, and she believed he chose not to exercise that visitation. When asked on cross-examination to acknowledge that the attorneys had coordinated and agreed to designate December 31, 2010 as the fifth weekend, mother testified that she did not agree to the "dispute back and forth" about the issue.

After listening to the parties' testimony and argument on the matter, the family court found that all three counts of contempt were established beyond a reasonable doubt. The minute order of the hearing states only: "The Court finds Count 1, Count 2 and Count 3 have been established beyond a reasonable doubt."

On June 7, 2012, the court filed a Judicial Council form findings and order after hearing regarding contempt. The court found there were valid orders of the court, petitioner had knowledge of the orders, and she violated them. More specifically, as to count 1, the court found mother "did not follow the recommendations of Dr. Ireland, as stipulated to by [mother] and ordered by Court on August 11, 2011." As to count 2, it found mother "scheduled and attended the first appointment of minor child's therapy on November 15, 2011, without the knowledge or consent of Respondent/Father, in violation of a stipulation entered into by [mother] and ordered by the Court on November 8, 2011." As to count 3, the court found mother "refused to allow Respondent/Father to have custody of the minor child on the 'second' weekend of January 14-17, 2011, as ordered by the Court on June 24, 2010 (Order filed on October 26, 2010)."

In April 2012, the court sentenced mother concurrently on the three counts of contempt to three days in custody for each of the three counts, suspended execution of that sentence, and put mother on three years of probation with conditions that (1) she complete three days (18 hours) of community service in a battered women's shelter and that the service be completed by the end of October 2012; (2) mother comply with all orders of the court; and (3) by stipulation, father would have custody of the child the third week of January 2013 or President's day of 2013 in lieu of visitation that was not exercised by him in January 2012. The family court reserved on the issue of attorney fees.

Mother filed the present petition for writ of certiorari or alternatively for habeas corpus.²

DISCUSSION

I. *Standard of Review and Legal Principles*

Civil contempt proceedings under Code of Civil Procedure sections 1209 through 1222 may arise out of either civil or criminal litigation. (*In re Koehler* (2010) 181 Cal.App.4th 1153, 1159.) "[E]ven though they are denominated civil, these proceedings are criminal in nature because of the penalties that a judge may impose. [Citation.] The

² "It is only by extraordinary writ—certiorari or habeas corpus [citation] or prohibition [citation]—that a contempt judgment may be reviewed." (*Nierenberg v. Superior Court* (1976) 59 Cal.App.3d 611, 617; see *In re Buckley* (1973) 10 Cal.3d 237, 240, fn. 1.) Mother first filed a petition for writ of certiorari in March of 2012. We denied the petition as premature in an unpublished order. (*Bunyard v. Superior Court* (Mar. 29, 2012, D061539).) She filed a new petition on July 2, 2012. We denied her request for stay and issued an order to show cause why her requested relief should not be granted.

constitutional rights of the accused must be observed." (*Ibid.*) When there are punitive sanctions, guilt must be proved beyond a reasonable doubt. (See *ibid.*, citing *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1256.)

"Willful failure to comply with an order of the court constitutes contempt." (*In re Grayson* (1997) 15 Cal.4th 792, 794; *In re Marcus* (2006) 138 Cal.App.4th 1009, 1014; see Code Civ. Proc., § 1209, subd. (a)(5).) We deal here with allegations of indirect or constructive contempt, that is, contempt committed outside the presence of the court. (See *Hanson v. Superior Court* (2001) 91 Cal.App.4th 75, 81 (*Hanson*); *In re Marcus*, at p. 1014.)

