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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.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Appellant,

v.

R.H. et al.,

Defendants and Respondents.

E058082

(Super.Ct.Nos. J246902 & J246903)

OPINION

APPEAL from the Superior Court of San Bernardino County. Gregory S. Tavill,
Judge. Affirmed.

Jean-Rene Basle, County Counsel, and Jeffrey L. Bryson, Deputy County
Counsel, for Plaintiff and Appellant.

Merrill Lee Toole, under appointment by the Court of Appeal, for Defendant and
Respondent R.H.

No appearance for Defendant and Respondent S.M.

After A.M., a four-month-old infant, suffered subdural hematoma and bruising on her body, the juvenile court declared the child, and her 19-month-old brother, I.M., dependents of the court pursuant to Welfare and Institutions Code¹ section 300, subdivisions (a) (nonaccidental infliction of serious physical harm as to A.M.), (b) (failure to protect or supervise as to both), (e) (infliction of severe physical abuse on a child under five as to A.M.), and (j) (sibling abuse as to I.M.). At disposition, the San Bernardino County Children and Family Services (CFS) argued that the teenaged parents of the children should be denied reunification services. The juvenile court denied services to father, who had admitted dropping the infant, but granted reunification services to mother. CFS appealed.

On appeal, CFS contends that the court erred in (1) amending the petition at the close of evidence to strike language relating to nonaccidental subdural hematoma and bruising on the forehead from two counts of the petition, (2) ordering reunification services to mother as to A.M. pursuant to Welfare and Institutions Code section 361.5, subdivisions (b)(5) and (b)(6) as to A.M., and (3) ordering reunification services to mother for I.M. pursuant to section 361.5, subdivision (b)(6) and (7). We affirm.

BACKGROUND

On November 16, 2012, four-month-old A.M. was taken to St. Bernadine's emergency room because she had not eaten, she had been throwing up, and was lethargic. Emergency room staff noticed an older bruise on the infant's forehead, as well as two to

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

three fingerprint bruises on her back and bruising on her buttocks. A.M. was transferred to Loma Linda University Medical Center (LLUMC) for further observation as she needed a higher level of care.

At LLUMC, an MRI was conducted as well as a bone survey. A.M. was examined by Dr. Young, who found the infant had suffered bilateral subdural hemorrhage, as well as abdominal trauma, evidenced by elevated liver enzymes. The examining physician suspected child abuse based on multiple impacts, evidenced by bruising on the forehead and under the eye, and severe bruising on the buttocks. The MRI suggested a possible prior injury and what appeared to be injury to the spinal cord (T2 lengthening in the posterior aspect of the thoracic cord). A bone survey conducted upon admission revealed no fractures, and an ophthalmological evaluation revealed no retinal hemorrhage.²

The social worker interviewed the infant's 16-year-old mother, the maternal grandmother, and the father. Mother claimed she did not notice the bruising on the infant because A.M. has Mongolian spots on her back and buttocks, as well as a diaper rash. The 17-year-old father, who did not live with mother and the children, eventually admitted that a few days earlier, on Monday, November 12, 2012, he accidentally dropped the baby as he was swinging her back and forth to get her to stop crying. He rocked her two or three times as he walked up the hall, but when he turned to enter her

² A diagnosis of shaken-baby syndrome is normally based on findings of retinal hemorrhage in conjunction with subdural hematoma and cerebral edema. (Taber's Cyclopedic Medical Dictionary (20th ed. 2005) p. 1984.)

bedroom, her head had hit the corner of the crib and he lost his grip, dropping her to the floor. He attempted to catch her by grabbing her around the torso, but her back had arched so her head hit the floor. The baby seemed fine afterwards, so he did not tell the mother what happened.

