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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SARA M., Petitioner, v. THE SUPERIOR COURT OF TUOLUMNE COUNTY, Respondent; TUOLUMNE COUNTY DEPARTMENT OF SOCIAL SERVICES, Real Party in Interest.	F045972 (Super. Ct. Nos. JV5731, JV5732 & JV5733) **O P I N I O N**

ORIGINAL PROCEEDING; petition for extraordinary writ. Eric L. DuTemple, Judge.

Sara M., in pro. per., for Petitioner.

No appearance for Respondent.

Gregory J. Oliver, County Counsel, and Kim M. Knowles, Deputy County Counsel, for Real Party in Interest.

This extraordinary writ proceeding (Cal. Rules of Court, rule 39.1B) arises from the six-month review hearing conducted on July 15, 2004, at which the juvenile court terminated reunification services for petitioner and her three children and set the matter for permanency planning pursuant to Welfare and Institutions Code section 366.26.[1] Petitioner does not challenge the juvenile court's orders and findings issued at the six-month review hearing. Rather, she appears pro se and asks this court to vacate the dispositional order issued on December 30, 2003, claiming she received notice of the hearing after it occurred.

On its face, this writ petition would compel a dismissal because petitioner waived appellate review of the dispositional order by failing to challenge it by a direct and timely appeal. (*In re Meranda P*. (1997) 56 Cal.App.4th 1143, 1150.) However, while it is not this court's practice to independently review extraordinary writ petitions for juvenile court error, we conclude the juvenile court erred in terminating reunification services at the six-month review hearing. Further, the criticality of reunification services in dependency proceedings dictates that we address the propriety of the termination order even though petitioner did not raise it in her writ petition. Therefore, in this rare exercise of our discretionary authority to review an issue not raised by the parties, we address whether the juvenile court can terminate reunification services at the six-month review hearing based solely on the parent's failure to visit and maintain contact with the children when the children were over the age of three years when removed from the home and were not removed because of the parent's failure to provide support. (*In re Sade C*. (1996) 13 Cal.4th 952, 994.) The parties

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

were offered an opportunity to provide supplemental briefing on this issue (Gov. Code, § 68081). We will grant extraordinary writ relief.

STATEMENT OF THE CASE AND FACTS

In November 2003, the Tuolumne County Department of Social Services (department) filed a juvenile dependency petition on behalf of petitioner's then eight-year-old, seven-year-old and four-year-old children pursuant to section 300, subdivisions (b) (failure to protect) and (c) (serious emotional damage). The petition alleges, inter alia, that petitioner's drug abuse and domestic violence placed the children at risk of harm. The juvenile court detained the children and, on December 9, 2003, conducted the initial jurisdictional hearing. Petitioner appeared at that hearing and was ordered to participate in drug dependency court. The court set a contested jurisdictional/dispositional hearing for December 30, 2003.

Petitioner failed to personally appear at the hearing on December 30, 2003, and her attorney was unable to account for her whereabouts. The juvenile court assumed dependency jurisdiction pursuant to section 300, subdivisions (b) and (c), ordered reunification services and set a six-month review hearing.

On January 13, 2004, petitioner appeared before the juvenile court sitting as the drug dependency court and was ordered to sign her reunification case plan. Petitioner complained she received notice of the dispositional hearing by mail on December 30, 2003 after the hearing had already been conducted. She acknowledged, however, that the court informed her of the dispositional hearing when she appeared in court on December 9, 2003. Despite her contention she was not properly notified of the dispositional hearing, petitioner did not file a notice of appeal challenging the court's dispositional findings and orders.

Over the next six months, petitioner failed to comply with her drug dependency treatment and reunification plans. Further, according to the department in its six-month status review, petitioner's last visit with the children occurred in January 2004.

During that visit, petitioner reportedly acted inappropriately and challenged the visitation rules. Consequently, the department discontinued visitation until petitioner agreed to abide by the rules. In late May 2004, petitioner requested, but was denied, visitation after she admitted being under the influence of methamphetamine and marijuana. In light of petitioner's noncompliance and lack of contact with the children, the department recommended the juvenile court terminate petitioner's reunification services and set a section 366.26 hearing.

