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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re NICHOLAS C., a Person Coming Under the Juvenile Court Law.	
MARIPOSA COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. JONATHAN C., Defendant and Appellant.	F066239 (Super. Ct. No. 2355) **OPINION**
In re NICHOLAS C., a Person Coming Under the Juvenile Court Law.	
MARIPOSA COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. CANDACE C., Defendant and Appellant.	F066240 (Super. Ct. No. 2355)

APPEAL from a judgment of the Superior Court of Mariposa County. Wayne R. Parrish, Judge.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant Jonathan C.

Susan M. O'Brien, under appointment by the Court of Appeal, for Defendant and Appellant Candace C.

Steven W. Dahlem, County Counsel, John P. LaLonde, Assistant County Counsel, for Plaintiff and Respondent.

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Nicholas C., then nine months old, was removed from the home of his mother and father, Candace C. and Jonathan C., and found to have been neglected. The parents agreed to waive their right to reunification services and to have the maternal grandparents appointed guardians of Nicholas. Six months later, the Mariposa County Department of Human Services asked the court to set a hearing pursuant to Welfare and Institutions Code section 366.26 to terminate the parents' parental rights so the grandparents could adopt Nicholas. The parents argued that they had been misled and never intended their agreement to a guardianship and waiver of reunification services to lead to termination of their parental rights. The termination hearing was set and the matter finally heard two years after the child's detention, along with the parents' Welfare and Institutions Code section 388 petition claiming changed circumstances. The court denied the section 388 petition and terminated the parents' parental rights. Both parents appeal.

The parents' argument that they did not intend their agreement with the county to lead to the termination of their parental rights is a challenge to the court's order setting a section 366.26 hearing. A challenge to that order cannot be made on appeal unless the parents previously filed a timely petition for extraordinary writ review. (Welf. & Inst. Code, § 366.26, subd. (*l*).) As they never did so, they cannot maintain their challenge in this appeal. Further, the court did not abuse its discretion when it ruled that the parents

did not make the necessary showing in support of their section 388 petition. We affirm the juvenile court's orders.

FACTUAL AND PROCEDURAL HISTORIES

Nicholas and his parents first came to the attention of the Mariposa County Department of Human Services (the department) in January 2010, six days after Nicholas was born. A county public health nurse reported to the department's Child Welfare Services her concern that the parents were not mentally or physically able to care for Nicholas. Both parents had long-term histories of mental illness. The father had diagnoses of paranoid schizophrenia, suicidality, and depression. The mother's diagnoses were schizoaffective disorder, oppositional defiant disorder, and depression. The father admitted to alcohol and drug dependency, which contributed to rages, which in turn led to fighting. The parents' home was dirty. Child Welfare Services provided voluntary family maintenance services. Soon afterward, the department's Behavioral Health and Recovery Services took over management of the case.

In October 2010, when Nicholas was eight months old, the parents' landlady contacted a mental health assistant with Behavioral Health and Recovery Services. The landlady believed alcohol was being abused in the home. She reported that the father could be heard yelling at all hours of the night. The mental health assistant referred the matter to Child Welfare Services, adding her own opinions that the home was dirty and that the back of Nicholas's head was flat because he was left lying on his back for too much of the day.

Two social workers and a deputy sheriff visited the home on October 12, 2010. The social workers confirmed that Nicholas's head was misshapen, the back being almost flat. He had a vacant look and they found it difficult to stimulate him or engage him in play. He also had severe diaper rash.

The house was very dirty. Cigarette butts, bottle caps, dirty diapers, and other kinds of trash were on the floors. Empty beer cans were on the patio. A marijuana pipe was in the parents' dresser.

The mother was present during the visit. She said she had forgotten that day to take the medications prescribed for her mental health. She exhibited rapid mood swings, ranging from tearfulness to hostile screaming. A social worker noticed an empty baby bottle in Nicholas's bed and asked the mother whether she had been propping the baby up with a bottle. The mother defiantly claimed he could hold his own bottle; the social worker had to explain the need to hold the child during feeding.

The father was not present during the visit. The mother said he was attending a DUI class. She said he had a drinking problem and that the two of them often argued about his drinking and his partying in the home with his friends. His friends once broke down a closet door. During the visit, the landlady appeared at the house and said there had been loud parties there.

