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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.M. et al., Persons Coming Under
the Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

D.J. et al.,

Defendants and Appellants.

E055273

(Super.Ct.No. RIJ103742)

OPINION

APPEAL from the Superior Court of Riverside County. Martin H. Swanson,
Judge, Temporary Judge. (Pursuant to Cal. Const., art VI, § 21.) Reversed.

Gerard McCusker, under appointment by the Court of Appeal, for Defendant and
Appellant D.J.

Liana Serobian, under appointment by the Court of Appeal, for Defendant and
Appellant J.M.

Pamela J. Walls, County Counsel, and Anna M. Deckert, Deputy County Counsel, for Plaintiff and Respondent.

Mother D.J. and Father J.M. appeal an order terminating their parental rights and selecting adoption as the permanent plan for their two children.¹ We conclude that the orders must be reversed because it is not clear what evidence the juvenile court relied on with respect to the disposition order.

FACTUAL AND PROCEDURAL HISTORY

Dependency proceedings pursuant to Welfare and Institutions Code section 300² began after the Riverside County Department of Public Social Services (DPSS) received a report that the parents' apartment was filthy. The reporting party also stated that the parents were developmentally disabled and expressed concern about their ability to care for their daughter, who was then two years old, and their newborn son, although the reporting party also stated that Mother was a "good mother." Mother was then in the hospital following the baby's birth.

DPSS social workers visited Mother in the hospital. There, they met Jaimi Lewis, the parents' in-home supportive services worker. Ms. Lewis reported that both parents were developmentally delayed and were regional center clients. She had worked with

¹ The children share the same initials. We will refer to them sometimes as A.M.-girl and A.M.-boy.

² All further statutory citations refer to the Welfare and Institutions Code unless another code is specified.

Mother since 2003 and with Father since 2006. At the time the daughter was born, Ms. Lewis provided 70 hours a month in supportive services. Her hours had been cut, however, and she was currently spending two to three hours two days a week assisting the parents. She did not know if her hours would be cut further. Workers from Inland Regional Center also provided assistance to the parents a couple of days a week for an unspecified number of hours.

Ms. Lewis stated that the parents' parenting skills were "adequate," but that the house was really dirty and cluttered. Before Father moved in, Mother had done better at keeping the apartment clean. (The parents had then been together for eight years.) Father, however, was "somewhat of a pack rat." When asked if Father helps with the housework, Ms. Lewis replied, "No, he's really lazy." She reported that Father was employed part time as a janitor at an amusement park and that both parents received SSI because of their disabilities. Mother also received food stamps and WIC for the child. Ms. Lewis also reported that both parents were very attentive to their daughter, that they disciplined her by means of brief time-outs, that she never observed any marks or bruises on the child, and that there was always food in the home and the utilities were always in working order.

A social worker met with Mother in her hospital room. Mother confirmed that Father was the biological father of both her daughter and the newborn baby. She confirmed Father's employment and the benefits they receive because of their disabilities. She also told the social worker that she suffered from a "serious infectious disease," for

which she took medications. She stated that the baby had been diagnosed with the same disease.³

The social workers went next to the parents' apartment. Father and several of his relatives were cleaning the apartment when they arrived. The condition of the apartment was "deplorable." It was extremely cluttered, with "stuff" everywhere. The walls appeared filthy, and cockroaches were "running up and down in every room." The floors did not appear to have been swept for months. Mother's medications were within reach of a child. The parents' bed was set up in the dining room, and the single bedroom had "loads of 'stuff'" piled up everywhere. The piles could easily have fallen on the two year old.

The paternal grandfather had just cleaned the bathroom, and it was "somewhat tidy." The grandfather said that before he cleaned it, "It was bad." The kitchen was "disgusting." There were cockroaches everywhere, including inside the cabinets, the refrigerator and the freezer. The freezer and refrigerator were filthy, and most of the food inside was uncovered and moldy. While the social worker was there, the two year old came in and asked her father for something to eat out of the refrigerator. The sink was full of dirty pots and dishes with spoiled food in them. Some appeared to have been left sitting there for "weeks, if not months." When the social worker confronted Father with

³ The record does not disclose the nature of this disease.

his earlier statement that he had been cleaning the house just before going to the hospital to visit Mother and the baby, he said, “I did clean the house.”

