Filed 12/23/10 In re L.L. CA5

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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. E.S., Defendant and Appellant.	F059134 (Super. Ct. No. 08CEJ300033) **OPINION**

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

Judith E. Ganz, 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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E.S. (mother) appeals from an order terminating her parental rights (Welf. & Inst. Code, § 366.26) to her son L.L., and daughters M.L. and L.S.[1] 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.

On appeal, mother contends: (1) the juvenile court should have appointed, sua sponte, a guardian ad litem for her in the underlying dependency proceedings; (2) the juvenile court erred when it suspended visitation with L. and M. before the jurisdictional hearing; (3) the jurisdictional findings as to L. and M. should be vacated; (4) the dispositional order removing L. and M. from her custody and bypassing reunification services should be reversed; and (5) the failure to comply with ICWA notice provisions requires reversal of the dispositional orders and termination of parental rights judgment. Mother further joins the father of L.L and M.L. in arguments he presents in his related appeal, *In re L.L.* (F059133), to the extent they benefit her, including his assertions that his attorney had a conflict of interest at the dispositional hearing, the juvenile court abused its discretion when it suspended visitation, that the jurisdictional findings are not supported by substantial evidence, and issues pertaining to the appointment of counsel for the foster mother when she was granted de facto parent status.

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

On review, we find no merit in mother's arguments, and accordingly reject them. In father's appeal, we concluded there was no actual conflict of interest, and therefore father was precluded from challenging the jurisdictional findings, the suspension of visitation, and the granting of de facto parent status to the foster mother, because he failed to file a notice of intent and petition for writ review. Since neither parent has shown error, we affirm.

PROCEDURAL AND FACTUAL HISTORY

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, Erianna B., 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 numerous 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. Erianna 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 had 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. A referral was made for a cultural broker[2] to assist the parents through the court process.

At the January 30, 2008 detention hearing, the court found father to be the children's presumed father, ordered them 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.[3]

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[2] A cultural broker is a community/family advocate from the family's neighborhood who does not work for the child welfare agency and who offers support and neighborhood resources to the family. The cultural broker's role is to help the Department and the family work together to achieve better outcomes for families.

[3] Mother requests that we take judicial notice of the following records in father's criminal case No. F08900776: (1) a certified record of the superior court's October 16, 2008 minute order showing father's case was dismissed after the court granted the People's written motion requesting dismissal for further investigation without prejudice; and (2) the reporter's transcript of the October 16, 2008 hearing, in which the court ordered the matter dismissed without prejudice. She asserts these records are relevant to whether there was substantial evidence to support the jurisdictional orders. This evidence, however, was not before the juvenile court when it made those orders, and is therefore irrelevant. Accordingly, we deny the request for judicial notice. (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 559 fn. 3 (*Stop Youth*

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 letters from Dr. Fields and 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.

In May 2008, the cultural broker submitted a report to the juvenile court in anticipation of the jurisdictional hearing. The broker stated that she had provided services including scheduling and facilitating meetings between mother and Department staff, and provided mother with crisis intervention, general advocacy and support as needed. The broker participated in mother's supervised visits with the children. The broker provided information obtained from her interview of mother and remarked that mother was "a young African-American female who appear[ed] to be very depressed and overwhelmed with the total court process." The broker noted that mother was determined to comply with whatever the court and Department required of her to have her children returned. The broker had attended numerous court appearances with mother since

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Addiction); *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1062-1063, overruled on another point in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276 [only relevant materials may be judicially noticed].)

January 31, 2008, and observed her to be "sober, alert, and punctual." It was "obvious" to the broker that mother did not "understand the [c]ourt proceedings concerning her appearances or expectations," and she seemed to depend on the broker's "assistance for clarification of how to proceed."

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)[4], 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 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.[5] 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 the children's therapist's concern 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

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

[5] 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.

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 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 an 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 , 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 said that they did not observe bruising to the head before January 23, which bruising was obvious from the autopsy pictures.

The Dispositional Hearing in the Children's Case

In the report prepared for the dispositional hearing, the Department stated that 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). The Department noted

that while mother and father stated they wanted to reunify with the children and were willing to participate in any recommended services, they had not accepted responsibility for Erianna's death and continued to deny domestic violence in their relationship. Moreover, they were not participating in services, mother had been unable to maintain stable housing or consistent contact with the Department, the court had suspended visitation, and father continued to engage in alcohol abuse and domestic violence with his new girlfriend. Thus, the parents had not ameliorated any of the conditions that brought them to the Department's attention.

The Department reported the parents met the criteria for denial of reunification services under section 361.5, subdivision (b)(4) because the court found true the petition's allegations under section 300, subdivision (f), that parents had caused Erianna's death through abuse or neglect. With respect to the denial of reunification services under section 361.5, subdivision (b)(6), the Department reported that parents met the criteria under that subdivision because one or both of them inflicted severe physical harm on Erianna, as shown by the court's finding true the petition's allegations under section 300, subdivisions (a) and (f) that mother and father had inflicted severe physical harm on Erianna.

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.

In March 2009, the cultural broker submitted a report in anticipation of the dispositional hearing. The broker stated that at the onset of the case, she had spent a tremendous amount of time with mother because of the nature of the case. According to the broker, mother initially desired to enroll early in court service recommendations, but her desire gradually diminished until she no longer had the desire or energy to do anything. The broker believed mother gave up completely when the children's visitation was suspended, and that shortly thereafter, mother told the broker she was pregnant, which solidified the broker's belief that mother "has had a very difficult time fully understanding the court process and complying with the court recommended services." It was clear to the broker from the trial that mother "did not know nor understand how she caused her daughter, Erianna's death."

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

I. Failure to Appoint Guardian Ad Litem

Mother complains that at some point prior to terminating her parental rights, the court should have appointed a guardian ad litem for her sua sponte. Relying largely on the cultural broker's reports, statements she made to a substance abuse specialist, and selective excerpts of her own testimony at the jurisdictional hearing, mother contends the court was repeatedly put on notice that she could not understand the dependency proceedings or assist her attorneys and therefore required a guardian ad litem.

For the sake of mother's argument, we have not considered the Department's various claims that she has waived the issue for appellate purposes. Nonetheless, having reviewed the entire record of every report filed with the juvenile court, as well as each and every hearing throughout the course of the children's dependency, we conclude the

court did not abuse its discretion by refraining to raise on its own motion the issue of mother's competence and potentially appoint a guardian ad litem.[6]

A juvenile court has the power, and a sua sponte duty, to appoint a guardian ad litem when it deems a party appearing before it to be an incompetent person. (Code Civ. Proc., §§ 372-373; *In re Sara D.* (2001) 87 Cal.App.4th 661, 672 (*Sara D.*); *In re Ronell A.* (1995) 44 Cal.App.4th 1352, 1367 (*Ronell A.*); *In re Lisa M.* (1986) 177 Cal.App.3d 915, 918-919; *In re R.S.* (1985) 167 Cal.App.3d 946, 978-979 (*R.S.*).) The question is whether the circumstances as a whole should have alerted the court that mother was incompetent at any of the hearings. Competency for a parent in this situation means the ability to understand the nature of the proceedings, meaningfully participate in the proceedings, and cooperate with counsel in representing his or her interests in the companionship, custody, control and maintenance of the child. (*R.S.*, *supra*, 167 Cal.App.3d at pp. 979-980; see also *Sara D.*, *supra*, 87 Cal.App.4th at p. 667; *In re Christina B.* (1993) 19 Cal.App.4th 1441, 1449-1451; *Ronell A.*, *supra*, 44 Cal.App.4th at p. 1367.) The appointment of a guardian ad litem for a parent dramatically changes the parent's role in the proceeding by transferring the direction and control of the litigation from the parent to the guardian ad litem. (*In re James F.* (2008) 42 Cal.4th 901, 910.) Thus, it is not a matter to be taken lightly.

