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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Jessica T.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Real Party in Interest.

D062753

(San Diego County
Super. Ct. No. NJ14640A)

PROCEEDINGS in mandate after referral to a Welfare and Institutions Code section 366.26¹ hearing. Laura H. Parsky, Judge. Petition denied. Request for stay denied.

¹ Unless otherwise specified, all statutory references are to the Welfare and Institutions Code.

Jessica T. seeks review of juvenile court findings and orders denying family reunification services to her under section 361.5, subdivisions (b)(4) and (b)(5), and setting a hearing under section 366.26 to select and implement a permanency plan for her son. We deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Jessica T. and her husband, Lee T., became the parents of twins, K.T. and W.T., in March 2012. Jessica is also the mother of five-year-old E.V. The twins were born six weeks prematurely. They were discharged from the hospital on March 29. Jessica and Lee took turns feeding the twins during the night.

On April 10, Jessica brought W.T. to the hospital with concerns about bruising on the baby's abdomen and thigh. Medical personnel determined the bruising was unusual and could possibly be non-accidental. W.T.'s computerized tomography (CT scan) and skeletal survey were clear. The doctor was reluctant to refer the matter to child protective services because there were no indicators of abuse. However, there was no medical reason or other explanation for the bruising on W.T.'s abdomen and thigh.

An investigating social worker made an unannounced visit to the parents' home on April 12. Jessica was appropriate and cooperative. E.V. denied any maltreatment. Jessica and Lee denied any mental health issues, substance abuse problems, domestic violence or childhood abuse. Jessica denied any post-partum depression. The social worker reported that Jessica was completely calm when managing the crying babies and Lee was calm when W.T. was crying.

On April 16, Jessica sent the following text message to Lee: "I know you love our babies. And I should have took [*sic*] them downstairs when they were crying. You have to compose yourself when waking from sleep to handle the babies so that you don't snap. I love you and don't beat yourself over this."

In a series of text messages, Lee responded: "I can never forgive myself[.] I just want to break down babe." "I know I didn't hit her hard but I still did it and now I have to live with it." "I am sorry for what I have done [. . .] I feel like the worst dad in the world[.] I just want to start this day over." "I know I just snapped it will never happen again."

Jessica responded: "I have to protect them too [Lee], I don't want to happen again, I don't want to witness that again, I don't want to see that side of you again as their dad."

On April 24, Lee fed the twins at 3:00 a.m. while Jessica slept. He awakened Jessica and explained he had dropped W.T.'s pacifier while carrying her. When he bent down to pick it up, W.T.'s head hit the doorjamb. She responded well to being comforted and Lee fed and changed her after the incident. Later that day, after Lee went to work, Jessica and Lee exchanged the following text messages:

"[Jessica]: W.T. looks beat up [☹] . . . [☹]
"[Lee]: I feel like shit for that
"[Jessica]: It looks bad [☹] . . . [☹]
"[Lee]: Damn man I didn't think she hit that hard.
"[Lee]: Send me a pic of it
"[Jessica]: She doesn't want to eat
"[Lee]: Well fuck should we take her in
"[Jessica]: I can't take her in like this
"[Lee]: Fuck man you already know they will pull
some shit
"[Jessica]: [Sends picture of W.T.'s face]

"[Jessica]: Um yeah I'm not bringing her like this[.]
"[Lee]: Man I feel horrible[.] I feel like the shittiest dad[.]
I mean I know she didn't hit hard she just bruised
easy Probably her jaws hurt. Is she not eating
at all[?]
"[Jessica]: She only had like not even an ounce[.]"

Despite concerns about W.T.'s ability to eat and the extensive bruising to her face, the parents did not take W.T. for medical treatment.

On April 26, Jessica was concerned because W.T. was throwing up. She spoke to Lee about taking her in to see her doctor. They decided not to seek medical treatment because her face was still bruised and they were concerned the doctor would make a referral to child protective services.

