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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

JOSÉ E.,

Petitioner,

v.

THE SUPERIOR COURT OF
CALIFORNIA FOR THE COUNTY OF
MONTEREY

Respondent,

MONTEREY COUNTY DEPARTMENT
OF SOCIAL & EMPLOYMENT
SERVICES,

Real Party in Interest.

No. H041895

(Monterey County

Super. Ct. Nos. J46952, J46953,
J46954)

On September 2, 2012, José E. (7), Evelyn E. (6), and S.E. (4) (collectively, the minors) were placed in protective custody after their mother, A.A. (Mother), was arrested on child endangerment charges. More than three months later, the Monterey County Department of Social and Employment Services (Department) filed three petitions alleging that Mother and the minors' father, José E. (Father), failed to supervise or protect the minors and were unable to provide regular care for their children. (Welf. &

Inst. Code, § 300, subd. (b).)¹ The Department also alleged that (1) Mother had a criminal history and untreated substance abuse issues that impaired her ability to care for the minors; and (2) Father was unable to care for the minors because he was serving a four-year prison sentence in Arizona after being convicted of possession for sale of a controlled substance (§ 300, subd. (g)).

The court sustained the petitions. The minors were placed outside of the home, and Mother was granted family reunification services. But the court denied services to Father, finding that the provision of services to him would be detrimental to the minors given his lengthy incarceration. Father did not appeal that decision.

At the 18-month hearing in June 2014, the court ordered the minors returned to Mother's custody and care by August 1. The minors lived with Mother and her new husband, Jesús V., for approximately two months, but after several incidents of domestic violence and a late-night occurrence in which José and Evelyn were injured by Jesús, the minors were again placed in protective custody. On September 16, 2014, the Department filed supplemental petitions under section 387 seeking out-of-home placement for the minors. The court ordered the minors detained.

Prior to the jurisdictional/dispositional hearing on the supplemental petitions, Father filed a memorandum requesting that the court (1) continue the hearing pursuant to section 352, subdivision (a) (§ 352(a)) and (2) grant him family reunification services. The Department opposed the request. After a contested hearing on December 8, 2014, the court denied Father's request. It concluded that continuing the hearing and granting services to Father would not be in the best interests of the minors. In separate orders filed in the three dependency proceedings (collectively, the Order), the court sustained the allegations of the supplemental petitions, and, among other things, set a selection and

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

implementation hearing in each case under section 366.26 (hereafter, sometimes referred to as a .26 hearing).

Father (José E.) seeks a writ of mandate to compel respondent superior court to vacate its Order. He contends the court abused its discretion by denying his request for reunification services. Finding no abuse of discretion, we will deny the petition.

FACTS AND PROCEDURAL HISTORY

I. Initial Petitions and Detention Orders

On December 18, 2012, the Department filed three separate petitions alleging the parents had failed to supervise or protect and were unable to provide regular care for their children, and alleging Father's incarceration and his inability to care for the minors.

(§ 300, subds. (b), (g).) The Department alleged,² among other things, that Mother had four children—Jasmine A. (12), whose father was Steve V., and the three minors, José, Evelyn, and S.E., whose father was petitioner José E. Jasmine was living with her maternal aunt, G.A. Mother had a criminal history and a substance abuse problem that impaired her ability to care for her children.

Father also had a history of criminal convictions and a substance abuse problem that impaired his ability to care for the minors. He had been incarcerated since 2011 and was serving a four-year prison term in La Palma Correctional Center in Arizona. He was convicted of possession for sale of a controlled substance after he had been found with a large quantity of drugs in the family home. In addition to his 2011 drug conviction, he was convicted in 2003 of assault with a deadly weapon other than a firearm, and in 2009 of annoying or molesting a child under 18 years old. Since 2002, the Department had received nine referrals for the family.

² In this paragraph and the succeeding five paragraphs, we have for simplicity generally omitted the phrase “the Department alleges in its petitions” in describing the allegations in the petitions.

The minors were initially detained on September 2, 2012, after Greenfield police officers had arrested Mother for child endangerment. She had permitted Jesús—her then-boyfriend—to drive a car while intoxicated. The minors were passengers in the car and were not wearing seatbelts. The minors were placed with their maternal aunt after that incident.

During the Department’s investigation of that incident, the minors reported that they had seen Mother intoxicated and had seen “ ‘[her] and another guy doing things on the bed while having no clothes on.’ ” They also said “[M]other’s current boyfriend is mean to them and hits them ‘really hard.’ ” The Department found no marks or bruises on the minors.

After a Team Decision Making (TDM) meeting on September 12, 2012, it was decided the minors would remain in their aunt’s home and that Mother would be offered voluntary family reunification services. Mother’s case plan included her (1) participation in an alcohol/drug assessment, (2) attending 12-step meetings at least semiweekly, (3) obtaining employment, and (4) securing stable housing. Mother failed to participate in services, did not complete any of her case plan goals, and disappeared. Because the minors’ maternal aunt suffered a stroke and could not care for the minors, they were transferred to the care of a paternal aunt.

On December 11, 2012, the Department received a referral indicating that Mother had been transient for some time. She had been drinking and using drugs, and she was threatening to remove the minors from their aunt’s home. The aunt was prepared to care for the minors but had no legal documentation to support her caretaker status. She also indicated she had no way to contact Mother.

On December 19, 2012, the court ordered the minors detained pursuant to section 319, subdivisions (b) and (g). Neither Mother nor Father attended the hearing.

