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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re L.L., et al., Persons Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.L., Defendant and Appellant.	F059133 (Super. Ct. No. 08CEJ300033) **OPINION**

APPEAL from an order of the Superior Court of Fresno County. Mark W. Snauffer and John F. Vogt, Judges; Jamileh L. Schwartzbart, Commissioner.

Donna B. Kaiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Kevin Briggs, County Counsel, and William G. Smith, Deputy County Counsel, for Plaintiff and Respondent.

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M.L. (father) appeals from an order terminating parental rights (Welf. & Inst. Code, § 366.26)[1] to his son L. and daughter M., whose mother is E.S. (mother). Dependency proceedings over the children were initiated when mother's three-year-old daughter, Erianna B., died as a result of multiple blunt force trauma. This led the juvenile court to exercise its dependency jurisdiction over the children (§ 300, subds. (a), (b) & (f)), remove them from parental custody, and deny mother and father reunification services (§ 361.5, subds. (b)(4) & (6)). The court in turn set a section 366.26 hearing to select and implement a permanent plan for the children. At that hearing, mother and father submitted on the recommendation to terminate their parental rights and the court selected adoption as the children's permanent plan.

Despite having been served a form notice of intent to file a writ petition, father failed to challenge the court's setting order by way of a petition to this court for extraordinary writ review. In this appeal, father does not raise any issues with respect to the section 366.26 hearing. Instead, he attacks the court's jurisdictional findings, an interim order suspending visitation, and an order granting de facto parent status to the children's foster mother, claiming he may do so because his attorney had a conflict of interest that he did not waive both at the dispositional hearing and at the section 366.26 hearing. Father further joins in arguments raised in mother's appeal which pertain to orders made at or before the dispositional hearing. (*In re L.L.* (F059134).) Finding no actual conflict of interest, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2008, father and mother, who were not married, were living together with their two children, 18-month-old son L.L. and two-month-old daughter M.L. Father's aunt, Charlotte, also lived with them. Mother had a three-year-old daughter,

[1] All statutory references are to the Welfare and Institutions Code unless otherwise stated.

Erianna, whose father was J.B. Erianna had neurofibromatosis, Noonan's Syndrome, and autism. She was nonverbal and communicated her needs by pointing. When she was three months old she was diagnosed with a seizure disorder and prescribed medication. She eventually outgrew the condition and no longer used medication to treat her seizures. Erianna primarily lived with her paternal grandmother, Virginia B. According to mother, Charlotte was not with Erianna that often.

According to Virginia, on Sunday, January 20, 2008, she took Erianna to father and mother's house so they could watch her because Virginia was going out of town. On Wednesday, January 23, mother called Virginia and said Erianna had several minor bruises on her stomach and some unexplained injuries elsewhere on her body. That same day, Virginia took Erianna and mother to see a doctor, who diagnosed Erianna with impetigo due to an abrasion on her chin. The doctor noted the presence of bruises on her stomach, which Virginia attributed to playing on a swing. Virginia subsequently returned Erianna to mother's care.

Erianna stayed with mother and father until January 25, 2008, when an ambulance was called to their apartment because mother thought Erianna was having a seizure. Erianna was transported to Children's Hospital Central California (CHCC). A social worker with the Department of Children and Family Services (Department) received a crisis referral regarding allegations of physical abuse and general neglect of Erianna Erianna was admitted to CHCC with a severe closed head injury; a CT scan showed significant cerebral edema and subarachnoid hemorrhage. She was in the intensive care unit on life support. She had bruises of varying shapes and colors on her abdomen, back, legs, face and arms. She had an abrasion on her chin, an adult-sized bite mark on her elbow and a smaller bite on her back, and a red circular mark inside her left knee. There was swelling to her forehead and head. Her brain was swelling, she had almost no brain activity, and she was not expected to survive. Erianna died on January 27, 2008.

Dr. Don Fields, CHCC's child advocacy physician, told a social worker that Erianna died from the head trauma she suffered and her medical conditions did not contribute to her death. While Noonan's Syndrome can cause a bleeding disorder and easy bruising, the bruises on her body were not caused by the syndrome, as they were too numerous to measure. Bruises covered her entire body; they were in all different sizes, shapes and colors, and in various stages of healing. Moreover, according to a geneticist Dr. Fields spoke with, her current bruises could not have been related to her Noonan's Syndrome because she did not have a history of bruising. She also had burn marks on her face, adult and child-size bite marks on her elbow and back, and a "loop mark" bruise on her knee consistent with extension cords.

