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

In re L.L., a Person Coming Under the
Juvenile Court Law.

H042125
(Santa Clara County
Super. Ct. No. JD21307)

SANTA CLARA COUNTY
DEPARTMENT OF FAMILY AND
CHILDREN'S SERVICES,

Plaintiff and Respondent,

v.

T.N.,

Defendant and Appellant;

T.L.,

Defendant and Respondent.

T.N. (mother) and T.L. (father) are the parents of L.L., who was born in September 2011. T.N. appeals from a custody order issued upon termination of juvenile court jurisdiction over her son.¹ The mother contends: (1) the juvenile court abused its

¹ The Santa Clara County Department of Family and Children's Services (Department) has filed a letter brief and stated that it has not taken a position in this appeal.

discretion by considering evidence and argument on the issue of custody at the termination hearing; (2) the order providing the father with “final say” on all legal custody issues was improper and nonenforceable; and (3) there was insufficient evidence to support the order providing the father with “final say” and that the minor’s primary residence would be with the father. The order is affirmed.

I. Procedural and Factual Background

A. The Petitions

In July 2012, the Department filed a petition alleging that the minor, who was then nine months old, came within the provisions of Welfare and Institutions Code section 300, subdivisions (a) (serious physical harm), (b) (failure to protect), and (e) (severe physical abuse).² The subdivisions (a), (b), and (e) allegations of the petition stated: the minor had suffered severe physical abuse that resulted in serious brain trauma and seizures which the mother did not adequately explain; the physicians determined that the minor had suffered two brain hemorrhages; and the attending physician opined that the injuries were most consistent with an abusive head injury. The petition also stated: the father put the minor at risk of severe physical harm six months earlier by holding him over a second story balcony and threatening to drop him if the mother ended their relationship; and the mother, a pharmacist, gave the minor a half dose of an adult relative’s Phenergan despite manufacturer warnings that the drug should not be given to children under the age of two. The subdivision (b) allegations included the additional facts: the father had a history of domestic violence against the mother while in the minor’s presence; there were charges pending against the father for domestic battery and false imprisonment; the mother obtained a restraining order restricting the father’s

² All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

contact with the mother and the minor; the minor developed normally until he was three months old when he started losing weight; and the minor's condition was diagnosed as psycho-social failure to thrive. At the detention hearing, the juvenile court detained the minor and ordered supervised visitation for both parents.

In August 2012, the Department filed its second amended petition. The second amended petition removed the section 300, subdivisions (a), (b), and (e) allegations that the mother used Phenergan to control the minor's vomiting and that the father had held the minor over the balcony.

In November 2012, the Department filed its third amended petition. The section 300, subdivisions (a) and (b) allegations were amended to also include: the minor was in the custody of the mother or the maternal grandmother when he suffered his injuries; the mother denied abusing the minor but she could not offer an explanation for his injuries; and the minor suffered an injury of a nature that ordinarily would not be sustained except as the result of the unreasonable or neglectful acts or omissions. The subdivision (e) allegations remained the same.

B. The Jurisdiction/Disposition Report

The jurisdiction/disposition report, dated August 2012, recommended that the juvenile court assume jurisdiction over the minor and order family reunification services for both parents. The report summarized the minor's medical records. On July 2, 2012, the mother found the minor limp and unresponsive in his crib and summoned an ambulance. In the treating physician's opinion, the episode was related to the minor's positioning in his crib. Two days later, the mother brought the minor to the emergency room, because he had been projectile vomiting and exhibiting seizure-like movements. When the minor arrived, he was unresponsive, did not move his extremities, and had a blank stare for approximately one minute. The mother stated that she had given him half

of a Phenergan rectal 12.5 mg. suppository earlier in the evening even though it was not recommended for children under the age of two.

The results of a magnetic resonance imaging (MRI) of the minor's brain revealed multiple hematomas of varying ages which raised the possibility of traumatic injury. Dr. Catherine Albin spoke with the mother, who stated that the maternal grandmother had seen the minor fall from a bed to a carpeted floor. The mother had also seen the minor fall from a bed approximately two months earlier. According to Dr. Albin, neither of these incidents was likely to have caused the minor's injuries. Extensive diagnostic testing failed to identify any medical cause for the minor's brain injuries. Dr. Albin opined that the evidence supported a diagnosis of abuse and that the most recent episodes occurred while the minor was in the care of the mother or the maternal grandmother.