II. Report and Jurisdiction/Disposition Hearing

In its January 31, 2013 jurisdiction/disposition report, the Department noted that the minors were placed with their paternal aunt. The aunt had indicated she was willing to help with reunification, but if that was not possible, she was prepared to commit to a permanent plan for the minors. The Department reported a lack of insight by Mother, who said she did not believe she needed drug and alcohol treatment or counseling. Mother “appear[ed] to not understand why the Department [was] involved, even though there was a criminal act which started the out-of-home placement and [Voluntary Family Reunification] case, and she disappeared for over a month before recently resuming contact with the children without permission.” Mother, however, had recently indicated to the Department that she was ready to begin her case plan so she could stabilize her life and resume as the custodial parent of her children. The Department also indicated that Mother’s older daughter, Jasmine, was ordered detained on January 30, 2013. That dependency proceeding, however, is not at issue in this writ proceeding.

The Department recommended that reunification services be provided to Mother. Because of the expected length of Father’s incarceration, the Department recommended he not receive family reunification services.

On February 6, 2013, after a jurisdictional and dispositional hearing attended by Mother, who was represented by counsel, and by Father’s counsel (who waived his client’s appearance based upon his continued incarceration in Arizona), the court found the allegations in the petitions true and sustained the petitions. The court declared each of the minors a dependent child of the juvenile court to remain in the care, custody and control of the Department. It ordered family reunification services for Mother, but denied them to Father, finding he was incarcerated and, by clear and convincing evidence, that the provision of services to him would be detrimental to the minors. The court further granted visitation rights to Mother and denied such rights to Father, finding that visitation by him would be detrimental to the minors. The court’s order included a notification of

the right of any objecting party to appeal the court's decision. No appeal was taken from the order under which the court, among other things, denied Father reunification services.

III. Six-Month Review Hearing

In an August 2013 report submitted in advance of the six-month review hearing, the Department noted the minors' change in placement. Evelyn was living (together with Jasmine) in a nonconcurrent foster home in Salinas. José was living in a different noncurrent foster home in Salinas. And S.E. was living in a nonconcurrent foster home in Watsonville. Mother had recently married Jesús. Mother was living in Soledad with Jesús, was expecting a child, and was working as a caretaker for an elderly woman where she and Jesús lived.

The social worker stated in the report that she had learned that while the minors had been living with their paternal aunt, they had telephone contact with Father. The Department did not support this form of contact, noting it had the effect of inciting the minors (particularly the boys) "to behave in very violent ways."

At the six-month review hearing on August 21, 2013, the court adopted the findings and orders as recommended by the Department, including continuing the minors and Jasmine in out-of-home care and continuing services to Mother.

IV. 12-Month Review Hearing

The Department indicated in its 12-month review report of January 2014 that Mother, her husband (Jesús), and their infant son (Jacob) had recently moved to an apartment in Salinas. Jacob had been detained in an open family reunification case but remained in Mother's care. Mother had not complied with the terms of her probation and was required to serve 60 days of home confinement through an electronic monitoring program.

The Department reported that Mother had completed outpatient substance abuse treatment in May 2013 and her drug testing results had been negative. But there were concerns about Mother's limited attendance at 12-Step meetings and lack of a support

system for her sobriety. Since the birth of her child in September 2013, Mother had regularly attended Victory Outreach to assist with her efforts to maintain her sobriety.

Mother received weekly supervised visitation. The visits generally went well, but Mother often had a difficult time managing all four children at the same time. At the Department's recommendation, Mother continued to visit all of her children, but not all four of them at the same time. The Department recommended that visitation continue to be supervised, but that consideration be given for unsupervised visitation depending on Mother's progress.

The Department concluded that Mother, although showing improvement, had not demonstrated she could parent Jasmine and the minors together, and she had "not fully addressed the neglect and abuse her children [had] experienced while in her care, along with how those experiences [had] impacted them." The Department also found that Mother was "not following the substance abuse treatment recommendations to engage in 12-Step meetings, obtain a sponsor and do step work."

The Department reported that Father was still incarcerated in Arizona and that, as a result, visitation could not be accommodated. Father was scheduled to be released from prison in September 2014, and upon such release, the question of visitation would be reevaluated.

At the 12-month review hearing on February 5, 2014, the court adopted the recommendations of the Department. It ordered, among other things, that reunification services be continued for Mother.

V. 18-Month Review Hearing

The Department stated in its June 2014 report that in April, Mother's visitation with Jasmine and the minors had increased and had moved from the family services offices to Mother's home in Salinas. In May, after evaluation of the visits, team leaders recommended that overnight visitation be permitted.

The Department noted that Father had been previously denied services because of the length of his incarceration, and he had not been in contact with the social worker. The social worker had sent a letter to Father in May indicating that upon his release, he was not to make direct contact with the minors and should contact the social worker directly regarding anything related to his children.

At the 18-month review hearing on June 17, 2014, the court adopted the recommendations of the Department. It found that Mother had participated in court-ordered treatment programs. It also concluded that Mother's progress in alleviating or mitigating the problems that had resulted in the placement of the minors had "been substantial." Based upon indications that Father would be released from prison in August or September 2014, the court ordered no visitation by Father until the Department determined that visitation would be safe for the children, or upon further order of the court. The court also ordered that (1) Jasmine and the minors to return to Mother's physical custody by August 1, 2014; (2) Jasmine and the minors to remain dependents of the court; and (3) child welfare services to continue for Mother.

VI. August 2014 Status Hearing

At a status hearing on August 26, 2014, the court was advised that Father had been released from prison on August 3. A social worker advised the court that the Department felt strongly that, because Father had been in prison throughout the dependency proceedings, a family assessment of Father should be conducted prior to establishing regular visitation with him. The social worker also reported that a first supervised visit between Father and the minors had been arranged and had taken place on August 25. "It did not go very well. . . . The report [was] . . . that [Father] yelled at the kids, [and] smacked one of them upside the head. . . .[O]ne kid withdrew. They reported to their mother that they did not particularly like the visit."

Another social worker reported that Mother had been having some contact with Father, which her current husband, Jesús, had taken as having been "behind his back."