Father claimed Erianna sustained the bruises when she fell in the bathtub. Father said when he left the bathroom, Erianna was standing up in the bathtub, but when he returned, she was lying face down in the water. Dr. Fields, however, said there was no evidence she had been wet or had symptoms of drowning. It appeared to Dr. Fields that she simply had been beaten, and more than likely she was beaten on more than one occasion.

According to Dr. Kathleen Murphy, a neurosurgeon at CHCC, Erianna suffered a severe head injury. She believed Erianna was quite likely the victim of non-accidental trauma given the multiple bruises all over her body, the few abrasions on her chin, the severe closed head injury with subarachnoid hemorrhage, and the cerebral edema. None of these injuries had been explained by any version of documented history. Dr. Murphy noted that while Erianna had a history of neurofibromatosis, autism and Noonan's Syndrome, none of these could explain any of Erianna's "current, severe, [and] ultimately fatal injuries."

During an autopsy on Erianna's body, the pathologist found blunt force injuries to the head, chest/abdomen, and arms/legs. The head injuries included multiple abrasions and bruising of the face and scalp region, diffuse cerebral edema with recent subdural

hematoma and herniation in the left hippocampal region, hemorrhage on the outside of the skull in the central lower back of the head, and two areas of hemorrhage of the reflected scalp. The chest/abdomen injuries included contusion of the front of the stomach and the mesentery to the small intestine, circular injury over the right side of the abdomen which was possibly a healing abrasion, circular hemorrhage on the right flank, ovoid hemorrhage of the muscles of the left anterior chest, and subcutaneous hemorrhage of the upper abdominal wall. Injuries to the arms and legs included hemorrhages over the right knee, right shin, and of the soft tissue and skin of the left forearm. The coroner ruled Erianna's death a homicide caused by multiple blunt force injuries with complications that were sustained at another's hands at an unknown date, time and place.

The Dependency Petition

On January 29, 2008, the Fresno County Department of Children and Family Services (Department) filed a dependency petition which alleged the children came within the meaning of section 300, subdivisions (a), (b) and (f). With respect to subdivision (a), the petition alleged that Erianna died after receiving severe head trauma and numerous bruises and bite marks which were inflicted non-accidentally and the children were at substantial risk of suffering serious physical harm inflicted by: (1) their mother, as she caused fatal physical injuries to Erianna and had no reasonable explanation as to how Erianna sustained her injuries; and (2) their father, as he caused fatal injuries to Erianna, and had no reasonable explanation as to how Erianna sustained her injuries.

With respect to section 300, subdivision (b), the petition alleged: (1) the children were at substantial risk of suffering physical harm or illness in that mother failed to protect Erianna from receiving fatal physical injuries caused by father, and she reasonably should have known of Erianna's ongoing physical abuse; (2) the children were at substantial risk of suffering physical harm or illness in that father failed to protect Erianna from receiving fatal physical injuries caused by mother, and he reasonably

should have known of Erianna's ongoing physical abuse; and (3) mother and father failed to provide adequate supervision and protection for the children as they exposed them to an unsafe environment of ongoing domestic violence, which included pushing each other and verbal aggression and warranted police intervention on at least four occasions. The subdivision (b) allegations also included two allegations that mother's and father's substance abuse problems negatively affected their ability to provide regular care for the children.

Finally, with respect to section 300, subdivision (f), the petition alleged: (1) Erianna died because mother failed to protect her from being severely physically abused by father and she reasonably should have known that he was abusing Erianna, as she had numerous injuries in various stages of healing; (2) mother caused Erianna's death by inflicting severe physical abuse, as Erianna suffered non-accidental fatal injuries while in mother's care and custody; and (3) father caused Erianna's death through severe physical abuse, as Erianna suffered non-accidental fatal injuries while in father's care and custody.

At a January 29, 2008 team decision meeting attended by the parents, the children's paternal grandmother Deanna M., two of the children's paternal aunts, and two of the children's paternal cousins, one of whom was C.T., placement options for the children were discussed and the parents identified one of the paternal aunts and the two paternal cousins, including C.T., as relatives they wanted assessed for placement.