On Tuesday or Wednesday (November 13th or 14th), mother noticed the baby was acting funny; she did not want to play and wanted to lie on her stomach. The baby threw up on at least two occasions, and the second time the vomit went “everywhere.” Also on Tuesday, mother noticed bruising on the child’s forehead and under her eye. She denied seeing any other bruises and had no idea where they came from. On Thursday morning, the maternal grandmother noticed the bruises on the child’s back and that the baby was lethargic; she was present when the baby vomited. While cleaning the baby up after vomiting, the maternal grandmother saw the bruising on the buttocks and informed mother they needed to take the child to the hospital.

The social worker informed the parents that their explanations were neither plausible nor reasonable. The child was detained in the hospital, and her 18-month-old brother, I.M., who showed no evidence of abuse or neglect, was detained with mother’s sister. On November 20, 2012, dependency petitions were filed on behalf of the children. As to A.M., it was alleged she had suffered serious physical harm (§ 300, subd. (a)), had been neglected due to failure to supervise or protect (§ 300, subd. (b)), and that she had suffered severe physical abuse. (§ 300, subd. (e).) As to I.M., the petition alleged failure to supervise or protect (§ 300, subd. (b)), and that he was at risk due to the abuse of a sibling. (§ 300, subd. (j).)

At the jurisdictional hearing, Dr. Young testified about the child's injuries. She observed the brain scans and could see hemorrhage around the brain, bruising on the right forehead, as well as beneath the right eye, multiple bruises on her back and severe bruising on the buttocks. There was edema in part of her spinal cord suggesting a spinal cord injury. A.M. had elevated liver enzymes which are consistent with abdominal injury from blunt force, and bilateral bleeding in her head. The bruising on the buttocks was distinguishable from the baby's Mongolian spots.³ The baby's diaper rash was significant in that the skin was denuded. An abdominal scan revealed that the infant was missing a kidney, which is a congenital problem.

The blood observed in the spectroscopy of the baby's head appeared to be the result of a recent injury. A.M. therefore suffered an acute, as opposed to a chronic, injury, although the MRI indicated there were possibly some chronic components. The bleeding in the brain could have occurred within the three or four days prior to the examination of the baby. The bruising could have occurred approximately within the same time period. The child required no treatment other than monitoring and the administration of fluids while hospitalized.

Dr. Young's finding was that A.M. suffered inflicted injury or child abuse based on multiple impacts on her body, as indicated by the bruises on her face, shin, back and buttocks. In Dr. Young's opinion, the bilateral bleeding in the brain is rarely seen in

³ Mongolian spots are blue or mulberry-colored spots usually located in the sacral region of certain infants, which usually disappears during childhood. (Taber's Cyclopedic Medical Dictionary, *supra*, p. 2055.)

accidental falls or single impacts and the type of bleeding observed is not the type that one finds in a single impact injury from a short fall. She believed that father's description of dropping the child could not have caused the injuries. Dr. Young believed the baby was shaken.

Father testified at the hearing. He admitted that he dropped the baby on the Monday before she went to the hospital. He explained that he had been swinging A.M. as he walked down the hallway leading to the mother's room, when her head hit the top of the changing table that was at the end of the crib, and lost his grip, dropping her. He tried to grab her, but her back had arched so her head still hit the floor. He did not mention anything to the mother. He denied seeing mother hit the baby or do anything violent to her. He denied ever spanking A.M., punching her or otherwise using physical violence against her.

The maternal grandmother with whom the mother and the children resided, assisted in the care of A.M. Although the maternal grandmother frequently changed the baby's diapers, she did not notice any bruising on the baby until mother noticed them while changing the baby's clothing prior to taking the infant to the hospital. The grandmother did not know how the bruises occurred; she never dropped the baby or bumped the baby into anything. Maternal grandmother never saw mother or father spank the baby.

Mother also testified, and denied that she had ever hit, slapped, pinched, poked or shaken A.M. She had no idea how the injuries or bruising occurred, but believed that father dropped her accidentally.