The social worker noted there had “been some altercations between [Jesús] and [Mother].” Jesús was reportedly concerned about his safety since Father had told the minors while he was incarcerated “that he was going to take care of [Jesús] when he got out of prison.”

The court issued an order that Father submit to a psychological evaluation. The court also stated it had concerns that Mother had made inappropriate contact with Father.

VII. Supplemental Petitions and Hearing

The Department filed supplemental petitions seeking a change of custody for the minors based on the following chronology of events.

The minors and Jasmine had returned to live with Mother by July 15. It was expected that Mother and the children would continue to attend therapy and she would continue to make the children available for services, including participation with the court-appointed special advocates (CASA Advocates). But beginning in July 2014, “there began to be a marked decline in the family’s participation in therapy.” In addition, the CASA Advocates for the minors had indicated that it had become difficult to schedule meetings with the minors to provide them with support. And Jasmine had not been attending school regularly since the beginning of the new school year and was receiving failing grades.

Father was released from prison on August 3 and saw the minors the same day. Since Father’s release, there had “been numerous reports of escalating domestic violence” involving Mother and Jesús. Mother advised the Department that the incidents were caused by Jesús’s jealousy and fear of Father. It was reported that on August 19, Jesús “punched/back-handed [Mother] in the car” near school. And Jesús “committed other aggressive acts against [Mother] and her children: he ransacked the home, broke a television set that he and [Mother] had purchased together, and took [Mother’s] cell phone to prevent her from making or receiving phone calls.”

On September 3, while the children were asleep, Jesús punched Mother in the eye. The minors observed Mother the next morning with a black eye, and it was “reported that the oldest child hit [Jesús] because he hit [Mother], and the other children each confronted [Jesús] and asked him why he did it; he did not respond.” Mother reported Jesús to the police, and he was arrested on September 6. Jesús was released from custody on September 8. An emergency restraining order was issued to protect Mother from Jesús, but she did not honor the terms of that order, admitting that fact to the Department.

A referral on September 12 indicated that José had suffered a black eye while under Mother’s care. José reported that he had awakened in the night, and as he approached Mother’s room, he heard whispering. After he knocked on the door, Mother told him to go away. After José said he had heard whispering, Mother told him she was on the phone. Because José had heard two voices, he awakened Jasmine, who then knocked on Mother’s door. By this time, all four children were awake and outside Mother’s room. Mother opened the door, and they saw Jesús and one-year-old Jacob inside the room. The four children yelled at Jesús to leave the house. They entered the room, and began striking Jesús. Mother placed her finger into Jasmine’s mouth and pulled on her cheek until she went down to the floor. Jesús put on his clothes and ran out of the room. As Jesús was running down the stairs, he fell, allowing José to catch up with him “ ‘to jump on his back and bite him.’ [Jesús] then stood up and threw his elbow back at José and hit José in the eye and ran off.” Evelyn reported that José’s eye was bleeding. Evelyn also reported that while Jesús was trying to leave the bedroom, “he grabbed [Evelyn] by [her] arms and threw her and she ended up hitting the wall.” She said she had two small bruises on her left hip. Evelyn also said that when José was coming up the stairs, she and S.E. were looking over the railing. Mother grabbed both of them from the back of their hair and pulled them into the apartment. Mother then left, telling her children she was going to drive Jesús to Soledad. Mother was gone for approximately four hours, having left the children (including the toddler) unattended. The minors were

detained by the Department on September 15. Both Mother and Jesús were incarcerated as a result of this incident.

On September 16, 2014, the Department filed supplemental petitions pursuant to section 387 seeking a change of custody for the minors. It requested modification of the orders from the 18-month review hearing. Specifically, the Department requested that the minors be placed out of the family home with foster caretakers.

On September 17, the court ordered the minors detained in the care, custody, and control of the Department. It also ordered that Mother submit to drug testing.

VIII. Jurisdictional/Dispositional Hearing

A. Department's Reports

The Department filed its jurisdictional/dispositional reports in October 2014. It reported that Mother and Jesús had both been booked into the Monterey County Jail on September 15. Mother was charged with willfully causing or permitting injury to a child (Pen. Code, § 273a, subd. (b)), and a violation of probation. Mother pleaded guilty and was released from custody on September 24. Mother indicated to the social worker that she had not been in contact with her sponsor and had not attended 12-step meetings since reunification with her children. She claimed she was clean and sober, but she had not been tested between February and September, 2014. As late as September 26, Mother had continued to deny there had been physical violence in the household “and claimed that if her children reported physical violence that they were lying.” Mother also reported to the social worker that she was pregnant with her sixth child.

Since the removal of her children on September 17, Mother had not visited them. She had one visit that had been scheduled, but she cancelled it because of illness.

After his release from prison, Father was instructed by the Department not to have contact with Mother or the minors until he met with the assigned social worker. The Department also told Father that any visits with his children would be supervised by his

parents to permit the Department to assess the appropriateness of his contact with the minors and how well the family was able to set boundaries with him.

Father's first supervised visit with the minors on August 25 "did not go very well" because he wanted the minors to do their homework during the visit and they got upset. "[Father] used his hand to smack José Jr. on the head to let him know he needed to concentrate and do his homework." The second supervised visit took place in late September. Father "was more appropriate during this visit and did not use any physical force or discipline on the children."

Father was in frequent contact with the social worker. He reported to her that he had gotten a job and had a valid driver's license and car registration. He had expressed frustration at not being permitted more frequent contact with the minors. The Department reported that "[Father] does not understand why he is not able to have more contact with his children as he has provided for them as much as possible and he has no part of any of the allegations involved in this dependency."