At the January 30, 2008 detention hearing, the court found father to be the children's presumed father, ordered the children removed from parental custody and temporarily placed them under the Department's care and custody. Reasonable, supervised visitation was ordered for both parents, with visits between the parents and L. occurring at least twice per week. Father's court-appointed attorney requested that several relatives be assessed for placement, including C.T.

On January 31, 2008, both mother and father were arrested for murder and cruel and inhumane treatment, but mother was released from jail on February 4, 2008. Father, however, was charged with murder, and remained incarcerated until October 2008, when the murder charge was dropped.

During a February 20, 2008 hearing, at which a contested jurisdictional hearing was set, the children's attorney requested the parents' visits with the children be suspended temporarily pending disposition given the severity of the charges, but he did not have any evidence of detriment to present. The court left the visitation order intact, with the exception of ordering once a week visits for any incarcerated parent, stating that if the Department or children's attorney wanted to change the order before the next hearing, an ex parte application could be submitted.

In March 2008, the children's attorney submitted a JV-180 petition to suspend visitation pending the dispositional hearing. After reviewing a letter from Dr. Fields, a therapist who supervised mother's visits, and hearing from a social worker who supervised the only visit father had with the children, the juvenile court suspended visitation on an interim basis and set a contested hearing on the JV-180 petition, to be held at the same time as the jurisdictional hearing.

Father's attorney was relieved from his appointment on May 20, 2008, and a new attorney, Deloise Tritt, was appointed to represent him on May 28, 2008. In May 2008, the Department began weekly visits between the children and their distant paternal cousin, C.T, who, along with M.Y. (collectively the Y.'s)[2], were licensed Fresno County foster parents, to see if a plan could be achieved for relative placement. In July 2008, the Y.'s home was approved for placement. By October 2008, the Department supported a transition of the children to relative placement, but the children's therapist was concerned

[2] C.T. and M.Y. eventually married. They will be referred to throughout the remainder of this opinion as the Y.'s.

about moving them, as the foster parent reported L. exhibited aggressive behavior after visits with his relatives.

At a November 18, 2008 hearing, the juvenile court granted a request by the children's foster mother for de facto parent status. The request was not contested and none of the parties objected to it.[3] At that hearing, a Department social worker stated the Department was in the process of attempting a transition plan to have the children placed with relatives, and the Department's attorney requested the court issue an order giving the Department discretion for relative placement. The de facto parent's attorney objected to the Department's transition plan, however, based on a concern by the children's therapist that moving them would be detrimental. The children's attorney also objected to moving the children to relatives based on the therapist's opinion. While mother's attorney submitted on the issue, father's attorney stated he wished to have the children placed with a relative. The Department thereafter withdrew the request, asserting it was an issue for disposition.

The Baby's Dependency Petition

In November 2008, mother had a baby, L.S. (baby). Although mother did not know who the baby's father was and identified both father and another man, J.J., as potential fathers, DNA testing ultimately revealed that J.J. is the baby's biological father. The Department initiated dependency proceedings over the baby on December 1, 2008. The first amended petition alleged the baby came within dependency court jurisdiction under (1) section 300, subdivision (f), as on or about January 27, 2008, Erianna died because mother failed to protect her from being severely physically abused by father and

[3] At a December 9, 2008 hearing, the Department's attorney pointed out that the granting of de facto parent status was premature as the jurisdictional hearing had not yet been held. Rather than withdrawing the grant of de facto parent status, the juvenile court, without objection from any of the parties, ordered that the de facto parent not participate in the proceedings until at least disposition, although she could be present during them.

mother reasonably should have known that father was abusing Erianna, as she had numerous injuries in various stages of healing, and (2) section 300, subdivision (j), based on allegations that mother had neglected and abused Erianna and the children, and had failed to address the issues that led to dependency jurisdiction over them. On November 26, 2008, the baby was placed with the Y.'s, who were being considered for placement of the children.

The Jurisdictional Hearing on the Children's Petition

The contested jurisdictional hearing on the children's petition began on January 21, 2009. The Department submitted on four Department reports, the reporter's transcript of the March 12, 2008 hearing regarding the interim order suspending visitation, and a January 20, 2009 letter from the children's therapist regarding her recommendations on increasing visitation with the Y.'s. Testimony was taken on January 22, with mother testifying on her own behalf, and father's mother, Deanna M., and Deanna's ex-husband, Michael G., testifying on father's behalf. Closing arguments were held on January 23, and the court's decision was announced on January 26.

