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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

L.P.,

Defendant and Appellant.

E055728

(Super.Ct.No. RIJ1100365)

OPINION

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and
Appellant.

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

Defendant and appellant L.P. (mother) appeals an order terminating her parental rights to her two daughters, R.M. and M.M. She contends that the juvenile court violated her due process rights by failing to advise her and obtain her express waiver of her trial rights at the jurisdiction and disposition hearing.

FACTUAL AND PROCEDURAL HISTORY

R.M., born in November 2009, was 16 months old when the petition pursuant to Welfare and Institutions Code section 300 was filed.¹ M.M., born in September 2010, was five months old. M.M. was born after less than 26 weeks of gestation as a result of a detached placenta. She weighed less than two pounds at birth. She remained in the hospital until December 11, 2010.

On February 18, 2011, M.M. underwent gastrointestinal testing after having digestive problems. That evening, she began choking and stopped breathing. Her father performed cardiopulmonary resuscitation, and M.M. began to breathe again. The parents did not seek medical help.²

On March 10, 2011, mother brought M.M. to the doctor because M.M.'s feet were swollen and the skin on the bottom of her feet was peeling. M.M. had previously been treated for a "weeping" rash on the soles of her feet, which doctors described as looking "almost like impetigo." When she brought M.M. to the doctor in March, she reported that she tried to treat M.M.'s feet with water and hydrogen

¹ All statutory citations refer to the Welfare and Institutions Code.

² F.M., the children's father, is not a party to this appeal.

peroxide, but the symptoms persisted. Mother also stated that she noticed bruising on M.M.'s face and believed that the bruising was caused by M.M.'s pacifier. M.M. also had lesions and peeling skin on her buttocks.

Mother was referred to Loma Linda University Medical Center. Dr. Kronstad, the emergency room doctor who first examined M.M. at Loma Linda University Medical Center, believed that M.M.'s injuries were ““suspicious but not conclusive”” of nonaccidental trauma. X-rays showed that M.M. had five to six rib fractures, as well as fractures of the right humerus, right wrist, and left tibia just above the ankle. Dr. Massi, a forensic pediatrician, concluded that the fractures were in three different stages of healing. Some of the rib fractures were in an advanced stage of healing while the tibia and humerus fractures were recent. He stated that the uninjured bones appeared normal and that “no disorder of bone metabolism” was suspected. Dr. Massi later reported that he found no clinical indicators of osteogenesis imperfecta³ and recommended against testing for the disorder. Dr. Kronstad considered it unlikely that M.M.'s ribs were broken as a result of receiving CPR in February 2011.

Dr. Massi did not believe the wounds on the bottom of M.M.'s feet were consistent with a medical problem, but appeared to be inflicted lacerations. He reported that the cause of the buttocks lesions was unclear. He also noted bruising to

³ “Osteogenesis imperfecta,” also called “brittle bone disease,” is a genetic disorder which causes bones to break easily. (<<http://www.nlm.nih.gov/medlineplus/osteogenesisimperfecta.html>> [as of Nov. 28, 2012].)

M.M.'s face and trunk which he believed was the result of blunt trauma. A dermatologist reported that the bruises on the buttocks appeared traumatic in nature and also noted that M.M. likely had scabies.

M.M.'s older sister, R.M., showed no signs of injury or any ongoing medical problems. (Both children had previously been treated for scabies. R.M. had no reoccurrence.)

Both children were taken into protective custody by the Riverside County Department of Public Social Services (DPSS) on March 11, 2011.

On March 15, 2011, DPSS filed a section 300 petition on behalf of R.M. and M.M., alleging that M.M., a child under the age of five, suffered serious injuries while in the care and custody of the parents and that R.M. was at risk of similar abuse. The petition also alleged that the parents were negligent for failing to seek medical attention when M.M. stopped breathing in February 2011 and that both parents abused controlled substances.

A day after taking the children into protective custody, DPSS approved the paternal grandmother for emergency placement. R.M. was placed with her immediately, and M.M. was placed with her a week later, after she was released from the hospital.

Before the children were detained, mother was the primary caregiver. Father worked at a warehouse and was gone for most of the day. Mother admitted that she recently smoked marijuana. Mother told police that she had no idea that M.M. had broken bones. Mother denied that M.M. was involved in any accidental falls. Mother

thought that M.M. might have been injured when she was taking M.M. in and out of her car seat. Father stated that he rarely held the children, as he was very strong and was afraid of accidentally hurting them. Father could not explain M.M.'s injuries, but he did not believe they were caused by mother.

Mother was referred to counseling, but the counseling program required mother to demonstrate a longer period of sobriety before she could begin. In May 2011, father tested positive for methamphetamines. DPSS reported that M.M.'s physical condition had improved since she was placed with the paternal grandmother, and that M.M. had suffered no further injuries.

In June 2011, DPSS filed a first amended section 300 petition, which resembled the initial petition, except that the allegations pertaining to the injuries to M.M.'s feet and buttocks were stricken.