Pursuant to the court's prior order, Father submitted to a psychological evaluation with a clinical psychologist, Elizabeth Lee, Psy.D. Father also completed a Family Mental Health Assessment with Kelli McDougall, Psy.D.

The Department reported that Father had received constant drug tests in connection with his parole and all test results had been negative. Father had renounced his Norteño gang affiliations, and he had enrolled in parenting classes and in Gestures of Support.

The Department also reported that the minors had been placed in a licensed foster family home in Monterey County. Jasmine had been placed in a separate foster home with a family in Monterey County, but she had been unwilling to remain in that placement. She was staying with a relative, and the Department was in the process of determining whether it would be appropriate to place Jasmine in her aunt's home. Jacob had been placed with his paternal grandmother in Monterey County.

The Department recommended the removal of the minors (as well as Jasmine and Jacob) from Mother's physical custody and the denial of placement with the noncustodial fathers. It also recommended that Mother be denied family reunification services, given that the statutory time for permitting such services had expired.

B. CASA Reports

Adrienne Taylor, the CASA Advocate for José and Evelyn, reported in October 2014 that the minors felt safe at their current placement. They were living with a Salinas family in a nonconcurrent placement in a "very nice home, with established structure and support from family members." Taylor had had no contact with the minors from July 12 to mid September (when they were again placed in a foster home) because Mother canceled each visit Taylor had attempted to schedule. When Taylor finally reconnected with José and Evelyn, "they were very excited and happy" to see her, saying they had thought they would never see her again. Evelyn told Taylor that telephone calls had come into the home when they were living with Mother, and Evelyn had asked Mother if Taylor had called; Mother repeatedly told her, "No." Taylor also observed changes in the two children. José seemed "more 'hyperactive' and agitated, much like when [Taylor had] first met him [in] June 2013." He was also "more argumentative with his siblings." Evelyn had "more 'attitude' and also show[ed] some regressive behavior."

Taylor reported that "[t]here is a long standing history of dysfunction and secrecy with [this] family," and she opined that this "pattern of family secrets and covert behavior with relatives [was] not in the best interest[s] of the children." Notwithstanding the existence of Department instructions for monitoring any visits with Father after his release from prison, "[p]aternal relatives arranged a 'chance' meeting between [F]ather and children at a farmers market on the day he was released." In mid-September, José and Evelyn were allowed to stay overnight at their paternal grandparents' home where Father was present, and Father took José to school the next morning, all contrary to the rules the Department had established.

Taylor also indicated that in a supervised visit, Father had “hit his children.” After one of the children told Father not to hit him or her, he responded, “ ‘You’re my kid. I’ll hit you if I want to.’ ” Taylor therefore expressed a great deal of concern about the possibility of Father having unsupervised contact with the minors. She also commented on “the manipulative quality of [Father’s] communication with his children.” The children reported that Father had recently told them he would take them out for Halloween “ ‘if [the Department] says he can.’ ” The children also reported that Father had told Evelyn “he ‘would take her to Great America, get a bounce house and a piñata for her birthday’ ” [in late September] if the Department allowed it.

Kym Byrne, the CASA Advocate for S.E., reported in October 2014 that S.E. had said that he liked his new foster home better than his previous foster home because his foster father played with him. S.E. was starting the first grade, and he changed schools after his removal from Mother’s home. Byrne reported that S.E. had said he did not want to attend supervised visits with Father. “He told his siblings that his dad had been mean and hit him at the first visit.” “[F]ather responded by telling José and Evelyn to persuade [S.E.] to come to the next visit. It was reported to foster mom that [Father had] told Evelyn and José that he would bring them Jordan shoes, but to let [S.E.] know that [S.E.] would not receive any shoes unless he came to the next visit.”

C. Father’s Request for Hearing Continuance

Prior to the jurisdictional/dispositional hearing on the Department’s section 387 petitions, a memorandum of points and authorities was submitted on behalf of Father. Although the statute was not cited or discussed in the body of his memorandum, Father asserted in a caption that the court had the discretion under section 352(a) to continue the hearing. Father requested that the court grant him reunification services. He cited a report from the psychologist, Dr. Lee, who, after examining Father, concluded: “If there is any way for the court to extend the period for reunification, I would strongly urge that an extension be granted.” Father argued that the court was empowered to order services

for him, and that it should set a further review hearing “since the only reason he was not offered services was his period of incarceration—not because he neglected or abused his children.” (Original underscoring.)

The Department filed a memorandum in opposition. It argued that 18 months of family reunification services and another month of family maintenance services had not been effective in protecting the minors from the problems that had resulted in the initial filing of the dependency proceedings. The Department contended that Father was “[e]ssentially” seeking under section 352 an order continuing the hearing to afford him services beyond the period of 18 months. It asserted further that while Father, since his release from prison, may have made “some minimal progress in sorting out his life,” he had not shown he was capable of reunifying with the minors. Furthermore, the Department argued, the actions of one parent (i.e., Mother) were sufficient to take jurisdiction over the minors. And the Department contended that extending services to Father was not in the minors’ best interests.

D. Hearing

A jurisdiction/disposition hearing on the Department’s section 387 petitions was held on December 8, 2014. The court received the Department’s report and the reports of the CASA Advocates; considered the Department’s petitions and the memoranda filed on behalf of Father and the Department; and heard argument from counsel. It denied Father’s motion under section 352(a) to continue the hearing in order to extend services to him, finding that such an order would not be in the best interests of the minors. In so ruling, the court commended Father for the steps he had taken in completing parenting classes, passing all drug tests, and his expression of interest in his children.

The court sustained the allegations of the section 387 petitions; ordered that no child welfare services be provided to Mother, Father, or Steve V. (Jasmine’s father); concluded that out-of-home placement of the minors continued to be necessary; found by clear and convincing evidence the existence of substantial danger to minors’ respective

physical health, safety, protection, or physical or emotional well-being if they were returned home; and found by clear and convincing evidence that placement of the minors with the noncustodial Father would be detrimental to their safety, protection or physical or emotional well-being. The court set .26 hearings for each of the minors' cases for April 28, 2015.