Mother contends the court should have been aware that she was unable to understand the nature of the proceedings and to assist counsel because first-hand observers, including a substance abuse specialist, the cultural broker, an investigator, and

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6 On December 3, 2010, mother filed a request for judicial notice, asking us "to take judicial notice of the fact the superior court has appointed a Guardian ad Litem to assist [mother], in the related sibling dependency case." Mother asserts this fact is relevant to her argument the court erred in failing to appoint a guardian ad litem and to show prejudice. Because this fact was not before the juvenile court, it is irrelevant to whether it should have recognized mother was incompetent during the time period at issue. (*Stop Youth Addiction, supra,* 17 Cal.4th at p. 559, fn. 3.)

her own attorney, noted she had difficulty understanding the nature of the proceedings and expressing herself, and had limited abilities. She also asserts that her testimony at the jurisdictional hearing showed her inability to assist counsel, as she did not know or could not recall facts, and often did not understand the questions asked.

Contrary to mother's contentions, the record to which mother cites does not show she was unable to understand the nature of the proceedings or assist counsel. First, mother points to an Addiction Severity Index assessment conducted on January 30, 2008, in which the substance abuse specialist noted that (1) mother was not able to report what involvement she had with the legal system at that time, but did state she was awaiting charges, trial or sentencing for homicide/manslaughter, described her legal problems as extremely serious, and said counseling or referral for these legal problems was extremely important, and (2) mother said she had experienced both serious depression and "trouble understanding, concentrating or remembering" during her lifetime. She also points to her attorney's use of this statement during his closing argument at the jurisdictional hearing, in which he argued the court had ample opportunity while mother was testifying to "observe and experience" her "difficulty in understanding, concentrating and remembering during her lifetime," to which he related since he experienced the same trouble understanding, concentrating and remembering during his lifetime, and that mother's "difficulty in understanding is a constant handicap, and it makes it all the more difficult for her to paint the picture for the authorities that they need . . . with respect to domestic violence."

That mother may have had difficulty understanding things during her lifetime does not mean that she was unable to understand the nature of the proceedings in which she was involved. Significantly, she understood that she might be subject to criminal charges of homicide or manslaughter, knew her legal problems were serious, and knew she needed assistance to deal with those problems. While mother asserts her attorney's argument shows his acknowledgement that she was unable to understand the proceedings

or assist him, when read in context, he was merely explaining why she might have difficulty recalling or explaining what occurred, not that she was unable to understand the proceedings or assist counsel.

Mother next points to the cultural broker's reports, where the broker stated: (1) in May 2008, she had attended numerous court appearances with mother and while mother appeared to be "sober, alert, and punctual[,]" it was obvious she "does not understand the [c]ourt proceedings concerning her appearances or expectations" and seemed to depend on the cultural broker's assistance for "clarification of how to proceed."; and (2) in March 2009, after the children's visits were suspended, mother's desire to enroll in services gradually diminished and eventually disappeared, and mother's statement, made shortly thereafter, that she was pregnant solidified the cultural broker's belief that mother "has had a very difficult time fully understanding the court process and complying with court recommended services." The cultural broker's statements, however, do not show that mother was unable to understand the nature of the proceedings. That mother may have been overwhelmed with or confused by the court process does not mean that she was unable to understand it.

Further, there is no evidence that mother was unable to communicate with or assist counsel, and we presume on such a record that counsel would have said so had that been a problem. (See Evid. Code, § 664.) Mother contends the record shows she was unable to assist her attorney because she had difficulty answering an investigator's questions, a police detective noted during an interview of Virginia that mother had mental limitations, and mother's testimony at the jurisdictional hearing did not support her defense that Erianna's death was explainable by medical causes.

While there is evidence here that mother may have had difficulty communicating, there is no evidence showing how this impaired her ability to assist counsel in protecting her interests. Although the district attorney investigator noted she would have to ask mother numerous follow-up questions when trying to get an answer to a quantitative

question, she also noted mother was "intelligent and thoughtful." As mother herself explained to the investigator, she had difficulty communicating when she is anxious or upset, but communicated more easily when she felt safe. That mother may have had difficulty communicating does not mean that she was unable to assist her attorney.

Mother also points to her testimony at the jurisdictional hearing, which she claims shows her inability to assist counsel. Mother asserts her inability to establish Erianna's medical history undercut her defense that Erianna's death was explainable by medical causes, and therefore shows she was unable to assist counsel. From our review of her testimony, mother appeared to be focused, she responded appropriately to questions, and she admitted when she did not understand a question. (See, e.g., *In re Jessica G.* (2001) 93 Cal.App.4th 1180, 1189 [that the mother's testimony was coherent, responsive and focused, despite her acknowledgment that she had emotional difficulties, did not demonstrate incompetence as a party].) That mother did not know or remember certain facts does not mean that she could not assist her attorney. Significantly, her attorney never asserted that she was unable to assist him.

Moreover, there is evidence in the record that mother did understand the proceedings and could assist her attorney. Mother attended virtually every hearing in this case. At the detention hearing, mother was responsive to the court's questions during the paternity inquiry. At the jurisdictional hearing, her attorney advised the court that she wanted to testify despite the possibility that her testimony could be used in a criminal proceeding, and the court stated they had discussed in chambers mother's right not to incriminate herself. The court then asked mother if she understood that right and agreed to give up the privilege against self-incrimination, to which she responded in the affirmative. Presumably mother consulted with her attorney prior to agreeing to testify, yet he mentioned nothing about her inability to assist him. That the court accepted her waiver and allowed her to testify shows the court did not consider mother incompetent. At the dispositional hearing, the court accepted mother's waiver of her attorney's

appearance and of father's attorney's dual representation of father and the Y.'s, which again demonstrated that the court did not consider mother incompetent.

In sum, the record does not show the juvenile court erred by failing to hold a hearing, sua sponte, on whether a guardian ad litem should have been appointed for mother.