Nicholas was taken into protective custody. He did not cry for his mother as he was being taken away.

The deputy sheriff escorted the father from the DUI class to the department's offices. The father was hostile and threatening, and the deputy handcuffed him. The father said he drank two or three 32-ounce beers each day and admitted he had a drinking problem. That morning he had had a severe case of "the shakes" and felt paranoid and had to drink to feel better. He used marijuana once or twice a week to calm himself, but did not have a medical marijuana card. He admitted that he and his friends drank in his home. Once he punched a hole in the bathroom door. He had been prescribed several medications for his mental health, but said he was refusing to take them because he did not like the way they made him feel. He had stopped attending alcohol and drug counseling because he did not like being told what to do.

The following day, the department spoke with a number of county employees who had had contact with the family. Two probation officers said they had found probationers living at the family's home. One of the probationers had been convicted of possessing methamphetamine. One of the probation officers heard loud partying before he entered and saw many empty beer cans around the house and a marijuana pipe on the table. A public health nurse reported that she had been working with the family and believed the flat spot on the back of Nicholas's head was caused by his being left in his crib or carrier most of the time. She said Nicholas was unable to sit upright or grasp a toy. She administered a test and concluded that Nicholas was delayed in gross and fine motor skills and in language development. She provided instruction on how to engage and stimulate him, but the parents seemed to resent efforts to help them. She believed the parents remained unable to care for Nicholas properly.

The department filed a dependency petition in the juvenile court on October 14, 2010. It alleged that the parents had failed to protect Nicholas within the meaning of Welfare and Institutions Code section 300, subdivision (b),[1] because of the parents' mental illness, developmental disability, or substance abuse. The detention hearing took place on October 14 and October 18, 2010. The parents submitted on the detention report and Nicholas was ordered detained. Two 2-hour visits per week were ordered and the parents were required to submit to random drug and alcohol testing.

The department filed a jurisdiction/disposition report on November 24, 2010. Nicholas had been placed in a foster home. The parents participated in supervised visits. During the visits, the parents were frequently prompted to engage with Nicholas and to attend to his needs, but they failed to do these things adequately without prompting and did not acknowledge that they were not demonstrating the necessary skills. The parents

[1]Subsequent statutory references are to the Welfare and Institutions Code.

were not cooperative in developing a case plan and did not accept responsibility for the situation.

Nicholas was evaluated at a hospital. It was determined that he had delays in motor skills, social development and language, and that these delays were caused by his environment.

The department recommended that the court declare the child a dependent of the court, order psychological evaluations for the parents to determine whether they would be able to benefit from reunification services, and continue the disposition hearing. At a hearing on November 29, 2010, the parents submitted on those recommendations and the court entered orders.

The department filed an addendum to the jurisdiction/disposition report on January 10, 2011, which included the results of the psychological evaluations. The evaluations—two for each parent—all concluded that, because of both parents' chronic mental illnesses and the father's substance-abuse problems, they would not benefit from reunification services and would not be able to care adequately for Nicholas. On the basis of these conclusions, the department asked the court to deny reunification services and set a hearing pursuant to section 366.26 to select a permanent plan of adoption.

The department filed another addendum on May 20, 2011.[2] It reported that Nicholas had been moved from foster care to the home of the maternal grandparents. He was happy and animated and exhibited no adverse effects from the transition to the grandparents' home. The department reported that Nicholas "appears connected" to the grandparents "as evidenced by his warm interaction with them and his seeking out their touch and attention." The department continued to recommend denial of reunification services and the setting of a section 366.26 hearing to select a permanent plan of

[2]This report bears a clerk's stamp date of March 20, 2011, but that date cannot be correct. The report is signed and dated by its authors May 19, 2011, and it describes events that took place in May 2011.

adoption, now with the maternal grandparents as the adoptive parents. It noted that the mother was pregnant with the couple's second child and that the new child would create additional stress for the family.