Dr. Albin discussed the diagnoses of abusive head injury and psycho-social failure with the mother. At that time, the mother revealed that that she had forgotten to tell Dr. Albin the previous day that she had seen the minor fall from a bed and that he also hit his head on a coffee table a couple of months ago. In Dr. Albin's experience, the mother's statement was a common fabrication to explain serious injuries.

The jurisdiction/disposition report also set forth the mother's statements to the social worker. The mother denied hurting the minor and stated that he rolled off the bed onto a carpeted floor on five occasions between May and July 2012. The mother did not tell Dr. Albin about all of these incidents because she felt Dr. Albin was "intimidating." The mother also denied giving Phenergan to the minor. However, the mother spoke to the social worker a couple of weeks later and told her that her father had given the medication to the minor. The mother explained that she informed the emergency room physician that she had done so, "because she wanted to take the blame for it."

In July 2012, the social worker met with the mother and Dr. Albin. Dr. Albin discussed the results of the MRI scan and the minor's growth. He was in the 25th

percentile at birth and was growing well until he was almost four months old when he lost “a lot” of weight and dropped to the 8th percentile. The minor was diagnosed with dry skin at age two months, but Dr. Albin explained that eczema does not cause children “to fall off the growth chart.”

Dr. Albin also explained psycho-social failure to thrive. She stated that it could be the result of a combination of factors, such as the refusal to feed the minor, personality conflicts, a power struggle between the caregiver and the minor, or the minor’s refusal to eat. The minor had been diagnosed with gastroesophageal reflux (GERD) in April 2012. However, Dr. Albin stated that GERD was not the cause of the minor’s weight issues, because the occupational therapist had found that he had “great feeding mechanics.”

Dr. Albin provided a follow-up report, which was dated August 2012. Since the tests showed no abnormalities that would explain the minor’s failure to thrive or brain hemorrhages, the diagnosis was trauma.

C. The Addendum Reports

Dr. Krishnan, the minor’s pediatrician, stated that she initially thought that the minor’s weight issues were due to GERD. However, though the minor gained a little weight after he was prescribed medication, his weight was not where it should have been.

According to Dr. Lewis, a pediatric neurologist, the minor’s follow-up MRI showed evidence of permanent injury. She expected him “to do well, though learning/processing deficits may become more apparent with school performance.” She also noted that there was no evidence of a metabolic disorder that could have predisposed the minor to bleeding. According to Dr. Albin, the follow-up MRI showed permanent damage with evidence of atrophy and her opinion that the minor’s injuries were caused by trauma remained unchanged. The minor, who was then 14 months old, was about six months delayed in his development.

Regarding the mother's visitation with the minor, the social worker stated that the mother provided basic care. However, the mother also rocked the minor to sleep during almost all the visits even though he was not sleepy and was quite active. The father's visits with the minor went well.

D. The Jurisdiction/Disposition Hearing

The Department submitted the jurisdiction/disposition report and the addendum reports at the jurisdiction/disposition hearing. Following argument, the juvenile court dismissed the subdivision (e) allegations, sustained the subdivisions (a) and (b) allegations in the third amended petition, and removed the minor from parental custody. The juvenile court ordered unsupervised visits with the father three times a week for two hours and supervised visits with the mother three times a week for two hours. The juvenile court also ordered reunification services: a parenting class, domestic violence counseling, and a 16-week accountability program for domestic violence for the father; and a psychological evaluation, a parenting class, individual psychotherapy, a domestic violence program, and a 52-week child abusers treatment program for the mother.³

E. Six-Month Review

In May 2013, the social worker filed a status review report in which she recommended that the minor be placed with the father, who would receive family maintenance services. She also recommended that the mother receive reunification services.

³ Both the mother and the minor appealed from the jurisdiction/disposition order, which was affirmed by this court.

The minor was in good health, but his weight remained below average. He was receiving services provided by Hope Services and his fine and gross motor skills had improved. The minor had no mental or emotional issues at that time.

The father had completed his parenting class, domestic violence counseling, and domestic violence accountability program. His criminal case for domestic violence was scheduled to be dismissed, because he had completed the accountability class. The mother remained engaged in all recommended services and had agreed to participate in a psychological evaluation.