The court found that the mechanism of the injury to the forehead was different from the mechanism of the injury to the buttocks, and resulted from separate incidents. Mother had to have noticed the bruising if she changed the baby as described in the testimony. Although the court acknowledged that the parents were very young, mother should have acted sooner. The court believed the parents and grandmother knew what had happened and disbelieved their denials of knowledge about what had happened, but it declined to disregard all of their testimony.

The court found that the child was hit multiple times on the buttocks, and determined that father was the person who struck the child. It determined that the severe bruising on the baby's buttocks and the abdominal trauma constituted severe physical abuse inflicted upon the child by an act of one parent and the consent of both parents.

The court further found that the head injury was accidentally inflicted, and that the parents and grandmother failed to act. It made true findings on the allegations under section 300, subdivision (a), based on the severe bruising that caused anemia, but struck the language regarding the bifrontal subdural hemorrhage because that injury was accidentally caused. The court made true findings that the child came within section 300, subdivision (b). It also struck the language relating to the bifrontal injuries to the forehead from the allegations under section 300, subdivision (e), having determined that the brain injury had been accidentally inflicted, but made a true finding that the minor came within that subdivision based on the bruising to the buttocks.

After a weekend recess, the court conducted the disposition hearing. The court declared the minors to be dependents, and removed them child from the parents' custody.

The court found that father was the person who struck the child causing the bruising to the baby's buttocks, causing severe physical harm within the meaning of section 361.5,⁴ subdivision (b)(6). The court reversed its prior finding that mother had consented to the abuse due to the lack of evidence of a pattern of abuse. Instead, it concluded mother had grossly failed to act. Thus, the court found that section 361.5, subdivision (b)(6), did not apply to the mother. The court denied reunification services for the father, but found that mother could benefit from services, and ordered services for her. CFS appealed.

DISCUSSION

1. *Amendment of the Petition to Conform to Proof.*

On appeal, CFS argues that the juvenile court erred in striking out language from two of the counts in the petition.⁵ We disagree.

Section 348, permits the amendment of dependency petitions to the same extent and with the same effect as if the proceedings were civil actions, governed by Code of Civil Procedure section 469, et seq. (*In re Andrew L.* (2011) 192 Cal.App.4th 683, 688-689.) Amendments to conform to proof are favored, unless it would have misled a party

⁴ The reporter's transcript indicates the court cited section "365.5(b)(6)" but there is no such section. Since the jurisdictional-dispositional report sought a denial of services pursuant to section 361.5, we assume this was a typographical error and that the court intended to cite 361.5.

⁵ The argument recites at length the evidence introduced at trial, but cites no authorities or a standard of review. Parties are required to include argument and citation to authority in their briefs and the absence of these necessary elements allows this court to treat the appellant's issue as waived. (*In re S.A.* (2010) 182 Cal.App.4th 1128, 1138.) Because the protection of children is of paramount importance, we exercise our discretion to address the issue on the merits.

to its prejudice. (*Ibid.*; see also *In re David H.* (2008) 165 Cal.App.4th 1626, 1640; *In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1042.)

The decision to amend to conform to proof is largely in the discretion of the trial court and its determination will not be set aside unless it clearly appears that there has been an abuse of such discretion. (*Trafton v. Youngblood* (1968) 69 Cal.2d 17, 31; *Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1377-1378.)

Where the variance is not material, the court may direct that the fact to be found according to the evidence, or may order an immediate amendment. (Code Civ. Proc., § 470.) In order to justify a reversal due to defective findings, it must affirmatively appear not only that substantial injury has been caused and that substantial rights have been affected, but also that a different result would have been probable if the defect had not occurred. (*Richards v. Oliver* (1958) 162 Cal.App.2d 548, 567.)

Here, the court made a true finding that serious injury was inflicted to the child by the act of one parent and the consent of both parents, referring to the severe bruising on the baby's buttocks, and the abdominal trauma. However, although it acknowledged the brain injury was substantial and significant, the court found it was accidentally inflicted. The court then struck the language alleging the subdural hematoma was nonaccidentally caused, over CFS's objection, based on the determination that such injury was accidentally caused. This was within the court's discretion, and CFS does not allege that true finding is not supported by substantial evidence, although it argues the trial court misperceived and misconstrued the evidence.

