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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re M.W. et al., Persons Coming Under
the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

L.D.,

Defendant and Appellant.

B268905

(Los Angeles County
Super. Ct. No. DK00922)

APPEAL from an order of the Superior Court of
Los Angeles County, Joshua D. Wayser, Judge. Affirmed.

William Hook, under appointment by the Court of Appeal,
for Defendant and Appellant.

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

INTRODUCTION

In this appeal, mother L.D. contends that the juvenile court abused its discretion and deprived her of due process when it denied her motion to continue the jurisdiction hearing on a subsequent petition. (Welf. & Inst. Code, §§ 342 & 352.)¹ We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The juvenile court declared mother's three children, M.W., C.D., and A.J., ages 12, 6, and 3 respectively, dependents of the court based on mother's history of violence during which she inflicted injuries on her male companion in front of the children and her failure to protect the children from her companion's drug abuse. (§ 300, subds. (a) [serious physical harm], (b) [failure to protect], (j) [abuse or neglect of sibling].) The court removed the children from mother's custody (§ 361, subd. (c)(1)). Mother's fourth child, J.J., became a dependent under subdivision (j) of section 300 when he was three months old but remained with mother. By May 2015, mother had regained custody of all of her children under the jurisdiction of the juvenile court and the care of the Department of Children and Family Services (the Department).

Three months later, in August 2015, the Department's Child Abuse Hotline received an anonymous call alleging that mother was hitting the children at least once a week with a blow dryer, her hand, and a belt. If the abuse left marks or bruises, mother kept the children in their bedroom. Additionally, mother

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

was seeing father Jason J. in violation of court orders.² The following day, an anonymous caller requested an evaluation for mother who was reportedly having a mental health crisis. Mother was yelling foul language, “‘acting crazy,’” and threatening to “‘kill everyone.’” The children were crying.

The social worker inspected the children for indications of physical abuse and found healing wounds on A.J.’s left and right shoulders, scrape marks on the right side of his face, corner of his eye, cheeks, nose, and right earlobe. The child was covered with what appeared to be makeup to hide wounds and bruises. Mother adamantly denied that there was makeup on A.J.’s face and explained that then five-year-old C.D. pushed 23-month-old A.J. off the older boy’s bicycle causing A.J. to fall onto the pavement. Mother falsely claimed that the family preservation social worker was at the house at the time. That social worker stated she did not see A.J. Mother stated she took A.J. to the doctor. A.J. is preverbal.

Three days later, the social worker found that A.J.’s entire left ear was severely injured and had “visible flesh” that “appeared to be bleeding at the top and scabbing at the bottom.” This time the child did not appear to have makeup on.

The Department’s report for the September 10, 2015 detention hearing related that a nurse practitioner at the Los Angeles County-USC Medical Center’s forensic clinic examined A.J. on August 31, 2015 and determined that the child’s injuries, which were on both sides of his face, “were suspicious and were not consistent with” mother’s account of the

² Neither father, Jason J. nor T.W., is a party to this appeal.

injuries' cause. The juvenile court ordered all four children detained from mother.

On September 10, 2015, the Department filed a subsequent petition (§ 342) alleging that A.J. had been "medically examined" and found to have numerous injuries to both sides of the child's face and "visible flesh" on the child's right ear lobe. These injuries were not consistent with the explanation of the cause given by mother, who had attempted to conceal the wounds. The petition then alleges that "Such injuries would not ordinarily occur except as the result of deliberate, unreasonable and neglectful acts by the mother who had care, custody and control of the child."

Mother changed her explanation for the cause of A.J.'s injuries. She stated that a crock pot full of water was sitting on the counter with its plug hanging over the side. A.J. and baby J.J. were in the play pen. C.D., who was outside playing with his sister, aunt and uncle, ran out of the gate. While mother was chasing him down the street, A.J. "hopped out [of] the play pen." When mother returned, the child had a burn on his face. Her relatives stated mother was unable to care for her children, was easily upset and angered, yelled, and needed counseling.

In its jurisdiction report, the Department opined that the children were at high risk of serious physical harm and it had "high concern" for the children's safety. Mother's credibility was in question. A.J.'s injuries were not consistent with mother's explanation and her story changed. Mother was deceptive and withheld critical information. Interviews with the relatives raised a "recurring concern" about mother's aggressive nature and inability to appropriately parent without being physical.

