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COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

IN RE KASITY K., ET AL. Persons coming under the Juvenile Law SHASTA COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent v. MELISSA H., ET AL., Defendants and Appellants.	**COURT OF APPEAL** **NO. C047217** SHASTA COUNTY SUPERIOR COURT NO. 22419301-401

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SHASTA
THE HONORABLE WILLIAM GALLAGHER, JUDGE, PRESIDING

APPELLANT'S OPENING BRIEF

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BY APPOINTMENT OF THE COURT OF APPEAL UNDER THE CENTRAL CALIFORNIA APPELLATE PROGRAM'S INDEPENDENT CASE SYSTEM

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INTRODUCTION.

In this dependency appeal, appellant-mother raises several issues: First, she contends that she was provided with ineffective assistance of counsel, which resulted in the dismissal of her California Rules of Court, rule 39.1B writ petition challenging the court's termination of her reunification services.

Second, she challenges the juvenile court's orders at the six-month review hearing, which continued the minors placed outside her care. Appellant argues that no substantial evidence demonstrated the return of the minors to her care was detrimental to their well-being.

Third, appellant challenges the juvenile court's termination of

her reunification services at the six-month review hearing. This argument is based on the fact that no substantial evidence sported the lower court's determination that the minors could not be returned to appellant within six months, and is valid even in light of the eighteen-month statutory limit to reunification services.

Fourth, appellant challenges the termination of her parental rights at the Welfare and Institutions Code[1], section 366.26 hearing because the juvenile court failed to invoke the subdivision (c)(1)(A) exception even though the bond shared by appellant and the minor necessitated such action.

Fifth, appellant contends that contradicting evidence surrounding the bonding issue at the 366.26 hearing made an accurate determination of the applicability of the subdivision (c)(1)(A) exception impossible, and that the juvenile court wholly failed to exercise its discretion to order a bonding study be preformed.

Finally, appellant contends that the numerous errors that occurred in this case undermined the effective functioning of the court and combined to create a highly prejudicial cumulative effect.

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[1]All statutory reference are to this code.

STATEMENT OF APPEALABILITY.

This appeal are taken from orders entered in Shasta Juvenile Court on June 11, 2004, terminating appellant's parental rights to the minors, Kasity and Victoria, under section 366.26. (CT 1147: RT 526.) The termination of parental rights is a "final judgment." Therefore, these arguments are authorized by section 395 and California Rules of Court, rule 1435(b).

INTEGRATED STATEMENT OF THE CASE AND FACTS.[2]

In March 2002, appellant-mother, Melissa H. ("appellant"), father, William W. ("father"), and the minors, Kasity K., born April 1, 1999, and Victoria W., born May 7, 2001, were living together in Tehama county. (CT 13.) The parents had a history of domestic violence and their living arrangement violated a restraining order which appellant had obtained against father after he broke three of her ribs. (CT 13, 59-61.)

On March 22, 2002, appellant left the minors locked inside a

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[2] *In re Kimberly F.* (1997) 56 Cal.App.4th 519, fn. 2, recommends combining the statement of case and facts in dependency appeals.

car for almost three hours while she argued with father. (CT 15.) The incident spurred police involvement, both parents were arrested for violation of the restraining order, and the Tehama County Department of Social Services ("Tehama Department") took the minors into protective custody. (CT 12.)

Due to the parent's history of domestic violence, on March 26, 2002, the Tehama Department filed a petition with the juvenile court alleging the minors came within the provisions of section 300, subdivisions (b) and (c). (CT 1-10.) The following day, the court found prima facie evidence to support the petition and formally detained the children. (CT 21-22.)

On May 8, 2003, during a contested jurisdictional hearing, the court dismissed the section 300, subdivision (c) allegations, but took jurisdiction over the minors based under subdivision (b). (CT 4, 70-71.) Specifically, the sustained allegations indicated the minors were at risk due to the parents' history of domestic violence. (CT 4.)