The paternal grandparents and paternal uncle had initially supervised the mother's visits. However, they felt uncomfortable with these visits, because the mother wanted to discuss the case rather than visit the minor. The Department began supervising the visits. Social workers noted that the mother was demanding at times and voiced concerns that the paternal grandparents were not taking care of the minor's personal hygiene. In more recent visits, the mother was acting appropriately.

At the six-month review hearing, the juvenile court returned the minor to the father's custody with family maintenance services and continued the mother's reunification services, including supervised visitation.

F. Mother's Section 388 Petition

In July 2013, the mother filed a section 388 petition in which she requested unsupervised visits with the minor on the ground that her psychological evaluation was "mostly positive." The psychological evaluation stated that the mother presented as "an intelligent, articulate and guarded woman with no evidence of a formal thought disorder or a significant emotional disturbance." However, she also presented with "paranoid and narcissistic features that raise[d] some concerns." The psychologist recommended that she receive weekly individualized counseling to help her gain insight into "her tendency

to externalize blame and responsibility for her behavior.” In the event that the minor was returned to the mother’s care, the psychologist also noted that she might benefit from weekly visits from a home health nurse to support and monitor the minor’s care.

G. Interim Review Report

The interim review report, which was dated August 2013, stated that the minor had been living with his father since June 2013. The mother had completed a psychological evaluation and the domestic violence support group. She continued to participate in the 52-week child abusers treatment program. However, after 24 weeks, she had made marginal progress in four out of nine assessment areas and the therapist thought that “the level of child safety” had “remained the same.” The mother also participated in monthly counseling at Kaiser.

The mother continued to have supervised visits three times per week. In August 2013, a family conference was held to form a plan to transition from supervised to unsupervised visits for the mother. The facilitator stopped the meeting, because “family members were unable to set boundaries with their emotions and continued with their blaming and shaming of others.”

Since the mother was complying with the case plan, the Department intended to develop a transition plan of unsupervised visits for the mother. Though the psychologist who conducted the evaluation recommended weekly counseling for the mother, the mother felt strongly that she did not need additional therapy. The mother’s therapist felt that the mother’s therapy could be terminated.

H. Addendum Report

The addendum report, which was dated September 2013, stated that the mother had been charged with willful harm to a child and corporal punishment or injury of a

child. No date had yet been set for the trial. The mother had supervised visits with the minor for about one year. The social worker opined that the minor “deserve[d] to spend more time with his mother to build the mother and child relationship.” Thus, she recommended unsupervised visits.

I. Father’s Section 388 Petition

In September 2013, the father filed a section 388 petition in which he requested that the juvenile court remove the social worker’s discretion to schedule unsupervised visits for the mother. He argued that the mother should complete further reunification services before transitioning to unsupervised visits. About a week later, the mother withdrew her section 388 petition for unsupervised visits. The father’s section 388 petition was set for mediation, which was not successful.

J. 12-Month Review Report

The 12-month review report, which was dated November 2013, recommended that the mother receive reunification services and that the father receive family maintenance services. Regarding the minor’s health, the social worker stated that his seizures had subsided and his appetite had improved. The minor continued to receive services related to his development. His motor skills had improved and his cognitive skills were “within limit.”

The mother transitioned from individual counseling at Kaiser to a private therapist. Her first session was in October 2013. The mother’s behavior was appropriate at the supervised visits. The social worker noted that the paternal family “was unable to move forward to acknowledge that the mother is ready for unsupervised visit.” The social worker recommended that the mother begin unsupervised visits. According to the social

worker, the minor “has reached the age of two, if same type of head injury occurs again, he will be less vulnerable compares when he was an infant.”

K. Addendum Reports

The addendum report, which was dated November 2013, stated that the social worker allowed the parents to make the arrangements for unsupervised visits, because the parents needed to learn to compromise. Since they were unable to come to an agreement, the social worker set up a transportation plan for the mother’s first unsupervised visit. When the mother arrived to pick up the minor, she was informed by the paternal grandmother that the social worker had told the father that the visits had been cancelled for the week. However, the social worker had not made this statement. The mother became upset, banged on the front gate, and pulled the cord to the security camera at the front door. The social worker recommended a coparenting class for both parents.