IV. Petition for Writ of Mandate

Father initially filed a notice of appeal challenging the court's December 8, 2014 Order. He thereafter filed an application to this court for relief from default in failing to timely file a notice of intent to file a writ petition to review the Order pursuant to California Rules of Court, rule 8.450(e).³ Father indicated in his application that his trial counsel had erroneously believed the Order was appealable and therefore had not timely pursued a writ petition. This court granted Father's application, deeming his notice of appeal to be a timely notice of intent to file writ petition under rule 8.450(e), and directed the clerk to file Father's petition for extraordinary writ. This court granted a temporary 60-day stay of the .26 hearings in order to consider Father's petition. Real party in interest Department filed its opposition on May 28, 2015.⁴

DISCUSSION

I. Applicable Legal Principles

A. Dependency Law Generally

Section 300 et seq. provides "a comprehensive statutory scheme establishing procedures for the juvenile court to follow when and after a child is removed from the home for the child's welfare. [Citations.]" (*In re Celine R.* (2003) 31 Cal.4th 45, 52.) As our high court has explained, "The objective of the dependency scheme is to protect abused or neglected children and those at substantial risk thereof and to provide

³ All rule references hereafter are to the California Rules of Court.

⁴ In its opposition, real party in interest Department erroneously designated itself as "respondent." No opposition was filed on behalf of respondent superior court.

permanent, stable homes if those children cannot be returned home within a prescribed period of time. [Citations.] Although a parent’s interest in the care, custody and companionship of a child is a liberty interest that may not be interfered with in the absence of a compelling state interest, the welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect. [Citations.] The Legislature has declared that California has an interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful. [Citations.] This interest is a compelling one. [Citation.]” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.)

The court at the jurisdictional hearing must first determine whether the child, by a preponderance of the evidence, is a person described under section 300 as coming within the court’s jurisdiction. (§ 355, subd. (a).) Once such a finding has been made, the court, at a dispositional hearing, must hear evidence to decide the child’s disposition, i.e., whether he or she will remain in, or be removed from, the home, and the nature and extent of any limitations that will be placed upon the parents’ control over the child, including educational or developmental decisions. (§ 361, subd. (a).) If at the dispositional hearing, the court determines that removal of the child from the custody of the parent or guardian is appropriate, such removal order must be based upon clear and convincing evidence establishing that one of six statutory circumstances exists. (§ 361, subd. (c).) One such circumstance is the existence of substantial danger to the dependent child’s “physical health, safety, protection, or physical or emotional well-being” were he or she returned to the home, and there are no reasonable measures to protect the minor without the removal. (§ 361, subd. (c)(1).)

After it has been adjudicated that a child is a dependent of the juvenile court, the exclusive procedure for establishing the permanent plan for the child is the permanency hearing as provided under section 366.26. The essential purpose of the hearing is for the

court “to provide stable, permanent homes for these children.” (§ 366.26, subd. (b); see *In re José V.* (1996) 50 Cal.App.4th 1792, 1797.)

B. Family Reunification Services

When a dependent child is removed from parental custody, the juvenile court is ordinarily required to provide the parent with services to facilitate the reunification of the family. (§ 361.5, subd. (a); see *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 303.) As explained by one court: “The importance of reunification services in the dependency system cannot be gainsaid. The law favors reunification whenever possible. [Citation.] To achieve that goal, ordinarily a parent must be granted reasonable reunification services. [Citation.] But reunification services constitute a benefit; there is no constitutional ‘entitlement’ to those services. [Citation.]” (*In re Aryanna C.* (2005) 132 Cal.App.4th 1234, 1242.)

A court may order reunification services bypassed altogether if one of sixteen circumstances is established by clear and convincing evidence, as specified in subdivision (b) of section 361.5. “These bypass provisions represent the Legislature’s recognition that it may be fruitless to provide reunification services under certain circumstances. [Citation.]” (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 597.) One such circumstance is where the parent is incarcerated and the court finds by clear and convincing evidence that the provision of services to the incarcerated parent “would be detrimental to the child.” (§ 361.5, subd. (e)(1).) “Section 361.5 recognizes that mandating services for incarcerated parents in some cases may be detrimental to the child. In deciding the issue of detriment, the court considers many factors, including the age of the child, the period of incarceration, the nature of the crime, the services offered in custody, and the likelihood of the parent’s release within the reunification time limits. (§ 361.5, subd. (e)(1).)” (*Fabian L. v. Superior Court* (2013) 214 Cal.App.4th 1018, 1030.)

The statutory time period for reunification services ordered in the case of a child three years of age or older is a period from the date services are ordered at “the dispositional hearing and ending 12 months after the date the child enters foster care . . . unless the child is returned to the home of the parent or guardian.” (§ 361.5, subd. (a)(1)(A).) Notwithstanding this time limit, the court may extend services to 18 months from the date the child was initially removed from the home if it is shown that the permanent plan of returning the child with the child being safely maintained in the home can be achieved within the extended period. (§ 361.5, subd. (a)(3).) And in an exceptional case, the court may order services extended to not more than 24 months after the child’s original removal from the parent. To extend services to 24 months, there must be a showing that the permanent plan is for the child to be returned to the home within the extended period, and the court must find that (1) it is in child’s best interest that the period be extended and (2) there is a substantial probability the child will be returned. (§ 361.5(a)(4).) Although a parent may reasonably expect under most circumstances to receive reunification services for at least the periods designated under section 361.5, subdivision (a)(1), there is no entitlement to services for a prescribed minimum period. (*In re Derrick S.* (2007) 156 Cal.App.4th 436, 445-450 [parent of child over three not entitled to minimum of 12 months of services].) Thus, “the juvenile court has the discretion to terminate the reunification services of a parent at any time after it has ordered them, depending on the circumstances presented.” (*In re Aryanna C., supra*, 132 Cal.App.4th at p. 1242.)