The minors were placed with a foster family and adjusted well. (CT 87.) T the time, Kasity suffered from sever tooth decay and had to have four teeth extracted. (CT 87.) Kasity was observed to be

aggressive and was seen biting her sibling's neck. (CT 88.) After the minors' removal, appellant consistently visited them three times a week. (CT 89.)

On June 10, 2002, during a dispositional hearing, the court found that the return of the minors to parental care was detrimental, and ordered the Tehama Department to provide the parents with reunification services. (CT 106-107.) After the dispositional hearing, it was determined the parents were residents of Shasta county, and they were referred to services there. (CT 155-156.) On August 26, 2002, the Tehama court found that the minors' legal residence was in Shasta County and transferred the case. (CT 163-166.) On September 23, 2002, the Shasta court accepted the transfer, and, on November 4, 2002, the six-month status review hearing was continued to allow the Shasta County Department of Social Services ("Department") to prepare a report. (CT 172-177; RT 1.)

Meanwhile, appellant continued to visit the minors three hours a week, and made progress with her case plan. (CT 185.) She attended an assessment at Shasta County Alcohol and Drug where it was determined she needed no services, and tested negative for drug

use. (CT 186.) Appellant did not follow up on referrals to anger management courses. (CT 187-188.)

In October 2002, father was incarcerated, and on October 23, 2002, appellant attempted to visit him in jail. (CT 824.)

On December 2, 2002, the six-month review hearing was continued a second time on request from appellant's counsel. (CT 275; RT 10.) On December 9, 2002, the hearing was continued again. (CT 277.)

On December 10, 2002, appellant reluctantly completed an assessment for anger management treatment where it was determined she needed to attend a sixteen-session program. (CT 289.) After beginning the program, she consistently participated in the meetings and reported enjoying them. (CT 289.) Appellant also enrolled in, and completed, a weekly domestic violence group. (CT 289.) Her domestic violence counselor in the program reported appellant "seemed to take the information to heart and gained a lot of insight and knowledge into the damage domestic violence [did] to herself and to her children." (CT 289.)

Appellant continued to consistently visit, but she was

inattentive to the minors at times, and although she had participated in parenting classes in Tehama county, the supervising social worker felt appellant needed further parenting training, and referred her to a parenting class. (CT 290.) However, appellant stated she had already signed up for a parenting class at the Remedy Center and declined the referral. (CT 290.)

In early 2003, Kasity made allegations of sexual abuse by an unidentified individual, and exhibited sexualized behavior. (CT 291-292.) The allegations were confirmed by a medical doctor who observed eroding and scaring of the minor's hymen consistent with traumatic penetration. (CT 291. 458-459.) After Kasity divulged the information, she began making herself vomit and smearing feces on the floor and wall. (CT 292.)

On January 20, and February 6, 2003, social worker, Andrea Wemette ("SW Wemette"), supervised visits between the minors and appellant. (CT 579.) Reportedly, appellant continued to visit and interact warmly with the minors, but was sometimes inattentive to them. (CT 579-580.) Because appellant would sometimes become sidetracked coloring or playing a video game during visits, SW

Wemette recommended she participate in another intensive parenting education class, as well as a psychological evaluation to determine her ability to benefit from parenting education. (CT 580.)

In February 2003, social worker, Valerie Pearson ("SW Pearson"), also began regularly supervising visits. (RT 102.)

On February 14, 2003, during the six-month review hearing, appellant moved to disqualify the bench officer. (CT 377.) The court denied her motion as being untimely and proceeded with the hearing. (CT 377; RT 15.) Appellant then requested her counsel be relieved. (CT 377 RT 19.) The court granted her request, allowed appellant to represent herself, and continued the review hearing again. (CT 377; RT 20.)

On March 10, 2003, appellant submitted a letter to the court accusing SW Minser of abusing her authority and acting unfairly toward her. (CT 386-397.)

On March 13, 2003, supervising social worker, Kim Minser ("SW Minser"), submitted an addendum report which stated appellant had tested negative for drug exposure eleven times, completed a parenting class, and was assessed as not needing services involving

mental health and drug issues. (CT 568.) Nevertheless, she recommended the minors remain outside appellant's care and that reunification services be extended. (CT 570.)