The disposition hearing was continued a number of times and finally held on May 25, 2011. At that hearing, the parties reached an agreement: The parents agreed not to receive reunification services from the department, the maternal grandparents agreed to become legal guardians instead of adoptive parents, and the department accepted this arrangement. Counsel for the mother explained that the parents "do have in place private services," which "at some point" could lead to reunification, "if they follow through with it." The court said to the grandparents:

> "So you understand what the proposal is, is that you become the guardians of the child rather than going by way of adoption. So in the future there may be a chance of reunification. But is this agreeable to you? Would you accept becoming the guardians …?"

The grandparents said yes. The court's understanding was that the case "would be dismissed once the guardianship is completed …."

By the time the department filed a post-permanent-plan status review report on October 31, 2011, however, the agreement appeared to have unraveled. The guardianship was completed, but the case was not dismissed. The department was again recommending that a section 366.26 hearing be set to select a permanent plan of adoption. The department noted that the parents' second child was born on October 4, 2011. No reason for abandoning the guardianship plan and seeking adoption is given in the report, except that the grandparents "continue to be concerned about the status of the parents and their ability to adequately care for their newborn" and were willing to adopt Nicholas.

The post-permanent-plan status review hearing was held on November 7, 2011. The mother and father stated their opposition to the goal of adoption, explaining that it

was inconsistent with the guardianship agreement reached on May 25. County counsel responded:

> "Your Honor, I think the objections of both attorneys for the parents can be met by setting this matter for a 366.26 hearing in which the Court would face several alternatives in selecting a permanent plan. One being adoption, another being the guardianship. And we believe that given the facts that the Court has retained its jurisdiction in this matter, it would be appropriate to set that hearing to determine the permanent plan for this child."

After this, the court said, "Submitted otherwise?" All counsel said yes. The court proceeded to set a hearing pursuant to section 366.26 for February 27, 2012. It advised the parties that, "if they wish to reserve the right for any review on appeal of the findings and orders made in this hearing, they're required to seek an extraordinary writ" within seven days, using the appropriate Judicial Council forms. The section 366.26 hearing did not actually take place until October 1, 2012. No writ petition was ever filed.

On April 16, 2012, the mother filed a petition pursuant to section 388 requesting that the court modify its previous order. The father later joined in the petition. The petition sought to reverse the effects of the May 25, 2011, agreement, requesting that the grandparents' guardianship be terminated and that the parents be provided with reunification services. It asserted that the parents had a new home in Merced that was clean, that the home was drug free, and that they had distanced themselves from people who use drugs and alcohol. It further stated that they had been seeing a psychologist, Dr. Roxanne Banks, who had made unannounced visits to the home and would testify that the home was suitable for children, that the parents were doing a good job of parenting their new child, that the parents were dealing with their mental health issues in a positive way, and that Nicholas should be reunited with his family. Dr. Banks would also testify that, since Nicholas was still developmentally delayed a year and a half after his removal from the parents' care, the department's conclusion that his delays were caused by the parents' neglect must have been exaggerated.

The department filed a report, a supplemental report, and a "pre-trial hearing report" for the section 366.26 hearing. These were dated February 8, May 11, and July 26, 2012. In these reports, the department asked the court to terminate the parents' parental rights and select adoption as the permanent plan. It reiterated that the psychological evaluations had concluded Nicholas would be at a substantial risk of harm if placed with the parents and that neither parent would benefit from reunification services.

The maternal grandparents continued to be willing to adopt Nicholas. A report by the Adoption Bureau of the California Department of Social Services stated that they had demonstrated their ability to meet Nicholas's needs and that he had demonstrated progress and improvement while under their care. The report also stated that Nicholas had "made a good transition and adjustment to the prospective parents' family." It concluded that adoption "seems to be in Nicholas' best interest."

The department reported some observations of a social worker during a supervised visit at a park. The parents arrived late. Nicholas climbed to the top of a slide and slid down by himself, and the father "was able to barely catch him" at the bottom. The younger child, Destiny, was then six months old. She did not want to drink from her bottle. The mother told the father this was because the bottle was cold. The father said, "I don't care, that's too bad," and tried to force Destiny to drink. The social worker "felt very uncomfortable with the level of supervision provided by the parents." Once, while climbing over a barrier separating a woodchip area from some grass, Nicholas fell and bumped his head. The social worker also described the parents' refusal to submit to drug testing, which resulted in the cancellation of a number of visits.