At approximately 3 a.m. on the morning of April 27, Lee fed K.T. and then W.T. According to Lee, he was changing W.T.'s diaper when she suddenly went limp. He awakened Jessica, telling her to call emergency responders while he administered CPR. At Rady Children's Hospital, W.T. was diagnosed with a left parietal skull fracture, compression fractures of three vertebrae, subdural hemorrhage, traumatic brain injury, retinal hemorrhages in the left eye and facial bruising. K.T. had a metacarpal fracture of his left hand and a healing rib fracture. Doctors determined the injuries were likely a result of inflicted trauma. The San Diego County Health and Human Services Agency (Agency) detained the twins in protective custody and filed section 300 petitions on their behalf.² W.T. died from her injuries on May 7.

² The Agency did not initiate dependency proceedings for E.V., who was in her father's care.

On K.T.'s behalf, the Agency filed an amended petition under section 300, subdivisions (a) [physical abuse], (e) [severe physical abuse of a child under the age of five years], (f) [parent caused the death of another child through abuse or neglect], and (j) [abuse or neglect of the child's sibling]. The jurisdictional and dispositional hearing was held on September 18, 19 and 24, 2012.³ The pertinent evidence is summarized below.⁴

Dr. Premi Suresh, a pediatrician specializing in child abuse and neglect, testified W.T. died from a significant brain injury. Lee's account of accidental injury when W.T.'s head hit the doorjamb did not explain W.T.'s extensive injuries. The fatal brain injury was not an impact injury but was consistent with shaking an infant. Dr. Suresh believed that the traumatic brain injury occurred shortly before W.T. became non-responsive.

K.T. had a left-sided hand fracture and a healing rib fracture. According to Dr. Suresh, in view of the totality of circumstances, his injuries were also likely a result of abuse. The injuries likely occurred at different times by different mechanisms. Dr. Suresh said returning K.T. to an unchanged home environment would place him at risk of further injury or death.

Deputy Medical Examiner Craig Nelson, M.D. testified W.T. had a constellation of injuries inconsistent with one event. The specific mechanism of striking an infant's

³ We grant the Agency's unopposed motion to correct the record to include the curriculum vitas of Dr. Premi Suresh and social worker Angela Duffy.

⁴ On appeal, we view the evidence in the light most favorable to the juvenile court's findings and orders. (*In re S.O.* (2002) 103 Cal.App.4th 453, 461.)

head on a doorjamb could potentially cause a fracture of the type W.T. had suffered. However, the three-day history between that incident and the day she became unresponsive was inconsistent with the severity of W.T.'s head injuries. After the initial impact, W.T. may have been unconscious or she may have had a lucid interval, losing consciousness as bleeding and swelling took place in the brain. The lucid interval would have been hours at most, quite possibly less time. After considering W.T.'s medical history, reported scene investigation, autopsy findings, and the circumstances surrounding her death, as currently described, Nelson listed the cause of death as blunt force head trauma and classified the manner of death as homicide.

Detective Juliette Barnes said Lee showed her the photo Jessica had texted to him of W.T.'s facial bruising and provided screen shots of other text messages between him and Jessica. The parents did not take W.T. to the doctor because they were concerned someone would think they had abused her. In a series of text messages between Jessica and Lee on April 16, Lee admitted hitting W.T., and Jessica admitted witnessing the incident.

Social worker Angela Duffy recommended the court deny reunification services to the parents. W.T.'s injuries were not consistent with Lee's explanations. K.T.'s injuries occurred at different times. Duffy said it was not in K.T.'s best interests to be reunified with his parents because of his twin's death, his own multiple injuries, his age and the parents' agreement not to seek medical treatment for W.T.'s facial injuries. Further, K.T. had only been in the parents' care from March 29 to April 27. That was an inadequate time to have formed a close attachment to either parent.

Duffy said Jessica and Lee were participating in voluntary services. They were no longer living together. The parents were compliant, cooperative and receptive to services but they did not understand the injuries were non-accidental. Duffy acknowledged that Jessica continued to parent K.T. as much as she could within limitations imposed by the court.

