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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

L.G.,

Petitioner,

v.

THE SUPERIOR COURT OF FRESNO COUNTY,

Respondent;

FRESNO COUNTY DEPARTMENT OF SOCIAL  
SERVICES,

Real Party in Interest.

F.R.,

Petitioner,

v.

THE SUPERIOR COURT OF FRESNO COUNTY,

Respondent;

FRESNO COUNTY DEPARTMENT OF SOCIAL  
SERVICES,

Real Party in Interest.

F064923

(Super. Ct. Nos. 07CEJ300083-2,  
07CEJ300083-3, 07CEJ300083-4)

**OPINION**

F064924

(Super. Ct. Nos. 07CEJ300083-2,  
07CEJ300083-3, 07CEJ300083-4)

**THE COURT\***

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Mary Dolas, Commissioner.

L.G., in pro. per.; Kenneth K. Taniguchi, Public Defender, and Cheryl K. Turner, Deputy Public Defender, for Petitioner L.G.

F.R., in pro per., for Petitioner F.R.

No appearance for Respondent.

Kevin Briggs, County Counsel, and William G. Smith, Deputy County Counsel, for Real Party in Interest.

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L.G. (mother) and F.R. (father) are the parents of four-year-old C.R., three-year-old A.R. and two-year-old V.R.<sup>1</sup> They were also the parents of a daughter, G.R., until she was freed for adoption in May 2010 after they failed to reunify with her.

In May 2012, the juvenile court denied mother and father reunification services as to C.R., A.R. and V.R. pursuant to Welfare and Institutions Code section 361.5, subdivision (b)(10) and (11)<sup>2</sup> and set a section 366.26 hearing to implement a permanent plan. Mother and father each filed a writ petition pursuant to California Rules of Court, rule 8.450 (rule) in propria persona, challenging the juvenile court's ruling without asserting a basis for error in compliance with the rule. Subsequently, mother's trial counsel filed a writ petition challenging the sufficiency of the evidence to support the juvenile court's denial of services order.

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\* Before Cornell, Acting P.J., Gomes, J., and Detjen, J.

<sup>1</sup> We refer to the family members in this case by their first and last initials because at least one of them has a unique name. (Cal. Rules of Court, rule 8.401(a)(2).)

<sup>2</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Having reviewed the appellate record and mother's petition, we find error in the juvenile court's denial order and grant her writ relief. Since father did not raise error in his writ petition or join in mother's argument, we would ordinarily dismiss his petition as facially inadequate. However, the denial of services order was error as to both parents. Further, real party in interest briefed the issue mother raised in its opposition to father's petition. Consequently, there is no prejudice to real party in this court granting relief as to father as well.

In our view, the criticality of reunification services in dependency proceedings dictates that we address the propriety of the juvenile court's denial of reunification services as to father even though he did not properly raise it in his writ petition. Therefore, in this rare exercise of our discretionary authority to review an issue not raised, we consolidate mother and father's cases on our own motion and address whether the juvenile court erred in denying mother and father reunification services pursuant to section 361.5, subdivision (b)(10) and (11). We conclude that it erred and grant extraordinary writ relief.

### **PROCEDURAL AND FACTUAL SUMMARY**

We begin our summary of the case with the facts and circumstances surrounding G.R.'s removal and mother and father's subsequent behavior since they form the factual basis upon which the juvenile court denied them services as to C.R., A.R. and V.R., the subjects of this writ petition.

#### **G.R.'s Dependency Proceedings**

In March 2007, newborn G.R. was taken into protective custody at the hospital after she and mother tested positive for methamphetamine. At the time, mother and father were living together in Huron. The juvenile court ordered G.R. removed from parental custody and ordered mother and father to participate in parenting classes, complete substance abuse and mental health evaluations and any recommended treatment

and submit to random drug testing. Mother and father were provided six months of services offered in Fresno. They initially attended parenting classes but then stopped attending, claiming their car was impounded. They completed mental health assessments and only mother required mental health therapy. She began therapy in August 2007 and made some progress, but had difficulty getting to her appointments because of the distance and lack of a vehicle. They completed substance abuse evaluations and were initially referred for intensive outpatient treatment, however, that was elevated to inpatient treatment after they continued to test positive for methamphetamine. They entered Comprehensive Addiction Programs, Inc. (CAP), a 90-day inpatient program, but father left after two days. Mother remained 30 days but was terminated for not following the rules. The department allowed her to participate in Primer Paso, an outpatient program in Huron, figuring it was better than no treatment at all. Mother was referred for anger management through Primer Paso and enrolled in October 2007. According to the author of a progress report dated in November, mother was “limited” in her effort to change, her interpersonal skills, and her ability to cope with stressful situations. Additionally, it was reported that she was reluctant to share her feelings. She was eventually dropped from the class for excessive absences.