The social worker opined that Destiny was exhibiting developmental delays similar to those Nicholas had exhibited. She attributed these delays to parental neglect.

In the final report, the department reported that the mother was making visits, but the father was still refusing to submit to drug testing and therefore could not attend the

visits. The department asserted that the mother's visits were "very non productive" because Nicholas "is not being provided with age appropriate activities and is often fussy and does not demonstrate an attachment to" the mother. The department opined that the visits were "confusing" and "disruptive" for Nicholas.

The Court Appointed Special Advocate (CASA), Eric Kramer, submitted three reports prior to the section 366.26 hearing. Kramer's reports contrasted sharply with the department's. The first report discussed an unannounced visit to the parents' home on April 23, 2012. When Kramer arrived, the father first said he was not welcome, but then changed his mind and invited Kramer in. The apartment was reasonably neat and clean. The parents spoke proudly about attending the classes the court had required them to attend. Destiny appeared clean and happy. She smiled and made eye contact with her parents. The father held a photo of Nicholas next to a photo of Destiny, pointed out their similar appearances and said he wished they could grow up together. The parents said Nicholas cried as they were leaving at the end of each visit. They told Kramer they had no car and had to depend on public transportation and friends to travel to visits with Nicholas, of which they were sometimes notified only one day in advance or not at all.

Kramer spoke to Dr. Roxanne Banks, who said she had made numerous unannounced visits to the home; she found it to be in good condition, found the parents to be performing their parental duties adequately, and found Destiny to be developing appropriately. Although acknowledging that his knowledge was limited by his recent appointment, he concluded that he had seen no reasons why the family should not receive reunification services.

In his second report, Kramer stated that he had spoken with the mother; Dr. Banks; a Merced County social worker; and Jennifer Gleason, who was described as the parents' advocate. The mother said she was taking additional parenting classes, was complying with the court's drug-testing requirement, and had begun selling Avon products to supplement the family's income. The social worker had visited the home and

found that Destiny was receiving "good, basic" parenting and no follow-up was necessary. Gleason stated that the parents were doing what was asked of them, were taking their medications, and were keeping in touch with their therapist, Banks. Banks told Kramer that the father was still refusing to submit to drug testing. He was taking prescription drugs and using marijuana with a doctor's recommendation and feared these would cause a positive test. Banks believed the department was biased against the parents. Kramer concluded that the parents had made great strides since Nicholas was detained, and with reunification services would be able to provide a safe home for Nicholas.

In his final report, Kramer reported that the father had agreed to submit to drug testing so he could participate in visits with Nicholas. The mother had graduated from her parenting class. Kramer reiterated his view that the parents had made great progress and could provide a safe home if given reunification services. At the same time, however, Kramer stated that the permanent plan of adoption by the grandparents "seems very appropriate …."

The section 366.26 hearing and the hearing on the parents' section 388 petition were combined and took place on October 1, 2012. The mother testified that she had been seeing Dr. Banks. She was taking her prescribed medication, Zoloft, which was for depression. She had completed one parenting course and was attending another. She had been keeping her home cleaner. The family's income was $1,444.20 per month and was sufficient to pay their bills. The income was from Social Security disability payments. The mother was born with only one hand and the father had a congenital heart condition. No one from the department in Mariposa County had visited the family's home in Merced County, but social workers from Merced County had visited, and none had suggested that Destiny should be removed from the home. The mother and father no longer allowed partying in their home. The mother believed she would benefit from reunification services. She thought the psychological evaluations finding the contrary

were wrong, and that the psychological tests the evaluators administered were invalid. She loved Nicholas and was willing to do anything necessary to reunify with him.

The mother believed the guardianship should be terminated. She felt there was no longer any need for her parents to care for Nicholas. She also felt she was led to believe, falsely, that if she agreed to the guardianship, she would be given a chance to reunify with Nicholas. Further, she was pregnant with Destiny at the time and believed the department was implicitly threatening that if it had to take Nicholas from her without her agreement, it would take her new child as well. She said, "I know very well if your rights to one child are involuntarily terminated you can lose any child after that, so I was scared." She also said that one of the department's social workers told her husband that, no matter what the parents did, their son would never come home.