C. Motions to Continue Hearing Under Section 352(a)

The court may grant counsel’s request to continue a hearing in a dependency proceeding beyond the time period for which it is otherwise statutorily required. (§ 352(a).) The continuance may be granted only upon a showing of good cause and for a period no longer than shown to be necessary. (*Ibid.*) But “no continuance shall be granted that is contrary to the interest of the minor.” (*Ibid.*) And in determining the

dependent child’s interests, “the court shall give substantial weight to a minor’s need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements.” (*Ibid.*) Appellate courts have interpreted section 352 as expressly discouraging continuance requests in dependency proceedings. (See, e.g., *In re Giovanni F.* (2010) 184 Cal.App.4th 594, 604; *In re David H.* (2008) 165 Cal.App.4th 1626, 1635.)

A trial court’s ruling on a request for a continuance under section 352 “is reviewed for abuse of discretion. [Citation.]” (*In re B.C.* (2011) 192 Cal.App.4th 129, 143-144; see also *In re Elijah V.* (2005) 127 Cal.App.4th 576, 585.) “Discretion is abused when a decision is arbitrary, capricious or patently absurd and results in a manifest miscarriage of justice. [Citation.]” (*In re Karla C.* (2003) 113 Cal.App.4th 166, 180.)

II. Denial of Request for Continuance Was Not an Abuse of Discretion

A. Father Did Not Challenge Prior Bypass Order

Father challenges the Order, claiming that in denying his request to continue so he could be offered reunification services, the court abused its discretion. In urging this position, he repeatedly asserts that he was never offered services throughout the dependency proceedings “[d]espite the law’s requirement [that] all parents be offered services absent circumstances not present in this case.” This premise—that the court’s previous denial of services to Father demonstrated the court’s abuse of discretion in denying his continuance request—is faulty, because (1) the court denied services to him under a recognized statutory exception for bypassing services for incarcerated parents, and (2) Father never appealed the bypass order, which is final and binding.

As noted, although there is no constitutional entitlement to them, the law favors granting reunification services to parents in dependency proceedings when the child is removed from the home. (*In re Aryanna C.*, *supra*, 132 Cal.App.4th at p. 1242.) But under certain circumstances delineated by statute—such as where a parent is incarcerated and it is shown by clear and convincing evidence that the provision of services “would be

detrimental to the child” (§ 361.5, subd. (e)(1))—the court may order that services be bypassed if providing such services would be fruitless. (*Francisco G.*, 91 Cal.App.4th at p. 597.) Here, at the jurisdictional and dispositional hearing held February 6, 2013—*some 21 months before* Father made his request to continue—the court issued its order denying services to him due to his incarceration and found by clear and convincing evidence that the provision of such services would be detrimental to the minors. Father did not seek review of that order.

“A judgment in a proceeding under Section 300” is appealable. (§ 395, subd. (a)(1).) “The dispositional order is the ‘judgment’ referred to in section 395.” (*In re S.B.* (2009) 46 Cal.4th 529, 532.) “ “A consequence of section 395 is that an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order.” ’ [Citations.]” (*Ibid.*) This rule is based upon the notion that “ ‘[p]ermitting a parent to raise issues going to the validity of a final order would directly undermine dominant concerns of finality and reasonable expedition,’ including ‘the predominant interest of the child and state . . .’ [Citation.]” (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1018 (*Sara M.*)). In *Wanda B. v. Superior Court* (1996) 41 Cal.App.4th 1391 (*Wanda B.*), the court held that where the juvenile court had issued a dispositional order denying the mother reunification services, and she did not appeal that order, she could not, six months later, challenge the order denying services in conjunction with a writ petition from an order setting a .26 hearing. (*Id.* at pp. 1395-1396.) It reasoned: “Because the mother did not appeal from or otherwise seek review of the order denying her services in a timely fashion, it is now a final judgment. This court is accordingly without jurisdiction to consider her current challenge by means of her writ petition.” (*Id.* at p. 1396; see also *Sara M.*, *supra*, 36 Cal.4th at p. 1018 [parent precluded from challenging by writ petition a prior order providing for reunification services from which she did not appeal].)

We agree with *Wanda B.* and *Sarah M.* Here, the court denied services to Father in February 2013 and he failed to appeal that order. He may not now, through a writ petition challenging the court's December 2014 Order denying his section 352 continuance request and setting a .26 hearing, argue that the court had previously erred in denying him services. (*Sara M.*, *supra*, 36 Cal.4th at p. 1018; *Wanda B.*, *supra*, 41 Cal.App.4th at p. 1396.)

B. Consideration of Factors Regarding Minors' Best Interests

Father stresses that he had a good relationship with the minors, and that prior to his incarceration, he "had been the primary parent." He argues that after his release from prison, he had shown that he was highly motivated to reunify with the minors. And he asserts that the only negative fact showing possible detriment to the minors was the instance in the first visit with the minors in which he struck José on the head. Father notes that he corrected his behavior in a later visit.

While we agree the record contains some evidence that Father maintained a relationship with the minors and had shown a commitment toward improving himself as a parent and in reconnecting with his children, he also disregards other evidence less favorable to his position. The crime that resulted in Father's incarceration in 2011 involved possession for sale of a large quantity of drugs located in the family home. While he was not directly involved in the circumstances leading to the dependency proceedings, he is not blameless. As the juvenile court noted: Although Father was "not the offending parent[] that caused the direct removal of these children," he was "not there to protect these kids . . . It's every parent's responsibility to be there with and for [his or her] children." Further, the following assertion by Father is somewhat misleading: "The second psychologist [Dr. McDougall] noted [that Father] had been the primary parent to the children" because of Mother's substance abuse issues. The record shows that Dr. McDougall merely reported that Father *told her* he had been the primary parent of the minors.