In its report for the six-month review hearing, the Department of Children and Family Services (department) recommended that the juvenile court terminate mother and father’s reunification services and set a section 366.26 hearing. The department reported that mother and father appeared to place more importance on their need to be together than on working toward reunifying with G.R. Father wanted to work so he could offer something to mother and G.R., but did not participate in services and continued to use drugs. Mother was, according to the department, “demanding, uncooperative, argumentative and seemingly unwilling to let go of her drug use.”

In December 2007, the juvenile court terminated mother and father's reunification services and set a section 366.26 hearing. In May 2008, mother gave birth to C.R. In June 2008, the juvenile court terminated mother and father's parental rights. In April 2009, mother gave birth to A.R. and in March 2010 to V.R. In May 2010, G.R. was adopted.

### **C.R., A.R. and V.R.'s Removal**

These dependency proceedings were initiated in October 2011 after the sheriff's department received a report that mother was observed smacking and kicking then three-year-old C.R., spitting at him and throwing a shoe at him. As soon as the deputies arrived at mother's apartment complex, her neighbors told the deputies they were relieved someone was finally intervening on the children's behalf. They said mother was always yelling at the children and squeezing their hands as if she was frustrated with them and could not control them.

Mother denied that anything had happened and asked the responding social worker to check the children for bruises. Mother said she and the children were walking to father's workplace to take him his lunch and she told C.R. not to run ahead. She said he obeyed her and she did not kick, spit or throw a shoe at him.

Father and the paternal grandmother also spoke to the social worker. Father said he did not live with mother but stayed there part time because he worked in the area. He did not believe that mother hit the children but said she yelled at them when they did not listen. He denied drinking and getting "wasted" but said he spent three months at CAP for using methamphetamine five years before. He denied having any mental health issues but stated that mother may be bi-polar because she became easily agitated and her mood changed abruptly. He said she spent time in a mental institution where she received treatment and that her sisters told him her mother was schizophrenic. He said mother did not take any medication.

Mother denied that she tested positive for methamphetamine at the time of G.R.'s birth and denied she ever used drugs in her entire life. She also denied having mental illness or taking medication.

The paternal grandmother said she and mother did not get along and she did not approve of how mother treated the children. She said mother pulled the children by their arms.

Following its investigation, the department filed an original dependency petition alleging the children were described by section 300, subdivisions (a) (serious physical harm), (b) (failure to protect), and (j) (abuse of sibling). Specifically, the department alleged under these subdivisions that mother's treatment of C.R. constituted serious physical harm, that she had mental health issues and possibly substance abuse issues, which had not been diagnosed or treated, and that she abused and neglected G.R. by her methamphetamine use and C.R., A.R. and V.R. were at risk of similar abuse. As to father, the department alleged under the same subdivisions that he failed to protect the children from mother and that he abused and neglected G.R. by his methamphetamine use.

### **Detention**

In November 2011, the juvenile court conducted the detention hearing, ordered the children detained pursuant to the original dependency petition and ordered reasonable visitation. The court did not order any other services for mother and father. Instead the department recommended they access community services and sent them a list of providers for parenting, mental health treatment, anger management and substance abuse. The juvenile court set the jurisdictional hearing for December 2011.

Mother and father denied the allegations in the original petition and the juvenile court set a contested jurisdictional hearing for February 2012. In its report for the hearing, the department asked the juvenile court to set the dispositional hearing out 30

days so the department could determine if mother and father should be offered reunification services given their dependency history.

The department also reported on the quality of visits during November and December 2011. Mother and father visited the children together for the first three weeks in November and father was loving and engaging with the children. Mother, on the other hand, appeared frustrated and did not interact with them. During one visit, mother told V.R. to “shut up.” During another visit, mother and father reportedly smelled strongly of marijuana and mother held her purse throughout the visit. At the end of November and the beginning of December, father and mother visited the children separately. Father was attentive and loving. Mother interacted poorly, telling V.R. to “shut up” and “get away” from her and pulling C.R., causing him to cry.

In February 2012, the department filed a first amended petition (petition) alleging two counts, one as to each parent, pursuant to section 300, subdivision (b) (failure to protect). As to mother, the petition alleged that she has problems with appropriate discipline as evidenced by eyewitness accounts of her throwing a small shoe at C.R. as she yelled at him in October 2011 and numerous referrals to the department regarding her questionable ability to parent her children. As to father, the petition alleged that he failed to protect the children because he stated mother had mental health issues yet allowed her to care for them.

