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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

E.H. et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Real Party in Interest.	B289469 (Los Angeles County Super. Ct. No. CK57697)

ORIGINAL PROCEEDINGS in mandate. Veronica McBeth, Judge. Petition denied. Temporary stay order vacated.

E.H. and J.H., in pro. per., for Defendants and Appellants.

No appearance for Respondent.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, William D. Thetford, Deputy County Counsel, for Plaintiff and Respondent.

E.H. (mother) and J.H. (father) challenge the April 9, 2018 juvenile court orders setting hearings under Welfare and Institutions Code sections 366.26 and 388[1] for their son S.H. and temporarily suspending father's visitation with the child. The petition is denied because petitioners have shown no error requiring reversal.

FACTUAL AND PROCEDURAL SUMMARY

The family's long dependency history has been documented before.[2] We will not review it here except as relevant to S.H., the parents' seventh child together.

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

[2] See *In re A.H.* (Oct. 17, 2018, No. B285546 [nonpub. opn.]); *In re A.H.* (Oct. 29, 2015, No. B261543 [nonpub. opn.]); *E.H.* v. *Superior Court* (Aug. 29, 2014, No. B255970 [nonpub. opn.]); *In re A.H.* (July 16, 2014, No. B251288 [nonpub. opn.]); *In re S.H.* (Dec. 11, 2013, Nos. B245942 & B248323 [nonpub. opns.]); *In re A.H.* (July 20, 2012, No. B236022 [nonpub. opn.]); *In re B.H.* (July 31, 2009, No. B211691 [nonpub. opn.]); *Jeffrey H. v. Superior Court* (June 13, 2006, No. B189786 [nonpub. opn.]).

S.H. was removed at birth in 2012 based on sustained allegations in his older siblings' case—that in 2011 father had hit his then-seven-year-old daughter A.H. in the face with his fist, giving her a black eye; mother had failed to protect her; and both parents had regularly given A.H. beer to drink. Reunification services as to S.H. were terminated and a section 366.26 hearing was set in 2014. Mother's writ petition challenging that order was denied in case No. B255970.

Ms. T. has cared for S.H. since 2014 and has been his legal guardian since 2016. With the exception of A.H., who was placed with Ms. T. in 2017, all of S.H.'s other siblings have been adopted, and jurisdiction over them has been terminated.

In September 2017, the juvenile court ordered weekly monitored visits between S.H. and father, who had lived out of state during a portion of the case. The social worker described the first visit as healthy, positive, and pleasant. However, in January 2018, Ms. T. reported that the visits with father had aggravated S.H.'s preexisting asthma and anxiety. Ms. T. also complained that the parents did not comply with the dietary restrictions for S.H.'s food allergies.

In February 2018, the court summarily denied petitioners' separate section 388 petitions, which requested reinstatement of reunification services and termination of the guardianship on the ground that Ms. T.'s estranged husband was not allowed to have contact with children under the supervision of the Department of Children and Family Services (DCFS). In March 2018, DCFS reported that Ms. T. was interested in adopting A.H. Ms. T. had an approved home study, but since she was separated from her husband, she needed to submit a spousal waiver in order to complete the adoption on her own.

Also in March 2018, the court referred the case to the Court Appointed Special Advocates (CASA), due to S.H.'s stress-related health and behavioral issues as reported by Ms. T. Ms. T. and DCFS filed section 388 petitions based on Ms. T.'s interest in adopting S.H. and the problems associated with his visitation with father—panic and asthma attacks, separation anxiety, difficulty falling asleep, having nightmares, aggression towards peers, and problems at school. The correlation between the visits and these problems was supported with the opinions of S.H.'s therapist Mendoza; pediatrician Dr. Szilagyi; emergency room physicians Ramirez and Schickedanz; and pediatric neurologist Dr. Zaytsev, all of whom attributed the exacerbated physical and mental problems reported by Ms. T. to S.H.'s visits with father.