The father testified. He had been taking medication for bipolar disorder, which was a recent change in his diagnosis. He had not had access to the medication for a week at about the time of the hearing, however, because the person assigned to deliver it to the family's home had not shown up. On a doctor's recommendation, he was using marijuana once each night before going to bed. He had completed two parenting classes. Since completing the classes, he and the mother had kept the apartment clean, made sure they always had food and anything else Destiny needed, and stopped having guests at their home.

The father agreed with the mother that the psychological tests included in the court-ordered evaluations were invalid. He said he had filled in answers at random on one of the tests. When asked what he had "done to address your anger issues that existed a year or so ago," he replied, "Nothing really."

The father's understanding of the agreement under which he and the mother had given up their right to reunification services was that the guardianship would be the fastest route to getting Nicholas back. He said the department and his lawyer told him he would have Nicholas back in two or three months. He said that if the court now ordered

reunification services, he would do everything required to reunify with his son, including drug testing.

Dr. Banks testified. Banks was a Ph.D. psychologist who had chosen not to seek a California psychologist's license because she was employed by a "Christian based program," and "if you're licensed with the State of California you cannot address any spiritual or religious issues …." She had been providing therapy to the mother and father for about a year, had visited their home about 20 or 30 times, had seen them at her clinic three or four times, and had consulted with them by phone two or three times each week. Her visits were unannounced. She had never seen anything in the home that would be harmful or detrimental to a child. The home was reasonably clean and there was no evidence of drinking or smoking. Banks concluded that the parents were doing a good job with Destiny, whom she found to be "a very healthy interactive child." She said Destiny's condition "shows some of their parenting skills off, better than any testimony."

Banks believed the mother "already is a good parent," and that both parents would benefit from reunification services. She also believed that the recent change in the father's diagnosis and medication made a significant difference. "I believe had he been on the correct medication for the last several months, he would have had a different quality to his life."

Banks criticized the psychiatric evaluations that had been obtained pursuant to the court's order. The tone of the reports was "not neutral" and the evaluators "seemed to have a bias against" the parents. She suggested that the methodology used was not appropriate. The Minnesota Multiphasic Personality Inventory II, one of the written tests the evaluators administered, was "not really a good tool" for determining whether parents can benefit from reunification services. In general, the administration of a battery of written tests during a single office visit—the method used by both evaluators—has little value as a means of making that determination. A superior method involves ongoing clinical observation, including home visits.

Banks also criticized the department's original conclusions at the time of Nicholas's detention. She said it "amazes" her that the department found Nicholas's developmental delays to be caused by his environment, as she was aware of no scientific research on the basis of which it would be possible to determine whether a child's developmental delays are caused by environmental or genetic factors. Regarding the flatness on the back of Nicholas's head, Banks attributed that to the parents' following the standard advice given to all parents to have infants sleep on their backs as a means of reducing the incidence of Sudden Infant Death Syndrome. Flatness on the back of the head is a general risk of this recommended practice.

Eric Kramer, the CASA, testified. He had 15 years' experience as a child protective services worker in Merced County. He said that when he visited the family's home, Destiny "was fine" and the parents "appeared to be competent parents." He believed their home was acceptable for Nicholas and he thought they could benefit from reunification services.

Jennifer Gleason testified. Gleason was a licensed vocational nurse with experience working with mentally ill patients. She met the mother and father when she was working on their case at Mariposa County Behavioral Health and Recovery Services. After she left that agency, she volunteered to assist them. She made both announced and unannounced visits to their home. In her view, the parents' housekeeping and parenting were satisfactory. The home was always "clean and in order" when she visited. The father had stopped associating with many of his friends and there was no partying. She observed the father cooking and believed Destiny was being provided with a healthy diet. They "have so much fun" with Destiny, and keep her clean and well-dressed. In Gleason's opinion, Destiny was meeting all developmental milestones. She believed the mother and father had the ability to provide a safe home for children, could absorb and apply information from parenting classes and therapy sessions, and were "really good parents."

The father's parents testified. Both had been visiting the home. In the time since Nicholas was removed from the home, the mother and father had been keeping their home clean and neat and had stopped bringing people into the house to party or sleep over. The father had not been drinking. There was nothing in the home that would be a danger to a child. The mother and father were taking good care of Destiny and they had the ability to provide a safe and happy home to their children.