In February 2012, the juvenile court convened the contested jurisdictional hearing. County counsel advised the court that the parties had settled on the allegations in the first amended petition and asked the court to find them true. Mother and father submitted on the petition and the juvenile court sustained the allegations. County counsel asked the court to defer ordering services until the issue of whether to provide them was assessed. County counsel also stated that it appeared reunification services would be recommended. She stated that the subdivision (j) count was eliminated because

substance abuse was not the issue and that it did not appear there was a connection between G.R.'s case and that of her siblings. The court set the dispositional hearing for March 2012. Meanwhile, the children were placed with their maternal aunt.

### **Disposition**

In its report for the dispositional hearing, the department recommended that the juvenile court deny mother and father reunification services pursuant to section 361.5, subdivision (b)(10) and (11) because they failed to make reasonable efforts to treat the problems that led to G.R.'s removal. As evidence, the department stated that mother and father did not successfully complete substance abuse treatment during G.R.'s dependency or thereafter. They denied having substance abuse problems and claimed to have been sober for several years, however the department could not verify that because they were not drug testing. In addition, father repeatedly made mention of mother's mental health problems and the visitation staff noticed her dramatic mood swings, yet mother denied having mental illness and was not participating in mental health therapy. Also, the department stated mother and father were provided a list of community services and only mother took advantage of them by enrolling in a parenting class.

The department also expressed its concern that mother and father denied needing any services, including substance abuse treatment, and did not have a history of being honest with the department. It also concerned the department that mother and father did not recognize any need to change in order to be better parents. The department also reported that visitation had improved, but mother and father missed visits when they conflicted with their work schedules or when they could not find transportation.

Mother and father challenged the department's recommendation. In father's statement of contested issues, he argued that the department failed to prove that he or mother abused substances, citing the fact that C.R., A.R. and V.R. did not test positive for drugs at the time of their births. In addition, he stated that he was employed and was

subject to random drug testing as part of his employment. Since the department failed to prove that he continued to abuse drugs, he argued, there was no basis to deny his reunification services under section 361.5, subdivision (b)(10) and (11). Further, he stated that he and mother were not married and did not live together. He asked the court to place the children in his care under family maintenance.

The contested dispositional hearing was conducted in April 2012. Mother testified that she did not test positive for drugs when G.R. was born and never used methamphetamine in her life. She said she had not used any drugs in five years and she remained drug-free by not associating with anyone who used drugs and by substituting other activities. She denied spanking, hitting, kicking, yelling, cursing, slapping, pushing or grabbing the children. She believed her parenting skills were appropriate. She also testified that she left CAP before completing it because they needed the space for other people and asked her if she wanted to leave the program.

Social worker Lindsey Vernooy testified that the only evidence that mother and father were using drugs was the visitation supervisor's statement that they smelled like marijuana during a visit in November or December of 2011. She said mother was terminated from CAP because she was not complying with her contract. She also testified that mother was not taking responsibility for her conduct in either of the dependency cases. She further testified that father denied that mother had a drug problem in the previous case and he acknowledged that she yelled at the children but did not believe she was inappropriate with them.

Father testified that he had been drug-free for a couple of years. He said that losing G.R. was a "reality check" and that he stopped using drugs on his own without going through substance abuse treatment but with the support of people in his church group. He said he started "living a different life." He denied smoking marijuana. Father

also testified that he worked several seasonal jobs, two of which required him to drug test. He said that he last drug tested in April 2012 and that he never tested positive.

Father further testified that he was not present when mother inappropriately disciplined C.R. and had never seen her abuse the children in any way. He did not think she mistreated them or even really disciplined them but said she got a little loud sometimes. He said it concerned him that mother denied testing positive for drugs at G.R.'s birth and several times after, but was not concerned about having the children in her care. He testified he believed mother stopped using drugs before he did. He said he was unable to utilize any of the community services because he did not have a car and the closest one was thirty miles away. He did however locate an online parenting class but was told it was not acceptable.

At the conclusion of the hearing, the juvenile court denied mother and father reunification services as recommended. The court stated:

“I think what’s notable for the Court was the evidence in the current case in regards to some resistance or hesitancy on the part of the parents to acknowledge or accept that their behavior was damaging and physically abusive to the children and the impact that behavior has on the children. The father’s inability to protect the children and well noted is that many of this inability to take responsibility, minimizing the behavior and asserting that there’s really no need for either parent to make any changes is very consistent with the exact same concerns the Department had in the prior case.

“Both parents in the prior case also were hesitant to believe that they had a problem, minimized their behavior and were resistant to any type of assistance to change the behavior for the benefit of their children. Unfortunately, that resulted in the loss of their parental rights and custody of the child [G.R.] and the concern here is that although the behavior is different, previously it was neglect due to substance abuse and here it’s neglect and risk of harm due to excessive and inappropriate discipline on the children that has been acknowledged and addressed by neighbors and other family members, that both parents seem to minimize and/or deny and the impact that that denial has had on their children and I think it’s detrimental.”