CFS relies heavily on the medical expert's opinion that the head injury was "nonaccidental," that was merely an opinion, which was not binding on the court, and which could be considered along with the rest of the evidence; it was not direct evidence. (*Johnathan v. Shea* (1971) 19 Cal.App.3d 328, 334; *People v. Green* (1984) 163 Cal.App.3d 239, 244.) CFS argues that the doctor's testimony should have compelled the court to find that nonaccidental trauma caused A.M. subdural hematoma and that the injury may have been caused by shaking. Dr. Young's opinion evidence, even if uncontradicted and is circumstantial rather than direct evidence; it is not binding upon the court. (*People v. Jones* (1997) 15 Cal.4th 119, 191 [overruled on a different point in *People v. Hill* (1998) 17 Cal.4th 800, 823]; *Johnathan*, at p. 334, citing *People v. Gentry* (1968) 257 Cal.App.2d 607, 611; see also *People v. Williams* (1957) 151 Cal.App.2d 173, 187.) Opinion testimony is an aid in coming to a conclusion and does not exclude consideration of other evidence which is pertinent to the issue involved. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1100.)

The relative weight to be given to the opinion testimony and factual evidence is for the trial court. (*Massing v. Babcock* (1944) 64 Cal.App.2d 752, 756.) The fact-finding function is that of the trial court. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405, citing *Tyrone v. Kelley* (1973) 9 Cal.3d 1, 13; see also *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1338.) It was for the court to determine whether the injuries were accidental or nonaccidental, and to make the required predicate findings. We cannot substitute our judgment for that of the court. (*In re Charlissee C.* (2008) 45 Cal.4th 145,

159; see also *In re Katelynn Y.* (2012) 209 Cal.App.4th 871, 881; *In re Michael G.* (2012) 203 Cal.App.4th 580, 584.)

Given the absence of retinal hemorrhage (one of the three findings suggestive of shaking (Taber's Cyclopedic Medical Dictionary, *supra*, p. 1984), the presence of impact injury to the head (consistent with father's testimony), and the lack of direct evidence of shaking, the doctor's opinion that the baby had been shaken was not binding.

CFS suffered no prejudice from the amendment because the court sustained the allegations that the minor was nonaccidentally injured under section 300, subdivision (a), and that she was subjected to the infliction of severe physical abuse within the meaning of section 300, subdivision (e), based on the severe bruising and elevated liver enzymes. These findings provided a basis on which the court could order a bypass of reunification services pursuant to section 361.5, subdivision (b), which the CFS sought. Whether or not the court struck out the language, the factual finding that the injury was accidental would be binding on any dispositional orders and the evidence supported the trial court's finding of accidental injury absent direct evidence of shaking. There was no error.

2. *Absent the Requisite Findings Against Mother, the Court Had Discretion to Order Reunification Services to Mother.*

In separate arguments, CFS argues that reunification services should have been denied for mother under section 361.5, subdivision (b)(5), (b)(6) and (b)(7). We disagree.

The general rule is that when a child is removed from the custody of a parent or guardian, the court must provide social services, including family reunification services,

designed to facilitate the parent’s or guardian’s resumption of full custody and control, unless the court finds specified circumstances by clear and convincing evidence.

(§ 361.5; *In re Ethan C.* (2012) 54 Cal.4th 610, 617, 626.) Thus, the law requires the juvenile court to provide reunification services unless a statutory exception applies. (*In re K.C.* (2011) 52 Cal.4th 231, 236.)