Both children were taken into protective custody, and a petition pursuant to section 300 was filed. It alleged failure to protect, pursuant to section 300, subdivision (b), based on the conditions in the home. It alleged that the parents had been provided with preplacement preventive services to address the cleanliness of the home but that the parents had failed to follow through with the services and had continued to fail to address the cleanliness of the family home.

The facts underlying the latter allegation are as follows: A referral in 2009 had first brought the family to the attention of DPSS. A.M.-girl was a year old at the time. The apartment was infested with cockroaches and was extremely cluttered, with five- to six-foot piles of baby clothing and other items. Mother was given a period of time to clean the apartment. At the follow-up visit, the home was “appropriate,” and A.M.-girl appeared well cared for. The parents were offered “Differential Response”⁴ referrals, but they declined. No dependency petition was filed, and the case was closed as “Inconclusive.”

The current petition also alleged that Mother had a history with DPSS resulting in the termination of her parental rights to the children’s half sibling, A.J., and that another half sibling, B.J., died from ongoing blunt force trauma to the head while in Mother’s custody. It alleged that the children were at risk of harm pursuant to section 300,

⁴ This term is not explained.

subdivision (f), i.e., because their half sibling died from abuse while in Mother's custody. The facts underlying those allegations are as follows. In 1995, Mother's first child, B.J., died at the age of two and a half months from repeated blunt force head trauma.⁵ Mother and her then husband, the child's father, were both arrested for murder. Mother was found incompetent to stand trial; the father was convicted. Mother was placed at Camarillo State Hospital for about a year, and the charge against her was later dismissed in the interest of justice pursuant to Penal Code section 1385.⁶ Mother's son A.J. was born in 2002. DPSS deemed A.J. at risk of harm because of the death of B.J. and because of Mother's alleged history of drug use, and detained him at birth. Mother was offered reunification services but failed to reunify with A.J. Her parental rights were terminated in 2002, and A.J. was later adopted.

On May 12, 2010, the court sustained the allegations pursuant to section 300, subdivision (b) but struck the allegation pursuant to subdivision (f). The court ordered two psychological evaluations for each parent, to determine whether they could benefit from services. The court set a contested disposition hearing for June 28, 2010.

⁵ At the time A.J. was taken into protective custody, DPSS was apparently under the impression that B.J. had died of dehydration or malnutrition. The autopsy report, as quoted in the reports DPSS submitted in this case, did not mention that B.J. showed signs of dehydration or malnutrition, however, and stated that he died from repeated blunt force head trauma.

⁶ We take judicial notice of our opinion in *In re A.J.* (April 9, 2004, E034848 [nonpub. opn.]), in which we stated that the case was dismissed because of the unavailability of material witnesses. (*Id.* [at p. 3].) (Evid. Code, § 452, subd. (d).)

Reports prepared for the disposition hearing showed the following: The jurisdiction/disposition report showed that A.M.-girl had not suffered any illness or injury as a result of the living conditions in the home. When she was detained from her parents, she was up to date on her vaccinations and was observed to be developing normally with no evidence of any delays. A well-child exam on March 3, 2010 revealed no medical concerns. The parents' in-home supportive services worker, Jamie Lewis, reported that as of March 18, 2010, the parents had cleaned the house, and it now "look[ed] good." The paternal grandfather was helping them "go through their stuff." Ms. Lewis confirmed that the parents had been told the year before that their daughter would be removed if they failed to clean up the house. She stated that in all the years she had known Mother, her house had never before been "filthy." She opined that the parents were capable of raising two children, if they could "get it together with their cleaning."

The parents had been given in-home services to which they had been receptive. The worker reported that they had followed her suggestions for organizing their small apartment so that it would not look cluttered. She reported that as of the second visit, on April 14, 2010, she inspected the home and found it "clean and organized." The worker reported that the parents were "benefitting very much" from her services. By August 30, 2010, DPSS reported that the parents had "completed their in-home parenting education."

DPSS referred the parents to counseling, which they attended regularly. Before the disposition hearing, the parents had completed a life skills class.

DPSS reported prior to the section 366.26 hearing that throughout these proceedings, the parents had visited the children consistently twice a week, for four hours a week. The visits had always gone well, and the children's caretakers reported that the parents interacted well with the children and the children enjoyed being with their parents. The caretaker reported that the parents worked as a team regarding the care of the children. The only negative comment was that the parents tended to "give into [*sic*] the needs and wants" of their daughter.

Both psychologists who evaluated the parents concluded that it was unlikely that they would benefit from services because of their limited mental abilities.

DPSS recommended against providing services to the parents, based on the psychological evaluations.

