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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

F.S., et al.,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE
COUNTY,

Respondent;

ORANGE COUNTY SOCIAL SERVICES
AGENCY et al.,

Real Parties in Interest.

G047965

(Super. Ct. No. DP022134)

O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Jane Shade, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petition granted.

Law Office of Peggy Oppedahl and Peggy Oppedahl for Petitioner F.S.

Frank Ospino, Public Defender, Michael Hill, Assistant Public Defender, Hong Nguyen and Dennis M. Nolan, Deputy Public Defenders, for Petitioner G.S.

No appearance for Respondent.

Nicholas S. Chrisos, County Counsel, and Karen L. Christensen, Deputy County Counsel, for Real Parties in Interest.

Law Office of Harold LaFlamme and Harold LaFlamme for Minor.

* * *

F.S. and G.A. are the mother and the presumed father, respectively, of now one-year-old H.A. Parents seek writ review (Cal. Rules of Court, rule 8.452) of the court's order denying reunification services to mother and setting a Welfare and Institutions Code section 366.26 hearing to terminate the parental rights of both parents.¹ The court relied on the severe physical abuse and severe physical harm exceptions under section 361.5, subdivisions (b)(5) and (b)(6), to deny services to mother. Parents contend (1) no substantial evidence supports the court's findings under those subdivisions, (2) the court violated mother's right to due process because all parties, including Orange County Social Services Agency (SSA), had agreed mother would receive reunification services and therefore mother's counsel called no witnesses and did not question any of the witnesses called by other parties at the jurisdictional and dispositional hearings, and (3) SSA did not provide the report mandated by subdivision (c) of section 361.5 since SSA assumed mother would receive services.² County Counsel and minor's counsel have informed us they do *not* oppose parents' petition. We agree with parents' insufficient evidence contention and grant their petition for a writ of mandate.

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

² Father joins in mother's petition containing these contentions. We therefore refer to mother's petition as parents' petition. We hereby deny mother's motion to file a supplemental petition (in which father joined), given that we grant her original petition.

FACTS

On January 6, 2012, parents were unmarried and had been living together for about 10 months.³ Their only child — a 12-day-old girl — lived with them. Mother was on maternity leave from her job at the Orange County Auditor-Controller's office, while father continued to work in an information technology position.

That day, the baby was admitted to a Los Angeles hospital, having suffered head trauma that caused bleeding in her brain, soft tissue swelling on the right side of her head, and severe seizures. The doctor said her prognosis for a full recovery was poor and most likely she would have difficulties in learning and reaching developmental milestones.

Around five days later, on January 11, father came forward claiming that early on the morning of January 6, "he was holding the baby and 'nodded off' allowing the baby to fall from his arms to the carpeted floor." In father's interview, he gave the account summarized in this paragraph. Mother had watched the baby all night on January 4. Father offered to take over shifts so mother could get some sleep. On the night of January 5, after mother went to sleep, father stayed in the living room with the baby as she slept. The baby woke up and cried three times over the course of two and a half hours. The first time, father fed her. The second time, he changed her diaper. The third time, he held her, standing while bouncing the baby "as this technique worked best to soothe her. The father got [sleepy] and his eyes started to close. The father dosed off for a second and the baby fell to the ground. The father immediately startled awake. The father noticed that the baby fell on her right side with her ear to the ground. The baby was crying so the father picked her up and checked her but did not see any bleeding or dents. The father admitted that he was afraid of the baby being taken from him and of the

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All dates refer to the year 2012, unless otherwise stated.

mother leaving him. The father stated that he heard that [SSA] takes babies away even for accidents. The father stated that he panicked and didn't tell the mother. The father rocked [the baby] and about 10 minutes later the baby went back to sleep. The father put the baby back in the swing and went back to sleep himself." Around 4:30 a.m., father tried to feed the baby, but she only drank a small amount. Around 7:30 a.m., mother woke father up. Father got ready quickly and ran out the door to work.