Attached to the jurisdiction report was the August 31, 2015 medical report of the nurse practitioner at the Los Angeles County USC Medical Center, first related in the Department's detention report. The nurse found that A.J. had hypopigmented scarring of both sides of the face and ears. According to the medical records, A.J. had evidence of past neglect and emotional abuse dating to 2013. A.J.'s facial injuries, covering a large part of the child's face and ears, were too old to determine their causes, and should have been seen by a medical provider when they occurred. The fact that the injuries were located on both sides of the child's face made the nurse suspicious about mother's explanation. Usually when a child falls, injury occurs to one side of the body. The nurse also noted that mother claimed to have taken the child to his doctor, who refused to see them because mother's medical insurance had expired. Mother also claimed the doctor's office told her to use an over-the-counter antibiotic ointment on the facial wounds.

As soon as appearances were made at the jurisdiction hearing on the subsequent petition, mother's attorney requested a continuance. Counsel argued that the Department failed to give notice that it intended to rely on section 355.1 because the petition did not cite the statute. Section 355.1 shifts the burden of producing evidence to mother once the Department presents evidence from a medical expert. Mother wanted time to retain an expert to carry her burden to rebut the presumption. The juvenile court denied mother's continuance request as the petition indicated the Department's reliance on the presumption and had been filed two months earlier. Mother lodged her objection on the grounds of due process.

The juvenile court sustained all counts in the subsequent petition (§ 342). Mother filed her appeal.

CONTENTIONS

Mother contends the denial of a continuance was an abuse of discretion and deprived her of due process.

DISCUSSION

Section 352 gives the court discretion to continue a hearing at the parent's request, for good cause only, for the time shown to be necessary, and provided the continuance is not contrary to the children's interest. Requests must be in writing and filed at least two days before the hearing sought to be continued. (§ 352, subd. (a);³ Cal. Rules of Court, rule 5.550(a)(1), (2) & (4).)

Continuances are discouraged in dependency. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 179.) We reverse orders denying a request for a continuance only on a showing of abuse of discretion. (*Id.* at p. 180.) Discretion is abused when the decision

³ Section 352 provides in pertinent part, "Upon request of counsel for the parent, guardian, minor, or petitioner, the court *may* continue any hearing under this chapter beyond the time limit within which the hearing is otherwise required to be held, *provided that* no continuance shall be granted that is contrary to the interest of the minor. In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements. [¶] Continuances shall be granted *only upon a showing of good cause and only for that period of time shown to be necessary by the evidence presented at the hearing on the motion for the continuance.* . . . [¶] In order to obtain a motion for a continuance of the hearing, written notice shall be filed at least two court days prior to the date set for hearing" (Italics added.)

is arbitrary, capricious, or patently absurd and results in a manifest miscarriage of justice. (*Ibid.*)

Mother contends the juvenile court abused its discretion in denying her attorney's request to continue the jurisdiction hearing, made orally after the hearing had commenced. She argues the Department did not give her notice of its intention to proceed under section 355.1 before the hearing and she needed time to obtain an expert to rebut the presumption under that statute.

Section 355.1 provides that "[w]here the court finds, based upon competent professional evidence, that an injury, injuries, or detrimental condition sustained by a minor is of a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, the guardian, or other person who has the care or custody of the minor, that finding shall be prima facie evidence that the minor is a person described by subdivision (a), (b), or (d) of Section 300." (*Id.*, subd. (a).)

The presumption of section 355.1, subdivision (a) is one affecting the burden of producing evidence. (*Id.*, subd. (c).) If the Department as petitioner establishes a prima facie case under section 355.1, then the burden " 'shifts to the parents the obligation of raising an issue *as to the actual cause of the injury* or the fitness of the home.' [Citation.] 'The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.'

(Evid. Code, § 604.)” (*In re D.P.* (2014) 225 Cal.App.4th 898, 903-904.)