In cases of constructive contempt, the affidavit that forms the basis of the prosecution must state facts sufficient to show the commission of the contempt. (*In re Donovan* (1950) 96 Cal.App.2d 693, 698.) The initiating affidavit is fatally defective if it does not allege the accused had notice or knowledge of the existence of the court order at the time he or she is claimed to have violated it. (*Freeman v. Superior Court, San Diego Count* (1955) 44 Cal.2d 533, 537.) "A trial court may take action to punish contempt under section 1218 of the Code of Civil Procedure. The elements of proof necessary to support punishment for contempt are: (1) a valid court order, (2) the alleged contemnor's knowledge of the order, and (3) noncompliance. [Citations.] The order must be clear, specific and unequivocal. [Citation.] 'Any ambiguity in a decree or order must be resolved in favor of an alleged contemnor.'" (*In re Marcus, supra*, 138 Cal.App.4th at pp. 1014-1015; Code Civ. Proc., § 1290, subd. (a)(5); see *Moss v. Superior Court* (1998) 17 Cal.4th 396, 428; *Koshak v. Malek* (2011) 200 Cal.App.4th 1540, 1548-1549.)

Because we are reviewing a contempt proceeding, the normal rules of appellate review do not apply. "[T]here is no presumption of regularity in contempt proceedings [citations], nothing can be implied in support of an adjudication of contempt [citation], and the record must be strictly construed in favor of . . . the one found in contempt." (*In re Koehler, supra*, 181 Cal.App.4th at pp. 1166-1167; see also *Mitchell v. Superior Court, supra*, 49 Cal.3d at p. 1256; *Freeman v. Superior Court, San Diego County, supra*, 44 Cal.2d at p. 536.) "[A] conviction of contempt should not be allowed to stand unless it appears from the record beyond question that the trial court found all the facts to exist which constituted the offense." (*In re Donovan, supra*, 96 Cal.App.2d at p. 698.)

II. *The Family Court's Contempt Order is Sufficiently Specific*

As a threshold matter, we address and reject mother's broad challenges to the contempt order's specificity and accuracy. Referring to its February 24, 2011 minute order, mother contends the family court's adjudication of contempt lacks specific findings and evidentiary facts; that it is vague, indefinite, uncertain and conclusory. She further argues the record does not support the factual findings contained in the court's later June 7, 2012 findings and order after hearing, and that those findings do not accurately reflect the family court's oral findings during the hearing. Mother maintains the order is void for vagueness because it does not specify which prior orders she failed to obey.

The contentions are meritless. The family court properly reduced its minute order to a formal contempt judgment when it entered the June 7, 2012 findings and order after hearing. (See *Moss v. Superior Court, supra*, 17 Cal.4th at p. 404, fn. 3 [deeming minute orders to be a "judgment of contempt" but disapproving a practice of issuing contempt

findings and sentence in minute orders in lieu of a formal judgment of contempt].) The June 7, 2012 findings and order after hearing identified the orders by their date and, as we set out above, the family court made factual findings as to how mother assertedly violated the orders.³

In the case of indirect contempt, in contrast to direct contempt, the court was not required to state evidentiary facts supporting an ultimate finding of willful violation of its orders. (*Hanson, supra*, 91 Cal.App.4th at p. 81; *Moss v. Superior Court, supra*, 17 Cal.4th at p. 404, fn. 3 [factual findings are not a jurisdictional prerequisite to indirect contempt judgment]; compare *Boysaw v. Superior Court* (2000) 23 Cal.4th 215, 222 [in case of direct contempt—contempt committed in the immediate view and presence of the court—the facts constituting contempt must be stated with specificity in the order itself].) "The generally recommended standard that the order recite every factor essential to the contempt holding appears to have been promulgated for application in direct contempt cases wherein there is no filing and serving of charging documents which present a prima facie showing of such elements or a record thereof. The significant thing in the indirect contempt cases is that the record contain the findings upon which the contempt order is based.'" (*Hanson*, at p. 81.) Nevertheless, "while an indirect contempt judgment need not recite the court's factual findings as a jurisdictional prerequisite, those findings should be specifically recited orally or in the judgment to assist a reviewing court in determining if the evidence is sufficient to support the judgment of contempt.'" (*Ibid.*, quoting *Moss*,

³ Whether the identified orders actually exist or are valid is a separate question.

17 Cal.4th at p. 404, fn. 3.) We are not persuaded by mother's reliance on lower court decisions⁴ that predate the California Supreme Court's confirmation in *Moss* that a recitation of evidentiary facts is not a jurisdictional prerequisite for an indirect contempt judgment. *Moss* further explained that though factual findings are not such a prerequisite, "we do expect the court to recite a factual basis for its judgment, grounded in the evidence, *orally* or in the judgment." (*Moss*, 17 Cal.4th at p. 404, fn. 3, italics added.)

