Filed 8/15/18 In re Javier M. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re JAVIER M. et al., Persons Coming Under the Juvenile Court Law.	B285728 (Los Angeles County Super. Ct. No. DK16834)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. AMANDA V., Defendant and Appellant.	

APPEALS from orders of the Superior Court of Los Angeles County, Robin R. Kesler, Juvenile Court Referee. Affirmed in part and dismissed in part with directions.

Jacques Alexander Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Kimberly Roura, Deputy County Counsel, for Plaintiff and Respondent.

Amanda V. appeals the July 28, 2017 order of the Los Angeles County Superior Court Dependency Court that her children, Javier M., Lorenzo M. and John M. receive the immunizations required for them to attend public school, Head Start or daycare programs, and certain earlier orders. The children were removed from the parents' custody due to the parents' chronic drug use. The parents objected to the immunization orders. Amanda has appealed. We affirm the July 28, 2017 order of the dependency court and dismiss her appeal from earlier orders.

PROCEDURAL AND FACTUAL BACKGROUND

Amanda (mother) and Francisco M. (father) are the parents of four children, Javier (born 2013), Lorenzo (born 2014), John (born 2015) and Carolyn M. (born 2016). At John's birth, mother and baby tested positive for marijuana. Following investigation of the family initiated by a report to the Los Angeles County Department of Children and Family Services (DCFS), a Welfare

and Institutions Code section 300[1] petition was filed in the dependency court. In that petition DCFS alleged mother had a history of substance abuse and was a current user of marijuana, smoking or ingesting marijuana, or applying it to her body in a topical solution, multiple times each day during her pregnancy with John; she continued to do so following his birth. Mother had been observed under the influence while her three infant sons were in her care. DCFS also alleged father was a frequent user of marijuana and was observed under its influence while caring for the children. Mother's and father's frequent use of marijuana, it was alleged, interfered with the ability of each of them to properly care for their infant children.

When she was interviewed on March 31, 2016 by a DCFS clinical social worker (CSW), mother acknowledged none of the children had been to a doctor from the time of their medical examinations immediately following their births, except for Javier. Mother stated she did not believe her children needed to see a doctor; if, however, medical attention were absolutely needed, she would seek it. DCFS determined mother had not taken Javier for a follow up medical visit to check on a mass that had been observed on one of his lungs when he was seen by a doctor when he was an infant. Mother acknowledged storing her cache of marijuana in her car but denied smoking while transporting the children. Mother told the CSW marijuana was a beautiful drug that she gave to her children "to help them naturally." In April 2016, following the commencement of the

---

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

DCFS investigation, father and mother obtained medical marijuana recommendations.

In DCFS's contact with the children at the time they were detained, DCFS observed each child was dirty and smelled. It was apparent from observing them that they had not bathed or been bathed in a long time. They had dirt in the folds of their necks, arms and legs; knotted hair; food crusted on their faces; and were wearing dirty and torn clothes. Lorenzo had a black spot on his teeth and what looked like an untreated burn on one of his fingers. The children all had scratches on their backs. John had a bloated, hard belly and exhibited symptoms of constipation.

At the time of Javier's birth, mother had told DCFS she did not think drinking liquids containing marijuana, as opposed to smoking it, would affect the fetus; she also claimed she stopped using marijuana after Javier's birth because she wanted to breast feed him.

In its Last Minute Information for the Court prior to the April 26, 2016 detention hearing, DCFS recommended the court order forensic medical examinations for each child and regional center assessments for Javier and Lorenzo because each appeared to have a speech delay. DCFS recommended the court address whether Javier should be placed in a Head Start program. DCFS also asked the court to "address the children['s] need . . . to receive immunizations."

At the detention hearing, the dependency court detained the children from their parents and granted each parent monitored visits. The court ordered forensic medical examinations, regional center referrals for Javier and Lorenzo and Javier's enrollment in a Head Start program. When DCFS

asked the court to order that all of the children receive the appropriate immunizations, counsel for father argued the court could not make such an order prior to adjudication and that the parents had the right to prevent their children from being immunized. Mother's counsel joined in the objection to immunization, also stating she did not object to a medical checkup of each child. Father's counsel asked the court to stay its order for immunization so he could seek appellate review. The dependency court ordered the immunizations, staying the effective date of its order one week so the parties might seek appellate review. At a hearing on May 3, 2016, at the request of counsel for the parents, the court continued the date of the adjudication hearing, and continued the stay on the immunization order to the new date for that hearing.