The court found by a preponderance of the evidence that: (1) from January 20, 2008 through January 25, 2008, Erianna was in the care of father and mother, with the exception of when she was taken to the clinic on Wednesday, January 23, and that on January 25, from approximately 9:00 a.m. to 11:30 a.m., father was the only adult supervising Erianna; and (2) Erianna sustained blunt force trauma between the January 23 medical visit and when the ambulance was called on January 25. In reaching this finding, the court stated the medical evidence clearly showed that something devastating occurred after the January 23 medical visit, since all of the health care providers who attended Erianna were of the opinion that her injuries and death were the product of external blunt force trauma to the head, including the CHCC discharge summary, the autopsy, and Dr. Field's and Dr. Huffer's opinions, and mother and Deanna, who had seen Erianna

during the week of her death, had also testified they did not observe bruising to her head before January 23, which bruising was obvious from the autopsy pictures.

The Disposition Hearing in the Children's Case

In the report prepared for the dispositional hearing, the Department stated that the after October 2008, it had begun working with the children's therapist, their care provider, and the Y.'s, to address the issues surrounding a possible change of placement. In January 2009, L.'s therapist recommended that if a transition were to occur, visits between the Y.'s and L. should increase in frequency. As of February 2009, the Department recommended the Y.'s continue to participate in unsupervised visits with the children and requested discretion for liberal visits. It was not, however, recommending placement with the Y.'s at that time. The Department noted that the children's current care provider was willing to provide a permanent plan of adoption for the children should the parents be unable to reunify and the Department's concurrent plan of adoption by the Y.'s could not be achieved. The Department recommended that mother and father both be denied reunification services pursuant to section 361.5, subdivisions (b)(4) and (b)(6).

On April 28, 2009, a letter from the Y.'s was filed, in which they stated: they had been a licensed foster care home for a year and a half; once it came to their attention they had family in the system they immediately sought relative placement; they and father were "long distance relatives" and were not a close family; the first time C. saw mother was in court; neither mother nor father knew the Y.'s address or home number; the Y.'s planned to do whatever was necessary to keep the children from harm and danger and provide a safe and loving environment; they wanted to keep the siblings together, so they would know their baby sister for whom they were currently caring; they wanted to teach the children about their African-American culture; and they had been visiting the children for a little over a year on a weekly basis and the children had bonded with them.

In April 2009, the Department submitted to the juvenile court a JV-180 request to grant it discretion for relative placement with the Y.'s and allow it to transition the

children to the Y.'s home. The Department requested the JV-180 be heard at the dispositional hearing. Father's attorney stated he concurred in the request and supported the JV-180, but father still wanted to contest the recommendation in the disposition report. Mother's attorney also stated she supported the JV-180, as did the children's attorney. The de facto parent's attorney, however, was opposed to the JV-180.

Father filed a statement of contested issues for the dispositional hearing, which included assertions that there was insufficient evidence for the court to have found father caused Erianna's death, reunification services for father were necessary and appropriate for the children and in their best interests, it would be detrimental to the children not to provide him reunification services, and it would be in the children's best interest to remove them from the foster parent's home and place them with the Y.'s, where they would benefit from and have the advantages of their extended family and cultural support within the African-American community.

At the June 9, 2009 dispositional hearing for the children, the juvenile court stated that it had met with counsel and the de facto parent in chambers to discuss the possible resolution of the case by stipulation. Since time for the morning session had been exhausted, the court directed the parties to continue to meet and confer, and asked them to return at 2:30 p.m., when mother's attorney, Kenneth Carrington, stated he would be available to return. The court ordered the Y.'s, who were witnesses, to return in the afternoon.

When the court went on the record at the afternoon session, Carrington was not present. Therefore, the court asked father's attorney, Deloise Tritt, to appear on his behalf, which she agreed to do, stating it was a special appearance. The court explained to mother, who was present, that Carrington had communicated earlier in the afternoon his inability to be present that afternoon and asked her for purposes of the proceedings whether she would agree to have Tritt specially appear for Carrington and on her behalf. Mother said "Yes."