II. Visitation

Mother contends the court's order suspending visitation should be reversed because (1) the procedures followed were unauthorized by statute and the rules of court; (2) the trial court's findings were not tethered to the statutory standard; (3) the order was not supported by substantial evidence; (4) mother was deprived of the right to cross-examine the declarants; and (5) the trial court set no parameters on how to restore visitation.[7]

A. Trial Proceedings

At the January 30, 2008 detention hearing, the court ordered reasonable, supervised visitation for both parents, with visits between the parents and L. occurring at least twice per week. When the contested jurisdictional hearing was set on February 20, 2008, the children's attorney requested the temporary suspension of visitation pending disposition based on the severity of the charges, but he admittedly did not have any evidence of detriment to present. Accordingly, the court left the visitation order intact

[7] Although mother did not file notice of intent or writ petition from the juvenile court's order at the dispositional hearing setting the section 366.26 hearing, we reach the issues she raises in this appeal regarding visitation, jurisdiction and disposition because the record shows the notice of intent was not mailed to mother's last known address, a fact the Department does not dispute. (See *In re Cathina W.* (1998) 68 Cal.App.4th 716, 722 [an appellate court may address the merits of a parent's challenge to an order setting a section 366.26 hearing on appeal from a parental rights termination order when the juvenile court fails to discharge its duty to give timely, correct notice of the writ remedy].)

and stated an ex parte application could be submitted if the Department or the children's attorney wanted to change the visitation order before the next hearing.

On March 3, 2008, the children's attorney submitted an ex parte application and a JV-180 request to change order, seeking to temporarily suspend visits pending disposition, as well as an order that relative placement not occur without a court order, based on a letter from Dr. Fields. The court set a hearing for the following day.

In his letter, Dr. Fields stated his professional opinion was that Erianna had been the victim of numerous beatings and abuses, and the injuries sustained in the final, fatal beating, which included injuries "too extensive to itemize, head trauma of brute force, bite marks, pattern bruises indicative of the use of extension cords, [and] internal organ damage," indicated a "rage-fueled attack of some duration." Dr. Fields noted the children were present during "this terror" and the perpetrator of the abuse not only murdered Erianna but terrorized all of the children present. Dr. Fields, who had been following the children's progress, stated that when the children were first placed in foster care, they were very insecure and exhibited developmentally delayed behaviors, which included lack of language and engagement, hiding, aggression, sleep difficulties, and night terrors. These behaviors had lessened over time. Dr. Fields attributed the improvement to removal from their caretakers and the environment, and believed visitation with the caretakers was not therapeutic, would be potentially harmful, and was not in the children's best interest. The foster mother reported regression after the children's visits with mother, particularly L., who was experiencing insecure, irritable and aggressive behaviors. In Dr. Fields' professional opinion, visitation with the adults responsible for creating the environment and who the children must associate the trauma with cannot be anything but psychologically and medically contraindicated.

At the March 4 hearing, the minors' attorney stated there had been visits between mother and the children, but father's first visit was scheduled for the following day. The court continued the hearing on the JV-180 to March 12, and ordered the Department to

supervise the visit with father and inform the court how that visit went at that hearing. Although mother did not receive notice of the March 4 hearing, the court suspended visits between mother and the children on "an interim basis" based on Dr. Fields' letter, and ordered that mother receive notice of the next hearing.

At the March 12 hearing, mother and father were present with their attorneys. A social worker reported on the children's March 5 visit with father at the jail, which was the first visit the children had with him since January 31. The social worker stated the visit was pretty traumatic for the children, especially L., who "sort of just froze" when father came into the room and did not smile. When the visits ended, L. did not say goodbye to father; he just wanted out. The care provider reported that after the visits, L. was more aggressive and M. more irritable. The Department also presented a letter from a therapist who supervised three visits between mother and the children. The therapist reported that mother interacted with the children in a loving and attentive manner, and responded appropriately to their needs.

Both mother and father opposed suspension of visitation, but had no evidence to present on the issue. The Department requested that visits be suspended for both parents. The court asked Dr. Fields, who was present at the hearing, his opinion of the therapist's letter. He recommended that visits with both parents stop. While he appreciated that mother interacted affectionately with the children, he believed visitation was detrimental to them because they would continue to be exposed to the people who were present during Erianna's murder, which would put them at risk of developing a mental health disorder. The children's attorney requested suspension of visits, arguing they were detrimental to the children.

The court ordered visits with both parents suspended on an interim basis, finding that visits were detrimental to the children based on their reactions during the visit with father and after visits with both parents. The court set the matter for a contested hearing, with trial on the JV-180 to be held on April 9, the same date as the contested

jurisdictional hearing. At the request of father's attorney, the court ordered Dr. Fields to return for the trial.

The jurisdictional hearing and the hearing on the JV-180 regarding visitation were continued numerous times for various reasons, without objection from father or mother. The hearings were eventually held in January 2009.

In a report prepared for the jurisdictional hearing, a Department social worker reported that on March 5, 2008, the children's care provider told the social worker that when the children were initially placed with her, L. experienced horrible night terrors, in which he would scream and thrash his entire body around. This behavior lasted for about two weeks and then subsided until he began visiting mother. According to the care provider, once visits with mother began, L. experienced night terrors following each visit and M. became more irritable and woke up more frequently during the night.

A social worker with the foster family agency (FFA) also reported that L. had nightmares when initially placed in the foster home; he would wake up screaming and crying and the care provider would find him in a fetal position with his hands covering his head as if something was trying to get him. As of April 25, 2008, L. was no longer experiencing nightmares and was sleeping through the night. The FFA social worker further reported that the children did not respond well to visits with mother; they were both fussy and had difficulty sleeping after the visits, and L. would become aggressive. The FFA social worker stated that L. did not have a positive experience when visiting his father on March 5, 2008. He cried when removed from his care provider and cried throughout the visit. L. was sullen and quiet the rest of the day.

At the jurisdictional hearing, after the court found true most of the petition's allegations, it addressed the visitation issue. The court proposed to continue all current visitation orders in effect until the dispositional hearing, namely that visits are suspended until further order of the court, at which time the matter could be taken up. The court asked if anyone wanted to be heard on the issue. The Department's attorney responded

"No." No other response is recorded on the reporter's transcript. Accordingly, visitation remained suspended pending disposition.

B. Analysis

Mother challenges the juvenile court's March 2008 order suspending visitation with her on an interim basis pending a hearing on the children's JV-180. "The Legislature has defined the juvenile court's statutory authority to modify its previous orders in Welfare and Institutions Code, article 12, sections 385 through 391." (*Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 111 (*Nickolas F.*).) Section 385 provides that any dependency order "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." (§ 385.) Nothing in article 12 imposes any particular procedural requirement on the court when it sua sponte exercises its authority to modify interim dependency orders, so long as it provides notice and an opportunity to be heard to any parent whose interests are affected. (*Nickolas F.*, *supra*, at p. 112, fn. 16.)

Here, at the detention hearing the court ordered visitation for mother. Within months, the children's attorney brought a petition to modify that order, arguing that visitation was detrimental to the children. The court thereafter suspended mother's visitation on an interim basis pending a contested hearing on the modification petition. While the court initially suspended mother's visitation without notice to her, at the next hearing, mother was present and objected to the interim order. The court gave mother's attorney the opportunity to present evidence on the visitation issue and respond to the factual material presented, but he stated he did not have any factual information to present. Although her attorney argued there was no evidence before the court, only opinions, and statements by the social worker and Dr. Fields "are not subject to cross-examination apparently," he did not specifically request to examine them. Mother's attorney also noted the statements were mostly hearsay, but did not assert that they should be excluded for that reason. After hearing argument from the parties, the court

found continued visitation detrimental to the children, suspended visitation on an interim basis, and set the modification petition for a contested hearing, at which it ordered Dr. Fields to appear at the request of father's attorney.