Separate interviews of mother, father, and the maternal grandparents yielded information on the subsequent events of January 6. After father left for work, mother took a nap on the couch next to the baby in the floor swing. The baby woke up at 10:00 a.m. and again at 11:30 a.m. Mother tried to bottle feed her, but the infant would not eat much. Around 11:30 a.m., father phoned mother during his break because he was concerned. Mother said the baby did not eat. Around noon, the baby threw up normal white spit. Around 2:00 p.m., the baby's face started twitching. Mother thought the infant was cold so mother wrapped her in a blanket. About 30 minutes later, the baby vomited green stuff. Around 3:30 p.m., father phoned and, upon learning of the green vomit, told mother to take the baby to the emergency room. Father looked up "Baby puke green" on the internet and saw it could indicate head trauma or intestinal blockage, so he texted mother to take the baby to the emergency room. Around 4:00 p.m., the maternal grandparents arrived at parents' home. Mother took off the baby's blanket and noticed twitching on the right side of the baby's body. The grandfather, who was very attached to the baby, held her and immediately noticed that something was wrong, so they rushed her to the emergency room. Father "got off work and went to the hospital."

On January 10, mother phoned father and told him the doctor believed the baby must have been dropped, and that father needed to get off work early because the hospital social worker needed to speak with him and because the maternal grandmother wanted to talk with him. "The grandmother watched as the mother racked her brain trying to figure out how the baby sustained the injury." The following afternoon, father

arranged to meet the grandmother at the hospital cafeteria, where father told the grandmother he had dropped the baby. The grandmother told father he should tell mother, which he did.

In an earlier incident, on December 31, 2011, when the infant was six days old, father propped the baby up on a large pillow on the coffee table because she cried when he put her in the crib. The pillow was fluffy and cradled the baby's body weight. Mother took over the shift at around 5:00 a.m. Mother took her eyes off the baby for a second and the infant rolled off and fell on her left side on the carpet. The baby did not wake up or cry. The baby was "her normal self" after the incident, eating and sleeping normally. The maternal grandmother confirmed it was possible for the baby to have rolled off as the infant had rolled over as early as three days old.

Mother defended father and said he was a good father and would never intentionally hurt the baby. Mother stated the baby soothed easily if someone stood up and rocked her or walked around with her, as opposed to sitting down. The maternal grandparents reported father is a loving parent and great with the baby, and holds and cares for her.

The social worker and social services nurse found both parents were appropriate and affectionate. But they also observed that father seemed highly anxious. The hospital social worker also observed father's anxious demeanor, but commented it resembled "hypomania." Father agreed to seek therapy and medication consultation.

Although the hospital social worker expressed concern that mother was passive with father, the next day SSA reported mother was protective of the baby and showed increased assertiveness with father. SSA advised parents "that the baby would reside with the mother and not the father given the circumstances, and the parents agreed. The father presented [as anxious] and was apologetic. Both parents presented highly cooperative and willing to do whatever [SSA] requested of them. The father admitted that he received two write ups at work for falling asleep while standing up. The father

also admitted that he had drunk five energy drinks the day before having stayed up with the baby at night. The mother confronted the father and told him that he should have told her because it would have changed things in that he probably wouldn't have been the one to watch the baby that night.”

The attending physician stated the baby's injuries could be consistent with father dropping the baby. The injury was isolated to one side of the baby's brain, whereas in shaken baby syndrome both sides of the brain are often injured due to the brain bouncing off the skull. Also, a neurologist, as well as an ophthalmologist, did not see any retinal hemorrhaging, which is often associated with shaken baby syndrome. The hospital social worker told SSA and the Los Angeles County social services agency that shaken baby syndrome had been ruled out as the baby had had no retinal hemorrhages, and confirmed the baby could be released to the parents.

But Dr. Dean Sarco, a pediatric neurologist and epilepsy specialist, stated father's explanation did not adequately explain the baby's injuries and the injuries were indicative of nonaccidental trauma. On January 19, the day the baby was ready for discharge from the hospital, Dr. Sarco expressed concern for the baby if allowed to go home with parents.