The exceptions to the requirement for the provision of reunification services apply when certain statutory findings are made by clear and convincing evidence. (§ 361.5, subd. (b).) We review the trial court’s findings under the substantial evidence test to determine whether the decision is supported by evidence that is reasonable, credible, and of solid value. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1232.) We do not reweigh the evidence, nor do we consider matters of credibility. (*L.Z. v. Superior Court* (2010) 188 Cal.App.4th 1285, 1292, citing *In re E.H.* (2003) 108 Cal.App.4th 659, 669.)

Section 361.5, subdivision (b), lists a number of situations in which reunification services are likely to be futile and “need not be provided” to a parent. (§ 361.5, subd. (b); *D.B. v. Superior Court* (2009) 171 Cal.App.4th 197, 202, citing *In re Kenneth M.* (2004) 123 Cal.App.4th 16, 20.) To deny services—or “bypass” them— under section 361.5, subdivision (b), certain statutory findings are prerequisite, as set forth in numerous subparagraphs.

One statutory exception is found in section 361.5, subdivision (b)(5), which authorizes a bypass if the court finds, by clear and convincing evidence, that 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. If the court finds these circumstances

to be supported by clear and convincing evidence, the court is prohibited from granting reunification services unless it finds that those services are likely to prevent reabuse or continued neglect of the child or that failure to try reunification will be detrimental to the child because the child is closely and positively attached to that parent. (*In re A.M.* (2013) 217 Cal.App.4th 1067, 1074-1075.)

The trial court expressly found that father's conduct caused the deep bruising to the child's buttocks, which formed the basis for its finding that the child came within section 300, subdivision (e). This finding authorized a bypass of services for father under 361.5, subdivision (b)(5), but the court did not make a similar finding as to mother. Absent such a finding, there was no statutory basis to deny reunification services to mother under 361.5, subdivision (b)(5).

Another statutory exception is found in subparagraph (b)(6) of section 361.5, which authorizes a bypass of services where 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, *and* the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent or guardian. (*In re A.M., supra*, 217 Cal.App.4th at p. 1075.) When section 361.5, subdivision (b)(6) applies, the juvenile court lacks the authority to order services unless it expressly makes a best interests finding by the requisite standard of proof. (*Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 107.) As with the exception under section 361.5, subdivision (b)(5), the

court made findings under this subparagraph as to father, but not mother, so that exception did not apply to mother.

CFS argues that pursuant to section 361.5, subdivisions (b)(6) and (b)(7), a presumption arose that services should not be provided to mother, citing *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744. It further argues that no competent testimony was presented to overcome the presumption. In *Renee J., supra*, the California Supreme Court acknowledged the general rule requiring the provision of reunification services although it observed that the Legislature recognized it may be fruitless to provide reunification services under certain circumstances. (*Renee J.*, at p. 744, quoting *In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 478.)

The court went on to observe, “*Once it is determined one of the situations outlined in subdivision (b) applies*, the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources.” (Italics added.) (*Renee J., supra*, 26 Cal.4th at p. 744, quoting *In re Baby Boy H., supra*, 63 Cal.App.4th at p. 478.) This reaffirms our conclusion that without a predicate finding by clear and convincing evidence that one of the exceptions exists, the juvenile court is bound to order reunification services for a parent.

Having made the requisite findings against father, a presumption arose and the court was authorized to bypass reunification for father under section 361.5, subdivision (b)(5) and (6). However, the court expressly found that the exceptions did not apply to mother, and without those findings on the predicate statutory exceptions no presumption arose and there was no need to present competent evidence to overcome it.

CFS also argues that services should have been denied with respect to I.M., the sibling, pursuant to subparagraph (b)(7) of section 361.5. Section 361.5, subdivision (b)(7), provides that services need not be provided where the parent is not receiving reunification services for a sibling or half-sibling pursuant to paragraph (3), (5), or (6). Because the juvenile court ordered reunification services to mother for both children, the predicate finding that the parent is not receiving services for a sibling is absent, and this provision never came into play.

Based on the findings made by the court, the statutory requirement for the provision of reunification services applied. The court did not err in ordering reunification services for mother.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

KING
J.