At the disposition hearing, the court denied services and ordered the children maintained in their foster home. The court set a section 366.26 hearing on termination of parental rights.⁷

The children were placed in several foster homes during the course of the proceedings. They always appeared to adjust well to their placements. However, they were removed from one foster home after A.M.-boy suffered a head injury. The foster father stated that the child had fallen from a "bouncy seat" which the foster father had placed on a kitchen chair. The foster father said he had failed to buckle the child into the seat. The injury, at first believed to be minor, was later determined to be very serious –

⁷ The court also found that the Indian Child Welfare Act does not apply.

the child had sustained two skull fractures and possibly bleeding in his brain. He was treated and eventually recovered.

At the section 366.26 hearing, the court made the necessary findings and terminated the parental rights of both parents. It found that it was reasonably likely that the children would be adopted and determined that adoption was the appropriate permanent plan for the children. The children were placed in a prospective adoptive home.

The parents filed timely notices of appeal.

LEGAL ANALYSIS

1.

CONTENTIONS PERTAINING TO THE DISPOSITION/SETTING HEARING ARE COGNIZABLE ON APPEAL

As noted above, at the disposition hearing the juvenile court found that neither parent would benefit from services. It denied services and then set the case for a section 366.26 hearing for termination of parental rights. Father challenges the sufficiency of the evidence upon which the court's rulings were based and contends that the denial of reunification services was an abuse of discretion.⁸ DPSS contends that issues pertaining to the disposition order are not cognizable on appeal because Father did not challenge the order by writ petition, as required by section 366.26, subdivision (l). We disagree.

⁸ The parents join in each other's arguments.

In dependency proceedings, a parent has the right to seek writ review of orders made at the hearing at which the juvenile court terminates or denies reunification services and sets a hearing on termination of parental rights, pursuant to section 366.26. If the parent does not file a writ petition challenging the orders made at the setting hearing, appellate review of those issues is waived. (§ 366.26, subd. (l).) The juvenile court is required to inform the parties present at the hearing orally of the right to writ review and of the effect of failure to file a writ petition. (Cal. Rules of Court, rule 5.590(b)(1).) If any party is absent from the hearing, the court must provide a written advisement within one day following the setting hearing. (Cal. Rules of Court, rule 5.590(b)(2).) If the court fails to advise a party as required by section 366.26, subdivision (l), claims of error at the setting hearing are cognizable on appeal from the order terminating parental rights.⁹ (*In re Harmony B.* (2005) 125 Cal.App.4th 831, 838-839 [Fourth Dist., Div.

⁹ Section 366.26, subdivision (l), which bars review of a referral order unless the parent has sought timely review by extraordinary writ, directs the Judicial Council to adopt rules of court to ensure that “(A) A trial court, after issuance of an order directing a hearing pursuant to this section be held, shall advise all parties of the requirement of filing a petition for extraordinary writ review as set forth in this subdivision in order to preserve any right to appeal in these issues. This notice shall be made orally to a party if the party is present at the time of the making of the order or by first-class mail by the clerk of the court to the last known address of a party not present at the time of the making of the order.” (§ 366.26, subd. (l)(3)(A).)

California Rules of Court, rule 5.590(b) provides, in pertinent part, “When the court orders a hearing under Welfare and Institutions Code section 366.26, the court must advise all parties and, if present, the child’s parent, guardian, or adult relative, that if the party wishes to preserve any right to review on appeal of the order setting the hearing under Welfare and Institutions Code section 366.26, the party is required to seek an extraordinary writ by filing a *Notice of Intent to File Writ Petition and Request for Record* (California Rules of Court, Rule 8.450) (form JV-820) or other notice of intent to file a writ petition and request for record and a *Petition for Extraordinary Writ*

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Two].) Although a disposition order is normally appealable, if services are denied at the disposition hearing and the case is then set for a section 366.26 hearing, “the traditional rule favoring the appealability of dispositional orders yields to the statutory mandate for expedited review.” (*In re Athena P.* (2002) 103 Cal.App.4th 617, 624-625.) However, if the parent’s failure to file a writ petition is excusable because the juvenile court failed to advise the parent of the writ requirement, the parent may, on appeal from the order terminating parental rights, challenge both the order setting the termination hearing and the disposition order. (*Ibid.*)

Here, at the disposition hearing, the juvenile court denied reunification services for the parents and set a section 366.26 hearing. It did not advise the parents pursuant to section 366.26, subdivision (l). A written advisement was mailed to the parents and their attorneys, but not until October 13, 2010, seven days after the disposition hearing. Father now contends that the omission of the oral advisement and the belated written advisement

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(*California Rules of Court, Rules 8.452, 8.456*) (form JV-825) or other petition for extraordinary writ.