Dr. Sandra Murray, a child abuse expert, was consulted. “Dr. Murray stated that the baby suffered serious injury which was not fully explained by the father's story that he dropped her as the baby would have only fallen about three to four feet onto carpeted floor. Also, it was highly suspicious that the father came up with the story five days after the injury occurred and after the baby was hospitalized. There is significant bleed to the right side of the brain but there is also a bleed in the left occipital lobe. It should also be noted that the retinal exam was conducted three days after the injury, which would allow enough time for any retinal hemorrhaging to have gone away.” Dr. Murray requested that another MRI and EEG be done.

Mother agreed to move in with the maternal grandparents to have added support and the baby released to her care. However, SSA placed the baby with the maternal grandparents as the primary caretakers.

On January 24, SSA filed a petition alleging the baby came within section 300, subdivisions (a) (serious physical harm), (b) (serious physical harm due to failure to protect and provide medical treatment), and (e) (severe physical abuse). The court ordered the baby to be placed with the maternal grandparents upon the child's release from the hospital. The court permitted mother to live with the maternal grandparents, but mother was not to have sole unmonitored contact with the baby. Father was given monitored visitation. The court ordered SSA to provide reunification services to parents as soon as possible.

Mother and father enrolled in parenting education. Father began individual counseling for his anxiety issues.

Dr. Murray's preliminary report concluded the baby's "brain injury was extensive and severe — her brain is melting away." The brain injury would impair her ability to walk, talk, see, and eat. Dr. Murray stated that father's story did not explain such a severe brain injury.

Subsequently, Dr. Murray's supplemental report stated the baby, at 65 days old, tested at one month in social emotional behavior, less than 16 days in cognitive and receptive language and motor skills, and 20 days in expressive language.

In April, SSA recommended father *not* be provided reunification services as it appeared that section 361.5, subdivisions (b)(5) and (b)(6) applied to him. SSA recommended that services be provided to mother, however. (SSA's recommendation remained unchanged in all subsequent reports.)

The baby suffered from developmental delays, including visual. Mother had returned to work, but would come home after work and attend to the infant's needs. The maternal grandparents' house was crowded and there was tension between mother

and the maternal grandfather (because he was judgmental of father) and between mother and her sister. Mother planned to move out of the home due to the crowding and move in with father. She had completed parenting education and planned to contact her church about individual therapy.

In June, the baby had “spasms.” At one point the baby became unresponsive, requiring CPR and a call to 911. At almost six months old, the baby appeared to have the gross motors skills of a 20-day-old newborn, and the fine motor skills and the cognitive skills of a 16-day-old newborn.

By July, the baby had improved. Although still developmentally delayed, she could lift and turn her head and smile and coo. SSA was “aware that mother had chosen to reside with father and his family” and to marry father in the future. SSA concluded: “She does not seem to be making life choices that involve the care, protection and safety of her child in the future. That said, [SSA] continues to recommend Family Reunification Services to the mother in the hopes that she will benefit from services and be able to ultimately reunify with her child with the child’s future needs being met.”

On August 23, 2012, the jurisdictional and dispositional hearing began. Mother’s counsel stated mother would not present any witnesses because she agreed with SSA’s recommendation. The parties agreed that jurisdiction and disposition would be bifurcated, but stipulated the social worker’s testimony taken that day would be for purposes of both jurisdiction and disposition.

The social worker testified she recommended that reunification services be provided to mother, but not to father. She did not recommend the immediate return of the child to mother, because the social worker was concerned about mother’s ability to protect the child. Her concern was based on mother’s statements, made in mother’s “initial” interview with SSA, that father would not intentionally hurt the child, that the child would not be possibly permanently delayed, and that mother did not agree with the medical professionals’ statements on how the child might have been injured. (Mother

had made these statements six months earlier, when the baby was seven weeks old, in response to specific allegations of the section 300 petition.) The social worker was also concerned that, now that the parents had reportedly married, it would be very hard for mother to protect the child while being married to and living with father. Mother had participated in an “extensive” parenting class and begun counseling. Mother visited the child daily and there were no reported problems. Mother was cooperative and making progress in parenting and visitation.

In September, SSA reported that the then seven-month-old child demonstrated capabilities at the four- to five-month level. Father participated in a child abuse treatment program. Mother and father had reportedly married. Mother had moved into her own apartment and said that father resided with his parents. Mother said she visited the child every day and the visits were going well. SSA continued to recommend family reunification services be provided to mother.