Contrary to mother's assertions, since she was given the opportunity to present evidence before the court issued its interim order, mother's due process rights were satisfied. (*Nickolas F., supra*, 144 Cal.App.4th at p. 112, fn. 16.) While it took nearly ten months for the actual contested hearing to be held, the continuances were made without objection by either parent. Although the visitation issue was brought to the court's attention through the children's modification petition, the court had the inherent power to temporarily suspend visitation pending a full hearing on the petition. Mother's arguments that the section 388 procedures were not followed and the court failed to apply the best interest standard for granting a section 388 modification petition are based on the misconception that the court actually granted the petition at the March 12, 2008 hearing. It did not. Instead, the court issued an interim order and set a contested hearing to be held at a later date. On this record, we presume the court found a prima facie case had been established and accordingly set a hearing.[8]

Mother contends there is insufficient evidence to support the court's interim order suspending visitation. "Visitation between a dependent child and his or her parents is an

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[8] Section 388 generally provides that a parent or person having an interest in a dependent child may, upon grounds of changed circumstances or new evidence, petition the juvenile court to change, modify, or set aside any order previously made by the court. (§ 388, subd. (a).) In addition to showing that changed circumstances or new evidence exists, the petitioning party must show that the requested change or modification would serve the child's best interests. (§ 388, subd. (d); *In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) The petitioner need only make a prima facie showing to trigger the right to proceed by way of a full hearing. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) A prima facie showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719, fn. 6.)

essential component of a reunification plan, even if actual physical custody is not the outcome of the proceedings. [Citation.] Visitation 'shall be as frequent as possible, consistent with the well-being of the child.' [Citation.] However, '[n]o visitation order shall jeopardize the safety of the child.' [Citation.] It is ordinarily improper to deny visitation absent a showing of detriment." (*In re Mark L.* (2001) 94 Cal.App.4th 573, 580 (*Mark L.*).)

The court's decision on a visitation order is reviewed for substantial evidence. (*Mark L.*, *supra*, 94 Cal.App.4th at p. 581 & fn. 5.) "We do not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts. [Citation.] The judgment will be upheld if it is supported by substantial evidence, even though substantial evidence to the contrary also exists and the trial court might have reached a different result had it believed other evidence." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

"The court may deny a parent visitation only if visitation would be harmful to the child." (*In re S.H.* (2003) 111 Cal.App.4th 310, 317 fn. 9.) "The focus of dependency law is on the well-being of the child," and the court may deny visitation by finding that forced contact between a parent and child may harm the child emotionally. (*Mark L.*, *supra*, 94 Cal.App.4th at p. 581.)

"[A] parent's liberty interest in the care, custody and companionship of children cannot be maintained at the expense of their well-being. [Citation.] While visitation is a key element of reunification, the court must focus on the best interests of the children 'and on the elimination of conditions which led to the juvenile court's finding that the child has suffered, or is at risk of suffering, harm specified in section 300.' [Citation.] This includes the 'possibility of adverse psychological consequences of an unwanted visit between mother and child.'" (*In re Julie M.* (1999) 69 Cal.App.4th 41, 50 (*Julie M.*).)

Here, the evidence before the court with respect to the children's visits with mother was that she responded appropriately to them during visits, but following visits,

the children, particularly L., exhibited insecure, irritable and aggressive behaviors. The behaviors were of concern because when first removed from their parents, the children had difficulty with language and engagement, hiding, aggression, sleeping, and night terrors, but those behaviors had lessened over time. Visits with mother, however, caused the children to regress, resulting in emotional harm. Accordingly, the juvenile court concluded continued visitation would be detrimental to the children. It did not err in doing so.

Finally, mother complains that the court provided no parameters on how to restore visitation. If mother wanted to restore visits, however, she could have demanded that the contested hearing on the modification petition be held sooner than the jurisdictional hearing or petitioned this court for a writ of mandate to set aside the interim order. She did neither.

In sum, we find no error in the court suspending visitation temporarily pending the contested hearing on the modification petition.

III. Jurisdictional Findings

Mother challenges the jurisdictional findings under section 300, subdivisions (a), (b) and (f) as to the children. She asserts we should vacate the findings because the trial court conflated the showings required under each subdivision, and misapplied the evidentiary presumption, and the findings are not supported by substantial evidence. She also asserts that her attorney provided ineffective assistance because he did not obtain an independent medical evaluation.

Since jurisdiction is obtained over a child whenever any single subdivision is found true, we need not address whether jurisdiction was properly taken under all of the above-listed subdivisions. Instead, we focus on section 300, subdivision (f), which authorizes jurisdiction over a child if the court finds that "the child's parent . . . caused the death of another child through abuse or neglect." As another appellate court recently explained: "Section 300, subdivision (f) requires a causal connection between the

parent's acts or omissions and a child's death. A cause is defined as "[s]omething that produces an effect or result." (Black's Law Dict. (9th ed. 2009) p. 250, col. 1.) Under both criminal and civil standards, a causal connection occurs when the acts of an individual are a substantial factor contributing to a death or injury." (*In re A.M.* (2010) 187 Cal.App.4th 1380, 1388.)

Mother contends jurisdiction cannot be sustained under section 300, subdivision (f) because there is insufficient evidence she caused any harm to Erianna. She claims the evidence suggests that either Michael or Charlotte abused Erianna, and there was no way she knew or should have known about the abuse or Erianna's need for medical care.

In a challenge to the sufficiency of the evidence to support a jurisdictional finding, the issue is whether there is evidence, contradicted or uncontradicted, to support the finding. In making that determination, the reviewing court reviews the record in the light most favorable to the challenged order, resolving conflicts in the evidence in favor of that order, and giving the evidence reasonable inferences. Weighing evidence, assessing credibility, and resolving conflicts in evidence and in the inferences to be drawn from evidence are the domain of the trial court, not the reviewing court. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 450-451; *In re Veronica G.* (2007) 157 Cal.App.4th 179, 185; *In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) The jurisdictional finding must be supported by a preponderance of the evidence. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248; § 355, subd. (a).)

The evidence produced at the jurisdictional hearing showed that Virginia stated she dropped Erianna off at mother's and father's house on January 20, 2008. Mother said that when she was giving Erianna a bath on January 22, she noticed red marks on her body, including small bruises on her stomach and back. No bruises were on her head.

She called Virginia about the bruises and was told they might have been caused by a swing.[9] Virginia scheduled a doctor's appointment for Erianna.

Deanna M., the children's paternal grandmother, testified that father came to her apartment after Virginia dropped Erianna off; he was upset and wanted her to look at Erianna because she had a lot of bruises on her body. Deanna claimed she saw a lot of little greenish bruising on Erianna's chest, little bruises on her back and legs, and one that looked like a hand with fingerprint marks on her stomach. The lesions did not look like impetigo to her; she suspected someone had beaten Erianna and told mother to call the police. Deanna came over on Tuesday and noticed the bruises were getting bigger.