“(1) The advisement must be given orally to those present when the court orders the hearing under Welfare and Institutions Code section 366.26.

“(2) Within one day after the court orders the hearing under Welfare and Institutions Code section 366.26, the advisement must be sent by first-class mail by the clerk of the court to the last known address of any party who is not present when the court orders the hearing under Welfare and Institutions Code section 366.26.

“(3) The advisement must include the time for filing a notice of intent to file a writ petition.

“(4) Copies of *Petition for Extraordinary Writ (California Rules of Court, Rules 8.452, 8.456)* (form JV-825) and *Notice of Intent to File Writ Petition and Request for Record (California Rules of Court, Rule 8.450)* (form JV-820) must be available in the courtroom and must accompany all mailed notices informing the parties of their rights.”

permits him to challenge the court's order setting the section 366.26 hearing despite his failure to file a writ petition.

DPSS grudgingly concedes that the oral advisement was not given.¹⁰ However, it contends that because Father did not object to the omission, he has waived the claim of error. DPSS does not cite to any authority supporting its position, and we are aware of none.

The fundamental purpose of the requirement of oral advisement if the parent is present or written advisement if the parent is absent is, obviously, to provide effective notice of the parent's right to writ review and of the consequences of failing to seek writ review. If the juvenile court fails to provide *any* notice, in most instances the parent will be relieved of the requirement of filing a writ petition. (*In re T.W.* (2011) 197 Cal.App.4th 723, 730-731, and cases cited therein.) However, the parties have not cited—and we have not found—any cases which address the current situation, i.e., where oral notification, although required because the parents were present in court, was not given, but written notice *was* given.

Father appears to accept that in the absence of required oral notification, timely and nondefective written notice will suffice. We agree with that proposition. Father

¹⁰ DPSS states that although the minute order states that notice was given, the reporter's transcript shows that the juvenile court "did not appear" to orally advise Father of his writ petition rights. Where there is a conflict between the reporter's transcript, which appears to be a complete transcription of the proceedings, and the minute order, we presume that the reporter's transcript is the more accurate. (*Jennifer T. v. Superior Court* (2007) 159 Cal.App.4th 254, 259; *In re Merrick V.* (2004) 122 Cal.App.4th 235, 249.)

asserts, however, that the advisement was defective because it was not timely. He relies on *In re Cathina W.* (1998) 68 Cal.App.4th 716 (*Cathina W.*) to contend that this defect deprived him of adequate notice.¹¹

In *Cathina W.*, *supra*, 68 Cal.App.4th 716, the mother did not attend the hearing at which the section 366.26 hearing was set. The court did not send written advisement of the writ requirement. However, four days after the setting order was filed, the court did mail to the mother a Judicial Council form JV-820, “Notice of Intent to File Writ Petition and Request for Record.”¹² The form was returned to the court marked “Return to Sender” and labeled with the mother’s new address. There was no indication in the court’s file that the form was ever sent to the new address, and the mother asserted that she did not receive it. The court held that the mother was relieved of the requirement to file a writ petition both because she did not receive the form in the mail and because, even if the mother had received the form, it was “defective in a material way,” because it stated incorrectly that the section 366.26 hearing was calendared for August 26, 1997. (*Cathina W.*, at pp. 722-723.) If the mother had received the form, “the ‘8/26/97’ date

¹¹ In the other cases he relies on, the parent did not receive *any* notice, either oral or written. (*In re Frank R.* (2011) 192 Cal.App.4th 532, 539; *In re Lauren Z.* (2008) 158 Cal.App.4th 1102, 1110; *In re Maria S.* (2000) 82 Cal.App.4th 1032, 1038.) The same is true of *Cathina W.*, *supra*. However, in that case, the court also discusses whether the notification sent by the court would have been adequate if the mother had received it. (See discussion, *post*.)

¹² Copies of the Judicial Council forms JV-820 (“Notice of Intent to File Writ Petition and Request for Record”) and JV-825 (“Petition for Extraordinary Writ”) are required to be mailed to the absent parent along with the advisement of the requirement for filing a writ petition. (Cal. Rules of Court, rule 5.590(b)(4).)

inserted on the form would have told the mother that she had until September 7, 1997, twelve days after August 26, 1997, within which to file a notice of intent [to file a writ petition]. A notice of intent filed during that time frame would have been late by a wide margin.” (*Id.* at p. 723, fn. omitted.)