In October, parents attended the child’s therapy session and the therapist informed them of the child’s delays. The child could not crawl, sit up on her own, or pull herself up and stand on her own. SSA’s therapy goals for mother included that she be able to (1) understand and express the gravity and severity of damage caused to the child, (2) express who may have caused the injury and/or admit fault if she caused any damage herself, (3) understand that the child’s injuries could have resulted in death and how she played a role in not preventing the damage, (4) express skepticism of any adult she permits near the child, and (5) express verbally and physically that she feels empathy for her child and resentment toward the perpetrator and is able to protect the child from harm. SSA continued to recommend family reunification services be provided to mother.

On November 13 and 14, Dr. Murray, the child abuse expert, testified at the jurisdictional hearing about the baby’s condition upon the child’s arrival at the hospital on January 6. Dr. Murray opined the child’s injuries were “nonaccidental.” The baby had presented at the hospital with brain damage and bleeding too extensive to have been

caused by the infant falling off the coffee table onto the carpeted floor or by father dropping her four feet onto the carpet. The medical records showed the baby's brain had been damaged in many areas, mostly on the right side, but also on the left. There was bleeding mostly on the right side, but also on the left. The blood was thinly spread over a broad area, as opposed to a concentrated, deep volume of blood that could compress and damage the brain. The bleeding was consistent with the stretching and tearing of blood vessels that can occur from acceleration, deceleration, and rotational movement of the brain. This type of movement can also damage brain tissue and cause swelling (which, in turn, can cause neurological problems). Acceleration and deceleration forces can result when a child is forcefully shaken or slammed onto a soft surface, or falls from a great height. The baby had suffered no skull fractures, indicating no sufficiently forceful impact from falling or from something falling onto her head. Nor had the baby suffered any bruising or scalp swelling. Dr. Murray testified the lack of retinal hemorrhages did not change her opinion because retinal hemorrhages will occur with abusive head trauma 80 to 90 percent of the time, not in every case. Symptoms of the injury would have begun to manifest within minutes to hours after its occurrence. Symptoms could include seizures, vomiting, not feeding well, and problems with breathing and being responsive. Babies with this type of injury nearly always end up with some sort of neurological deficit and are at serious risk of dying. Shaken baby syndrome is categorized as a type of abusive head trauma.

On November 14, mother filed a waiver of rights as to jurisdiction and pleaded no contest to the section 300 petition. Mother's counsel informed the court that mother agreed with SSA's April 17 recommendation as to her and wished to resolve her portion of the case. The attorneys for all the parties (i.e., SSA, the child, mother, and father) (1) agreed on the record that mother would enter a no contest plea as to the jurisdictional findings and (2) stipulated, as to the disposition, that they would follow SSA's recommendation of April 17 "as to the mother only." SSA's counsel stated that,

although “a more prudent course of action [was] to have the court take the full plea . . . under submission to some extent with a full understanding that the parents, at least, are in agreement with this, that this is the anticipated course of action and a likely outcome on the case,” he was concerned about “the court finding the petition true as to one parent today when the petition is as to the child.” The court therefore filed mother’s waiver of rights, but deferred her plea.

In December, SSA reported mother was participating in therapy sessions. Although the child could now sit on her own and babble, at her age she should have been able to stand on her own, crawl, and form words.

In January 2013, a social worker visited the maternal grandparents’ home and reported that (1) although mother would take some initiative to feed and change the child, she would otherwise “sit” unless the grandmother asked for help, (2) mother “always ‘lets’ dad do all because he wants to,” and (3) an incident occurred during the child’s bath. In that incident, mother “helped bathe baby . . . and baby sat in tub slouched down and tipped her head in water[. G]randmother stepped out for a quick second when this happened and said[,] ‘[H.A.] get your head out of the water your [*sic*] going to drown[,]’ and lifted her head. Mom said[,] ‘[O]h [H.A.] don’t put your head in the water’. No other movements made by mom.” SSA continued to recommend reunification services for mother.

At the end of the jurisdictional hearing, the court found the allegations of SSA’s petition true by the preponderance of the evidence.