Jessica's therapist reported that Jessica was grieving for her daughter. Jessica was confused whether W.T.'s death was a result of an accident or intentional injury. She told the therapist she did not take W.T. to the doctor for treatment of facial bruising because she monitored the bruising and did not believe W.T. needed treatment. Jessica was attending a 52-week child abuse program. She did not accept direct responsibility for W.T.'s death and did not admit abuse. Jessica appeared to be very sad about her daughter's death. During visits with K.T., Jessica was affectionate and attentive. She brought supplies to visits, including diapers, formula, clothing, toys, medication and other items.

The juvenile court found that on April 10, both parents knew that W.T. had bruises to her abdomen and thigh. Six days later the parents discussed Lee's physical violence to W.T. On April 24, Jessica decided she could not seek medical care for W.T. because of the severity of the facial bruising. The court found that Jessica failed to protect W.T. and failed to provide medical care to her. Because of K.T.'s age, there were no issues of continuity of care or bonding with either parent. After sustaining the section 300 petition, the court removed K.T. from parental custody, denied reunification services to the

parents under section 361.5, subdivisions (b)(4) and (b)(5), and set a section 366.26 hearing.

Jessica petitions for review of the juvenile court's orders. (§ 366.26, subd. (I); Cal. Rules of Court, rule 8.452.) She asks this court to reverse the orders setting a section 366.26 hearing, and to remand the matter with directions to the juvenile court to enter orders for family reunification services. This court issued an order to show cause, the Agency responded and the parties waived oral argument.

DISCUSSION

Jessica contends the juvenile court erred when it denied family reunification services to her under section 361.5, subdivisions (b)(4) and (b)(5), and set a hearing to select and implement a permanency plan for K.T. She asserts the finding reunification was not in K.T.'s best interest is not supported by substantial evidence. Jessica also argues there is no substantial evidence supporting the finding she knew or reasonably should have known that Lee was abusing W.T. (§§ 300, subd. (e) & 361.5, subd. (b)(5).)

A.

LEGAL STANDARDS FOR THE DENIAL OF FAMILY REUNIFICATION SERVICES UNDER SECTION 361.5, SUBDIVISIONS (b)(4) AND (b)(5), AND THE STANDARD OF REVIEW

Family reunification services play a critical role in dependency proceedings. (*In re Alanna A.* (2005) 135 Cal.App.4th 555, 563.) To deny family reunification services to a mother or a statutorily presumed father, the court must find by clear and convincing evidence the parent is described by one or more of the provisions in section 361.5, subdivision (b). (§ 361.5, subd. (b)(1)-(15); see also 42 U.S.C. § 671(a)(15)(D).)

Here, the court denied reunification services to Jessica under section 361.5, subdivisions (b)(4) and (b)(5).

Section 361.5, subdivision (b)(4) directs the court to not order reunification services for a parent who has caused the death of another child through abuse or neglect. However, if section 361.5, subdivision (b)(4) applies, the court may order reunification services to that parent if it finds, by clear and convincing evidence, that reunification is in the child's best interest. (§ 361.5, subd. (c).)

A juvenile court has broad discretion when determining whether further reunification services would be in the best interests of the child under section 361.5, subdivision (c). An appellate court will reverse that determination only if the juvenile court abuses its discretion. (*In re William B.* (2008) 163 Cal.App.4th 1220, 1229; *In re Angelique C.* (2003) 113 Cal.App.4th 509, 523.)

Section 361.5, subdivision (b)(5), directs the court to deny reunification services to a parent when the child was brought within the jurisdiction of the court under section 300, subdivision (e), because of the conduct of that parent. A child comes within section 300, subdivision (e) if the child is under the age of five years and has suffered severe physical abuse by a parent or by any person known to that parent, if the parent knew or reasonably should have known that the person was physically abusing the child.⁵

⁵ If a parent is described by section 361.5, subdivision (b)(5), the court is prohibited from ordering reunification services unless it finds that, based on competent testimony, those services are likely to prevent re-abuse 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).) The social worker is required to investigate the circumstances that

We review the court's decision to deny reunification services under section 361.5, subdivision (b)(5) under the substantial evidence standard. (Cf. *Amber K. v. Superior Court* (2006) 146 Cal.App.4th 553, 560.) We do not resolve conflicts in the evidence, pass on the credibility of witnesses or determine where the preponderance of the evidence lies. (*Elijah R. v. Superior Court* (1998) 66 Cal.App.4th 965, 969.) The petitioner has the burden to show that the evidence is insufficient to support the juvenile court's findings. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

B.