In the addendum report, which was dated December 2013, the social worker recommended that the case be dismissed with family custody orders. The mother had begun unsupervised visits in October 2013. She was currently having three unsupervised visits for three hours each week. The mother had missed none of her supervised visits during the previous year and would finish her 52-week child abuse treatment program in February 2014. The social worker noted that the minor had bonded with the mother and the father had done an excellent job of caring for him. Thus, the social worker felt that the minor was not at risk with either parent and recommended that the case be dismissed.

In the addendum report, which was dated January 2014, the social worker recommended that the case be dismissed with family custody orders. The mother had six overnight visits the previous month and had completed 12 individual counseling sessions with her new therapist. The mother’s criminal case had not yet been set for trial. The social worker assessed the risk to the minor in each parent’s care as “very low.”

However, the social worker expressed her concern regarding the communication between the parents in their e-mails. The social worker instituted a rule requiring the parents to provide 48-hours advance notice if they needed to change the visitation schedule.

In the addendum report, which was dated March 2014, the social worker recommended that the dependency case remain open and that both parents receive family maintenance services. Since there were at least 20 “frictional” e-mails between the parents from September 2013 to February 2014, the social worker concluded that continued monitoring of the parents by the Department was necessary. According to the social worker, “[i]n the beginning, the [social worker] felt that [the father] had exercised some power control over the mother by controlling the visitation schedule. In January, the [social worker] noticed that the father showed more cooperation with the visitation schedule. The [social worker] noticed that the mother became more critical of the father via emails. The [social worker’s] concern is that the friction between the parents will eventually affect [the minor] emotionally.” The social worker recommended that the parents participate in a coparenting class.

In the addendum report, which was dated April 2014, the social worker recommended that both parents receive family maintenance services and that the case remain open until they had completed the coparenting class. The mother had had several overnight visits consisting of two nights each in the previous six week period. The visits went well and there were no disagreements between the parents. The mother had completed her child abuse treatment program. According to the social worker, the mother had “developed an insight into the reasons why [the minor] was placed into protective custody and is remorseful that the incidents had happened.” The coparenting class had not yet started. The mother’s criminal trial was scheduled for June 2014.

L. Combined 12- and 18-Month Review Hearing

In May 2014, a combined 12- and 18-month review hearing was held. The juvenile court returned the minor to the care, custody, and control of both parents with family maintenance services.

M. Father's Section 388 Petition

In July 2014, the father filed a section 388 petition in which he requested that the juvenile court modify the timeshare agreement, which allowed the mother to select the nights of the overnight visits after she received her work schedule each month. The father stated that the mother had repeatedly disregarded the court order, demanded visitation that was inconsistent with the court order, and engaged in argument with him during the exchanges. The father believed that a non-varying schedule would reduce the minor's exposure to the conflict between the parents. He also sought additional protection for the minor at exchanges.

The mother filed a response to the section 388 petition. She stated that she never agreed to the exchange protocol that had been discussed by counsel and denied intentionally distressing the minor during the exchanges. The mother also asserted that the father had intentionally caused one of the exchanges to fail and that she had not refused to cooperate with the court-ordered schedule. She argued that the father's request for a non-varying schedule was not in the minor's best interest.

In August 2014, the juvenile court granted the section 388 petition in part by adopting the specific timeshare schedule set forth by the Department after the social worker reviewed the mother's work schedule. The juvenile court also denied the section 388 petition in part by finding no detriment to the minor and refusing to make specific orders for additional protections at exchanges.

N. Dismissal of the Dependency and Custody Orders

In a status review report, which was dated November 2014, the Department recommended that the case be dismissed with family custody orders. The parents were involved in a family court case in which the mother had filed for custody and child support. The minor, who was then three years old, no longer needed developmental services and had no mental or emotional issues. He did not qualify for an individual educational plan. The parents were unable to agree on enrolling the minor in a full-time program. The minor was attending a day care program three days a week and a program on Saturday. The father had completed the coparenting program in July and the mother was scheduled to complete the program in November 2014. There were no problems with visitation.

In an addendum report, which was dated December 2014, the social worker continued to recommend that the case be dismissed. The mother had completed her cooperative parenting program. The mother had provided the minor's updated health information that had not been previously provided by the father. The minor was happy and thriving in the care provided by his parents.