At the beginning of the dispositional hearing on January 10, 2013, mother’s attorney reiterated for the record that, for both the jurisdictional and dispositional hearings, mother agreed with SSA’s recommendation and that mother’s counsel was acting accordingly. As a result, mother’s counsel did not question any witness at the hearings.

The social worker testified predominantly about father, but stated that mother had completed her parenting education.

The maternal grandmother testified that father consistently visited the child during his designated hours and assisted with “everything” concerning the child’s care, checked on her every day by phone, and went to most of her medical visits. Parents paid for the baby’s daycare, medical visits, medicine, formula, diapers, clothes, and all of her other needs. Mother visited the child almost every night.

Counsel then gave their closing statements. SSA’s counsel asked the court to follow SSA’s recommendation that reunification services be provided to mother, but not to father, and that the child not be returned to either parent. Minor’s counsel agreed with SSA’s recommendation. Mother’s counsel agreed with SSA’s recommendation and asked the court to adopt it.

On January 24, 2013, the court denied both parents reunification services and set a section 366.26 hearing as to them.

DISCUSSION

Parents contend insufficient evidence supports the court’s finding mother is a parent described in section 361.5, subdivisions (b)(5) or (b)(6), which establish exceptions to the general rule that parents are to be provided reunification services for a statutorily specified period of time. Parents further contend the court erred by denying mother reunification services even though SSA (1) recommended that services be provided to mother, and (2) based on that recommendation, did not prepare the report (mandated by § 361.5, subd. (c)) on whether reunification was likely to be successful and whether failure to order reunification was likely to be detrimental to the child. Parents also contend mother “was denied due process when the parties agreed in open court that mother [would] receive reunification services and the court then denied mother

reunification services at the close of father's case without rejecting the parties['] settlement agreement and providing mother an opportunity to participate in the hearing." SSA and counsel for the child do *not* oppose parents' writ petition, because SSA and minor's counsel were in favor below of the court granting mother reunification services.

We agree with all parties that the court should have granted mother reunification services. No substantial evidence supports the court's findings as to mother under section 361.5, subdivisions (b)(5) or (b)(6). Because we grant parents' writ petition on this ground, we do not address their other contentions.

We review the relevant law. Section 361.5 governs the provision of family reunification services in dependency cases. Under subdivision (a) of that section, whenever a child is removed from a parent's custody, the court must order SSA to provide services to the child and to the parent for a statutorily specified time period.⁴ "This requirement implements the law's strong preference for maintaining the family relationship if at all possible." (*In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 474.)

Subdivision (b) of section 361.5 contains 16 exceptions which permit a court to deny reunification services to a parent. These exceptions "have been referred to as reunification 'bypass' provisions." (*Tyrone W. v. Superior Court* (2007) 151 Cal.App.4th 839, 845 (*Tyrone W.*)) "There is no general bypass provision; the court must find by *clear and convincing evidence* that one or more of the subparts enumerated in section 361.5, subdivision (b) apply before it may deny reunification services to a parent." (*Id.* at p. 846, italics added; § 361.5, subd. (b).)

At issue here are the exceptions established by subdivisions (b)(5) and (b)(6) of section 361.5. A parent comes within subdivision (b)(5) of section 361.5

⁴ Here, the time period for court-ordered services ended March 5, 2013 (§§ 361.5, subd. (a)(1)(B), 361.49), but may be extended for six more months if it is shown that the permanent plan is for return of the child to mother's custody within the extended time period (§ 361.5, subd. (a)(3)).

(subdivision (b)(5)) if the court finds that “the child was brought within the jurisdiction of the court under [section 300, subdivision (e)] *because of the conduct of that parent . . .*” (Italics added.) Jurisdiction under section 300, subdivision (e) applies to a child under age five who “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.” Thus, subdivision (b)(5)’s phrase, “because of the conduct of that parent,” includes any parent in the household who was the actual abuser or who knew or reasonably should have known of the abuse. (*In re Kenneth M.* (2004) 123 Cal.App.4th 16, 21 (*Kenneth M.*.) The conduct of one parent can come within subdivision (b)(5), while the other parent remains innocent and entitled to reunification services. (*In re Joshua H.* (1993) 13 Cal.App.4th 1718, 1732 (*Joshua H.*.)