At the hearing on April 9, 2018, S.H.'s attorney declared a conflict, and the court appointed a new attorney over the parents' objection. The court set Ms. T.'s and DCFS's 388 petitions for a hearing and temporarily suspended father's visitation, pending that hearing. The parents objected that they did not have copies of the petitions, and the court explained they would get copies once the matters were set for a hearing. Father argued that S.H.'s asthma was induced by allergies and had nothing to do with visitation. The court reordered an Evidence Code section 730 evaluation for father and S.H., which had originally been ordered in January 2018.

The court also set a section 366.26 hearing for S.H. and provided the parents with the statutory notice. Petitioners filed a timely notice of intent to file a writ petition and obtained an extension to file the actual petition. We issued an order to show cause and a temporary stay of the section 366.26 hearing.

DISCUSSION

The parties seek to expand the record and scope of our review. Therefore, we begin by clarifying what is at issue in this proceeding.

All court orders made at a hearing at which a section 366.26 hearing is set may be challenged by a petition for extraordinary writ. (§ 366.26, subd. (l)(1); *In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1021–1024; *In re Charmice G.* (1998) 66 Cal.App.4th 659, 671.) However, prior orders of the court are not subject to such a petition as they are independently appealable. (See *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 259 [dispositional and subsequent orders are directly appealable, except orders setting § 366.26 hearings].) Because of the interest in "finality and expedition of decisions concerning children," a parent may not challenge a prior appealable order that was not timely appealed. (*Dwayne P.*, at p. 259.) Hence, we decline to consider petitioners' challenge to orders made before April 9, 2018—specifically, to the ex-parte orders summarily denying their section 388 petitions in February 2018, as those orders are independently appealable. (See *In re Angel B.* (2002) 97 Cal.App.4th 454, 461.)[3]

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[3] We will not engage petitioners' conspiracy theories and strident characterizations of the dependency system as a "poor farm controlled by . . . whip crakers [*sic*] of the SEIU to retard poor babies for adoption to Hollywood pedophile . . . ," except to remind them that appellate review is limited to reasoned arguments supported by citations to the record and to legal authority. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

Furthermore, while orders made contemporaneously with the setting of the section 366.26 hearing are reviewable, petitioners are aggrieved only by orders affecting their own rights. (*In re K.C.* (2011) 52 Cal.4th 231, 236.) Contrary to petitioners' belief, the local agency, not the parents, normally represents the child's interests in a dependency case, unless there is a conflict of interest, in which case, the child is entitled to separate counsel to represent his or her best interests in court. (See *In re Cole C.* (2009) 174 Cal.App.4th 900, 910; *In re Mary C.* (1995) 41 Cal.App.4th 71, 75.) That is because the child's interests are independent of, and often in conflict with, those of the parents. (See *In re Marilyn H.* (1993) 5 Cal.4th 209, 309 [once reunification services are terminated, child's interest in permanency and stability takes priority over parent's interest in reunification].) Since petitioners cannot represent their child's interests in the dependency proceeding, we will not consider their challenge to the court's appointment of an attorney for S.H.

Finally, we decline as unnecessary DCFS's requests for judicial notice of subsequent orders continuing the hearings to August 2018 and for augmentation of the record with later-produced evidence of a spousal waiver. The general rule is that we review the correctness of orders at the time they are made and on the evidence before the court. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) While evidence mooting an issue may be considered (*In re A.S.* (2012) 205 Cal.App.4th 1332, 1339), the evidence offered by DCFS does not moot the issues raised by petitioners.

I

Petitioners challenge the setting of a section 366.26 hearing because they consider Ms. T. unfit to adopt S.H. and she had not filed a notarized spousal waiver at the time the hearing was set. They cite no authority that these concerns preclude the setting of a permanency hearing.