The Department's attorney then stated that he believed the parties were able to reach a settlement agreement, which mother and father had already agreed to "that with the overall agreement as to the placement of the children that they're not going to be contesting the disposition part of this case." The Department's attorney explained the agreement: the court would grant the JV-180 giving the Department discretion to place the children with the Y.'s and authorize discretion to begin liberal visits, and the Department would implement a detailed five-month transition plan to transition the children from the de facto parent to the Y.'s. By stipulation, the parties would agree to waive time for the normal setting of a section 366.26 hearing and agree it could be set sometime in November. Finally, the de facto parent would be given visitation rights after the transition period until adoption took place, and there would be a post-adoption visitation agreement. The de facto parent's attorney stated that all the parties had agreed to this, and specifically the Y.'s were in agreement with the post-adoption visitation order.

The court then stated that the Y.'s were unrepresented in the proceedings and it became clear during the court's informal discussions that Tritt had become conversant with them personally and acquainted with the nature and extent of their participation in this matter, but they did not discuss the specifics of her being able to officially represent them. The court asked Tritt if that agreement would be forthcoming. Tritt responded that it would, that she had discussed the necessity for a conflict waiver with father, who agreed to sign one, and she had discussed the potential of representing the Y.'s as de facto parents before the court, and they wanted her to represent them. Tritt stated she would need to be appointed if she was going to be representing the Y.'s to take care of the formalities.

The court asked father directly whether he understood what the court had been discussing with Tritt. Father said "Yes, your Honor." Father also agreed that Tritt could continue to represent him and simultaneously represent the Y.'s. The court also asked

mother whether she understood, and mother said "Yes." The court asked mother if she objected to Tritt representing the Y.'s, and mother said "No." The court asked whether anyone objected to Tritt representing the Y.'s; both the de facto parent's attorney and the Department's attorney said "No." The court then accepted the oral representation of the waiver of conflict, "the potential conflict of interest by [father]" and appointed Tritt to represent the Y.'s interests in the case.

The court asked the Department's attorney whether there was anything to add to the agreement; he responded "No." The court asked the children's attorney whether he objected; he responded "No objection, your Honor." When the court asked the de facto parent's attorney whether he objected, he asked for clarification of something on the minute order, but then stated he did not object. Carrington then appeared in the proceedings. The court stated Carrington was now present and asked whether he objected on mother's behalf. He responded, "No, your Honor, we'll submit it." Tritt submitted on behalf of father. The court then accepted the parties' stipulation with regard to both the dispositional hearing and the JV-180 request.

The court found that mother and father had made minimal progress in alleviating or mitigating the causes necessitating placement, the children were persons described within section 300, subdivisions (a), (b) and (f), and made them dependents. The court ordered that reunification services not be provided to either mother or father pursuant to section 361.5, subdivisions (b)(4) and (b)(6). The court set a section 366.26 hearing for November 24, 2009. The court also granted the JV-180 petition.

The baby's jurisdictional hearing was held on May 6, 2009, and the court found the amended petition's allegations true. On August 26, 2009, Tritt appeared on the Y.'s behalf at a dispositional hearing for the baby. Mother submitted on the report and recommendation of no services. Tritt requested the Y.'s be given de facto parent status, which the court granted.

On September 18, 2009, Tritt petitioned for an accelerated move of the children to the Y.'s home, but the petition was withdrawn on October 27, 2009 because the placement of the children was to be completed that day.

The Section 366.26 Hearing

At the section 366.26 hearing for the children and the baby, Tritt, who also appeared for the Y.'s, told the court there were conflict waivers in the case. Both mother and father submitted on the recommendation to terminate their parental rights, which the court ordered. The court selected adoption as the permanent plan for the children and the baby. The Y.'s did not agree to post-adoption visitation for either father or mother.

DISCUSSION

Father appeals from the section 366.26 hearing order terminating his parental rights. The issues he raises on appeal, however, pertain only to orders made at or before the June 2009 dispositional hearing. Specifically, he attempts to challenge the suspension of visitation in March 2008, the grant of de facto parent status to the children's foster mother in November 2008, and the jurisdictional findings. Despite being mailed a notice of intent to file a writ petition, father did not petition for writ review from the order setting the section 366.26 hearing, which is the exclusively prescribed vehicle for appellate review of all orders issued at that hearing. (*In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1021-1023; § 366.26, subd. (*l*).) Failure to seek writ review forecloses father from seeking relief from any order made at or before the June 2009 dispositional hearing. (*In re Tabitha W.* (2006) 143 Cal.App.4th 811, 815-816; see also *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151 [pursuant to the waiver rule "an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order on an appeal from later appealable order . . . "].)