Subdivision (b)(6) of section 361.5 (subdivision (b)(6)) establishes a separate exception and permits a court to deny reunification services to a parent if the court finds that the child has been adjudicated a dependent under section 300 as a result of “the infliction of severe physical harm to the child . . . by a parent . . . , and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent” (Subd. (b)(6).) Severe physical harm may be inflicted, inter alia, “by an act or omission of the parent . . . , or of another individual . . . with the consent of the parent” (*Ibid.*) Thus, by “its express terms, subdivision (b)(6) applies to the parent who inflicted severe physical harm to the minor” (*Kenneth M., supra*, 123 Cal.App.4th at p. 21) or consented to such harm inflicted by another individual. Unlike subdivision (b)(5), subdivision (b)(6) does not apply to a negligent parent who reasonably should have known of the abuse. (*Tyrone W., supra*, 151 Cal.App.4th at p. 851.) “[W]here there is no evidence to show both parents knew the child was abused or injured, the court must identify the parent who inflicted the child’s injuries before denying reunification services to that parent under . . . subdivision (b)(6).” (*Id.* at p. 852.) Thus, subparagraph (b)(6) “requires identification of the perpetrator.” (*Kenneth M., at p. 21.*)

Subdivision (c) of section 361.5 (subdivision (c)) requires the social worker to prepare a report for the dispositional hearing “that discusses whether reunification services shall be provided.” Subdivision (c) also prohibits courts from ordering reunification for parents described in subdivision (b) of the statute. As to a parent described in subdivision (b)(6), a court may not order reunification “unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child.” As to a parent described in subdivision (b)(5), the court may not order reunification “unless it finds that, based on competent testimony, those services are likely to prevent reabuse . . . 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. The social worker shall investigate the circumstances leading to the removal of the child and advise the court whether there are circumstances that indicate that reunification is likely to be successful or unsuccessful and whether failure to order reunification is likely to be detrimental to the child.” (Subd. (c), italics added.) “The fact that a parent . . . is no longer living with an individual who severely abused the child may be considered in deciding that reunification services are likely to be successful” (*Ibid.*)

An appellate court applies the substantial evidence standard of review to a juvenile court’s findings under section 361.5. (*In re Harmony B.* (2005) 125 Cal.App.4th 831, 843.) In doing so, we “view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the trial court.” (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336.) Substantial evidence “““must be reasonable in nature, credible, and of solid value; it must actually be ‘substantial’ proof of the essentials which the law requires in a particular case.””” (*Ibid.*)

Here, the court found, based on the parents’ statements about the events of January 5 to January 6, that it was “possible that either mother or father [could have] inflicted the nonaccidental traumatic injury to [the child] [¶] The evidence shows

that from late January 5 into January 6, 2012[,] each parent was alone with [the child] at some point during that time frame.” The court then stated that if SSA “proves by clear and convincing evidence that a dependent minor falls under subdivision (e) of section 300, the general rule favoring reunification services no longer applies. That general rule is replaced by a legislative assumption that offering reunification services would be an unwise use of governmental services. [¶] If the court then chooses to offer services, the court must make a finding that the reunification services are likely to prevent reabuse of the child, and this finding must be supported by substantial evidence. [¶] The evidence shows that neither of the incidents described by father, which are first that [the child] rolled from a pillow on the coffee table onto the floor, nor second, that [the child] fell from father’s arms as he held her, . . . account for the severe acute decompensating brain hemorrhage.” The court noted that Dr. Murray, Dr. Sarco, and other neurologists, radiologists, and neurosurgeons agree (1) with the diagnosis of nonaccidental trauma, and (2) that parents’ “reported mechanisms of injury are not adequate to explain [the child’s] injury.” The “most recent evidence as to mother” was that “mother needs additional and ongoing services” despite “completing a parenting class and participating in individual counseling.” “According to [SSA’s] report, mother needs to learn to cope with anger, frustration and avoidance before she can become [the child’s] primary caretaker. Mother’s therapist concurs with the senior social worker that additional coping skills need to be incorporated into mother’s individual counseling sessions.” The court found the bath incident to be “of great concern.” The court also noted “the most recent report shows that during visits, mother does little to become involved in [the child’s] care” and “often just ‘sits there.’” The court also observed that when mother lived with the child’s caretakers, mother “had difficulty getting along with the maternal grandmother, the stepfather and the sister who lived in the residence. Mother’s poor behavior created tension in the household. [¶] The grandmother caretaker described the level of tension as unbearable. Eventually, mother left the grandparents’ residence and moved in with [the