By March 14, 2003, appellant had secured the counsel of Attorney Cibula, and the six-month review hearing was again continued to allow the new attorney to meet with appellant. (CT 581.)

From March 23, to April 3, 2003, appellant visited with father in jail for approximately four times for about thirty minutes each time (CT 824.)

In a status review report submitted on May 7, 2003, SW Minser changed her recommendation and requested appellant's reunification services be terminated because appellant was not able to safely and effectively parent her children. (CT 726.) SW Minser reported that appellant's parenting skills were poor because she put her needs before those of the minors. (CT 736.) To support her conclusion and recommendation, SW Minser referred to a report by SW Wemette which stated appellant was once allowed to visit with the minors outside, and that the minors enjoyed playing outside, but that appellant never requested to visit outside again. (CT 736.) She also

pointed to reports by SW Wemette which indicated appellant would decline offers from the minors to play with blocks and would instead put polish on their nails and make up on their faces. (CT 736.) Other problems referred to in SW Wemette's report, and referenced by SW Minser in her status review report, included appellant encouraging the minors to overeat, talking about her tan or the activities she was doing, and putting "regular" rubber bands instead of terry cloth rubber bands in the minors' hair. (CT 737.)

Relying upon earlier reports, SW Minser reorted that the minors did not feel safe with appellant and that Kasity always wanted to know the foster parents were within cell phone reach in case she wanted to end visits early. (CT 733.) SW Minser reported that she had referred appellant to a second parenting class in March 2003, but that appellant had still not enrolled. (CT 738.) SW Minser also reported both she and SW Wemette felt "an undercurrent of hostility" from appellant, and that appellant's immaturity interfeared with the reunification plan. (CT 736.)

Meanwhile, the minor, Kasity, began therapy to address sexual molest issues, and while making progress, nevertheless exhibited

extremely disturbed behaviors, lacked empathy, and showed no remorse. (CT 734, 823.) Both minors were physically healthy. (CT 734-735.)

In July 2003, appellant was engaged to be married to boyfriend, Jonathan H. (RT 186-187.) Jonathan had no history of domestic violence, no criminal history or involvement with the Department, no difficulties getting along with father, and that he planned on marrying appellant. (CT 879; RT 187-188, 190.)

In August 2003, SW Minser reported that appellant's visits were chaotic with poor structure and too few boundaries, and that Kasity always had to be assured of the foster parents' whereabouts during the visits. (CT 819, 821.)

In August 2003, SW Minser filed an addendum report that continued to recommend appellant's services be terminated. (CT 804.) This report indicated appellant had requested charges of child abuse be filed against both SW Minser and SW Wemette. (CT 803.)

In August 2003, appellant completed her sixteen-session anger management program. (RT 168.)

On August 15, 2003, during the six-month review hearing,

Attorney Cibula informed the court that Attorney Mackey was associated with him and would be representing appellant as co-counsel. (CT 843; RT 22.)

SW Pearson was then called to testify regarding the visits she had supervised. (RT 102.) Pearson stated that the minors used to want to leave the visits early, but now wanted to stay through the entire visits, and that the minors seemed to feel safe with appellant. (RT 102, 105) SW Pearson also opined that appellant had grown a lot, improved her parenting skills, and was nurturing and responsive to the minors' needs. (RT 107.) SW Pearson stated that the minors were bonded to appellant and looked to her for direction when other relatives were not in the room. (RT 108-109.)

SW Minser was then called to testify and stated that she had never formally referred appellant to a psychological evaluation because she did not believe appellant would complete it. (RT 166.)

On August 29, 2003, the six-month review hearing was continued due to attorney Mackey being ill. (CT 894; RT 286.)