Father acknowledges that normally he would be precluded from challenging orders made at the dispositional hearing. Nevertheless, he asserts we should find that he did not waive his challenges because Tritt had an actual conflict of interest that the record

fails to show he effectively waived and which deprived him of counsel and due process, citing *In re Janee J.* (1999) 74 Cal.App.4th 198 (*Janee J.*). In *Janee J.*, the court held that due process precludes application of the waiver rule where a defect so fundamentally undermined the statutory scheme that the parent was denied its protections as a whole, such as where the parent lacked notice of the right to petition for review of the order setting the section 366.26 hearing. (*Janee J.*, *supra*, 74 Cal.App.4th at pp. 208-209.) In addition, "to fall outside the waiver rule, defects must go beyond mere errors that might have been held reversible had they been properly and timely reviewed. To allow an exception for mere 'reversible error' of that sort would abrogate the review scheme [citations] and turn the question of waiver into a review on the merits." (*Id.* at p. 209.)

Cases refusing to apply the waiver rule illustrate the circumstances in which due process requires this result. In *In re S.D.* (2002) 99 Cal.App.4th 1068, the appellate court refused to apply the waiver rule where the mother's attorney had conceded jurisdiction based on an erroneous understanding of the law as "the error here was entirely legal, and quite fundamental. . . . [T]he parent is hardly in a position to recognize, and independently protest, her attorney's failure to properly analyze the applicable law." (*Id.* at pp. 1074-1075, 1077-1078, 1080.) The court in *In re M.F.* (2008) 161 Cal.App.4th 673, vacated an order terminating parental rights because the trial court failed to appoint a guardian ad litem for the mother, herself a minor, until after services were terminated and the hearing on termination of parental rights was pending. Although the mother had not filed a writ petition after her reunification services were terminated, *In re M.F.* declined to apply the waiver rule because the "failure to appoint a guardian ad litem in an appropriate case goes to the very ability of the parent to meaningfully participate in the proceedings. For the same reasons that [the mother] needed a guardian ad litem, she was 'hardly in a position to recognize . . . and independently protest' the failure to appoint her one." (*Id.* at p. 682.)

Here, father contends that we should decline to apply the waiver rule because Tritt had an actual conflict of interest at the dispositional hearing that "undermined the fundamental fairness of the entire dependency proceedings." He asserts the conflict arose when Tritt was appointed to represent the Y.'s. Rule 3-310 of the Rules of Professional Conduct provides that an attorney cannot represent more than one client in a matter in which the interests of the clients actually or potentially conflict without the informed written consent of each client. Simultaneous representation of more than one client when their interests actually conflict is the "most egregious example" of a violation of this rule. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282-283.) Here, father claims Tritt had an actual conflict that excused his failure to petition for writ review from the order setting the section 366.26 hearing.

On review of the record, however, we conclude that by the time Tritt was appointed to represent the Y.'s no actual conflict was present. While, as father points out, he contested jurisdiction, objected to the order suspending visitation, and initially objected to the Department's recommendation that he not receive reunification services by setting the matter for a contested hearing, when the dispositional hearing finally was held, the parties worked out a settlement whereby father and mother agreed not to contest disposition and the Department and the de facto parent agreed the children would be placed with the Y.'s. The settlement discussions and agreement took place while father was Tritt's sole client in this case. When the juvenile court appointed Tritt to represent the Y.'s, with father's agreement and without objection from any other party, father and the Y.'s shared a common goal, i.e. to have the children placed with the Y.'s with a view toward their adopting them.

When jointly represented clients share common goals in their simultaneous representation, their interests are not actually (currently) in conflict. Put another way, there is no adversity where two parties have "sought to accomplish a common end result and engaged the services of a single attorney to implement their joint plan." (*Moxley v.*

Robertson (1959) 169 Cal.App.2d 72, 75 [attorney's representation of both seller and buyer of equipment was proper, where they had common purpose of wresting possession of equipment from defendant]; accord, *Buehler v. Sbardellati* (1995) 34 Cal.App.4th 1527, 1540 ["an attorney's representation of partners pursuing a common end result does not constitute a conflict of interest"]; *Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 899 [attorney properly represented both divorcing spouses, where the couple shared a common interest in opposing the county's efforts to impose child support obligation on the husband].) Here, the interests of father and the Y.'s did not actually conflict when Tritt was appointed to represent the Y.'s since father had already agreed to not contest disposition and to support placement of the children with the Y.'s.