In an addendum report, which was dated February 2015, the social worker stated that the mother had pleaded no contest to misdemeanor willful harm or injury to a child (Pen. Code, § 273a, subd. (a)). The trial court placed the mother on probation for four years and ordered that she complete a 52-week parenting class and 100 hours of community service. The minor's development was much better than had been initially expected and family members were pleased with his progress.

The contested hearing was held on March 10, 2015. The juvenile court admitted the November and December 2014, and February 2015 reports into evidence. The report,

which was dated November 24, 2014, by Steve Goetze was also admitted into evidence.⁴ Goetze, a senior social worker with Legal Advocates for Children and Youth (LACY), testified as an expert witness in assessing visitation and custody, risk assessment, and placement. Goetze was assigned to the minor's case in July 2012. He had met the minor six times, read court reports, and spoken to the social worker, the parents, the paternal grandparents, the paternal aunt and uncle, and the daycare providers. He had also observed visits and reviewed the mother's psychological evaluation. Goetze believed that the best custody arrangement for the minor would be for the father to have sole physical and legal custody. He explained that the father and his family had always been the more protective of the minor and that the minor had been brought into the dependency due to the head traumas which he suffered in the mother's care.

Goetze observed the mother's visits with the minor on three occasions. During the first two-hour visit, the mother attempted to put the minor down for a nap after 40 minutes. The minor resisted her efforts. However, about 15 minutes later, she succeeded in putting him down for a nap. Goetze questioned why the mother tried to get the minor to sleep at 10:45 a.m. when she had a limited time in which to visit him. During the second visit, which occurred at a Chuck E. Cheese restaurant, Goetze was unable to observe the mother's natural interactions with the minor, because it was noisy, he did not understand the language which people were speaking, and the paternal grandmother interfered with the visit by not stepping away. At the most recent visit in the mother's home, the mother spent a lot of time talking about the need to fatten up the minor and showed Goetze supplements, which were "pumped full of sugar." She also expressed concern about the lack of communication with the father and asserted that the father did not respond to her e-mails.

⁴ This court has granted the father's request to augment the record on appeal to include Goetze's report. (Cal. Rules of Court, rule 8.122, subd. (a)(3).)

When Goetze visited the father, he observed that the father allowed the minor to direct their interactions by following the minor's cues. The father was also very nurturing and caring toward the minor. The father expressed frustration about communication with the mother and was concerned that the supplements, which were provided by the mother, were primarily sugar.

After Goetze asked the father why he did not respond to the mother's e-mails, the father replied that he did respond to them. His trial counsel subsequently provided Goetze with 20 to 25 e-mails between the parents. In the most recent e-mails, the mother was attacking and blaming others when things did not go smoothly. The mother also failed to take responsibility for the fact that it required both of the parents to agree on an issue. In testifying about the parents' e-mails, Goetze acknowledged that the father failed to inform the mother that the minor had an allergic reaction to a cashew, which "highlights that [the lack of communication is] not 100 percent mother's fault."

Goetze testified that he had not seen any indication that the mother had taken some responsibility for her part in why the minor was taken into the protection of Child Protective Services. In Goetze's opinion, the mother "puts her own pathology first and her son's health and safety second." He opined that the mother initiated more of the negative aspects around the minor than the father and his relatives did. Goetze also noted that the mother had told the paternal grandmother that she wanted to take the minor to her criminal court date on child abuse charges to show the judge that the minor was okay.

In Goetze's opinion, the father should be responsible for making educational decisions. The minor had received services through the father's school district and had been assessed by that school district. Goetze recognized that the minor's health had improved, but noted that the effects of his head trauma remained unknown. In Goetze's view, it would be better if the more protective parent had legal authority, since the

parents could not agree on exchange times and what to feed the minor. As to visitation, Goetze opined that the 50/50 arrangement should remain the same.

In closing argument, all parties argued that the juvenile court should terminate jurisdiction. The Department argued that both parents should have physical and legal custody of the minor with primary residence with the father. The father and the minor argued that the father should have sole physical and legal custody. The mother argued for joint physical and legal custody with his primary residence with both parents.