Virginia and mother took Erianna to Dr. Gwen Huffer at a CHCC clinic on January 23, where Dr. Huffer diagnosed an open sore on the left side of Erianna's mouth and several small red dots on her skin as impetigo. Erianna also had three half-dime-sized bruises on her abdomen that appeared to be at least a week old, which Virginia attributed to playing on a swing. Dr. Huffer took cultures of Erianna's open wounds and prescribed medication and cream. While mother initially testified at the jurisdictional hearing that she told the doctor the marks on Erianna were bruises and the doctor said they were impetigo, mother later agreed that the doctor said some of the bruises were impetigo while some were actual bruises that Virginia said were caused by a swing. Deanna testified that when Virginia and mother returned, she was told Erianna had impetigo. Deanna, however, disagreed and said they were bruises.

According to Virginia, mother said she wanted to keep Erianna until 9 p.m. that night. When Virginia returned to pick up Erianna, father answered the door. He did not invite her in and said she could not have Erianna. Mother eventually came to the door and said Erianna was asleep, she wanted to keep her, and Virginia should come back the

[9] At the jurisdictional hearing, mother testified that Virginia told her the bruises were impetigo.

next morning. Mother testified she took care of Erianna on Wednesday night, with father's help. Father did not come to bed with mother that night; mother said it was not uncommon for father to stay up and take care of M.

The following day, Virginia called mother to arrange to pick up Erianna, but was told she was sick. Virginia agreed to pick her up the following Sunday. Mother said that when she got up on Thursday at 11 a.m., father had fed M. and Erianna was asleep on the couch. Mother went to the drug store to fill the prescriptions. When she left, father, Charlotte, Erianna and the children were in the apartment, as well as Deanna's two children. When she returned around noon, Deanna, Deanna's husband Michael and Charlotte were all in the apartment. Father told her Erianna, who was awake on the couch, threw up when he tried to feed her. When mother took Erianna to the bathroom to change her, Erianna had diarrhea, which father cleaned up. Mother gave Erianna a bath and noticed more spots or bruises all over her body, which she thought were impetigo. Mother put medicine on the bruises and covered them with adhesive bandages; mother said Erianna looked like one big bandage. According to mother, only she and father changed Erianna's diaper; she did not let Charlotte do it. Mother also said that Charlotte was not around Erianna that often.

Two to three hours later, mother, Deanna, Deanna's teenage daughter, and a friend and her daughter, left to get their nails done and go shopping. Father watched the children while they were gone; Michael and Charlotte were also present in the apartment. When the women returned to the apartment, Michael and Deanna left, as did the friend and her daughter. Erianna was asleep on the couch. Mother went to sleep in another room and did not recall father coming to bed with her that night.

On the morning of Friday, January 25, mother got up early in the morning, threw some clothes on and went downtown with Deanna and Michael to go shopping. Deanna and Michael dropped their children off before going shopping. The three left around 8:30 a.m. Mother did not check on Erianna before leaving. The children and Erianna

were there, as were father and Charlotte. According to Deanna, Erianna was asleep on the couch. Charlotte stayed at the apartment until 9 a.m., when she walked to the drug store. When she returned, father was home alone with the children and Erianna. She left for school around 9:55 a.m., and did not return to the apartment until about 3:00 p.m.

Father told police that Deanna left her daughter and the children, including Erianna, with him so she and mother could go shopping. As soon as they left, he gave L. a bath. After that, he got Erianna ready for a bath and placed her in the bathtub. He heard M. crying, so he left Erianna in the bathtub with the water running while he went to check on M. Three to five minutes later, father checked on a thumping sound he heard from the children's bedroom and then went into the bathroom, where he saw L. standing near the bathtub, holding Erianna's hair. Erianna was hanging over the bathtub with her arms out of the water; she was gasping for air and coughing. He assumed Erianna had slipped under the water. He picked her up, took her to the bedroom and dried her off. Eventually she fell asleep and he put her down for a nap in a bedroom.

Mother claimed that when they returned to the apartment a couple of hours later, father said Erianna had diarrhea and when he gave her a bath, she slipped under the water. Father also said Erianna threw up when he tried to feed her. Father put Erianna in one of the bedrooms to sleep; mother found her asleep on a mattress that was on the floor. When she returned awhile later to check on Erianna, she saw that Erianna had rolled off the mattress and onto the floor a few inches below the mattress. When she lifted Erianna up, she saw that her head was swollen and misshapen "like a light bulb," and she was stiff and could not stand. Mother had never seen her head like that before. Deanna came to the door and called 911.

The medical evidence shows that on admission to CHCC, Erianna had sustained numerous bruises all over her body, she had a severe closed head injury and her brain was swelling, and 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. Drs. Fields

and Murphy both opined that Erianna had a significant traumatic closed head injury with cerebral edema and multiple traumatic-appearing bruises. Given the severity of the injuries, neither doctor believed they were attributable to her medical conditions. The coroner concluded Erianna's death was a homicide caused by multiple blunt force injuries with complications.

According to Dr. Fields, the marks on Erianna's body were not impetigo, but were undeniably bruises that were two to three days old and in various stages of healing. He also opined that Erianna had sustained head trauma on January 25, 2008. The injuries were inflicted by an adult, and could not have been caused by falling in a bathtub, against furniture or to the ground. Dr. Murphy also thought an adult likely inflicted the apparent bite marks on Erianna. Erianna had a number of café au lait spots, which Dr. Murphy noted were probably the result of her neurofibromatosis.

According to Dr. Huffer, Erianna's new injuries were not present during her examination on January 23. While Dr. Huffer recognized that Erianna had an illness that could cause her to bruise more easily, trauma still needed to occur for bruises to appear. Dr. Huffer concluded Erianna's visible and internal injuries were excessive even considering her pre-existing medical conditions and, in her opinion, could only have been caused by external blunt force trauma.

This evidence was sufficient to support the juvenile court's finding that the allegations under section 300, subdivision (f) were true, i.e. that mother caused the death of Erianna through abuse or neglect. Erianna died of multiple blunt force trauma to her head and body inflicted by an adult. The trauma was not present at the January 23 doctor's appointment. Erianna was in either mother's or father's care between that appointment and when the ambulance was called on January 25. After the doctor's appointment, mother acknowledged seeing a significant increase in bruises on Erianna's body, yet she did not intervene or seek medical care. While mother testified she thought the bruises were impetigo, the juvenile court reasonably could have rejected that

testimony based on the appearance of the bruises, which the court noted were obvious from the autopsy pictures. Moreover, the evidence showed that Dr. Huffer had diagnosed *both* impetigo and bruising, that mother herself identified the marks as bruises, and even Deanna thought Erianna had bruises that resulted from abuse, all of which the juvenile court could rely on to reject mother's assertion that she relied on Dr. Huffer's impetigo diagnosis when determining whether the bruises were actually bruises.

The juvenile court, in finding the section 300, subdivision (f) allegations true, concluded that mother knew of Erianna's injuries — either because she inflicted them, knew that someone else (most likely father) inflicted them, or observed the obvious bruises — and failed to intervene or obtain medical care, thereby causing Erianna's death. The evidence recited above supports this conclusion and is sufficient to sustain a finding under subdivision (f). While mother claims that it was more likely that someone other than she or father inflicted Erianna's injuries, such as Charlotte or Michael, even if neither parent actually inflicted the injuries, mother was still responsible for causing Erianna's death by failing to intervene. Because there is sufficient evidence to support the juvenile court's jurisdictional finding under this subdivision, we need not address whether there is sufficient evidence to support the court's findings under other subdivisions.