On September 25, 2004, during a continued six-month review hearing, the court found that appellant had failed to make substantial

progress with her case plan, and that it was not substantially probable that the minors could be returned to parental care within "a reasonably foreseeable time." (CT 922; RT 410-411.) Whereupon, the court terminated reunification services, continued the minors placed outside parental care, and set the matter for a section 366.26 hearing. (CT 922; RT 410-411.) The court acknowledged appellant loved and had an emotional connection with the minors, but stated that the crux of its decision was based on appellant's communications with father. (RT 408.)

After the review hearing, appellant continued to consistently visit the minors, but the visits were reduced to once a week. (CT 1092.) SW Wemette stopped supervising visits, and the visits were primarily supervised by SW Pearson. (RT 449, 499-500.)

On October 1, 2003, appellant filled out a notice of intent to file a writ petition and signed the document personally. (CT 1001.) However, when she sought to file the document, she was incorrectly informed by a court clerk that the notice had to be filled out by her attorney, and not her. (CT 1001.) Appellant immediately went to attorney Cibula's office, and he filled out and signed a new notice of

intent. (CT 926-927, 1001.) Later that day, appellant returned to the courthouse and filed the notice signed by attorney Cibula without signing the document herself. (CT 1001, 1014, 1016.)

Because the notice which was ultimately filed was not signed by appellant, on October 31, 2003, this Court directed appellant to show, by letter or brief, why the writ should not be dismissed pursuant to rule 39.1B(f). (CT 1029.) The deadline provided by this court was November 10, 2003. (CT 1029.)

On November 12, 2003, instead of filing a new notice of intent to file a writ petition signed by appellant with an explanation of the circumstances the dissuaded compliance with rule 39.1B(f), appellant's counsel filed a brief opposing the juvenile court's initial assumption of jurisdiction over the minors, and questioning the services provided by the Department. (CT 1032-1049.) Because the brief wholly failed to address the issues surrounding rule 39.1B(f), this Court dismissed appellant's writ petition. (CT 1012.)

On January 22, 2004, attorney Mackey again attempted to correct the mistake by filing a declaration opposing the dismissal. (CT 1024.) However, because this Court had already dismissed the

matter, it indicated it had no jurisdiction to review the declaration and returned it to trial counsel without review. (CT 1021.)

Before the review hearing, the minors had been placed with the same foster family for approximately one year, and demonstrated a bond with them. (CT 962.) They were physically healthy and Kasity's emotional problems were improving. (CT 961.) The foster parents had an approved home study on file, understood the legal and financial responsibilities of adoption, and were committed to adopting the minors. (CT 962.)

At a hearing on February 18, 2004, appellant underwent a psychological evaluation which she paid for herself. (CT 1064.) Psychologist, David Hamilton, determined that appellant suffered from no severe mental disorders and that her mental functioning allowed her to maintain meaningful interpersonal relationships. (CT 1065.) On February 13, 2004, attorney Mackey filed a section 388 petition on behalf of appellant requesting that reunification services be reinstated and that a bonding study be ordered. (CT 1062; Supp RT 2.)

On February 13, 2004, Attorney Cibula was not present in

court. (CT 1073; Supp RT 2.) Attorney Mackey informed the court that she was not retained to help with the section 366.26 hearing, and the matter was continued. (CT 1073; Supp RT 2.)

On February 17, 2004, Attorney Cibula was present, and informed the court that he would be representing appellant without the assistance of attorney Mackey. (CT 1076; Supp RT 11.) After the February 17 hearing, appellant terminated the services of Attorney Cibula, and requested the court appoint her a new attorney. (CT 1079.)

On March 22, 2004, the court appointed attorney Vicky Cochran to represent appellant, and the matter was continued. (CT 1080.) On April 9, and May 21, 2004, the section 366.26 hearing was continued again due to attorney Cibula failing to send a complete file to newly appointed counsel, attorney Cochran. (CT 1106, 1129; Supp RT 23.)

In May 2004, SW Minser submitted an addendum report which continued to recommend appellant's services be terminated. (CT 1111.) SW Minser reported that Kasity would act out before and after visits, but seemed to enjoy the visits while they were taking place.