On July 15, 2004, the juvenile court conducted a contested six-month review hearing. Petitioner testified the department failed to properly notify her of the December 30, 2003 dispositional hearing. She conceded her failure to comply with her court-ordered services or visit her children. Nevertheless, she asked the court for continued reunification services so that she could participate in residential drug treatment.

After argument, the juvenile court terminated reunification services and set a section 366.26 hearing for November 9, 2004. This petition ensued.

DISCUSSION

The Welfare and Institutions Code sections dealing with dependent children (§ 300 et seq) set forth specific guidance concerning the provision of reunification services. Section 361.5, subdivision (a) governs the duration of services provided to a parent whose children have been removed from the home. Where, as here, the children were all over the age of three years when removed from parental custody, the statute contemplates a minimum of 12 months of reunification services with status review hearings to be conducted every six months after the initial dispositional hearing. (§§ 361.5, subd. (a)(1) & 366, subd. (a)(1).)

Section 366.21, subdivision (e) guides the juvenile court in its review of the first six-month period of reunification. The statute generally requires the court to continue reunification services to the parent if returning the child to parental custody

would place the child at a substantial risk of detriment. However, the statute provides an exception. It states: "If the child was removed initially under subdivision (g) of Section 300 and the court finds by clear and convincing evidence that the whereabouts of the parent are still unknown, or the parent has failed to contact and visit the child, the court may schedule a hearing pursuant to Section 366.26 within 120 days. If the court finds by clear and convincing evidence that the parent has been convicted of a felony indicating parental unfitness, the court may schedule a hearing pursuant to Section 366.26 within 120 days."

Subdivision (g) of section 300 allows the juvenile court to adjudge the child a dependent of the court when the child has been left without provision for support. It sets forth specific parental acts that amount to child abandonment: voluntary surrender of the child, incarceration or institutionalization without making arrangements for the care of the child, leaving the child with a relative or other adult custodian who is unwilling or unable to provide care or support for the child, and disappearance.[2]

California Rules of Court, rule 1460(f)(1)[3] (rule), the Judicial Council's interpretation of section 366.21, subdivision (e), provides further guidance with respect to the six-month review hearing. The rule states in relevant part: "(f) If the court does not return custody of the child, [¶] (1) The court may set a hearing under

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[2] The full text of section 300, subdivision (g) describes the child as one who "has been left without any provision for support; physical custody of the child has been voluntarily surrendered pursuant to Section 1255.7 of the Health and Safety Code and the child has not been reclaimed within the 14-day period specified in subdivision (e) of that section; the child's parent has been incarcerated or institutionalized and cannot arrange for the care of the child; or a relative or other adult custodian with whom the child resides or has been left is unwilling or unable to provide care or support for the child, the whereabouts of the parent are unknown, and reasonable efforts to locate the parent have been unsuccessful."

[3] Further references to rules are to the California Rules of Court.

section 366.26 within 120 days if: [¶] (A) the child was removed under section 300(g) and the court finds by clear and convincing evidence that the parent's whereabouts are still unknown; or [¶] (B) the court finds by clear and convincing evidence that the parent has not had contact with the child for six months; or [¶] (C) the court finds by clear and convincing evidence that the parent has been convicted of a felony indicating parental unfitness; …."

In this case, the juvenile court terminated reunification services under the authority of rule 1460(f)(1) based on petitioner's failure to contact her children in the six months preceding the review hearing. Real party in interest justifies the termination order not only based on rule 1460(f)(1) but also on the prevailing interpretation of section 366.21, subdivision (e) enunciated by Division 1 of the Fourth Appellate District in *In re Monique S.* (1993) 21 Cal.App.4th 677 (*Monique S.*). There the court concluded, after analyzing the grammatical structure of the provision in conjunction with rule 1460(f)(1), that section 366.21, subdivision (e) empowers the juvenile court to set the section 366.26 hearing based strictly on the parent's failure to contact and visit the child regardless of the initial grounds for removal. (*Id*. at p. 682.) The court explained: "We interpret the Legislature's placement of the comma after the word 'unknown' to create an additional ground for setting the section 366.26 hearing where 'the parent has failed to contact and visit the child,' regardless of the initial grounds for removal. Our interpretation is supported by California Rules of Court, [rule 1460(f)(1)], ..."[4] (*Ibid*., fns. omitted.)