The juvenile court terminated its jurisdiction, dismissed the dependency, and granted joint physical custody. The juvenile court also found that it was in the minor's best interest to grant joint legal custody, but "if there is any dispute or disagreement with respect to any legal issues, final say rests with the father." The juvenile court ordered that the minor's primary residence would be with the father.

II. Discussion

A. Admissibility of Evidence

The mother contends that the juvenile court abused its discretion when it considered evidence that the father should have sole physical and legal custody. Relying on *In re Elaine E.* (1990) 221 Cal.App.3d 809 (*Elaine E.*), she argues that section 364 precludes consideration of evidence that seeks to change an existing custody order when the dependency jurisdiction is terminated. We agree with the minor and the father that this issue has been forfeited.

"[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citations.] [Fn. omitted.] The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.] [¶] Dependency matters are not exempt from this rule. [Citations.] [¶] But application of the forfeiture rule is not automatic.

[Citations.] But the appellate court’s discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. [Citations.]” (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, superseded by statute on other grounds as stated in *In re M.R.* (2005) 132 Cal.App.4th 269, 273-274.)

Here, the minor sought a contested hearing on the custody orders or, alternatively, admission of the report written by Goetze. After the mother objected to the admission of this report, the juvenile court set the matter for a contested hearing. At the contested hearing on March 10, 2015, the mother filed a motion to impose disclosure and discovery sanctions and to limit Goetze’s testimony. The minor had provided all parties with Goetze’s report as well as his expert qualifications on December 8, 2014. However, on March 9, 2015, the minor notified all parties that Goetze would “incorporate” information that he had acquired since the report was written in November 2014 into his testimony. The mother requested that the juvenile court limit Goetze’s testimony to opinions and impressions formed prior to submitting his report, or, alternatively, to treat Goetze as a percipient witness. After argument, the juvenile court asked whether the mother requested a continuance. The mother stated that she was not requesting a continuance, but that she wanted the witness’s testimony limited. The juvenile court denied the motion for sanctions.

Though the mother objected at the beginning of the hearing to the juvenile court’s consideration of Goetze’s testimony regarding opinions formed after submitting his report, she did not object on the ground that the report and all of Goetze’s testimony was precluded by section 364. The mother contends, however, that she preserved the issue in her argument at the conclusion of the hearing. Her counsel argued: “Minor’s Counsel has still cited no statutory authority or case law to support her proposition that the Court can even consider sole physical custody when the child has been returned to both of his parents on a plan of joint Family Maintenance. Such an order would constitute a removal

from the mother and require a 388 motion and clear and convincing evidence that there is a substantial risk of harm to the minor in the mother's care. No such motion has been filed. We would object to an oral motion being made, and no such showing can be made." She also argued that granting legal custody to one parent was not in the minor's best interests. But counsel for the mother did not refer to section 364 in her argument. She also did not object to the admission of Goetze's testimony or his report. Accordingly, the mother has forfeited the issue of the admissibility of Goetze's testimony or his report and the consideration of this evidence by the juvenile court in ruling on the issue of legal custody.

Even assuming that the mother did not forfeit the issue, we would reject her contention. In *Elaine E.*, *supra*, 221 Cal.App.3d 809, the juvenile court refused to allow the appellant to present evidence at the final review hearing to support his request for unsupervised visitation. (*Id.* at p. 813.) *Elaine E.* found no error and explained: "Subdivision (c) [of section 364] makes clear that the purpose of the review hearing is to determine whether continued juvenile court supervision is necessary. It states: 'After hearing any evidence presented by the probation officer, the parent, the guardian, or the minor, *the court shall determine whether continued supervision is necessary. The court shall terminate its jurisdiction* unless the probation department establishes by a preponderance of evidence that the conditions still exist which would justify initial assumption of jurisdiction under Section 300, or that such conditions are likely to exist if supervision is withdrawn. . . .' (Italics added.) By its very terms section 364 limits the court's inquiry to whether the conditions for continuing supervision exist." (*Elaine E.*, at p. 814.) *Elaine E.* also concluded that when "the noncustodial parent seeks modification of an existing order, he must comply with the specific requirements of section 388" and show changed circumstances. (*Id.* at p. 815.)