In its Jurisdiction/Disposition Report in advance of the scheduled May 12, 2016 adjudication hearing, DCFS again reported the children had not had a medical examination subsequent to their examinations at birth. The only child who had seen a doctor from the time of his birth was Javier. At the time of this report, mother was five months pregnant with her fourth child. She told DCFS then that she had recently stopped using marijuana. Javier and Lorenzo appeared to have speech delays; each appeared reluctant to eat solid food, preferring baby food. John also exhibited signs of developmental delay.

At the date scheduled for adjudication, the court granted mother's request to continue the adjudication hearing to May 26 and continued the stay of the immunization order. On the latter date, the adjudication hearing and the stay were again continued, to June 17, 2016. In the addendum report to the court for the hearing scheduled for that date, the CSW reported on a verbal

dispute between the parents and the caregiver during a visit which had occurred at a restaurant. At the conclusion of the visit, the parents did not want to return the children to the caregiver, resulting in the police being called to resolve the situation. The CSW also reported that Instagram photos taken a few weeks earlier showed mother using marijuana and father "holding a substantial amount of cannabis." The children's medical examination reports indicated each child was healthy, but each had delays in all domains of assessment. It was recommended that the children receive occupational therapy.

The adjudication hearing was continued from June 17 to August 4, 2016; the stay on the immunization order was continued to the same date. The court ordered reunification services for the parents, including full drug and alcohol programs, weekly drug testing, parenting education and monitored visits before adjourning.

The addendum report prior to the August 4, 2016 adjudication hearing informed the court mother and father continued to have "unstable" housing and "are unable to properly care for all three children" when the parents visit with the three older children at the same time. Each parent had each missed multiple drug tests. DCFS recommended the children be declared dependents of the court, the parents receive reunification services, the children participate in age appropriate services and receive medical services. The parents pled no contest to an amended petition, which the court sustained. The court ordered the children removed from the custody of their

parents, and continued placement with the same caregiver. The immunization order was not specifically addressed.[2]

On September 13, 2016, the children's then caregiver filed a Request to Change Court Order, advising the court she had been unable to enroll John in any educational activities appropriate to his age because he was not immunized. The caregiver also stated John regresses when his parents visit, the parents continue to use drugs, John had bonded with the caregiver, and she had filed for de facto parent status and would like to adopt John. The matter was set for hearing on October 21, 2016. This request was later dismissed following the relocation of the children.

In 2016, mother gave birth to a fourth child, Carolyn. After orders releasing her child to the care of mother (over DCFS's objection), on March 1, 2017, the court detained the child and placed her in shelter care.

On September 26, 2016, the dependency court moved the three older children, placing them with a different caregiver, who was also a relative.

On October 21, 2016, DCFS filed an ex parte application to have the three older children immunized. It gave as reasons that the caregivers were having "a great hardship in trying to provide childcare for the children without a record of immunizations. The licensed childcare providers as well as the state Head Start programs will not allow the children to receive services without

---

[2] The only order made at the adjudication hearing that might be construed as including the earlier (stayed) immunization order was that stating: "All prior orders not in conflict shall remain in full force and effect. We consider the effect of this order on the parties' contention on appeal in the text, *post*.

being immunized." DCFS noted "Javier ha[d] been accepted in[to] a Head Start program where he can . . . receive [s]peech therapy; however, the child must be immunized in order to start receiving such services." As at prior hearings, mother and father objected to immunizations. The court asked the parties to file briefs on the matter and continued the hearing to November 18, 2016.

In advance of this hearing, DCFS reported the new caregiver required childcare for the children and the children were attending a licensed childcare facility which allowed them to be in a home setting while getting help remedying the areas in which they had delays, and that this facility had accepted the children "pending immunization." Once enrolled at this facility, each child had made major improvements in development. DCFS again reported there were no other childcare facilities that would accept the children without their being immunized and that it had sought other in home placements for the children as a unit, but without success. It was also noted that the State of California required that all children enrolled in childcare or school programs must be immunized.