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[4] The *Monique S.* court cited rule 1460(f)(2)(A), which was renumbered and is now contained in rule 1460(f)(1).

We recognize that *Monique S*. has been favorably cited by two published decisions.[5] However, we interpret the statute differently. We conclude the Legislature tied parental failure to visit or contact the child with a prior adjudication of abandonment. We believe our interpretation is sound both structurally and logically. For example, if we read the phrase "or the parent has failed to contact and visit the child" as standing apart from a previous adjudication under section 300, subdivision (g), it would then also stand apart from the requirement of a finding under clear and convincing evidence, a result which makes no sense. Furthermore, it is not reasonable to assume the Legislature meant that a failure to contact and visit the child alone is an independent ground for advancing directly to the section 366.26 hearing when it carefully enumerated a second ground, conviction of a felony indicating parental unfitness, in a separate sentence and indicated that finding must be made by clear and convincing evidence.

Therefore, we interpret section 366.21, subdivision (e) as establishing only two situations where the court can schedule a section 366.26 hearing at the six-month review: (1) when the child has been removed under section 300, subdivision (g) and the court finds by clear and convincing evidence the whereabouts of the parent is still unknown or the parent has failed to contact and visit the child; or (2) when the court finds by clear and convincing evidence the parent has been convicted of a felony indicating parental unfitness. Either of these circumstances reasonably justifies accelerating the section 366.26 hearing.

Moreover, any doubt that remains is readily clarified by express Legislative intent. Section 366.21, subdivision (e) was enacted in 1987 as part of Senate Bill No.

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5 See *In re Tameka M*. (1995) 33 Cal.App.4th 1747, 1754, and *In re David H*. (1995) 33 Cal.App.4th 368, 386, footnote 11.

243 (1987-1988 Reg. Sess.), a bill intended to establish a new structure for making permanency decisions. With respect to the six-month review, the Senate Committee on Judiciary stated "the new structure would allow a case to go directly from the 6 month review to a permanency planning hearing if the child had been abandoned or the parent was convicted of a felony which indicated parental unfitness." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 243, as amended Apr. 27, 1988.)

Finally, we disagree with real party in interest that our interpretation conflicts with section 366.26, subdivision (c)(1) which provides that once a child has been deemed adoptable, certain enumerated circumstances constitute a sufficient basis for termination of parental rights including a finding "under subdivision (e) of Section 366.21 that the whereabouts of a parent have been unknown for six months or that the parent has failed to visit or contact the child for six months or that the parent has been convicted of a felony indicating parental unfitness …." Real party argues this section, by its plain language, lists three different bases for the termination of parental rights without ever mentioning that the child was removed from the home pursuant to section 300, subdivision (g). We find no conflict between sections 366.21, subdivision (e) and 366.26, subdivision (c)(1). By invoking the provision of section 366.21, subdivision (e), section 366.26, subdivision (c)(1) necessarily imports the effect of section 300, subdivision (g), which clear legislative intent tells us is a foundational requirement for the setting of a section 366.26 hearing.

Our interpretation of section 366.21, subdivision (e) mandates a grant of relief in this case. Petitioner was entitled to 12 months of reunification services pursuant to section 361.5, subdivision (a)(1) based on the ages of her children on the date of their removal for her custody. Though petitioner failed to contact and visit her children for the six months following the dispositional hearing, she had not previously abandoned them. They were removed from her custody under subdivisions (b) and (c) of section 300, not subdivision (g). Therefore, she did not fall under the exception to 12 months

of services in section 366.21, subdivision (e), and the court erred in terminating reunification services at the six-month review hearing and setting the section 366.26 hearing.

DISPOSITION

The petition is granted. Let an extraordinary writ issue directing respondent court to vacate its order of July 15, 2004, terminating reunification services and setting the section 366.26 hearing. Respondent court is further directed to conduct a new six-month review hearing and enter a new order reinstating reunification services for an additional six months.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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CORNELL, J.

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GOMES, J.