We view the problem with the ineffectual attempt at advisement differently than did the court in *Cathina W.* The problem is not that the “notice of intent” form sent to the mother contained an incorrect date; rather, the problem is that it utterly failed to notify her that she was required to file the notice of intent within 12 days from the date of the order setting the section 366.26 hearing and failed to notify her of the consequences of not filing a writ petition. Nevertheless, we agree with the basic premise of *Cathina W.*, i.e., that the juvenile court has a duty to provide timely, correct notice as mandated by section 366.26, subdivision (*l*), and that where there is a material defect in the advisement—i.e., a defect which renders the advisement ineffective to adequately convey to the parent both the requirement for filing a notice of intent to seek writ review and the time limits for doing so—the parent is relieved of the writ requirement, unless the record otherwise reflects that the parent had actual knowledge of the requirement and the time limit.

Here, the advisements sent to both parents incorrectly stated that the hearing had been held on October 13, 2010, and that the parents had 12 days from that date to file notices of intent to file writ petitions. In fact, the hearing was held on October 6, 2010, and the notice of intent was due by October 18. A notice of intent filed between October

18 and October 25, in reliance on the advisement mailed to the parents would not have been timely. That is a relatively minor concern, however, because the reviewing court may grant relief from default upon a showing of good cause. (*Karl S. v. Superior Court* (1995) 34 Cal.App.4th 1397, 1404; accord, *Jonathan M. v. Superior Court* (1995) 39 Cal.App.4th 1826, 1831.) The juvenile court’s failure to provide a timely advisement which accurately states the time limit for filing a notice of intent as required by section 366.26, subdivision (l) is surely good cause for relief from default. (See *In re Athena P.*, *supra*, 103 Cal.App.4th at p. 625.)

Of greater concern is the fact that the advisements state that it is necessary to file a writ petition in order to preserve any appellate rights “[i]f [the parent] did not appear at the hearing.” (Italics added.) A reasonable person reading that notice could conclude that a writ petition was *not* necessary if the parent did attend the hearing. Here, the parents did attend the hearing. It would be reasonable for them to conclude from the wording of the advisement that the writ requirements did not apply to them. Consequently, we conclude that the juvenile court’s failure to advise the parents orally at the conclusion of the hearing was not cured by the ambiguous and misleading written advisement, and the parents were therefore relieved of the requirement to seek writ review.

We also reject DPSS’s contention that Father has waived review by his failure to object at the hearing to the removal of the children from his custody. The hearing was set contested, and Father presented argument and did not acquiesce in the ruling. (Cf. *In re*

Richard K. (1994) 25 Cal.App.4th 580, 588-590 [mother's submission on department's recommendation, without presenting contrary evidence or argument, constitutes acquiescence in the ruling].) Because the court was required to make dispositional findings, including determining whether removal of the children was necessary for their protection (§ 361, subs. (a), (c)), Father's lack of acquiescence constituted an implicit objection to removal of the children, and no express objection was required. Moreover, the sufficiency of the evidence to support an order or judgment is an exception to the general rule that points not argued in the trial court cannot be raised on appeal. (*People v. Butler* (2003) 31 Cal.4th 1119, 1126, citing *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 23, fn. 17.)

For all of these reasons, the issues Father raises concerning the disposition order are cognizable on appeal.

2.

THE DISPOSITION AND TERMINATION ORDERS MUST BE REVERSED

Father contends that the disposition order removing the children from his custody must be reversed for insufficient evidence to support findings under section 361 and that it was an abuse of discretion to deny reunification services based on section 361.5, subdivision (b)(2).

Section 361, subdivision (c) provides that children shall not be removed from the physical custody of a parent with whom they were residing when the dependency petition was filed unless there is clear and convincing evidence of any of several enumerated

circumstances. Clear and convincing evidence is required in order to protect the parents' constitutional rights to the care, custody and management of their children. (*In re Henry V.* (2004) 119 Cal.App.4th 522, 529.) Out-of-home placement is a "last resort, to be considered only when the child would be in danger if allowed to reside with the parent." (*Id.* at p. 525.) The juvenile court must also determine whether reasonable efforts were made to prevent or to eliminate the need for removal of the child from his or her home, and it must state on the record the facts on which the decision to remove the child was based. (§ 361, subd. (d); *In re Henry V.*, *supra*, at p. 525.)