At the combined jurisdiction and disposition hearing, DPSS submitted on the detention and jurisdiction/dispositions reports, including a large packet of medical records. Mother's attorney acknowledged receipt of the amended petition and stated that he would "continue with denials." He stated that mother would offer no affirmative evidence. He did not argue against jurisdiction, but asked the court to provide reunification services to mother if the court took jurisdiction.

The juvenile court found that the children were described by section 300, subdivisions (a), (b), (e), and (j), and removed them from parental custody. The court ordered no reunification services pursuant to section 361.5, subdivisions (b)(5) and

(b)(6). The juvenile court set a hearing under section 366.26, advised the parents of their statutory writ rights, and ordered monthly supervised visitation.

Mother did not file a notice of intent to file a statutory writ petition.

In October 2011, DPSS reported that both children were healthy and developmentally on target. R.M. called the paternal grandmother “mommy.” M.M.’s physical condition continued to improve. The paternal grandparents, who remained married, expressed a desire to adopt the children. The social worker believed the likelihood of adoption was high.

DPSS reported that mother maintained regular visitation with the children. The paternal grandparents did not want to sign a postadoption contact agreement. They were, however, open to arranging supervised visits with the parents as long as the visits remained appropriate.

At the section 366.26 hearing held December 28, 2011, DPSS submitted its reports into evidence and asked the juvenile court to terminate parental rights. Mother was present at the hearing. Mother’s attorney asked the juvenile court to select a plan of legal guardianship rather than adoption. Father’s counsel argued that the beneficial parental relationship exception applied. The juvenile court found that none of the exceptions under section 366.26, subdivision (c)(1) applied and that the children were likely to be adopted. The court terminated parental rights and ordered the children referred for adoptive placement.

Mother filed a timely notice of appeal.

LEGAL ANALYSIS

THE JUVENILE COURT'S FAILURE TO ADVISE MOTHER OF HER TRIAL RIGHTS AND TO FIND THAT SHE KNOWINGLY AND INTELLIGENTLY WAIVED THEM WAS HARMLESS

Rule 8.682 of the California Rules of Court provides that at the beginning of the jurisdiction hearing, the court must advise the parent of the following rights:

“(1) The right to a hearing by the court on the issues raised by the petition;

“(2) The right to assert any privilege against self-incrimination;

“(3) The right to confront and to cross-examine all witnesses called to testify;

“(4) The right to use the process of the court to compel attendance of witnesses on behalf of the parent or guardian.” (Cal. Rules of Court, rule 5.682(b).)

The rule further provides that after admission of the allegations of the petition, a plea of no contest or submission, the court must find that the parent “has knowingly and intelligently waived the right to a trial on the issues by the court, the right to assert the privilege against self-incrimination, and the right to confront and to cross-examine adverse witnesses and to use the process of the court to compel the attendance of witnesses on the parent or guardian’s behalf[.]” (Cal. Rules of Court, rule 5.682(f)(3).)

Here, mother contested the petition but chose to submit on DPSS’s evidence. The juvenile court neither advised her of her trial rights nor obtained her waiver of

those rights, and it did not make an express finding that she knowingly and intelligently waived her trial rights.⁴

Mother contends that the juvenile court's failure to advise her of her trial rights and to obtain her personal waiver violated her right to due process. She contends that review was not waived by her failure to challenge the jurisdictional findings by filing a writ petition following the court's order setting the section 366.26 hearing.⁵

Although we disagree with mother's contention that submission of her case without the presentation of affirmative evidence or argument as to the jurisdictional allegations was "tantamount to [an admission]" of the allegations,⁶ we agree that the

⁴ The minute order states that "[c]ounsel waives reading of petition and advisement of rights." The reporter's transcript shows, however, that while father's attorney waived both reading of the petition and advisement of rights, mother's attorney waived only reading of the petition. 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.)

⁵ Jurisdictional findings must normally be challenged on appeal from the disposition order, or review is waived. (*In re Athena P.* (2002) 103 Cal.App.4th 617, 624.) However, 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" and the parent must seek review by means of a writ petition. (*Athena P.*, at pp. 624-625; § 366.26, subd. (l).) "Much like failure to appeal from an appealable dispositional order, failure to take a writ from a nonappealable dispositional order waives any challenge to it." (*Athena P.*, at p. 625.)

⁶ In the case of a submission, the court is required "to weigh evidence, make evidentiary findings and apply relevant law to determine whether the case has been proved." (*In re Tommy E.* (1992) 7 Cal.App.4th 1234, 1237.) In that case, "the parent acquiesces as to the state of the evidence yet preserves the right to challenge it

[footnote continued on next page]

juvenile court was required to advise mother of her trial rights and, following submission, to make a finding that she knowingly and intelligently waived those rights. (Cal. Rules of Court, rule 5.682(f)(3).) However, even if we assume that this was a violation of mother's right to due process, mother has failed to show that the omission requires reversal. Mother concedes that if a due process violation occurred, it is not reversible per se but is reviewed under the standard of *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). Under that test, an error requires reversal unless the reviewing court can say that the error was harmless beyond a reasonable doubt. (*Id.* at p. 24.)