Father also downplays the circumstances of his having physically disciplined the minors, and ignores evidence of his attempts to manipulate them. In the first supervised visit in which Father struck José on the head, he also reportedly said to one of the children, “ ‘You’re my kid. I’ll hit you if I want to.’ ” Since this took place during a supervised visit, this caused CASA Advocate Taylor to express understandable concern if Father were to be granted unsupervised visitation. Additionally, S.E. reported to his CASA Advocate Byrne that Father “had been mean and hit him during the first visit,” causing him not to want to visit again. Father reportedly attempted to bribe S.E., through his siblings, by refusing to give him a gift that he would bring for the siblings unless S.E. consented to the visit. And, as indicated by CASA Advocate Taylor, there was a manipulative quality of Father’s relationship with the minors, insofar as he promised activities and gifts to them prefaced by the statement, “ ‘[I]f [the Department] says he can.’ ”

Father also emphasizes that one psychologist, Dr. Lee, urged that services be provided to Father if the court could extend the reunification period. Dr. Lee noted that she believed Father was “capable of making enough progress in treatment to reunify within six months.” But a somewhat contrary opinion was expressed by Dr. McDougall; she suggested a much more lengthy and uncertain process for Father’s potential reunification with the minors. Dr. McDougall indicated that Father would likely be able to participate in parenting classes and “other structured requirements asked of him.” But she opined that he would “struggle . . . in the emotional aspects of parenting, and meeting the emotional needs of his children. His children have been through a lot, even more since his incarceration, and are likely quite emotionally damaged. Furthermore, the family has a history of keeping secrets and this family dynamic will need to be addressed and changed in order to heal In order for [Father] to be successful in meeting the children’s emotional needs_[,] he will require lots of support . . . If [Father] is going to be successful in this area, he will require multiple services_[,] including: his own therapy,

[Parent Education Group], parenting classes, consultation with the children's clinicians, and eventually conjoint therapy with the children. It will also be essential that [the Department] remain in contact with [Father's] parole officer to monitor his progress and address any concerns. *This is likely to be a lengthy and involved process.*" (Italics added.)

Father nonetheless argues that there would have been no detriment had the court granted a continuance and provided him services because the minors "had only been in a foster home, a non-concurrent one, for three months when the court refused to grant services to [him]." But this is only one factor the court could have considered in denying Father's section 352(a) motion. Furthermore, it presents a myopic view of the proceedings, ignoring the fact that the minors had two prior foster family placements and a short return to Mother's home before being placed with new foster families.

Father also argues that his section 352(a) motion to continue should have been granted because he never received services and the Department never developed a reunification plan for him. This position is in effect a challenge of the court's prior bypass order. As we previously discussed, that order is final and binding and Father's purported challenge to it here is not cognizable. In any event, a court may not grant a continuance of hearing under section 352(a) if the continuance is "contrary to the interest of the minor." (§ 352(a).)

In determining the child's interests, "the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements." (*Ibid.*) Here, Father was seeking a continuance of the hearing on the Department's section 387 petitions, where the hearing was taking place *some 24 months* after initiation of the dependency proceedings. Father had been incarcerated for all but four months of that period. Each of the three minors had received three separate placements with foster care families, along with a tumultuous two-month period in the

summer of 2004 in which they were living with Mother, Jesús, Jasmine, and Jacob. And the minors, prior to their latest out-of-home detention in September 2004, had been exposed to the trauma of domestic violence and physical abuse in the family home. Given the length of time the dependency proceedings had been pending and the instability the minors had experienced, the court—after considering all of the circumstances, including the minors’ need for prompt resolution of their custody status—did not abuse its discretion by concluding that a continuance would not be in the minors’ best interests.

C. *In re Elizabeth R.* and *In re Dino E.*

Father relies on two cases in support of his position that denial of his continuance motion was an abuse of discretion: *In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, and *In re Dino E.* (1992) 6 Cal.App.4th 1768. The court in *In re Elizabeth R.* had ordered reunification services for the mother, but she was bipolar and was “hospitalized for all but five months of the reunification phase of the dependency proceedings.” (*In re Elizabeth R.*, at p. 1777) She otherwise had “an impeccable record of visitation and efforts to comply with the reunification plan.” (*Id.* at pp. 1777-1778, see also *id.* at p. 1790 [mother’s “record of visitation [was] exemplary”].) At the 18-month review hearing, the court terminated family reunification services and set the case for a .26 hearing. (*Id.* at pp. 1777-1778, 1782-1783.) Afterwards, scheduled visits with the children were cancelled at the last minute, and the agency refused to permit the mother to make up the visits. (*Id.* at p. 1784.) The mother filed a petition under section 388 to modify the prior order based upon changed circumstances. (*Id.* at p. 1785.) The court denied the mother’s amended petition, found the children adoptable, and terminated parental rights. (*Id.* at p. 1786.)