child's] father and his family. Later, mother obtained her own residence and she denied that father lived with her." The court found the child was particularly vulnerable as she is developmentally disabled, less able to protect herself, and less able to communicate abuse. The court concluded: "The court does find that the agency has proved by clear and convincing evidence that [the child] comes within section 300(e). The court does not choose to offer services to the parents. And even if the court did, it is unable to find substantial evidence that services would be likely to prevent reabuse."

In sum, the court's cited evidence as to mother was that (1) the medical experts agreed the child suffered nonaccidental brain trauma not attributable to father dropping the baby or the baby rolling off the coffee table, (2) mother was alone with the child for about nine hours on January 6 and could possibly have inflicted the nonaccidental brain trauma, (3) "mother needs additional and ongoing services" despite "completing a parenting class and participating in individual counseling," (4) "mother needs to learn to cope with anger, frustration and avoidance before she can become [the child's] primary caretaker," (5) mother did not lift the child's head out of the bath water on one occasion, (6) mother is insufficiently involved in the child's care and "often just 'sits there,'" (7) mother had difficulty getting along with the stepfather and her sister when she lived with them, and (8) mother moved in with father and his family and then obtained her own residence and denied that father lived with her.

This evidence is insufficient to support the court's findings mother came within subdivisions (b)(5) or (b)(6). Furthermore, the record contains no other evidence which, when combined with the court's cited evidence, constitutes substantial evidentiary support for the court's findings, even drawing all reasonable inferences from such evidence. No substantial evidence shows that *mother* (1) inflicted severe physical harm or abuse upon the baby, (2) consented to another person doing so, or (3) knew or reasonably should have known another person was physically abusing the child. There was no evidence mother had ever seen father mistreat the child or had previously

observed any signs of injury to the baby. There was no evidence suggesting mother experiences anger or frustration of the type or intensity to cause her to inflict severe physical harm to the baby; rather, as to “anger/frustration/ avoidance,” SSA stated that the social worker asked mother’s therapist about mother’s progress on specific goals since the matter would soon be discussed in court. The social worker “expressed some concern [about mother’s] ability to cope with anger/frustration/avoidance [and] elaborated that [mother’s] participation/reactions during monitored visitation with [the child] in December 2012 may necessitate the need to develop additional coping skills in preparation to assume the role as primary caretaker when deemed appropriate.” (Mother’s reactions during the December visit were that she lacked initiative to take actions other than to feed or change the child, allowed father to do everything, and did not lift the child’s head out of the bath water.) Mother’s therapist “concurred that the development of additional, constructive coping skills for [mother] particularly in light of the fact that [the child] has special needs was definitely appropriate and would be incorporated into future counseling sessions.” As to mother’s strained relations with the maternal grandfather and her sister when living in their home, SSA attributed this to the overcrowded conditions in the home and the grandfather being judgmental of father. Finally, that mother had the opportunity to physically abuse the child, did not show sufficient initiative to care for her in the grandmother’s presence, and told the child to lift her head out of the water rather than physically helping her, do not constitute substantial evidence mother came within subdivisions (b)(5) or (b)(6).