Mother contends that the omission was not harmless because if she had been advised of her trial rights, she would not have submitted on the evidence adduced by DPSS and she would have been able to successfully challenge DPSS's evidence pertaining to the serious injury allegations under section 300, subdivision (e) and would therefore have had a good chance of avoiding termination of her parental rights. Even if we assume that *Chapman* is the appropriate standard of review as mother contends,⁷ we find no reversible error.

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as insufficient to support a particular legal conclusion.” (*In re Richard K.* (1994) 25 Cal.App.4th 580, 589.) If the parent admits the allegations, however, or makes a no contest plea, the parent does not retain the right to challenge the sufficiency of the evidence. (*In re Andrew A.* (2010) 183 Cal.App.4th 1518, 1526 & fn. 5.) Accordingly, even though a finding of jurisdiction is likely to result from a submission, the distinctions between a submission and an admission are not illusory.

[footnote continued on next page]

Section 300 subdivision (e) provides for dependency jurisdiction if a child under the age of five “has suffered severe physical abuse by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the child.” For purposes of section 300, subdivision (e), “severe physical abuse” means, among other things, more than one act of physical abuse, each of which causes a bone fracture. As discussed above, Dr. Massi reported that M.M.’s multiple fractures were at different stages of healing and supported the inference that M.M. had been subjected to “at least three distinct episodes of inflicted injuries.” The juvenile court found the serious injury allegation true and denied services as permitted by section 361.5, subdivision (b)(5) and (b)(6).⁸

Because Dr. Massi gave no opinion as to how long ago any of the fractures occurred, Mother contends that this evidence is of questionable value to establish either that the injuries all occurred during the two months M.M. was in her custody

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⁷ *In re Monique T.* (1992) 2 Cal.App.4th 1372 assumed without deciding that *Chapman*, rather than *People v. Watson* (1956) 46 Cal.2d 818, is the correct standard for reviewing a claim that a parent’s due process rights were violated by the juvenile court’s failure to advise the parent of his or her trial rights. (*Monique T.*, at pp. 1377-1378.)

⁸ Section 361.5, subdivision (b) provides that reunification services need not be provided if the juvenile court finds by clear and convincing evidence either “(5) [t]hat 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[; or] (6) [t]hat the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of severe sexual abuse or the infliction of severe physical harm to the child, a sibling, or a half sibling by a parent or guardian, as defined in this subdivision, and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent or guardian.”

after being released from neonatal ICU or that they were intentionally inflicted. She contends that if the court had properly informed her of her trial rights, she would have exercised those rights and would have hired her own medical expert to challenge the inference that the fractures all occurred while M.M. was in her care and were nonaccidentally inflicted, or would at least have subjected Dr. Massi to cross-examination as to his conclusion that there was no evidence of brittle bone disease. It is pure speculation, however, that mother had evidence which she would have presented if only the juvenile court had not failed to advise her that she had the right to do so. On the contrary, the record refutes this.

On April 4, 2011, the contested jurisdiction hearing was continued at mother's request to May 5, 2011, to afford her attorney additional time to review the medical records. The court also ordered DPSS to seek a second medical opinion regarding brittle bone disease, and authorized the parents to "seek their own medical opinion."

The addendum report prepared for the May 5 hearing reports that in response to the court's order that DPSS obtain a second opinion concerning brittle bone disease, DPSS contacted Loma Linda Medical Center to find out if Dr. Massi had tested M.M. for the disease. Dr. Massi stated that a test was not clinically indicated. He referred DPSS to two websites pertaining to the disease. The indicators for brittle bone disease listed by both websites did not appear to be present, according to Dr. Massi's initial examination of M.M. and his follow-up examination. The hearing was again continued at the parents' request because "new discovery [had been] provided," presumably consisting of the information contained in the addendum report.

Based on this record, we are convinced beyond a reasonable doubt that the court's failure to advise mother of her trial rights when the hearing convened on June 16, 2011, was not the reason that mother failed to do more than offer a pro forma denial of the allegations. Rather, we can infer that the new discovery shared with defense counsel—and perhaps information received from other medical experts the defense contacted after the court authorized them to do so on April 4, 2011—convinced the parents' attorneys that there was no basis for asserting that the injuries resulted from brittle bone disease and were accidentally inflicted. Accordingly, even though the juvenile court erred by not advising mother of her trial rights and making an express finding that she knowingly and voluntarily waived them, the error was harmless.

DISPOSITION

The order terminating parental rights and referring the children for adoptive placement is affirmed.

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MCKINSTER
Acting P. J.

We concur:

RICHLI
J.

CODRINGTON
J.