The sole ground for removal listed in section 361, subdivision (c) which applies in this case is subdivision (c)(1), which permits removal upon a finding that there is or would be a substantial danger to the child's "physical health, safety, protection, or physical or emotional well-being" if the child were returned home, and there is no reasonable means by which the child's physical health can be protected without removing the child from the physical custody of the parent.

Father contends that the evidence is insufficient to support a finding under section 361, subdivision (c)(1) that removing the children from his custody was necessary because undisputed evidence showed that by the time of the disposition hearing, he and Mother had cleaned the apartment and removed the clutter and had also child-proofed the home. They had maintained a clean and sanitary home for a period of several months, as well as having completed in-home services to which they were referred by DPSS and

were participating in counseling. Father also points out that the court did not consider whether any reasonable alternative to removal existed.

DPSS responds that there was sufficient evidence to support the order because the record shows that in spite of having received a prior warning from DPSS that their child might be removed from their custody if they did not maintain a clean home, the parents did not maintain a clean home. Further, the evidence showed that they were unable to maintain a clean home in spite of family support and the benefit of several years of services from an independent living skills support coordinator. DPSS contends that this evidence supports the conclusion that there was no reasonable alternative to removal of the children.

Both Father and DPSS assume that the disposition order continuing the children's removal from the parents' physical custody was based on the evidence pertaining to the home cleanliness and safety issue. However, the juvenile court did not state the factual basis for its findings under section 361, either in its oral ruling at the disposition hearing or in the minute order. It is not even clear that the court actually made the findings required by section 361, subdivisions (c) and (d), or that it even considered those requirements. At the disposition hearing, the court and the parties focused exclusively on DPSS's recommendation that reunification services be denied to Father under section 361.5, subdivision (b)(2), based on the psychological evaluations which stated that he was unlikely to benefit from services, and to Mother under section 361.5, subdivisions (b)(2), (b)(10) and (b)(11), because of her failure to reunify with A.J. and the termination

of her parental rights as to that child.¹³ The court’s ruling was limited to finding that reunification services need not be given for those reasons. Neither the court nor the parties made any reference to the home cleanliness and safety issue in the course of the hearing, and the court made no express ruling under section 361, subdivisions (c) and (d).¹⁴

¹³ Section 361.5, subdivision (a) provides that, except as provided in subdivision (b), the court shall order reunification services to the child, the mother and the presumed father. As pertinent, section 361.5, subdivision (b) provides that reunification services “need not be provided” when the court finds any of the following:

“(2) That the parent or guardian is suffering from a mental disability that is described in Chapter 2 (commencing with Section 7820) of Part 4 of Division 12 of the Family Code and that renders him or her incapable of utilizing those services. [¶] . . . [¶]

“(10) That the court ordered termination of reunification services for any siblings or half siblings of the child because the parent or guardian failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent or guardian.

“(11) That the parental rights of a parent over any sibling or half sibling of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from the parent.”

¹⁴ The minute order perfunctorily states that the court made findings pursuant to section 361, subdivision (c). We do not, however, consider the minute order to be a reliable reflection of the court’s actual findings or orders because it contains a myriad of incorrect statements.

As we have noted above, the minute order incorrectly states that notice of writ review rights and the ramifications of failing to seek writ review were given as required by section 366.26, subdivision (l). In addition, the minute order states that the children were adjudged dependents based on section 300, subdivisions (b) and (f). However, at the jurisdiction hearing, the court struck the subdivision (f) allegation.

The minute order also states that reunification services were denied to Mother under section 361.5, subdivisions (b)(2), (b)(4), (b)(5), (b)(10) and (b)(11). Subdivisions

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On this record, we are not willing to infer that the court actually made findings under section 361, subdivisions (c) and (d), nor are we willing to infer a factual basis which would have supported those findings. “Where insufficiency of the evidence is an issue, an appellate court reviews the entire record in the light most favorable to the order and determines whether any substantial evidence supports the conclusion of the trier of fact. [Citations.] However, where the trial court has failed to make express findings[,] the appellate court generally implies such findings only where the evidence is clear. [Citations.]” (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1825; accord, *In re Isayah C.* (2004) 118 Cal.App.4th 684, 699.)