It appears the court misinterpreted subdivision (b)(5) to require only a finding that the child came within section 300, subdivision (e), in order to deny both parents reunification services. The court expressly applied the clear and convincing standard of proof to the finding under section 300, subdivision (e) (a jurisdictional finding), rather than to the required dispositional finding under subdivision (b)(5) that the child come within section 300, subdivision (e) *because of the parent’s conduct*. The

court stated that once SSA “proves by clear and convincing evidence that a dependent minor falls under subdivision (e) of section 300, the general rule favoring reunification services no longer applies. That general rule is replaced by a legislative assumption that offering reunification services would be an unwise use of governmental services.” Later, the court reiterated its understanding of subdivision (b)(5): “The court does find that the agency has proved by clear and convincing evidence that [the child] comes within section 300(e). The court does not choose to offer services to the parents.” The minute order summarizes the ruling: “Court finds that SSA has proved by clear and convincing evidence that minor comes within 300(e). Court does not choose to offer services to the parents” Thus, the court apparently did not find by clear and convincing evidence that the child came within the court’s jurisdiction under section 300, subdivision (e) *because of mother’s conduct*.⁵ As stated in *Joshua H.*, *supra*, 13 Cal.App.4th at page 1732, there is no reason to deny an innocent parent reunification services.

⁵ “[I]n dependency proceedings the burden of proof is substantially greater at the dispositional phase than it is at the jurisdictional phase if the minor is to be removed from his or her home. [Citation.] [burden of proof in jurisdictional phase is preponderance of the evidence; burden of proof in dispositional phase is clear and convincing evidence when court awards custody to a nonparent]; [citations.]” (*In re Henry V.* (2004) 119 Cal.App.4th 522, 528-529.) “Of course, on appeal, the substantial evidence test is the appropriate standard of review. Thus, in assessing this assignment of error, “the substantial evidence test applies to determine the existence of the clear and convincing standard of proof. . . .”” (*Id.* at p. 529.) Nonetheless, “the findings before us are not sufficient to support an out-of-home placement under the controlling clear and convincing evidence standard. Our conclusion is bolstered by the absence of any indication on the record that . . . the court . . . understood the necessity of making the dispositional findings on clear and convincing evidence. . . . A dispositional order removing a child from a parent’s custody is ‘a critical firebreak in California’s juvenile dependency system’ [citation.], after which a series of findings by a preponderance of the evidence may result in termination of parental rights. Due process requires the findings underlying the initial removal order to be based on clear and convincing evidence. [Citation.] Here, where the jurisdictional and dispositional phases were combined in a single hearing, we cannot be confident the lower standard of proof governing the jurisdictional findings was not transferred to the dispositional findings.” (*Id.* at p. 530.)

The court’s ruling may have been based on this court’s opinion in *Raymond C. v. Superior Court* (1997) 55 Cal.App.4th 159, 164, which contains the language recited by the juvenile court here. But in *Raymond C.*, substantial evidence showed the father was a violent person (*id.* at p. 162) and had physically abused the mother, and that the mother had seen the father treat the child roughly (*id.* at p. 161). Thus, the issue was *not* whether the parents came within subdivision (b)(5), but, rather, what standard should be applied for the granting or denial of reunification services under subdivision (c) to parents who come within subdivision (b)(5). Within that context, we stated: “Given a finding under section 300, subdivision (e), the juvenile court is directed to hold a dispositional hearing to decide whether services should be offered. It must *not* order services *unless* it finds, ‘based on competent testimony, those services are likely to prevent reabuse’” (*Raymond C.*, at p. 163.) To support that mandated restriction, we cited subdivision (c). We then continued: “Thus, once SSA proves by clear and convincing evidence that a dependent minor falls under subdivision (e) of section 300, the general rule favoring reunification services no longer applies; it is replaced by a legislative assumption that offering services would be an unwise use of governmental resources.” (*Raymond C.*, at p. 164.) The court’s misinterpretation of subdivision (b)(5) is particularly significant here because the court’s oral pronouncement and statement of reasons focused on section 300, subdivision (e) (and thus on subd. (b)(5) to the exclusion of subd. (b)(6)).⁶ And, in any case, no substantial evidence supports the court’s implied findings under either subdivision of section 361.5.

⁶ Under section 361.5, subdivision (k), the “court shall read into the record the basis for a finding of . . . the infliction of severe physical harm under paragraph (6) of subdivision (b), and shall also specify the factual findings used to determine that the provision of reunification services to the offending parent . . . would not benefit the child.” The court did not do this here.

DISPOSITION

Let a writ of mandate issue directing the trial court to vacate its orders of January 24, 2013 as to mother only, and to issue new and different orders that provide for family reunification services to mother.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.