Mother asserts the section 300, subdivision (f) finding cannot stand because the statutory language requires a showing that she caused Erianna's death either directly or by criminal negligence. We are unaware of any cases that hold that a finding under subdivision (f) requires evidence of criminal negligence and the only published cases appellant cites for that proposition, *Patricia O. v. Superior Court* (1999) 69 Cal.App.4th 933 (*Patricia O.*) and *In re Ethan N.* (2004) 122 Cal.App.4th 55 (*Ethan N.*), are not on point. *Patricia O.* examined the sufficiency of the evidence to support the juvenile court's denial of services to a mother under section 361.5, subdivision (b)(4) (*Patricia O., supra,* 69 Cal.App.4th at pp. 935, 941) and *Ethan N.* examined the juvenile court's best

interest analysis in granting reunification services under section 361.5, subdivision (c) (*Ethan N., supra,* 122 Cal.App.4th 55, 63-69).

Moreover, one appellate court has recently rejected mother's argument in *In re Ethan C.* (2010) 188 Cal.App.4th 992 (*Ethan C.*). There, a father maintained that the "abuse or neglect" contemplated by section 300, subdivision (f) must rise to the degree of culpability encompassed within the concept of criminal negligence. (*Ethan C., supra,* 188 Cal.App.4th at p. 999.) In rejecting this assertion, the court explained that before 1997, dependency jurisdiction was authorized under subdivision (f) only if the juvenile court found the child's parent or guardian had been convicted of causing another child's death through abuse or neglect, but the Legislature amended the statute in 1996 to delete the requirement of a criminal conviction, and in doing so, intended to eliminate the delay that was entailed in waiting for a criminal conviction before jurisdiction could be established under subdivision (f) and "'lower the standard of proof by which the parent's cause of the other child's death is found' from the higher 'beyond a reasonable doubt' criminal standard, to the lower mere 'preponderance of the evidence' standard required in a civil action." (*Ethan C., supra,* 188 Cal.App.4th at pp. 999-1000.)[10]

While the father in *Ethan C.* asserted that despite this stated intent, the Legislature still intended to retain a criminal negligence standard, the court found the statute's language did not require analysis because it was simple and clear, and requires only a showing that the parent caused the death of another child through abuse or neglect. (*Ethan C., supra,* 188 Cal.App.4th at p. 1000.) The court also noted the fundamental

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[10] While not noted by the court in *Ethan C.*, this same explanation was given for removing the requirement of a criminal conviction when denying reunification services under section 361.5, subdivision (b)(4), which now provides for denial of services when the parent of the child has caused the death of another child through abuse or neglect. (See Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2679 (1995-1996 Reg. Sess.) as amended May 14, 1996, § 1, p. f., and § 2-E, p. o.)

principle that dependency proceedings are civil in nature, not criminal or punitive, and the purpose of dependency law is to protect children, not prosecute their parents. (*Id.* at p. 1002.) We agree with the court in *Ethan C.* that there is no support for mother's assertion that criminal negligence must be shown to sustain an allegation under section 300, subdivision (f).

Mother also asserts that because the juvenile court found true allegations that both mother and father caused Erianna's death and were negligent, the juvenile court made inconsistent jurisdictional findings that require us to vacate them.[11] Moreover, she contends the juvenile court misapplied the evidentiary presumption established by section 355.1, subdivision (a)[12] when finding true the section 300, subdivision (f) counts. Even if there were inconsistent findings or the juvenile court erroneously applied the evidentiary presumption, however, we do not review the reasons for the juvenile court's

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[11] In support of this assertion, mother cites *In re Carmaleta B.* (1978) 21 Cal.3d 482, 496, in which our Supreme Court stated that "where fundamental rights are affected, . . . discretion by the trial court . . . can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action." In this case, however, we are reviewing whether substantial evidence supports the jurisdictional findings, not whether the trial court properly exercised its discretion.

[12] Section 355.1, subdivision (a) provides, in pertinent part: "Where the court finds, based upon competent professional evidence, that an injury, injuries, . . . 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." Section 355.1 operates on two presumed facts: (a) that the child suffered an injury and (b) the injury is of a type that ordinarily does not occur in the absence of unreasonable parental conduct. Further, it "constitutes a presumption affecting the burden of producing evidence." (§ 355.1, subd. (c).) It does not affect the burden of proof. (*In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1041.) "As such, it merely shifts to the parents the obligation of raising an issue as to the actual cause of the injury or the fitness of the home." (*In re James B.* (1985) 166 Cal.App.3d 934, 937, fn. 2.)

decision, but must affirm it if it is correct on any theory, even if its reasoning was erroneous. (*Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329-330 (*Davey*); *J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15-16.)[13] As there was sufficient evidence to support the jurisdictional finding under section 300, subdivision (f) that mother caused Erianna's death by her failure to intervene or seek medical care despite knowing Erianna was being abused, jurisdiction under section 300, subdivision (f), was established.

Finally, mother contends her attorney was ineffective because he failed to obtain a medical opinion regarding the cause of Erianna's death. A parent represented in a dependency proceeding is entitled to competent counsel. (§ 317.5.) A claim of ineffective assistance of counsel may be reviewed on direct appeal if there is no satisfactory explanation for trial counsel's acts or failures to act. (*In re Dennis H.* (2001) 88 Cal.App.4th 94, 98, fn. 1.) To prevail on her claim of ineffective assistance of counsel, mother must show both that her trial counsel failed to act in the manner expected of a reasonably competent attorney acting as a diligent advocate, and that had her counsel performed adequately, it is reasonably probable the outcome would have been more favorable for her. (*In re O.S.* (2002) 102 Cal.App.4th 1402, 1407 (*O.S.*).) The court need not evaluate whether counsel's performance was deficient before examining the issue of prejudice. (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1180.) Rather, the court may reject a claim of ineffective assistance of counsel if the parent cannot show the result would have been more favorable but for her trial counsel's failings. (*Ibid.*)

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[13] *Davey* states: "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." (*Davey, supra,* 116 Cal. at p. 329.)

The record shows that mother's attorney was attempting to locate a medical expert to review the records, as he stated in a May 2008 hearing that he had contacted a couple of experts but they were unavailable, and he was trying to find a forensic pathologist. At a July 15, 2008 hearing, mother's attorney stated he was trying to obtain expert witness analysis, but was having difficulty doing so, the forensic pathologists he contacted were unavailable, and he planned on searching for someone in California who could render a valid opinion. Father's attorney informed the court she and mother's attorney were going to meet with a doctor from CHCC and if he could not help them, she hoped he could direct them to someone who could. As mother points out on appeal, no expert witness testimony was presented on her behalf at the jurisdictional hearing.

On this record, we cannot tell why mother's attorney did not present expert testimony at the jurisdictional hearing. One reasonable explanation is that he was unable to find an expert whose opinion was favorable to mother's position. Thus, it is not clear that her attorney's performance was deficient. For this reason, her ineffective assistance of counsel claim fails.