The family court did so here. It heard father and mother's testimony as well as counsel's arguments, engaged counsel in discussion, and made oral factual findings before concluding that father had proven contempt beyond a reasonable doubt. Our role on review is to decide whether there is substantial evidence in the record before us to support those findings and the charges of contempt beyond a reasonable doubt. (*In re Marcus*, *supra*, 138 Cal.App.4th at p. 1015; see *In re Coleman* (1974) 12 Cal.3d 568, 572-573.)

III. *Count 1*

"To hold a person in constructive contempt for wilful disobedience of a court order, the order must be in writing or must be entered in the court's minutes." (*In re Marcus*, *supra*, 138 Cal.App.4th at p. 1015, quoting *Ketscher v. Superior Court* (1970) 9 Cal.App.3d 601, 604-605; see also Code Civ. Proc., § 1003 [defining an "order" as the

⁴ Mother cites *In re Mancini* (1963) 215 Cal.App.2d 54, which in turn relies on *Harlan v. Superior Court* (1949) 94 Cal.App.2d 902, distinguished and clarified in *Signal Oil & Gas Co. v. Ashland Oil & Refining Co.* (1958) 49 Cal.2d 764, 776, fn. 5, as well as *Powers v. Superior Court* (1967) 253 Cal.App.2d 617.

"direction of a court or judge, *made or entered in writing*"), italics added.) "[A] writing is essential to avoid the uncertainty that can arise when attempting to enforce an oral ruling." (*Marcus*, at p. 1016.) "The need for certainty is especially important in contempt proceedings. . . . An oral ruling is subject to varying memories and may not be clear or specific. Nor is an oral ruling necessarily the unequivocal decision of the court. A court may change its ruling until such time as the ruling is reduced to writing and becomes the order of the court. [Citations.] Thus it is that only precise court orders *as written* may be enforced by contempt." (*Ibid.*)

Applying these principles, we conclude father's count 1 charge was not proven beyond a reasonable doubt. Specifically, father did not prove, and there is no indication in the record, that at the time mother was alleged to have committed the conduct underlying the count 1 citation, the court had issued a written order of sufficient specificity governing Dr. Ireland's treatment and recommendations. The record shows only that an oral hearing occurred on August 11, 2010, and thereafter, on November 9, 2010, the trial court issued written findings and an order after that hearing.⁵ It was on November 7, 2011—two days *before* the family court entered its written findings and order after hearing—that Dr. Ireland's services ended after mother walked out of the child's appointment.

⁵ There is no minute order for the August 11, 2010 proceeding in the record. Though father asserts that mother signed a stipulation on October 24, 2011, the order based on that stipulation was not entered until November 8, 2010. Also, that order specifically appoints Dr. Tess and sets out an order regarding his intake appointments, and could not have governed mother's conduct relating to Dr. Ireland's treatment or medication regimen.

Because mother could not have had notice of an order that was not filed or entered in the court minutes on the dates of her alleged interfering and alienating conduct, the evidence is insufficient to support the contempt finding on count 1. "[I]n the absence of evidence showing contempt, the order of commitment should be annulled." (*Arthur v. Superior Court* (1965) 62 Cal.2d 404, 409; *Board of Supervisors v. Superior Court* (1995) 33 Cal.App.4th 1724, 1736.)

IV. *Count 2*

"Punishment for contempt 'can only rest upon clear, intentional violation of a specific, narrowly drawn order. Specificity is an essential prerequisite of a contempt citation.' " (*In re Marcus, supra*, 138 Cal.App.4th at p. 1016; see also *Wilson v. Superior Court* (1987) 194 Cal.App.3d 1259, 1273.) And the acts constituting the contempt must be clearly and specifically prohibited by the terms of the underlying order. (E.g., *Brunton v. Superior Court of Los Angeles County* (1942) 20 Cal.2d 202, 205 [involving disobedience of an injunction].) We resolve any ambiguity in the decree in mother's favor. (*In re Blaze* (1969) 271 Cal.App.2d 210, 212; *Butler v. Superior Court In and For Alameda County* (1960) 178 Cal.App.2d 763, 765.)