The appellate court reversed the order terminating parental rights. (*In re Elizabeth R.*, *supra*, 35 Cal.App.4th at p. 1799.) It framed the issue as “whether the juvenile court was compelled by law to terminate reunification services and order a [.26] hearing when

a parent, although hospitalized for treatment of her mental illness for most of the reunification period, had substantially complied with the reunification plan.” (*Id.* at p. 1787.) The court emphasized that if services are offered to a parent known to be suffering from mental illness, the agency must tailor the services to accommodate those circumstances. (*Id.* at p. 1790.) The agency in *In re Elizabeth R.* did not do so; for instance, there was no evidence the agency attempted to arrange visitation of the children while the mother was hospitalized, and after her hospitalization, “most of [the mother’s reunification] efforts were rebuffed” by the agency. (*Id.* at p. 1791.) The court concluded that the language of section 366.22 did not preclude the court from exercising discretion in an appropriate case involving special needs. (*Id.* at p. 1792.) But it found that since the court had already terminated services and set a .26 hearing at the 18-month review hearing, a section 388 petition was not the appropriate vehicle for the mother. (*Id.* at pp. 1796-1797.) Instead, the court held that section 352(a)—although the mother had not invoked the statute—permits the court to exercise its “discretion upon a showing of good cause to continue juvenile dependency hearings beyond the statutory time limits.” (*Id.* at p. 1798.) But that statute serves only as “an *emergency escape valve in those rare instances* in which the juvenile court determines the best interests of the child would be served by a continuance of the 18-month review hearing.” (*Id.* at pp. 1798-1799, italics added.) The court accordingly reversed and remanded the case to permit the mother to make a motion to continue under section 352(a) because of “the unusual facts . . . requir[ing] exigent judicial intervention.” (*Id.* at p. 1799.)

In re Elizabeth R., *supra*, 35 Cal.App.4th 1774 bears little resemblance, either factually or procedurally, to the case before us. The mother in that case was granted reunification services. Here, the court bypassed services to Father. Other issues not existing here were the degree of the mother’s compliance with her case plan, the failure of the agency to adapt her case plan to her special needs, and the agency’s failure to support the mother’s efforts to reunify. And there was evidence that the mother in *In re*

Elizabeth R. was very diligent in pursuing visitation, and that she was affirmatively denied promised visitation in some instances. Here, while there was a short history of Father's seeking and obtaining visitation after he was released from prison in August 2014, there was never a case plan because the court ordered services bypassed, and there was no evidence the Department denied him promised visitation. In short, the circumstances here, unlike those in *In re Elizabeth R.*, do not present "unusual facts . . . requir[ing] exigent judicial intervention." (*Id.* at p. 1799.)

In *In re Dino E.*, *supra*, 6 Cal.App.4th at pages 1772-1773, the agency developed a reunification plan for the mother, but did not do so for the petitioner father because the mother repeatedly denied he was the child's father. Eight months after the child was initially detained and after completion of blood testing, the court declared the petitioner the natural father of the child. (*Id.* at p. 1773.) The father, who was incarcerated at the time, then filed a petition under section 388 seeking relative placement of the child with his (the father's) mother in Ohio. (*Ibid.*) The court adopted the agency's recommendations by ordering that the child continue to be placed in foster care and "that 'continued reunification services' be provided." (*Ibid.*) After he was released from jail, the father informed the agency that he wanted to work toward the child's ultimately being placed with him, and the agency arranged for weekly visits between the father and the child. (*Id.* at p. 1774.) At the combined 12-month/18-month review hearing, which was a contested proceeding, the agency recommended termination of reunification services and the setting of a .26 hearing. (*Ibid.*) The court found that adequate services had been provided to the mother but not to the father. (*Ibid.*) But because the court believed the law did not authorize it, the court denied the father's request to extend services beyond 18 months; it therefore ordered a .26 hearing. The father challenged the order. (*Id.* at p. 1775.)

This court held that the juvenile court had erred in setting a .26 hearing "without any exercise of discretion." (*In re Dino E.*, *supra*, 6 Cal.App.4th at p. 1775.) We noted

that the agency's failure to develop an adequate reunification plan that "can be realistically implemented within 18 months defeats [reunification] and has been held to be reversible error. [Citations.]" (*Id.* at p. 1776.) Noting that "[i]n the usual case, a service plan will be developed at the dispositional hearing and its implementation will be reviewed at six- and twelve-month intervals," we reasoned that "[w]here no reunification plan is in place . . . a strict enforcement of the time line does not provide the opportunity to reunite the family. We do not believe that such a result was intended by the Legislature." (*Id.* at p. 1778.) We concluded that under the circumstances where 18 months had elapsed and there had been no reunification plan developed for the father, the court could exercise its discretion by weighing the competing interests. (*Ibid.*) As the court did in *In re Elizabeth R.*, we concluded that section 352(a) provided a mechanism by which the court could exercise its discretion to continue juvenile dependency hearings beyond the statutory time frames. (*Id.* at p. 1779.) We therefore granted the father's writ petition and remanded the case to the trial court for it to entertain a motion by the father under section 352(a) to allow for a continuation of services beyond 18 months. (*Id.* at pp. 1779-1780.)

In re Dino E., *supra*, 6 Cal.App.4th 1768 is factually and procedurally distinguishable. Unlike here, where there was an *express order* denying services to Father, the father in *In re Dino E.* received services—and the agency and court assumed the father had been granted services, although there was no express order—but no specific plan was developed for his reunification with his child. And the father in *In re Dino E.* was available for the most part to participate in reunification services, while here, Father was incarcerated for the first 20 months of the proceedings. Moreover, the juvenile court in *In re Dino E.* had believed it had no discretion to extend the period of reunification services to the father. Here, the court was not considering whether to extend the time period for services previously offered Father, since services had been bypassed. The court here understood it had discretion to grant or deny Father's section

352(a) motion and chose to deny it after concluding that granting it would not be in the minors' best interests.

In re Elizabeth R. and *In re Dino E.* involved very different circumstances than those presented here, including the failure of the agency to provide court-ordered reunification services that were adequate, reasonable and tailored to the needs of the parent. Neither case, therefore, offers any support for Father's claim of error.

DISPOSITION

The petition for writ of mandate is denied.

Márquez, J.

WE CONCUR:

Rushing, P.J.

Grover, J.