Other courts have distinguished and declined to follow *Elaine E.* (*In re Roger S.* (1992) 4 Cal.App.4th 25, 29-30 (*Roger S.*); *In re Michael W.* (1997) 54 Cal.App.4th 190, 196.) In *Roger S.*, the appellant argued that the juvenile court erred when it failed to admit evidence regarding visitation under sections 364 and 362.4⁵ at the final review hearing. (*Roger S.*, at p. 29.) *Roger S.* agreed and reasoned: “[W]hen making an order to be transferred to the family court, the juvenile court has the power to hear evidence relevant to that order under section 362.4, which the *Elaine E.* court did not discuss. When the juvenile court terminates its jurisdiction over a dependent child, section 362.4 authorizes it to make custody and visitation orders that will be transferred to an existing family court file and remain in effect until modified or terminated by the superior court. As section 362.4 gives the juvenile court power to fashion termination orders, it makes no sense to interpret section 364 to preclude the court from considering evidence relevant to that task. To the extent *Elaine E.* implies that a trial court cannot receive evidence concerning visitation under section 362.4, we decline to follow it.” (*Roger S.* at p. 30, fn. omitted.) We agree with *Roger S.* that the juvenile court in the present case properly admitted evidence relevant to its custody orders under section 362.4.

B. Custody Order with “Final Say” to the Father and Primary Residence

The custody order states in relevant part: “The parents shall share joint legal custody of the child. In the event of a disagreement between the parents over a decision

⁵ Section 362.4 provides in relevant part: “When the juvenile court terminates its jurisdiction over a minor who has been adjudged a dependent child of the juvenile court prior to the minor’s attainment of the age of 18 years, and proceedings for dissolution of marriage, for nullity of marriage, or for legal separation, of the minor’s parents, or proceedings to establish the paternity of the minor child . . . , are pending in the superior court of any county, or an order has been entered with regard to the custody of that minor, the juvenile court on its own motion, may issue . . . an order determining the custody of, or visitation with, the child.”

affecting the child, final decision-making authority shall be with the father. [¶] . . . [¶]
The child’s primary residence shall be with the father.”

The mother argues that the “final say” requirement is not a lawful order under the Family Code sections 3003⁶ and 3083⁷.

“‘Dependency proceedings in the juvenile court are special proceedings governed by their own rules and statutes. [Citations.]’” (*In re Josiah Z.* (2005) 36 Cal.4th 664, 678.) “[T]he Legislature has expressly provided that specific parts of the Family Code apply to orders issued by the juvenile court. [Citations.] . . . [T]his shows that the Legislature knows how to make the Family Code applicable to the juvenile court when it intends to do so” (*In re Chantal S.* (1996) 13 Cal.4th 196, 206 (*Chantal S.*)) This also suggests that the Legislature’s omission to do so regarding other sections of the Family Code indicates that it did not intend that these Family Code sections would apply in juvenile court proceedings. (*Id.* at pp. 206-207.) Moreover, in connection with the right to custody of a minor child, Family Code section 3021 lists the proceedings in which the Family Code is applicable. (Fam. Code, § 3021.) These proceedings do not include juvenile court proceedings.⁸ Thus, we conclude that Family Code sections 3003 and 3083 do not expressly apply to juvenile dependency proceedings.

⁶ Family Code section 3003 states: “‘Joint legal custody’ means that both parents shall share the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.”

⁷ Family Code section 3083 provides in relevant part: “In making an order of joint legal custody, the court shall specify the circumstances under which the consent of both parents is required to be obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent. In all other circumstances, either parent acting alone may exercise legal control of the child.”

⁸ The Family Code “applies in any of the following: [¶] (a) A proceeding for dissolution of marriage. [¶] (b) A proceeding for nullity of marriage. [¶] (c) A proceeding for legal separation of the parties. [¶] (d) An action for exclusive custody

(Continued)

The mother acknowledges that “[i]f . . . the order was one that a juvenile court could properly make on termination of its dependency jurisdiction, the fact that the family court would be precluded from making that same order does not render the order unenforceable in the family court.” (*Chantal S.*, *supra*, 13 Cal.4th at p. 209.) She contends, however, that the “final say” requirement is improper, because “it is inherently inconsistent and antagonistic to any joint custody order, rendering the order in practical terms a de facto sole legal custody order.”