To the contrary, section 366.3, subdivision (c) provides: "If, following the establishment of a legal guardianship, the county welfare department becomes aware of changed circumstances that indicate adoption . . . may be an appropriate plan for the child, the department shall so notify the court. The court may . . . order that a hearing be held pursuant to Section 366.26 to determine whether adoption or continued legal guardianship is the most appropriate plan for the child." At the time when it sets a section 366.26 hearing, the court also orders the department to prepare "[a] preliminary assessment of the eligibility and commitment of any identified prospective adoptive parent or legal guardian, particularly the caretaker. . . . ." (§ 366.22(c)(1)(D).) Then at the section 366.26 hearing, the court must consider the department's assessment, as well as "other evidence that the parties may present," in order to determine the child's adoptability. (§ 366.26, subd. (c)(1).)

As these provisions make clear, whether Ms. T. is unfit to adopt S.H. and whether there is any legal impediment to adoption will be decided at the section 366.26 hearing. Petitioners' adoptability-related arguments are, therefore, premature.

II

Petitioners contend that their due process rights were violated because they had no prior notice that the court would set the section 366.26 and 388 hearings and had not been served with the petitions and supporting evidence beforehand.

Due process requirements in dependency cases focus on the right to notice and a hearing. (*In re Crystal J.* (1993) 12 Cal.App.4th 407, 412.) Petitioners have not been denied that right. California Rules of Court, rules 5.570(g) and 5.524 provide that when a petition is set for a hearing, it must be served along with the notice of hearing. At the hearing on April 9, 2018, petitioners received notice of the dates of the future section 388 and 366.26 hearings, along with the petitions and supporting evidence, and the juvenile court made it clear that they will have an opportunity to call and cross-examine witnesses at those hearings. (*Id.* at p. 413.)
At the April 9, 2018 hearing, the court made no substantive decision that implicated petitioners' due process rights.

To the extent father argues that the temporary suspension of his visitation with S.H. violates due process and is not supported by substantial evidence, he is mistaken. Since reunification services for the parents have long been terminated, father may be denied visitation with S.H. if it is detrimental to the child. (See § 366.21, subd. (h).) Terminating visitation pursuant to section 388 requires a finding of detriment. (*In re Manolito L.* (2001) 90 Cal.App.4th 753, 760.) On the other hand, the setting of a full hearing on a section 388 petition requires a prima facie showing of changed circumstances or new evidence and the best interests of the child. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 310.) Such a

showing means that if the evidence submitted in support is credited, it will sustain a favorable decision in the moving party's favor. (See *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719, fn. 6.) The showing may be made by "declarations or other attachments which demonstrate the showing the petitioner will make at a hearing of the change in circumstances or new evidence." (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

By setting the section 388 petition for a full hearing, the court found that there was a prima facie showing to hold a hearing on the issue whether visits with father were detrimental to S.H. It did not make a final decision on the merits and thus did not implicate father's due process rights to present evidence and cross-examine witnesses. Nor was that right violated by the temporary suspension of father's visits pending a full hearing since orders granting temporary relief pending a formal hearing may be made on an ex-parte basis and on a prima facie showing. (See, e.g., Cal. Rules of Court, rule 5.630.)

Father disagrees with the correlation Ms. T., and the health professionals whose opinions rely on her reporting, draw between S.H.'s asthma and allergies and father's visitation. He does not address many of the other symptoms Ms. T. has reported. The credibility of her reports, along with the health professionals' qualifications and conclusions, may be challenged at the formal hearing, which the court originally set within 30 days, as required.[4] (See Cal. Rules of Court, rule 5.570(f)(2).)

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[4] As of the date of filing of this opinion, we have received no notice of an order on the 388 petition. We have no information regarding the reasons for delay of the hearing on

DISPOSITION

The petition is denied. The stay on the section 366.26 hearing is lifted.

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MICON, J.*

We concur:

MANELLA, P. J. WILLHITE, J.

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the petition, but any subsequent continuances do not affect the validity of the orders at issue in this case.

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