Adequate notice that the Department intends to rely on the section 355.1 presumption is given when the petition invokes the statute by borrowing from its language in the charging allegations, the parent is represented by counsel at all stages of the proceeding, and was informed that the evidence on which the Department intended to rely included the findings of medical providers that the child’s trauma was nonaccidental. (*In re D.P.*, *supra*, 225 Cal.App.4th at p. 904, citing Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2013) § 2.110[6], p. 2-287 [requisite notice “can be accomplished by including the applicable language of Welf. & Inst. Code § 355.1 in the petition . . .”].) We explained in *In re D.P.* that the petition need not specifically cite to section 355.1 to give notice of the Department’s reliance on the presumption, mother’s assertion to the contrary notwithstanding. (*In re D.P.*, at p. 904, rejecting *In re A.S.* (2011) 202 Cal.App.4th 237, 243.)

Here, mother was given sufficient notice. The subsequent petition used the wording of section 355.1 in its charging allegations, namely that A.J.’s “injuries would not ordinarily occur except as the result of deliberate, unreasonable and neglectful acts by the mother who had care, custody and control of the child.” Mother was represented by counsel throughout. And, the Department’s detention and jurisdiction reports both include the opinion of the nurse practitioner that A.J.’s injuries were nonaccidental. The subsequent petition was filed two months before the hearing. Mother had adequate notice. (*In re D.P.*, *supra*, 225 Cal.App.4th at p. 904.)

More important, mother's eleventh-hour, oral request failed to satisfy the requirements of section 352. A continuance is permitted only if it is not "contrary to the interest of the minor." (§ 352, subd. (a).) When considering the children's interests, the court must give substantial weight to their need for stability and prompt resolution of custody status, along with the damage to children of prolonged temporary placements. (*Ibid.*) When she requested the continuance, mother made no mention of the best interest of the children. On appeal, she argues that an expert "could" clear her "of any wrongdoing" and "illuminate the nature of the family's issue[s]" to better tailor reunification services to their needs. Yet, the juvenile court had other evidence apart from the nurse practitioner's opinion, to support the subsequent petition, such as the relatives' statements and mother's use of physical methods to discipline the children. Also, the juvenile court could reasonably have concluded, given these children had been dependents for over two years, during which time they had been in and out of mother's custody, that prompt resolution of the case to provide them with a stable environment and meet their needs could not be achieved by further delaying the adjudication of the subsequent petition.

Likewise, section 352 only authorizes continuances "for that period of time shown to be necessary by the evidence presented at the hearing on the motion for the continuance." (§ 352, subd. (a).) Mother's oral motion did not indicate the length of time she needed. Meanwhile, the petition, whose charging allegations gave mother notice of the Department intent to rely in part on the section 355.1 presumption, and the detention report, describing the nurse practitioner's findings, were filed on September 10, 2015, two months and one day before

the jurisdiction hearing. Mother had sufficient time to subpoena documents from, or to call to the witness stand, the doctor to whom she brought A.J., or the nurse practitioner who examined the child on August 31, 2015, to explore whether the injuries were consistent with mother's crock-pot story. "Continuances shall be granted only upon a showing of good cause." (§ 352, subd. (a); Cal. Rules of Court, rule 5.550(a)(2).) Mother made no showing of good cause. For these reasons, the juvenile court acted well within its discretion when it denied mother's continuance request.

Mother next argues that the trial court's ruling denying her a continuance deprived her of due process. But mother had procedural due process as she had ample notice and an opportunity to be heard. (*In re Matthew P.* (1999) 71 Cal.App.4th 841, 851 [in dependency, "due process focuses on the right to notice and the right to be heard"].) Mother does not argue that she was denied substantive due process. The dependency scheme provides parents with substantive due process and fundamental fairness by safeguarding their rights. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307-308.)

Mother's due process contention is really a prejudice argument. She asserts that "the court's *error* in this case was a 'structural *error*' " requiring automatic reversal because the error deprived her of "her fundamental right to be 'heard in a meaningful manner.'" (Italics added.) She argues that the continuance "*could be* viewed as her best opportunity to reunify with the children" because expert testimony "*might* result in the dismissal of the petition." (Italics added.) Yet, as the juvenile court did not abuse its discretion in denying the continuance request, it did not commit error or deprive mother of due process.

Even had a continuance enabled mother's attorney to retain an expert whose testimony did result in the dismissal of the subsequent petition, the result here would be the same. The children would remain dependents of the court under subdivisions (a), (b), and (j) section 300 in the original petition.

DISPOSITION

The order of the juvenile court is affirmed.

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ALDRICH, Acting P. J.

We concur:

LAVIN, J.

GOSWAMI, J.*

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