IV. Denial of Reunification Services

Mother next challenges the denial of reunification services. Recognizing that she entered into a settlement in which she agreed not to challenge disposition, she asserts the settlement must be set aside because her due process rights were violated as (1) father's attorney, Deloise Tritt, who appeared on her behalf at the outset of the dispositional hearing, had a conflict of interest, and (2) her counsel, Kenneth Carrington, was ineffective for agreeing to a settlement that was not beneficial to her. She also challenges the sufficiency of the evidence to support the denial of reunification services under section 361.5, subdivisions (b)(4) and (b)(6), arguing there was no clear and convincing evidence she caused Erianna's death and the juvenile court should have exercised its discretion to award services "even under the tragic circumstances of this case."

We begin with mother's due process arguments. She first asserts that due process was violated because she did not have a guardian ad litem to assist her. We have already rejected her contention that the court was required to appoint a guardian ad litem for her sua sponte. She next asserts the juvenile court should have questioned her to determine whether she understood and consented to the settlement. But the authorities she cites, Code of Civil Procedure section 664.6, which provides that a court may enter judgment pursuant to the terms of a settlement agreement if the parties to pending litigation stipulate either in writing or orally before the court for settlement of the case, and *Levy v. Superior Court* (1995) 10 Cal.4th 578, 583-586, in which the court held that the settlement agreement must be signed by the parties themselves rather than their attorneys of record to be enforceable under section 664.6, do not address agreements entered into in dependency proceedings.

Mother next asserts that Tritt could not represent her interests at the dispositional hearing because Tritt did more than stand in for Carrington, as Tritt requested mother's consent to dual representation (representing both father, mother and the Y.'s) that amounted to an actual conflict of interest. First, for the same reasons expressed in our decision in father's appeal, there was no conflict of interest between mother and the Y.'s when Tritt was appointed to represent them, as the parties had already agreed to the settlement. Even assuming a conflict of interest existed, Tritt's special appearance did not prejudice mother, as Tritt did nothing to commit mother to the agreement. (See, e.g., *In re Sophia B.* (1988) 203 Cal.App.3d 1436, 1440; *In re Katrina W.* (1994) 31 Cal.App.4th 441, 448.) Mother makes no showing that Tritt's special appearance denied her a fair hearing. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1153.) She cannot make such a showing, as it was Carrington who eventually appeared at the hearing before the juvenile court and who submitted on the dispositional issues.

Finally, mother asserts she was denied effective assistance of counsel because "[t]here could be no strategy to fail to contest the bypass of reunification services, where

the Department's burden of proof was high and not satisfied." As previously stated, to prevail on this claim, mother must show both that Carrington failed to act in the manner expected of a reasonably competent attorney acting as a diligent advocate and had he performed adequately, it is reasonably probable the outcome would have been more favorable for her. (*O.S., supra,* 102 Cal.App.4th at p. 1407.)

Appellate review of a trial attorney's performance must be highly deferential. Consequently, "[u]nless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.'" (*People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.) The appellate record seldom shows that there could be no rational explanation for an attorney's actions, and consequently, when the record is silent, the issue must be raised not on direct appeal, but on habeas corpus, which allows for an evidentiary hearing at which the reasons for the attorney's actions or omissions can be explored. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)[14]

Here, the record contains no explanation for Carrington's decision not to press the issue of reunification services. A plausible explanation for his conduct, however, is the

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[14] Mother requests that we take judicial notice that The State Bar of California website states that mother's trial attorney at the dispositional hearing, Kenneth Carrington, is deceased. We grant the request. (Evid. Code, § 452.) From this, mother asserts in footnotes in her opening and reply briefs that she is foreclosed from obtaining information from trial counsel as to why he acted as he did. To the extent mother is arguing that a habeas corpus petition would be ineffective absent information from trial counsel, we disagree, as there are other sources of information to flesh out the reasons trial counsel may have acted as he did, such as mother's testimony or testimony from father's trial counsel.

recognition that in light of the juvenile court's jurisdictional findings, mother was unlikely to prevail on claims that either provision under which the juvenile court ultimately denied services did not apply to her or that it would be in the children's best interest to provide her reunification services, and it would be to her benefit to have the children raised by the Y.'s, who like the children are African-American and who desired to educate them about their heritage and culture. An attorney does not provide ineffective assistance by failing to advance a futile argument. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 804.)

As we find no due process violation, we turn to mother's sufficiency of the evidence argument. Here, the juvenile court denied reunification services under section 361.5, subdivisions (b)(4) and (b)(6), both of which mother challenges. We conclude the court properly denied appellant reunification services under section 361.5, subdivision (b)(4), as we will discuss below. Because reunification services need not be provided to a parent when the court finds true any of the 14 exceptions contained in section 361.5, subdivision (b), we do not address her multiple arguments regarding the denial of services pursuant to section 361.5, subdivision (b)(6).

Under section 361.5, subdivision (b)(4), reunification services need not be provided to a parent if a court finds, by clear and convincing evidence, "[t]hat the parent or guardian of the child has caused the death of another child through abuse or neglect." In addition, section 361.5, subdivision (c) provides, "The court *shall not* order reunification for a parent or guardian described in paragraph . . . (4) [or] (6) . . . of subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child." (Italics added.) As one court has stated, "In enacting section 361.5, subdivision (b), the Legislature has recognized that, notwithstanding the crucial role of reunification services when a minor is removed from the home, it may be useless under certain circumstances to provide services. [Citations.] 'Section 361.5 reflects the Legislature's desire to provide services to parents only where

those services will facilitate the return of children to parental custody. The exceptions in subdivision (b) to the general mandate of providing reunification services "demonstrate a legislative determination that in certain situations, attempts to facilitate reunification do not serve and protect the child's interest."'" (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1137, disapproved on another ground by *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748 fn. 6, citing *In re Joshua M.* (1998) 66 Cal.App.4th 458, 470; see also *Ethan N., supra,* 122 Cal.App.4th 55, 66 [the gravity of the problem that led to dependency is relevant to the question of best interest and the parent responsible for the previous death of another child must affirmatively show reunification would be in the best interest of a surviving child].)

When a parent challenges a dispositional finding, the question is whether substantial evidence supports the finding. (*Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1078; *Mark L., supra*, 94 Cal.App.4th at pp. 580-581 [although trial court makes findings by the elevated standard of clear and convincing evidence, substantial evidence test remains the standard of review on appeal].) In resolving this question, we view the evidence in the light most favorable to the trial court's determination, drawing all reasonable inferences in favor of the determination and affirm the order even if there is other evidence supporting a contrary conclusion. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610; *In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

Mother argues the denial of reunification services under section 361.5, subdivision (b)(4) cannot be upheld because there was not clear and convincing evidence she caused Erianna's death. But as we discussed above, the juvenile court, in finding the section 300, subdivision (f) allegations true, concluded that mother knew of Erianna's injuries — either because she inflicted them, knew that someone else (most likely father) inflicted them, or observed the obvious bruises — and failed to intervene or obtain medical care,

thereby causing Erianna's death. While mother asserts criminal negligence is required, as we explained above, criminal negligence is not the standard.