In their closing arguments, counsel for the parents said the testimony established changed circumstances by showing that the parents had obtained services privately, taken control of their mental health and substance-abuse issues, and proved they could parent their other child. They also claimed they entered into the agreement to forego reunification services without understanding that the department would seek to terminate their parental rights.

The department argued that the parents had not shown a change of circumstances. It said the court should rely on the earlier evaluations stating that the parents could not benefit from reunification services and would not be able to parent adequately in the foreseeable future. In criticizing Banks's testimony, the department emphasized her lack of a California psychologist's license and her decision not to administer any additional written tests. It argued that, for these reasons, her testimony lacked foundation and should be disregarded. The department also maintained that, even if the parents had shown a change of circumstances, they had not shown it would be in Nicholas's best interest to order reunification services and end the guardianship, a necessary element for the section 388 petition. As for the agreement under which the parents gave up their right to argue for reunification services and submitted to the establishment of a guardianship, the department said this was "their choice" and "their proposal." Counsel for Nicholas supported the department's position.

After hearing these arguments, the court said:

> "This is a difficult case, and I will tell you I have taken this very seriously, thought about it a great deal, and have come to some conclusions. I've come to the conclusion, first of all, that the parents are not sophisticated, and because of that did not understand the import of their actions. There's no doubt in my mind that's true. It's also true that they sought services elsewhere, and that Destiny is apparently okay in the home. We're not talking about Destiny, we're talking about Nicholas, and I think that's where the parents have fallen short. If reunification services were ordered I would have to find that it's in the best interest of Nicholas. Nicholas has not been in the home. He's not bonded with the family, and what the parents are, I believe, feeling is a lack of bonding on their own part. And while I am sympathetic to the parents, they're not my primary concern; Nicholas is. He has not been in the home for some time.… I'm sure that the parents do not understand the import of the best interest of Nicholas [with respect to receiving regional center services, for which he had been found eligible because of his developmental delays].
>
> "The other thing that bothers me is that while the parents present themselves well, and they are apparently doing well, I'm concerned about a few things .… I'm concerned that dad has not had any services to deal with his anger issues or with his mental health issues. There's not been a visitation schedule … to allow Nicholas to bond with either his parents or his sibling, and therefore I'm going to deny the [388] petition and … make the orders under 366.26 as follows .…"

The court went on to terminate the parents' parental rights and select adoption as Nicholas's permanent plan.

The parents left the courtroom when the court terminated their rights. The court supplemented its remarks:

> "I want to put on the record, even though the parents have left, and I understand their emotional state. I really do. And I think they've done a tremendous job with their limitations, but as I pointed out they have failed to present any best interest for Nicholas, and Nicholas is a very different child than Destiny. And that is my obligation to make sure that Nicholas has the services that he needs in a situation for the rest of his life, that he needs. And that's basically the reason for my order."

DISCUSSION

I. Agreement to bypass reunification services

The parents maintain that they "were misled into waiving reunification services, which waiver placed them at a distinct disadvantage in their efforts to successfully prove that they should be afforded reunification services pursuant to their petition for modification …." The disadvantage arises from the principle that, after reunification services are denied or terminated, the juvenile court's focus changes from reuniting the family to providing permanence to the child. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) The parents say they "failed to understand that their waiver was not truly a second chance at reunification, but rather the final blow to any hope of resuming a parenting relationship with Nicholas." The parents ask us to reverse the juvenile court's orders because the parents' waiver under these circumstances led to a miscarriage of justice.

The department contends that review of this issue on appeal is barred by section 366.26, subdivision (*l*). The parents' briefs do not address this contention.

Section 366.26, subdivision (*l*), provides:

> "(*l*)(1) An order by the court that a hearing pursuant to this section be held is not appealable at any time unless all of the following apply:
>
> "(A) A petition for extraordinary writ review was filed in a timely manner.
>
> "(B) The petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record.
>
> "(C) The petition for extraordinary writ review was summarily denied or otherwise not decided on the merits.
>
> "(2) Failure to file a petition for extraordinary writ review within the period specified by rule, to substantively address the specific issues challenged, or to support that challenge by an adequate record shall preclude subsequent review by appeal of the findings and orders made pursuant to this section. [¶] … [¶]
>
> "(4) The intent of this subdivision is to do both of the following:
>
> "(A) Make every reasonable attempt to achieve a substantive and meritorious review by the appellate court within the time specified in

Sections 366.21, 366.22, and 366.25 for holding a hearing pursuant to this section.