Father contends that Tritt was advocating for the Y.'s interests in gaining custody and seeking adoption before she was appointed to represent them, pointing to her request at the March 11, 2009 hearing, when the court set the contested disposition hearing, that the court order the Department to assess the Y.'s for placement of the children and stated the direction of the case seemed to be moving toward the Y.'s, which would be in the children's best interests. That Tritt was advocating for relative placement, however, does not mean that she was advocating for a position contrary to father's interests. In fact, the social worker and court are to consider a father's wishes when determining whether to give preferential consideration to a relative's request for placement. (§ 361.3, subd. (a)(2).) Moreover, as shown by father's statement of contested issues for the dispositional hearing filed on May 5, 2009, Tritt was not only advocating for placement of the children with the Y.'s, but was also advocating for his interests in obtaining reunification services and placement of the children with him, as the statement shows he intended to challenge the sufficiency of the evidence that he caused Erianna's death, the recommendation to deny reunification services, and removal.

Father contends Tritt had a conflict because it would have been contrary to the Y.'s interests for her to advise father to file a notice of intent to file a writ petition, or to

have filed it herself, and therefore he "could not avail himself of the protections of the dependency scheme, including, inter alia, his right to contest the denial of custody, services and visitation by way of writ review after the [dispositional] hearing." But Tritt did not have a duty to initiate writ proceedings. In *In re Cathina W.* (1998) 68 Cal.App.4th 716, 723 (*Cathina W.*), this court specifically rejected the suggestion that it was incumbent upon a parent's counsel to ensure a client's appellate rights were protected by filing the requisite notice of intent and the writ petition. "The 'burden is on the *parent* in a juvenile dependency case to pursue his or her appellate rights[; i]t is not the *attorney's* burden.' (*Janice J. v. Superior Court* (1997) 55 Cal.App.4th 690, 692; *Suzanne J. v. Superior Court* (1996) 46 Cal.App.4th 785, 788.) In the absence of a specific direction from the [parent], [the] attorney in the juvenile court was not obligated to take any steps to comply with section 366.26, subdivision (*l*), on the [parent's] behalf." (*Cathina W., supra*, 68 Cal.App.4th at pp. 723-724, fn. omitted.)

While father complains that he was unable to avail himself of the protections of the dependency scheme absent conflict-free counsel, he was served with the notice of intent to file a writ petition. It was father's burden to ensure that the notice of intent and petition for writ review were filed. The record is silent on what advice Tritt may or may not have given him regarding filing of a petition for writ review or whether father authorized her to file the notice. We note that Tritt, when she agreed that the juvenile court could mail notice of father's writ rights to him, recognized that he had limited time to act, as she requested the court send the notice out quickly due to the short deadline involved. There is nothing in the record to suggest that Tritt dissuaded him from filing the notice of intent and writ petition.

Father claims Tritt's conflict continued at the section 366.26 hearing. There is nothing in the record, however, to show that father wanted to change his course of action at that hearing so that it conflicted with the Y.'s interests. While he asserts his filing of the notice of appeal shows he did not understand that Tritt was submitting on the

recommendation to terminate his parental rights and that he in fact wanted to challenge that decision, that he had a change of heart after the hearing does not mean he did not agree with Tritt's recommendations at that hearing.

In sum, on this record, father has not shown an actual conflict of interest that violated his rights to due process and a fundamentally fair hearing. Accordingly, there is no basis to excuse father's failure to file a notice of intent and petition for writ review. His failure to do so precludes him from challenging the jurisdictional findings, the suspension of visitation, and the granting of de facto parent status to the foster mother. Since father raises no issues with respect to the section 366.26 hearing, and the issues in mother's appeal address only orders made at or before the dispositional hearing, there is no basis to reverse any of the juvenile court's findings and orders.

DISPOSITION

The juvenile court's order is affirmed.

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Gomes, J.

WE CONCUR:

_____
Cornell, Acting P.J.

_____
Dawson, J.