The order underlying count 2 is the court's November 8, 2011 order that states in part: "[S]ubject to the parties 'mutual' agreement of date/time prior to scheduling same, [mother] shall schedule [the child's] first appointment with Dr. Tess. Both parties then may attend their child's first appointment." Though there is a clear directive in this order that mother schedule the child's first appointment with Dr. Tess subject to her and father's mutual agreement, the order does not expressly state—and is therefore ambiguous—as to

who, whether it be mother or some other person, is required to obtain father's agreement as to the date and time. We resolve the ambiguity in mother's favor, and interpret the family court's order as permitting any person, including the therapist or therapist's representative, to obtain father's consent or agreement to the date and time of the child's first appointment. The sole testimony on the point was that mother believed Dr. Tess had cleared the date and time of A.'s first appointment with father prior to the appointment; that father was "okay" with that arrangement. Father merely testified that he learned A.'s first appointment with Dr. Tess had taken place without his knowledge.

Because the court did not make a clear directive that mother was to obtain father's agreement to the date and time of Dr. Tess's first appointment with the child, and the evidence shows mother therefore did not violate the order, the judgment on the count 2 contempt must be annulled. (Accord, *Schaefer v. Superior Court* (1968) 268 Cal.App.2d 180, 181 [contempt based on alleged violation of a superior court's judgment attaching a contract pertaining to customer lists and trade secrets; contempt judgment annulled because "there never was any command by the court to the petitioners to perform the contract"]; *Butler v. Superior Court In and For Alameda County, supra*, 178 Cal.App.2d at pp. 764-766 [annulling judgment of contempt of narrowly drawn injunction which prohibited petitioner from soliciting business from plaintiff's subscribers that they became acquainted with or whose identity and addresses they learned "while in and by virtue of, and in the course of their employment by" the plaintiff, and where trial court expressly found petitioner knew of subscriber before he was employed by the plaintiff; court's own findings showed the petitioner had not violated the narrow injunction].)

V. Count 3

Mother advances several challenges to the count 3 citation involving the parties' visitation schedule. First, she contends the charge was improperly pleaded and failed to cite a valid order: that father's affidavit cites an order "issued" on October 26, 2010, whereas the actual order assertedly issued on June 24, 2010. Second, she maintains that assuming no pleading defect, the affidavit cited to an order that was not sufficiently specific or narrowly drawn, because the order regarding father's parenting time did not address a weekend split between two months, and whether it would count as the first or fifth weekend. Mother argues the meaning of the "first full weekend" was not clarified until the court hearing on August 11, 2011, and thus the order could not have given her notice as to what behavior would constitute a violation, nor could the court have found a willful violation. Third, mother argues the actual court order underlying count 3 was neither introduced into evidence nor the subject of a request for judicial notice, and thus father failed to prove the existence of a valid order beyond a reasonable doubt. Finally, mother makes a broad charge of trial court bias, which she maintains warrants annulling the entire order.

At the hearing on the contempt charges with respect to count 3, father's counsel began with a request for judicial notice:

"[Father's counsel]: "Moving now to count 3, your honor. We ask the court to take judicial notice of both the FCS report dated June 2nd, 2010 and the order after hearing filed with this court June 29th, 2010 [*sic*], most particularly page 9 of the FCS report recommendation No. 5.

"[The court]: All right. Any objection to that?

"[Mother's counsel]: No, your honor.

"[The court]: All right. Let me make sure I have it here. June 29th [*sic*] is the FCS?

"[Father's counsel]: Dated June 2nd.

"[The court]: Order is June 29th [*sic*]?

"[Father's counsel]: Yes.

"[The court]: Okay. I have a decision re move-away. Is that what you are referring to?

"[Father's counsel]: That's correct, your honor. That decision adopts the FCS report under the assumption that both parties will continue to reside in San Diego County." The minute order of the hearing provides that the family court "takes judicial notice of the [FCS] recommendation dated June 2, 2010 and the Findings and Order after Hearing filed on June 29, 2010."