"(B) Encourage the appellate court to determine all writ petitions filed pursuant to this subdivision on their merits."

Section 366.26, subdivision (*l*), bars a direct appeal from an order setting a section 366.26 hearing unless a timely writ petition was first filed and was denied without consideration of its merits. (*In re Tabitha W.* (2006) 143 Cal.App.4th 811, 816.) Among its purposes are "to expedite finality in dependency proceedings and to achieve permanency for children in the system." (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 248.) The bar extends to other orders made at a hearing in which a section 366.26 hearing is set. (*In re Merrick V., supra,* at p. 247.) It does not extend, however, to matters arising at the section 366.26 hearing itself. (*Sue E. v. Superior Court* (1997) 54 Cal.App.4th 399, 404.) Further, it does not apply at all if the juvenile court failed to give the parent notice of the requirement to file a writ petition. (*In re Merrick V., supra,* at p. 248.)

In this case, the department made its request for a section 366.26 hearing to terminate parental rights and select adoption as the permanent plan at the hearing on November 7, 2011. The parents stated their opposition to this request and made, for the first time, their argument that they were misled into giving up their right to a hearing on reunification services. The court rejected their contentions and proceeded to set the section 366.26 hearing. It advised the parents that they must file a writ petition to challenge the order setting the hearing.

The parents' argument that they were misled can only be understood as a challenge to the juvenile court's decision to set the section 366.26 hearing to terminate their parental rights. The argument was first made in opposition to the department's request to set that hearing. The point of the argument was that the proceedings should not turn down the road to termination and adoption because the parents were wrongfully

deprived of the opportunity to argue in favor of reunification services. The parents raised the argument again at the section 366.26 hearing itself, but the point was still that the juvenile court should not have been considering termination, not that the evidence presented at the hearing failed to establish that termination was the appropriate action. Since the parents were given the necessary advisement and never filed a writ petition, we conclude that their appeal on this issue is barred by section 366.26, subdivision (*l*).

II. Section 388 petition

The parents argue that the court should have granted their petition under section 388 requesting that the court modify its prior order bypassing reunification services and establishing a guardianship. To succeed on their section 388 petition, the parents were required to show two things: (1) that there had been new evidence or a change of circumstances, and (2) granting the petition would be in Nicholas's best interest. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) We review the denial of a section 388 petition for abuse of discretion. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) The juvenile court abused its discretion if its conclusion exceeded the bounds of reason. We cannot substitute our view for that of the juvenile court merely because both views are reasonably supported by the facts. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

The juvenile court's denial of the petition was expressly based on its finding that placing Nicholas on a path to reunification with his parents was not in his best interest. Evidence supported this finding. Both parents had long histories of mental illness, Nicholas had special needs, and the addition of another child placed additional strain on the parents' coping skills. There was evidence that the parents' situation had improved, and the benefits to Nicholas of growing up with his biological parents and sister were a factor to be considered. We cannot say, however, that the juvenile court exceeded the bounds of reason by determining that adoption by the maternal grandparents was a superior outcome from the point of view of Nicholas's well-being. In light of this

conclusion, it is unnecessary for us to resolve the parties' dispute over whether the parents demonstrated changed circumstances.

If the section 388 petition is viewed as including an argument that the order bypassing reunification services should be modified because the parents were misled into agreeing to it—i.e., an argument that the department's decision to abandon the guardianship plan and pursue adoption amounted to a change in circumstances—our conclusion would still be the same. Under this theory of changed circumstances, the parents would still be required to establish that modification is in Nicolas's best interest. The juvenile court could reasonably find that they did not, as we have said.

DISPOSITION

The orders of the juvenile court are affirmed.

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Wiseman, Acting P.J.

WE CONCUR:

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Levy, J.

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Kane, J.