At the November 18, 2016 hearing, DCFS again reported it had been unable to locate programs that would accept the children without immunizations. Mother's counsel stated mother had a personal objection to immunization and argued it would be premature to order immunization while the parents were still receiving reunification services. Father joined in this argument. The court declined to order immunization, stating: "Taking . . . notice of the fact that these children are ages three, two and one, and they're not of an age where they're compelled to attend school or participate in a school educational plan, then in addition to the

fact that we are currently in family reunification, the parents' rights have not been terminated—well, I can agree with counsel for the parents that they're—well, at this time at this stage in the case, it would be improper for the court to order over their parents' objection that they be immunized forcibly." The court ordered DCFS to explore educational "alternatives," and "to seek appropriate exemptions" from immunization.

As of January 2017, the parents had not yet enrolled in a drug treatment program. Mother had not appeared for weekly drug testing three additional times and had four positive tests for marijuana. Father had two additional no shows and five positive tests for marijuana. The parents claimed they were attending Narcotics Anonymous meetings weekly. Their monitored visits with their children were going well. Mother was kicked out of a relative's home where she had been living due to inappropriate behavior. Mother had completed a parenting class.

Father and mother enrolled in drug treatment programs in February and March 2017, respectively. At a status review hearing on March 21, 2017, the court found the parents to be in partial compliance with their plans and continued the children in their placements.

On July 28, 2017, counsel for all of the children filed a Request for Walk-On order, advising the court the children needed to be immunized "so that they can attend school and/or daycare." "Their caretaker . . . intend[ed] to return to work in August, and she had confirmed with local schools and daycares that the children cannot be accepted into school and/or daycare without the required immunizations." In addition, children's counsel pointed out that Senate Bill No. 277 (Stats. 2015, ch. 35, § 2), which had become effective on January 1, 2016, removed the

personal belief exception to immunization requirements for enrollment in private or public school or daycare (with an exception not relevant in this case).

At the hearing on this request, counsel for mother and for father continued to oppose immunization, arguing there had been no change of circumstances other than the caretaker wanted to return to work. Children's counsel argued Javier would be five years old soon and required immunization to attend Head Start.[3]

The court acknowledged the recent legislation, noted there were now measles outbreaks in the community and in other areas of the state, and observed that not having the children immunized would expose them to disease. The court also stated the risk from immunization was very low and the risk of contracting or spreading diseases was higher. The court ordered the children to be immunized.

This appeal, filed by mother, followed on September 20, 2017.

CONTENTIONS

Mother contends: (1) the dependency court was without jurisdiction to order immunizations at the detention hearing for the older three children, or at any time prior to adjudication in August 2016, because the parents' rights to make medical decisions for their children had not been terminated and there was no medical emergency; (2) given the order made in November

---

[3] Javier, born in 2013, was four years and three months old at the time. Counsel erred in stating his age, but not in the application of Senate Bill No. 277, as is discussed in the text, *post*.

2016 declining a request to immunize the children, both the doctrine of collateral estoppel and the absence of any new facts made improper the order for immunization issued July 28, 2017; and (3) the immunization order made in July 2017 was void because there was no medical necessity for it.

DISCUSSION

I. Appellate Jurisdiction

Before addressing the merits of mother's contentions, we must consider the timeliness of mother's notices of appeal. (Mother filed a separate notice of appeal for each child.) In her notices, mother identified three orders as the subject of appeal: those issued "10/21/16," "11/18/16," and "7/28/17."

The dispositional order in a dependency proceeding is the first appealable order. That order, and those made subsequent to it (with exceptions not relevant here), are appealable. (§ 395; *In re Eli F.* (1989) 212 Cal.App.3d 228, 233.) Earlier orders are reviewable by writ. (*Karen P. v. Superior Court* (2011) 200 Cal.App.4th 908, 912; see *Melinda K. v. Superior Court* (2004) 116 Cal.App.4th 1147, 1153.)

In addition to determining which orders are appealable, we must consider whether an appeal from an otherwise appealable order is timely. Appeals from orders of the dependency court are governed by California Rules of Court, rules 5.585 and 8.406(a)(2).[4] These rules require the filing of the notice of appeal

---

[4] California Rules of Court, rule 5.585 provides: "The rules in title 8, chapter 5 govern appellate review of judgments and orders in cases under . . . section 300 . . . ." Rule 8.406(a)(1) requires the filing of the notice of appeal "within 60 days after

within 60 days after the date on which each order was made at or following the dispositional hearing.