*THE JUVENILE COURT DID NOT ERR WHEN
IT DENIED REUNIFICATION SERVICES TO JESSICA*

1. *Jessica does not show on appeal the court abused its discretion when it found that reunification was not in K.T.'s best interest under section 361.5, subdivision (b)(4)*

Jessica does not dispute the finding she caused W.T.'s death through abuse or neglect. (§§ 300, subd. (f), 361.5, subd. (b)(4).) She contends reunification is in K.T.'s best interest because she is a skilled and loving parent, was enrolled in therapy and parenting classes and is no longer living with Lee. Jessica argues she is making substantive progress in therapy to accept responsibility for W.T.'s injuries.

The reviewing court does not reweigh the evidence. (*Elijah R. v. Superior Court, supra*, 66 Cal.App.4th at p. 969.) The juvenile court did not abuse its discretion when it determined that reunification with either parent was not in K.T.'s best interest. Jessica

led to the removal of the child and to advise the court whether there are circumstances that indicate that reunification is likely to be successful or unsuccessful, and whether failure to order reunification services is likely to be detrimental to the child. (*Ibid.*)

did not protect W.T. and K.T. from ongoing physical abuse. The children's injuries were inflicted on various occasions and by different mechanisms. Jessica was aware of bruising to W.T.'s abdomen, thigh and face. Despite participating in services for approximately four months, Jessica did not acknowledge that her decision to conceal W.T.'s facial injuries rather than seeking medical treatment⁶ and her failure to protect her children permitted ongoing physical abuse to W.T. and K.T., and led to W.T.'s death. Further, K.T. was in Jessica's care for less than a month. The social worker said K.T. had not formed a close attachment and bond with Jessica. In view of the severity of K.T.'s and W.T.'s injuries, Jessica's failure to protect her children, K.T.'s age and his lack of attachment to Jessica, the court could reasonably conclude that reunification with Jessica was not in K.T.'s best interest. (§ 361.5, subs. (b)(4), (c).)

2. *There is substantial evidence to show Jessica knew or should have known that Lee was abusing W.T.*

Section 361.5, subdivision (b)(5) directs the court to deny reunification services to a parent who knew or reasonably should have known that the other parent was physically mistreating the child, as well as to the parent who personally abused the child. (*In re Joshua H.* (1993) 13 Cal.App.4th 1718, 1732; *Tyrone W. v. Superior Court* (2007) 151 Cal.App.4th 839, 848-849.)

⁶ W.T.'s facial bruising was on different planes of her face, including her ear. Lee's explanation for the injury did not account for the extensive bruising. According to Dr. Paresh, W.T.'s injuries would have been characterized as non-accidental.

The record shows that on April 10, Jessica knew that W.T. had suffered unexplained bruising to her abdomen and thigh. On April 16, Jessica knew that Lee had "snapped" when he was awakened by the twins. In a series of text messages, Lee admitted hitting W.T. Jessica said she did not want to "witness" that again, allowing the trier of fact to conclude that she saw Lee commit an act of physical abuse against W.T. On April 24, W.T. suffered significant facial bruising while in Lee's care. Jessica did not seek medical treatment for W.T. for fear the Agency would become involved. When discussing W.T.'s injuries with Dr. Suresh for the first time, Jessica asked whether the injuries were caused by "shaken baby." Jessica said she knew the injury did not "just happen" and said, "I'm not stupid." The record amply supports the court's finding that Jessica knew or should have known that Lee was abusing W.T. Jessica does not meet her burden on appeal to show there is no substantial evidence to support the findings under section 300, subdivision (e) and section 361.5, subdivision (b)(5). (*In re L.Y.L., supra*, 101 Cal.App.4th at p. 947.)

DISPOSITION

The petition is denied. The request for stay is denied.

IRION, J.

WE CONCUR:

McDONALD, Acting P. J.

O'ROURKE, J.