"It does not require the citation of any authority to support the rule that in a contempt proceeding the burden is on the party seeking to have a person adjudged guilty of contempt to establish his charges against the alleged contemner by competent evidence." (*Ransom v. Superior Court* (1968) 262 Cal.App.2d 271, 275-276; see also *Bone v. Superior Court for Los Angeles County* (1966) 245 Cal.App.2d 972, 973-974 [all elements of charged contempt must be averred in accuser's affidavit and proven].) In a proceeding for indirect contempt, a person cannot be deprived of property or liberty

without adequate procedural safeguards, including "evidence having been offered against him in accordance with the established rules" (*Bone v. Superior Court*, at p. 973.)

Here, the trial court purported to take judicial notice of an order dated June 29, 2010, an order that was not cited in father's affidavit or contained in the appellate record. On appeal, we are not permitted to give the usual presumption in favor of regularity in the proceedings; "presumptions or intendments may not be indulged in to support the contempt order." (*In re Martin* (1977) 71 Cal.App.3d 472, 480.) We must strictly construe the "whole record" in mother's favor. (*Ex parte Moulton* (1950) 100 Cal.App.2d 559, 564.) Thus, we will not infer in father's favor that the trial court misspoke and intended to take judicial notice of either the June 24, 2010 findings and order after hearing, or the October 26, 2010 order. Even if we were to assume the court intended to refer to the June 24, 2010 findings and order, there is no indication that that pleading was signed by the court and filed on that date. We acknowledge the family court correctly referred to the June 24, 2010 findings and October 26, 2010 order in its contempt judgment, but the question is not whether its findings are correct, but whether they are supported by substantial *evidence* in the record. In view of the failure of proof, we cannot say that is the case.

Even setting aside the failure of proof, we conclude that the order underlying the count 3 contempt, which did not state whether Fridays were to be included in the calculation of a "full weekend" or allocate weekends by date, was not sufficiently clear and unambiguous that it could support a finding that mother willfully violated that order.

The contempt power should be used only when the factual predicates for its exercise are clearly and unambiguously shown. (*In re Jones* (1975) 47 Cal.App.3d 879, 881.) "Practically speaking . . . this places the burden on the court to 'dot all the 'i's' and cross all the 't's.'" (*In re D.W.* (2004) 123 Cal.App.4th 491, 501.) There should be no room for doubt as to whether there was a court order, and whether mother knew of and understood it. Absent the admission of competent evidence of a valid order violated by mother, father has not proved the elements of contempt beyond a reasonable doubt. Accordingly, we annul the contempt finding on count 3.

VI. *Grant of Probation*

Though it is not necessary to our opinion and purely advisory, we observe that the family court was without jurisdiction to place mother on "probation." In criminal cases, probation is a wholly statutory creation. (*People v. Tanner* (1979) 24 Cal.3d 514, 519; *People v. Enriquez* (1985) 173 Cal.App.3d 990, 996.) Subject to proscriptions against cruel and unusual punishment (U.S. Const., art. VIII; Cal. Const., art. I, § 17), the power to fix penalties is vested exclusively in the legislative branch. (*People v. Tanner*, 24 Cal.3d at p. 519 & fn. 3; see *People v. Almodovar* (1987) 190 Cal.App.3d 732, 742.) Courts have no inherent power to grant probation. (*Almodovar*, at p. 741.)

The punishment for contempt is statutory; it may be punished by a fine not exceeding \$1000 or imprisonment not exceeding five days, or both (Code Civ. Proc., § 1218) or, in the case of an omission to perform an act, the sentence may be punishment by imprisonment until the act is performed (Code Civ. Proc., § 1219). The statutory

punishment for contempt does not allow for probation. The family court's grant of probation was unauthorized.

DISPOSITION

Let a peremptory writ of certiorari issue annulling the June 7, 2011 judgment of contempt. The parties are to bear their own costs in connection with the present extraordinary writ proceedings.

O'ROURKE, J.

WE CONCUR:

McINTYRE, Acting P. J.

IRION, J.