The juvenile court also set a section 366.26 hearing. This petition ensued.

### **DISCUSSION**

Petitioners contend the juvenile court erred in denying them reunification services under section 361.5, subdivision (b)(10) and (11) (hereafter subdivision (b)(10) and (11)) because there was insufficient evidence upon which to apply the statute and that the juvenile court failed to expressly make the requisite findings. The failure to make the requisite findings does not undermine the court's decision because we can infer a required finding if it is supported by substantial evidence. (*In re Corienna* (1989) 213 Cal.App.3d 73, 83-84.) The problem in this case is that substantial evidence does not support the juvenile court's order to deny mother and father reunification services under subdivision (b)(10) and (11) as we now explain.

When the juvenile court removes a child from parental custody, it must order reunification services unless it finds by clear and convincing evidence that the parent satisfies any of the exceptional circumstances set forth in section 361.5, subdivision (b). (§ 361.5, subd. (a).) In this case, the juvenile court denied petitioners reunification on the basis of two of the circumstances, subdivision (b)(10) and (11) which provide in pertinent part:

“(b) Reunification services need not be provided to a parent ... when the court finds, by clear and convincing evidence ... [¶] ... [¶] (10) [t]hat the court ordered termination of reunification services for any siblings ... of the child because the parent ... failed to reunify with the sibling ... and [the] parent ... has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling ... of that child from that parent ... [¶] (11) [t]hat the parental rights of a parent over any sibling ... of the child had been permanently severed, ... and [the] parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling ... of that child from the parent.”

Petitioners do not dispute that subdivision (b)(10) and (11) apply insofar as their reunification services and parental rights as to G.R. were terminated. Rather, they

contend there was insufficient evidence that they subsequently failed to make reasonable efforts to treat the problem(s) requiring G.R.'s removal.

In this case, G.R. was removed at birth from mother and father because mother and G.R. tested positive for methamphetamine. At the time, mother and father were engaged in a lifestyle of drug abuse. They were offered services to help them overcome their drug use but did not take advantage of those services or otherwise remedy their drug problem. As a result, their reunification services were terminated and their parental rights to G.R. were severed.

In recommending that the juvenile court deny mother and father reunification services under subdivision (b)(10) and (11), the department bore the burden of proving by clear and convincing evidence that they failed to make subsequent reasonable efforts to treat the problems that required G.R.'s removal. (*In re Angelique C.* (2003) 113 Cal.App.4th 509, 521.) However, the department failed to do so. The only evidence that the department could offer as to continuing drug use was the visitation social worker's statement that they smelled of marijuana. However, there was more evidence that they were not using drugs. Notably, C.R., A.R. and V.R. were born drug-free, mother and father had no arrest history for drug-related crimes and the department had not received any reports of drug use on their part. There is simply no evidence that the causal factor for G.R.'s removal, i.e. drug use, persisted.

The juvenile court identified the underlying problem in both dependency cases as neglect. In G.R.'s case, it was neglect due to drug use and in the instant case, it was neglect due to inappropriate discipline. The court also found a common thread in mother and father's refusal to admit they had a problem and resistance to change their behavior.

We find it improbable that something as broad as neglect could be the "problem" that, if not remedied, should result in a denial of reunification services. Indeed, if that were the case, then the specific nature of the parental behavior that required the sibling's

removal would have little significance since conceivably all parental misconduct involves some degree and form of neglect. Further, basing a decision to deny services on a generic rather than a specific problem could have the unintended consequence of allowing a juvenile court to deny reunification services to a parent who previously failed to reunify with a sibling of the child but in the meantime worked toward correcting the underlying problem. (See *In re Harmony B.* (2005) 125 Cal.App.4th 831, 842.)

When the Legislature authorized the denial of reunification services under the exceptional circumstances contained in subdivision (b) of section 361.5, it did so in recognition of the fact that in some cases recidivism is a concern and that provision of services in such cases may be fruitless. (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744-745.) We do not consider this to be such a case.

That said, we are cognizant that mother and father may have been using drugs; however, there was no way of knowing because the juvenile court did not order drug testing. Further, mother's false testimony regarding her drug use at the time of G.R.'s birth, and subsequently, is not lost on this court. However, the department had a burden of showing that mother and father failed to treat their drug problem and it failed to do so. Consequently, we grant the petition.

### **DISPOSITION**

Let an extraordinary writ issue directing respondent court to vacate its order of May 14, 2012, denying petitioners reunification services pursuant to Welfare and Institutions Code section 361.5, subdivision (b)(10) and (11), and setting a Welfare and Institutions Code section 366.26 hearing. Respondent court is further directed to conduct a new dispositional hearing, and after taking into consideration any new evidence or change in circumstances, make any appropriate orders. This opinion is final forthwith as to this court.