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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

FRANCISCO M. and SUSANA G.,

Petitioners,

v.

THE SUPERIOR COURT OF SANTA
BARBARA COUNTY,

Respondent;

SANTA BARBARA COUNTY CHILD
WELFARE SERVICES,

Real Party in Interest.

2d Civil No. B244169
(Super. Ct. Nos. J1396000)
(Santa Barbara County)

Francisco M. (presumed father) and Susana G. (mother) seek extraordinary relief from a September 19, 2012 order denying reunification services and setting a permanency planning hearing for their son F.G. after the juvenile court found that F.G. suffered severe physical abuse while in their care. (Welf. & Inst. Code, §§ 300, subd. (e) 361.5, subd. (b)(5).)¹ We deny the petitions for extraordinary writ.

Factual and Procedural History

Eleven-month-old F.G. was detained on May 3, 2012, after Oxnard Police responded to a call that he was being physically abused at home. F.G. had cuts on the back of his head, bruises on the face, cheeks and jaw line, bite marks, "claw

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

marks" to the ear, and a burn on the right side of his knee. Father was arrested for being under the influence of methamphetamine. The detention report noted that the family was living in a room with a bare mattress on the floor, open beer cans, and holes in the wall.

On May 8, 2012, Ventura County Human Services Agency filed a dependency petition for failure to protect (§ 300, subd. (b)) and severe physical abuse (§ 300, subd. (e)). The petition stated that the parents had a history of substance abuse and domestic violence that included a February 8, 2012 incident in which father punched mother unconscious while she was holding F.G. After the incident, mother refused to follow the safety plan, moved to Lompoc, and F.G. was injured again.

Jurisdiction Hearing

Mother waived trial and father submitted on the jurisdiction report which included police reports, medical records, photos, and incident reports documenting F.G.'s severe physical abuse. The Ventura County Superior Court found F.G. to be a child described by section 300, subdivisions (b) and (e) and transferred the case to Santa Barbara County for disposition. (§375; Cal. Rules of Court., rule 5.610.)

Disposition Hearing

After the transfer, Santa Barbara County Child Welfare Services (CWS) submitted a disposition report recommending reunification services. The report, however, did not investigate "the circumstances leading to the removal of the child and advise the court whether there are circumstances that indicate that reunification is likely to be successful or unsuccessful and whether failure to order reunification is likely to be detrimental to the child." (§361.5, subd. (c); see Cont.Ed.Bar, (2012) Cal. Juvenile Dependency Practice §5.55, p. 375.)

In an August 22, 2012 addendum report, CWS recommended that mother and father not be provided services (§ 361.5, subd. (b)(5)) and the trial court calendar a section 366.26 hearing. The addendum report stated: "Due to the severity of the physical abuse upon the child, the parents' continued denial of the physical abuse despite the Juvenile Court's involvement, the parents' history of substance abuse,

the parents' history of domestic violence and initial denial of domestic violence between each other, and the father's inconsistent visitation with the child, it is believed that Family Reunification services are not likely to prevent reabuse or continued neglect of the child."

The report noted that mother was living with father and wanted to continue the relationship. F.G.'s prognosis was guarded and he "remains at risk for abuse, neglect, victimization, exploitation, or of developing more severe symptoms without intervention." F.G. had gross motor coordination problems and "appeared apathetic, inattentive, unspontaneous, detached," and unable to maintain eye contact.

At a September 19, 2012 contested hearing, a visitation case aide testified that F.G. was not bonded or attached to his parents and had a blank expression at visits. Evidence was received that father had missed supervised visits and drug tests, and never said that he would attend domestic violence counseling. The case worker testified that mother and father were in denial about physically abusing F.G. and have not "owned up to the domestic violence. . . ."

Citing section 361.5, subdivision (b)(5), the trial court denied services on the ground that F.G. had suffered severe physical abuse and it was unlikely that reunification services would prevent F.G.'s reabuse.

Discussion

Our review begins and ends with a determination whether there is any substantial evidence, contradicted or uncontradicted, that supports the trial court's order. (*In re Joshua H.* (1993) 13 Cal.App.4th 1718, 1728.) We do not reweigh the evidence or consider matters of credibility. (*In re E.H.* (2003) 108 Cal.App.4th 659, 669.)

Section 300, subdivision (e) provides in pertinent part that a child comes within the jurisdiction of the juvenile court where: "The child is under the age of five years and has suffered severe physical abuse by a parent, or by any other person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the child. For the purposes of this subdivision, 'severe

physical abuse' means any of the following: *any single act of abuse which causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement*, permanent physical disability, or death; . . . or more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness" (Emphasis added.)

Section 361.5, subdivision (b)(5) provides that reunification services need not be provided when the court finds by clear and convincing evidence "[t]hat the child was brought within the jurisdiction of the court under subdivision (e) of Section 300 because of the conduct of that parent or guardian." The parent need not have actual or constructive knowledge that the child in fact suffered severe physical abuse in order to fall within the statutory definition. (*In re E. H.*, *supra*, 108 Cal.App.4th at pp. 669-670; Cont.Ed.Bar , *supra*, Cal. Juvenile Dependency Practice, § 3.12, p. 173.)