An appellate court must dismiss on its own motion an unauthorized appeal. (*Rubin v. Western Mutual Ins. Co.* (1999) 71 Cal.App.4th 1539, 1548; *Northern Trust Bank v. Pineda* (1997) 58 Cal.App.4th 603, 607-608; see also *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 864 [it is the timely filing of a notice of appeal which invokes the jurisdiction of the appellate court]; *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 662 [same].)

Here, only one order was made within 60 days prior to the filing of the notices of appeal, that made on July 28, 2017 ordering immunization of all four children. While the order made on November 18, 2016 is outside the time limit for appeal, and appeal from it was untimely, we also note that it was not adverse to mother and thus not appealable by her for this additional reason. (See *In re Pacific Std. Life Ins. Co.* (1992) 9 Cal.App.4th 1197, 1202 [only aggrieved party may appeal].)

Mother also listed October 21, 2016 in her notices of appeal as the date an appealable order was made. We have carefully reviewed the record and find that on that date the dependency court set a future hearing date, but made no other order. We dismiss mother's appeal from the order made on October 21, 2016 for this reason.

---

the rendition of the judgment or the making of the order being appealed."

II. Mother's Claims Are Without Merit

A. *The orders for immunization made prior to the adjudication hearing are not appealable.*

Mother's first argument concerns the order that the children be immunized, made on April 26, 2016, and stayed to the date of the adjudication hearing, August 4, 2016 (and not listed in mother's notices of appeal). Neither mother nor father ever sought appellate review of that order even though the court initially stayed the order for a week so that father or mother could seek a writ. That stay was later continued to the date of the adjudication hearing, giving a total of four months in which to seek appellate review. There is no indication mother (or father) ever did so.

As DCFS points out, any orders made prior to the adjudication hearing on August 4, 2016 are not reviewable by appeal. Rather, review of those orders is available only by writ. (See *Karen P. v. Superior Court*, *supra*, 200 Cal.App.4th at p. 912; Cal. Juvenile Dependency Practice (Cont.Ed.Bar 2016) Appeals and Writs, § 10:84, pp. 917-918.)

Mother's attempt to raise this pre-dispositional order on this appeal fails for this reason. It also fails because mother did not list this order in her notice of appeal.

B. *The November 18, 2016 order did not preclude consideration of and issuance of the July 28, 2017 order for immunization.*

Mother contends the doctrine of collateral estoppel precluded issuance of any order to immunize the children once the court had denied the request to do so in November 2016, arguing "[s]ince the issue was already thoroughly litigated, the

parties were estopped from litigating it again, absent any new evidence." While mother correctly sets out the five elements that must be present to apply the doctrine,[5] she fails to acknowledge the limits to its application, particularly when one seeks to apply the doctrine to preclude readdressing a ruling due to changed circumstance and that, when made, was limited to the circumstances as they then existed.

When the dependency court made the order in November 2016 denying the request for an order that the children be immunized, the judge stated: "Having listened to counsel's argument and having reviewed the reports to address the issue of immunization, taking note—notice of the fact that these children are ages three, two, and one, and they're not of an age where they're compelled to attend school or participate in a school educational plan, then in addition to the fact that we are currently in family reunification, the parents' rights have not been terminated—well, I can agree with counsel for the parents that they're—well, at this time at this stage in the case, it would be improper for the court to order over their parents' objection that they be immunized forcibly. The court orders DCFS to explore alternatives, educational alternatives, to assist the family in an IEP process as it relates to Javier, who is the eldest child,

---

[5] The elements required to be present before the doctrine of collateral estoppel may be considered applicable are: (1) a prior adjudication on the merits that is now final, of (2) the identical issue, (3) actually litigated and necessarily decided in the prior action, and (4) which is asserted against a person who was a party in the first action or in privity with that party. (*In re Donovan L.* (2016) 244 Cal.App.4th 1075, 1084, citing *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 825.)

and to seek appropriate exemptions, that the minute order shall indicate that the children are not to be immunized at this time."

Mother's reliance on collateral estoppel to support her argument that the July 2017 order was in error fails to consider that the doctrine is equitable in nature. Even when the technical requirements are all present, the doctrine is to be applied "'*only* where such application comports with fairness and sound public policy.' (*Vandenberg v. Superior Court* [(2015)] 21 Cal.4th [815,] 835 . . . ; see *White Motor Corp. v. Teresinski* (1989) 214 Cal.App.3d 754, 763 . . . ; *Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 941 . . . .)" (*Smith v. ExxonMobil Oil Corp.* (2007) 153 Cal.App.4th 1407, 1414.)