It is far from clear that there is substantial evidence which warrants continued removal of the children based on the home cleanliness and safety issue. It is true that the parents failed to keep their home clean after being warned once before that failure to do so could result in the removal of their child. It is also true, however, that after their children actually were removed, the parents cleaned up their home, child-proofed it, and removed the clutter. DPSS, which had the burden of proving the necessity for removing

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(b)(4) and (b)(5) do not apply to this case. Subdivision (b)(4) permits denial of services where the parent has caused the death of another child through abuse or neglect. That allegation was stricken from the petition. Subdivision (b)(5) permits denial of services if the child “was brought within the jurisdiction of the court under subdivision (e) of Section 300 because of the conduct of that parent or guardian.” Section 300, subdivision (e) provides for dependency jurisdiction where the child has suffered severe physical abuse. The petition in this case contained no such allegation.

Finally, the minute order does not state that services were denied to Father.

the children from the parents' physical custody, presented no evidence that they had failed to maintain the home in good condition since then.

Nor is it clear that removal of the children was necessary based on the psychological evaluations. Harm to a child cannot be presumed from a parent's mental illness or cognitive impairment. (*Tracy J. v. Superior Court* (2012) 202 Cal.App.4th 1415, 1424.) Although both psychologists concluded that the parents would be unable to provide adequate care for their children and would not benefit from services because of their mental limitations, that conclusion merely begs the question until the parents actually were provided services: Mild mental retardation is not a sufficient ground, in itself, for the removal of a child from the parent's physical custody, and a psychologist's opinion, rendered before the parent has had the opportunity to participate meaningfully in reunification services, is not substantial evidence that removal is warranted. (*Id.* at pp. 1424-1425.) Moreover, during the reunification period, the parent is entitled to "every presumption in favor of returning the child to parental custody. [Citations.]" (*Id.* at p. 1424.) In the absence of the required statement of the facts on which the decision to remove the child was based (§ 361, subd. (d); *In re Henry V.*, *supra*, 119 Cal.App.4th at p. 525), we are not persuaded by the record that the juvenile court gave the parents the benefit of that presumption in this case.

We are unwilling to make any inferences in support of the juvenile court's ruling for the additional reason that it appears that the court might have determined to deny services to Father and to set a hearing to terminate his parental rights based on factors

which applied solely to Mother. It appears, too, that the court might have based its ruling as to both parents on some misconceptions concerning what it termed Mother's "long and very dismal history."

In making its ruling, the court discussed the efforts the parents had made (without specifying what efforts it was referring to) and noted that they seemed to be "good hearted," but commented that they would not benefit from services because of a "bad luck of the draw genetically." This appears to be a reference to section 361.5, subdivision (b)(2). However, the court did not expressly state that it was denying services to either parent under that provision. Rather, the court then segued into a discussion of Mother's history, and asserted that it might be "avoiding a tragedy" by denying reunification services. It then said, "In any case, I will find without challenge (b)(10) and (b)(11) due to history. *Based on those statutes*, I will find that parents would not benefit. I will not order services. I will be forced to set a permanency hearing." (Italics added.) The court did not refer to subdivision (b)(2).

The court did not appear to distinguish between Mother and Father, and it appeared to deny services to both of them solely on the basis of subdivisions (b)(10) and (b)(11) of section 361.5. However, those subdivisions do not apply to Father; he had no other children with whom he failed to reunify or as to whom his parental rights were terminated. Accordingly, services could not be denied to Father on that basis.¹⁵ Those

¹⁵ For the same reason, the facts underlying those subdivisions do not justify removal of the children from his custody.

subdivisions do, of course, apply to Mother. However, we question whether the facts underlying those subdivisions constitute substantial evidence which would justify either removing the children from Mother's custody or denying her services because it is not at all clear that Mother's "history" with her older children constituted clear and convincing evidence that the younger children are at risk of harm. While Mother was certainly culpable for failing to protect B.J., there is no evidence that she personally inflicted any of the injuries that lead to his death or otherwise abused or neglected him. The juvenile court implicitly so found when it struck the allegation under section 300, subdivision (f). Nor is there any evidence that Mother abused or neglected A.J. On the contrary, A.J. was detained immediately after his birth and was never in her physical custody. At the time of his birth, Mother was a transient, and there was apparently some evidence that she was abusing drugs. The jurisdiction/disposition report in this case also states that at the time A.J. was born, it was believed that B.J. died "due to dehydration or malnutrition" and that A.J. was detained out of concern that Mother would abuse or neglect him in a similar manner. This belief was later shown to be unfounded.¹⁶ After the criminal case against Mother was dismissed, Mother was offered services but failed to reunify for reasons which are not stated in the record of the current case.¹⁷

¹⁶ It bears repeating that there is no evidence that B.J. was malnourished or dehydrated when he died. The autopsy report states that he died of repeated blunt force trauma to the head and contains no finding that the child was malnourished or dehydrated.