Mother asserts the juvenile court was required to identify the perpetrator before denying reunification services, relying on *In re Christina T.* (1996) 184 Cal.App.3d 630. But that case dealt only with whether the juvenile court abused its discretion when it dismissed a dependency petition after a contested jurisdictional hearing based on insufficiency of the evidence to support the allegations, not the showing necessary to deny reunification services under section 361.5, subdivision (b)(4).[15]

As we have discussed, the court's findings are supported by substantial evidence and justify the denial of reunification services under section 361.5, subdivision (b)(4).

V. ICWA Notices

At the children's detention hearing in January 2008, mother stated she did not believe she had any Native American or Indian ancestry. At that time, she and father both signed the ICWA-020 "Parental Notification of Indian Status" denying they had any Native American ancestry. Based on their statements, the Department reported that ICWA did not apply to the children.

In December 2008, however, mother signed a second ICWA-020 in the baby's case indicating she might have Native American ancestry. Mother subsequently informed the Department she might have Blackfeet and Cherokee ancestry through her father, Eric S. The baby's father, J.J., claimed Native American or Indian ancestry in the Choctaw and Chickasaw tribes, while the children's father confirmed he did not have any Native American ancestry.

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[15] The other two cases mother cites, *In re Kenneth M.* (2004) 123 Cal.App.4th 16 and *Tyrone W. v. Superior Court* (2007) 151 Cal.App.4th 839, both addressed denial of reunification services under section 361.5, subdivision (b)(5), not section 361.5, subdivision (b)(4).

On December 12, 2008, the Department sent an ICWA-030 "Notice of Involuntary Child Custody Proceedings for an Indian Child" by certified mail to the following organizations: the Blackfeet Tribe, the Cherokee Nation of Oklahoma, the United Keetoowah Band of Cherokee Indians, the Eastern Band of Cherokee Indians, the Choctaw Nation of Oklahoma, the Jena Band of Choctaw Indians, the Mississippi Band of Choctaw Indians, the Chickasaw Nation and the Bureau of Indian Affairs (BIA). The Department received a response from the BIA stating that all tribal determinations were final for ICWA purposes.[16] The Notice included the names of all three children, L.L., M.L. and the baby, as well as their dates and places of birth.

The Department received responses from the Chickasaw Nation, the Chocktaw Nation of Oklahoma, and the Cherokee Nation, in which each tribe stated that, based on the documentation received, the children and baby were not considered Indian children under ICWA in relation to those tribes. In March 2009, the Department filed a motion in the baby's case asking the court to find that ICWA did not apply, as none of the tribes from which responses were received claimed the baby was an Indian child and the 60-day time period for responses expired on February 10, 2009.

In the February 2009 report prepared for the children's dispositional hearing, the Department recognized that ICWA may apply, as responses had not yet been received from any of the tribes. No motion was filed in that case, however, to declare ICWA inapplicable, and at the June 9, 2009 dispositional hearing in the children's case, the court did not make any express ICWA finding. At the baby's June 10, 2009 dispositional hearing, however, mother's attorney submitted on the ICWA issue and the court found that ICWA did not apply in the baby's case. The baby's dispositional hearing was

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[16] Mother requests that we take judicial notice of Judicial Council form ICWA-030. The Department does not oppose her request. Accordingly, we grant the request. (Evid. Code, § 451, subd. (c).)

continued to August 2009, when the court denied both parents reunification services and set a section 366.26 hearing. Although mother was advised of the requirement to file a petition for extraordinary writ in the baby's case, she did not file one.

Mother now claims that the June 9, 2009 dispositional orders and the order terminating parental rights in the children's case must be reversed because the Department failed to comply with ICWA. Specifically, she contends the following errors were made: (1) the Department omitted the children's maternal great-grandmother's name and contact information, as well as information concerning father and his family; (2) the notices listed other great-grandparents in the wrong place and omitted great-grandmother's maiden name; (3) the Department failed to submit separate ICWA notice forms for each child; (4) the Department failed to include the children's birth certificates; (5) the Department failed to attach the children's petitions to the notices; and (6) signed receipts from four noticed tribes were signed by individuals other than the designated addressee.

We conclude that because mother failed to challenge the court's ICWA finding in the baby's case, which finding is now final, she is foreclosed from raising ICWA notice issues in this case. This is because if the children have Native American or Indian ancestry, it is through mother, as only she, not father, claims such ancestry. The court already determined ICWA does not apply to the baby's case, a determination mother did not challenge in this court. Accordingly, the juvenile court's determination that ICWA did not apply in the baby's case is now final and no longer open to review. (*In re Pedro N.* (1995) 35 Cal.App.4th 183, 185 (*Pedro N.*).)

Mother's failure to challenge the finding in the baby's case means that there is nothing left for us to review in this case. In *Pedro N.*, this court held a parent who fails to timely challenge a juvenile court's action regarding ICWA is foreclosed from raising ICWA notice issues once the court's ruling is final in a subsequent appeal. In so ruling, we specifically held we were only addressing the rights of the parent, not those of a tribe.

Mother contends the ICWA notice errors as to the children are not forfeited because our prior order stated that mother may raise in this appeal issues arising out of the June 9, 2009 dispositional hearing regarding the children. We did not state, however, that all issues mother may raise are necessarily cognizable. To the extent mother cites other decisions, such as *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247), *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739, and *In re Nikki R.* (2003) 106 Cal.App.4th 844, 849, which disagreed with our *Pedro N.* holding on a theory that it is inconsistent with the protections ICWA affords to the interests of Indian tribes, we are not persuaded. We do not foreclose a tribe's rights under ICWA on account of a parent's appellate waiver. (*Pedro N., supra,* 35 Cal.App.4th at p. 185; see also *In re Desiree F.* (2000) 83 Cal.App.4th 460 [we reversed denial of tribe's motion to intervene after final order terminating parental rights and invalidated actions dating back to outset of dependency and taken in violation of ICWA].) In so ruling, we held we were addressing only the rights of the parent to a heightened evidentiary standard for removal and termination, not those of the tribe (*Pedro N., supra,* 35 Cal.App.4th at p. 191), or, for that matter, the rights of the child.

Finally, mother contends we should consider ICWA notice issues on this appeal as a matter of fairness and due process, citing *In re Gerardo A.* (2004) 119 Cal.App.4th 988. But unlike the father in *Gerardo A.*, who raised his ICWA challenge at the first opportunity after learning of mother's claim of Indian heritage and the court's ruling, mother had an opportunity to raise the ICWA issues she raises here in the baby's case, yet failed to do so. Mother has not been deprived of due process.

In sum, we conclude mother has forfeited her personal right to complain of any ICWA violation in the children's case.

DISPOSITION

The juvenile court's orders are affirmed. We grant the request for judicial notice of (1) the State Bar of California's attorney listing for Kenneth Carrington which shows

that he is deceased, and (2) Judicial Council form ICWA-030. We deny the requests for judicial notice of (1) an October 16, 2008 minute order and reporter's transcript in father's criminal case and (2) the fact that the superior court appointed a guardian ad litem for mother in the related sibling dependency case.

_____
Gomes, J.

WE CONCUR:

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Cornell, Acting P.J.

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Dawson, J.