In this case, there was a significant change in circumstances between those present in November 2016 and in July 2017. By the latter date, Javier was about to enroll in Head Start and the caretaker needed to return to work.

Further, in dependency cases, a specific statute provides authority for a court to revisit prior orders in appropriate circumstances. Thus, section 385 provides: "Any order made by the court in the case of any person subject to its jurisdiction may at any time be changed, modified, or set aside, as the judge deems meet and proper, subject to such procedural requirements as are imposed by this article." While some orders are not reviewable (e.g., *In re Joshua J.* (1995) 39 Cal.App.4th 984, 992 [findings that a father had abused his son]), cases in which facts change, or in which the court, when it makes the order sought to be changed, made its earlier determination with the caveat that it applied only to the circumstances then before it, are ripe for consideration anew based on the new circumstances. (Cf. *In re G.B.* (2014) 227 Cal.App.4th 1147, 1160 [the juvenile court has

authority to change a previous order sua sponte if it decides that a previous order was improvidently granted].)

That is the situation in the present case. When it made the November 18, 2016 ruling denying the request for an order that the children be immunized, the dependency court clearly based its determination on the youth of the children at that time and on its view that they were not then "compelled" to attend school or daycare, as well as other factors. As DCFS argues, those circumstances had changed by the summer of 2017. The children were a "school year" older, Javier had been admitted to a Head Start program where he was to get needed remedial help, and all of the children were in daycare—apparently still "pending immunization." In addition, their caregiver now wished to resume working and needed the children to be in daycare so she could do so. These are changed circumstances warranting renewed consideration of the request that the children be immunized. Thus, there was ample authority for the dependency court to revisit the issue in July 2017, as well as to then order that all children must be immunized.[6]

---

[6] In her reply brief, mother raises an objection to the dependency court resolving the matter without additional notice. We have reviewed the record, including the reporter's transcript of proceedings on the date of the hearing, and find that counsel for mother and for father were both present, and neither objected for the reason now raised on appeal; their sole objection was parental opposition to immunization. Mother has therefore waived this late, procedural objection. (*In re T.G.* (2015) 242 Cal.App.4th 976, 984; see *In re A.R.* (2014) 228 Cal.App.4th 1146, 1153-1154.)

There is an independent basis upon which the July 28, 2017 order is validated.[7] This order corrected an error of law made by the dependency court when on November 18, 2016 it denied the request for immunization. The earlier order did not comply with Health and Safety Code section 120335, which eliminated the parental objection to immunization in all circumstances relevant to the present case. Thus, when the dependency court made its order in November 2016, the statute invalidating the objection which the parents had been asserting had been in effect for almost 11 months. As of that date, the children were all enrolled in daycare (and the facility was awaiting proof of immunization). The order the court made in November 2016 was contrary to the cited statute. While the court asked DCFS to locate a facility which would accept the children without immunizations, there was no licensed facility at which the children could have been placed as all would have had to comply with the immunization requirement of the Health and Safety Code.

Mother makes an additional claim: that the July 28, 2017 order was invalid because there was no medical necessity for it. This assertion ignores the legislative judgment enacted in Health and Safety Code section 120335, as well as the statement of legislative purpose for this statute set out in Health and Safety Code section 120325, that the Legislature has determined that there is need for "total immunization of appropriate age groups against [specified] childhood diseases" of all school age children

---

[7] Prior to oral argument in this case, we asked the parties to brief the effect, if any, of our then recent decision in *Brown v. Smith* (2018) 24 Cal.App.5th 1135, on their arguments. We have considered their responses in preparing this opinion.

who attend public or private school. (Health & Saf. Code, § 120325, subd. (a) [with exceptions not relevant to the present case].) This legislative determination invalidates mother's contrary assertion.

DISPOSITION

We affirm the order made on July 28, 2017 and dismiss the appeal from the orders made on and prior to November 18, 2016.

Because the children are in need of prompt enrollment in school and preschool programs that complies with California law, and with the consent of the parties as required by California Rules of Court, rule 8.272(c)(1), we direct immediate issuance of the remittitur in this case, so that the children may receive the immunizations appropriate to their respective ages and as required by statute.

GOODMAN, J.*

We concur:

RUBIN, Acting P. J. GRIMES, J.

---

* Retired judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.