The Petition

Father argues that the injuries alleged in the petition do not meet the legal definition of severe physical abuse. Father waived the issue by not challenging the petition at the detention or jurisdiction hearing. He is precluded from challenging the legal sufficiency of the petition for the first time on appeal. (*In re S.O.* (2002) 103 Cal.App.4th 453, 460.)

Evidence of Severe Physical Abuse

Father asserts that the physical abuse was not severe enough to potentially cause permanent disfigurement or disability within the meaning of section 300, subdivision (e). Even if bruises and scratches are not tantamount to broken bones or life threatening injuries, a third degree burn suffices.

In May 2012, mother told the police that she was "in a rush" and poured boiling water into F.G.'s bottle. Mother wedged the bottle between F.G.'s knees and the car seat. The bottle was so hot that caused third degree burns on the right side of his knee even though F.G. had jeans and a blanket on. Mother stated that F.G. "cried during the ride from Lompoc to Santa Barbara and she just assumed he didn't want to

be in the car seat. " When they arrived in Santa Barbara for a medical appointment, the burns were treated.

Father argues that the medical evaluation, conducted months later, reflects minor bruises, lumps, and scratches but no traumatic injuries or bone fractures or dislocations. A May 3, 2012 emergency room report states that F.G. had a "small approximately 1 x 1 cm old burn scar on the right thigh. . . ." The fact that the third degree burn was treated months earlier and left a scar supports the finding of severe physical abuse. A third degree burn is defined as the "total destruction of the skin and underlying tissue." (*Johnson v. Havener* (6th Cir. 1976) 534 F.2d 1232, 1233; Webster's Collegiate Dictionary (10th ed. 1999) p. 1226.) It is common knowledge that a serious burn, even when treated, can result in permanent scarring, i.e., a "permanent physical disfigurement" as defined by section 300, subdivision (e).

Mother waived trial at the jurisdiction hearing. Father submitted on the jurisdiction report and presented no evidence contesting the severe physical abuse allegation. It was tantamount to a plea of "no contest" and "admits all matters essential to the court's jurisdiction over the minor. Accordingly, by their knowing and voluntary acquiescence to the allegations of the petition, parents waived their right to challenge on appeal the legal applicability of section 330(e) to their conduct." [Citations.] (*In re Troy Z.* (1992) 3 Cal.4th 1170, 1181.) On the merits, the evidence shows, by mother's own admission, that F.G. suffered severe physical abuse (i.e., a third degree burn) while in her care.

Bypass of Services

Father argues that the order denying services must be reversed because the trial court did not find by clear and convincing evidence that F.G. suffered severe physical abuse "because of the conduct of that parent." (§361.5, subd. (b)(5).) The trial court stated: "I don't have to pick between the parents to say which particular injury or cause of injury; it's enough that they caused it or should have known it was being caused." This is a correct statement of the law. " '[C]onduct' as it is used in section 361.5, subdivision (b)(5) refers to the parent in the household who knew or

should have known of the abuse, whether or not that parent was the actual abuser.' [Citation.]" (*In re L.Z.* (2010) 188 Cal.App.4th 1285, 1292.) There is no question that R.G. suffered severe physical abuse.

Due Process

Mother argues that she was denied due process because she was led to believe she would receive services after the case was transferred to Santa Barbara County. The first disposition report filed by CWS was deficient because it failed to "advise the court whether there are circumstances that indicate that reunification is likely to be successful or unsuccessful and whether failure to order reunification is likely to be detrimental to the child." (§ 361.5, subd. (c).) Where "the department shows by clear and convincing evidence that the child falls under §300(e), the assumption is that services will be denied; to grant them, the court must find that [services] are likely to prevent reabuse and this finding must be supported by substantial evidence. [Citation.]" (Cont.Ed.Bar, *supra*, Cal. Juvenile Dependency Practic, §5.55, p. 376; see *Raymond C. v. Superior Court* (1997) 55 Cal.App.4th 159, 163-164.)

Mother was represented by counsel and knowingly and voluntarily waived trial at the jurisdiction hearing. There was no representation that mother would receive services nor has mother cited any authority that she has a due process right to services. "Other courts have considered - and rejected - due process challenges to section 361.5, subdivision (b). [Citations.]" (*In re Allison J.* (2010) 190 Cal.App.4th 1106, 1113; see *In re Joshua M.* (1998) 66 Cal.App.4th 458, 473 [section 361.5, subdivision (b) is "constitutional on its face" and comports with substantive due process].)

Mother and father intend to continue a relationship plagued by domestic violence and substance abuse. It is uncontroverted that F.G. suffered severe physical abuse while in their care and has been exposed to repeated physical abuse. The trial court did not err in denying services and setting the matter for a section 366.26 permanent placement hearing.

The petitions for extraordinary relief are denied.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Arthur A. Garcia, Judge
Superior Court County of Santa Barbara

Madeleine Nantze, for Petitioner.

Richard Martinez, for Petitioner.