¹⁷ In our previous opinion concerning A.J., we stated that the child was detained at birth because the murder charge was still pending. (*In re A.J.*, *supra*, E034848 [at pp. 2-
[footnote continued on next page]

As to the children who are the subjects of the current proceeding, there is absolutely no evidence of abuse or neglect, except for the home cleanliness and safety issues, and there is evidence that despite their limitations, both parents were in fact successfully raising their daughter. Their daughter was healthy and generally well cared for, including being up to date on her vaccinations, and the in-home supportive services worker who had worked with the couple for several years observed that Mother and Father were good parents and were very loving and attentive to their daughter, whom they disciplined appropriately. The worker opined that they were capable of raising a child, apart from the home cleanliness and safety issues.

Moreover, B.J. died in 1995, and Mother's parental rights to A.J. were terminated in 2002, when Mother was a transient. By the time the current petition was filed, Mother's life had changed dramatically. Mother and Father had been in a stable and nonabusive relationship for eight years, and they were maintaining a stable residence. There is no evidence that either parent abused drugs or alcohol, and there is no evidence that they abused or neglected their daughter, apart from the home cleanliness issue. Thus, despite Mother's history of failing to reunite with A.J., there is no evidence which

[footnote continued from previous page]

3].) The charge had been dismissed by the time of the jurisdiction/disposition hearing in that case, however, and the court ordered six months of reunification services. (*Id.* [at pp. 3-4].) At the six-month review hearing, DPSS recommended termination of services. It contended that Mother had benefitted only minimally from services because she "had shown no indication of feelings of remorse for failing to protect her previous child." Further, DPSS was concerned about Mother's ability to care for the child because of her developmental delay. (*Id.* [at p. 4].)

supports the conclusion that removal of these children from the parents' custody is necessary to protect them for any reason pertaining to either of Mother's older children. And, the juvenile court failed to consider whether the significant changes in Mother's circumstances between the removal of A.J. from her custody and the filing of the current petition indicated that she had "subsequently made a reasonable effort to treat the problems that led to removal" of A.J. from her custody. (§ 361.5, subs. (b)(10), (b)(11).)

Finally, there is no indication that the court considered any alternatives to removing the children from the parents' custody. The primary issue which brought the family to the attention of DPSS was the filthy condition of the home. However well founded DPSS's concern for the children based on Mother's history may have been prior to any investigation of the family's circumstances, the absence of any evidence that either parent had abused their daughter, combined with the absence of any evidence that Mother personally abused either B.J. or A.J., strongly indicates that removal of the children was not warranted.

Our dependency system "recognize[s] an "essential" and "basic" presumptive right to retain the care, custody, management, and companionship of one's own child, free of intervention by the government. [Citations.]" (*In re Henry V.*, *supra*, 119 Cal.App.4th at p. 530.) "Even when [a parent] seriously violates parental responsibilities . . . the strong countervailing interests unique to the status of parent must still be considered.'" (*Id.* at p. 531.) "Maintenance of the familial bond between children

and parents—even imperfect or separated parents—comports with our highest values and usually best serves the interests of parents, children, family, and community. Because we so abhor the involuntary separation of parent and child, the state may disturb an existing parent-child relationship only for strong reasons and subject to careful procedures.” (*Id.* at pp. 530-531.)

Because the record does not reflect that the court discharged its duty to weigh and consider the evidence with respect to the findings required by section 361, subdivisions (c) and (d) or to make those findings, and because it appears that the juvenile court may have denied reunification services based on evidence which does not support the denial, we will reverse the disposition order removing the children from the parents’ physical custody and denying them services. The order terminating parental rights must be reversed as well.¹⁸

¹⁸ Because we reverse the orders on this basis as to both parents, we need not address the issues pertaining to the section 366.26 hearing raised in both parents’ opening briefs.

DISPOSITION

The orders entered at the disposition hearing and the order terminating parental rights are reversed as to Mother D.J. and Father J.M. The matter is remanded for a new disposition hearing consistent with the views expressed in this opinion, and with consideration of the current circumstances of the parents and the children.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.