Cassady v. Signorelli (1996) 49 Cal.App.4th 55 is instructive. In that case, the mother argued that the trial court erred when it ordered that the father should have the final say regarding decisions about the minor’s health care if the parents disagreed. (*Id.* at p. 62.) *Cassady* held that the trial court did not abuse its discretion based on the mother’s difficulty coping with life, questionable ability to make decisions, and “a delusional quality to her thinking.” (*Ibid.*) Though *Cassady* was not a dependency case, the circumstances of the present case necessitated a similar type of order. Here, the parents, particularly the mother, were often unable to cooperate in making decisions about the minor without the Department’s supervision. Based on the record before us, as discussed *infra*, the juvenile court did not abuse its discretion when it designated the father as responsible for resolving conflicts.

pursuant to Section 3120. [¶] (e) A proceeding to determine physical or legal custody or for visitation in a proceeding pursuant to the Domestic Violence Prevention Act (Division 10 (commencing with Section 6200)). [¶] In an action under Section 6323, nothing in this subdivision shall be construed to authorize physical or legal custody, or visitation rights, to be granted to any party to a Domestic Violence Prevention Act proceeding who has not established a parent and child relationship pursuant to paragraph (2) of subdivision (a) of Section 6323. [¶] (f) A proceeding to determine physical or legal custody or visitation in an action pursuant to the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12). [¶] (g) A proceeding to determine physical or legal custody or visitation in an action brought by the district attorney pursuant to Section 17404.” (Fam. Code, § 3021.)

The mother next contends that the order was improper, because joint legal custody was the pre-existing order of the court. However, the mother fails to acknowledge that the May 2014 order also provided that the parents were receiving “supervision by the Department of Family and Children Services.” Thus, though the parents had joint custody, the social worker had resolved the conflicts between them.⁹

The mother also contends that there was insufficient evidence to support the joint physical and legal custody order with “final say,” and thus the juvenile court abused its discretion. The mother points out that she did not miss any of her visits with the minor, there was a strong bond between her and the minor, the parents shared 50-50 physical custody, the Department recommended joint legal custody, the father had a history of domestic violence, and the father withheld the minor’s medical information from her.

We “review the juvenile court’s decision to terminate dependency jurisdiction and to issue a custody (or ‘exit’) order pursuant to section 362.4 for abuse of discretion [citation] and may not disturb the order unless the court “‘exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].’” [Citations.]” (See *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 300-301.)

Here, there was substantial evidence to support the juvenile court’s order. The mother was responsible for the minor’s serious injuries and eventually pleaded no contest to willful harm or injury to a child. The mother also placed the minor at severe risk of harm by either administering or allowing her father to administer medication that the minor should not have been given. The psychological evaluation disclosed that the mother presented with “paranoid and narcissistic features” and tended to “externalize

⁹ Relying on *Elaine E.*, *supra*, 221 Cal.App.3d at pp. 814-815, the mother argues that the final say provision was beyond the scope of the dismissal proceedings. As previously discussed, the mother has forfeited this issue.

blame and responsibility for her behavior.” The psychologist also noted that the mother was “described on a number of occasions as mishearing what she was told, becoming angry and loud, accusing social workers of lying to her and seeming to lose control.” In Goetze’s opinion, the best custody arrangement for the minor would be for the father to have sole physical and legal custody, because the father and his family had always been the more protective of the minor and the minor suffered head traumas while in the mother’s care. He also noted that the mother “puts her own pathology first and her son’s health and safety second” and that she initiated more of the negative aspects around the minor than the father and his relatives did. Given that the parents were unable to agree on many issues concerning the minor’s care without the assistance of the social worker, the juvenile court did not abuse its discretion in providing the father with “final say” in making decisions.

The mother further argues that the juvenile court abused its discretion when it excluded her home as the primary residence. She asserts that it would be in the minor’s best interest for his primary residence to be with her for potential consideration for purposes of public assistance or eligibility for the minor’s school attendance. We find no abuse of discretion. The minor had resided with the father throughout the majority of the dependency. He had also been assessed for and received services through the school district near the father’s home. Based on this record, the juvenile court did not abuse its discretion when it ordered that the minor’s primary residence would be with the father.

III. Disposition

The order is affirmed.

Mihara, J.

WE CONCUR:

Elia, Acting P. J.

Bamattre-Manoukian, J.

In re L.L.
H042125