(CT 1110.)

Finally, on June 11, 2004, the section 366.26 hearing took place. (CT 1145.) During the hearing, SW Pearson again testified regarding the visits she continued to supervise. (RT 447.) The social worker stated that the minors would run to appellant when they saw her, called her "mom," and would hug and kiss her. (RT 449.) SW Pearson opined that appellant had benefitted from her parenting classes, and stated appellant was appropriate during visits, and the minors appeared to enjoy the visits. (RT 450, 452.) Pearson also stated that the visits would end with hugs and kisses, and on various occasions Kasity didn't want to leave. (RT 453-455.) However, SW Pearson stated that the minors occasionally had to be reassured that the social worker would not leave. (RT 475.)

SW Wemette was then called to testify. (RT 489.) Although she had not supervised a visit since September 2003, and could not recall the last visit she supervised, Wemette opined that appellant provided very little structure during visits, and that the visits caused Kasity to act out behaviorally. (RT 499-500.) She stated that the minors were not bonded to appellant, and, that after the last visit she

supervised, Kasity was anxious about the whereabouts of her foster mother, and began to cry when she failed to see her foster mother immediately after the visit. (RT 500-501.) SW Wemette testified that Kasity frequently asked to end the visits early. (RT 502.) SW Wemette also informed the court that she participated in picnics, swim parties, Christmas parties, and home visits with the foster family as part of her responsibilities as the family's social worker. (RT 496-497.)

After both social workers had testified, attorney Cibula expressed concern with SW Wemette's credibility. (RT 517-518.) However,the court found SW Wemette to be a credible witness who gave "the most reasoned and deepest analysis of all the people who testified." (RT 524.) The court also stated that the "subtle distinctions" of the social workers' testimonies could be reconciled. (RT 525.) Whereupon, the court found the minors to be adoptable, and terminated appellant's parental rights without invoking the provisions of section 366.26, subdivision (c)(1)(A). (CT 1147; RT 526.)

On July 1, 2004, appellant filed a notice of appeal seeking

relief from the juvenile court's orders terminating her parental rights and freeing the minors for adoption. (CT 1156-1157.) This challenge follows.

ARGUMENT

I

BY FAILING TO ENSURE APPELLANT'S NOTICE OF INTENT TO FILE A WRIT PETITION WAS FILED APPROPRIATELY, AND BY FAILING TO CORRECT THE DEFICIENT NOTICE AFTER THE ERROR WAS BROUGHT TO LIGHT BY THIS COURT, TRIAL ATTORNEYS, CIBULA AND MACKEY, FAILED TO EFFECTIVELY REPRESENT HER.

During and immediately after the six-month review hearing, appellant was represented by attorneys Cibula and Mackey. (CT 581, CT 843, 922, 1073, 1076; RT 22.) These attorneys failed to provide appellant with effective assistance of counsel in two ways: First, they failed to ensure that her notice to file a writ petition was filed appropriately, which resulted in appellant filing a notice which did not include her signature. (CT 926.) Second, after allowing appellant to file the defective notice, counsel failed to competently respond to a

request from this court to explain the signature's omission, which resulted in the petition being dismissed. (CT 1001, 1012, 1029, 1032-1049.)

Appellant's counsel's ineffective representation prejudiced her by robbing her of a chance to challenge the juvenile court's orders entered at the six month review hearing.

A. The rules governing claims of ineffective assistance of counsel in the dependency context.

Section 317 provides that counsel shall be appointed for an indigent parent when out-of-home care of a child is an issue. (subd. (a) and (b).) The appointed counsel is required to "represent the parent, guardian, or minor at the detention hearing and at all subsequent proceedings before the juvenile court." (§ 317, subd. (d).) Section 317.5 provides that "[a]ll parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel."

The parents bear the burden of assuring their attorney's representations were deficient and that these deficiencies resulted in prejudice. (*In re Dennis H.* (2001) 88 Cal.App.4th 94, 98.) First,

there must be a showing that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Second, there must be a showing of prejudice, that is, reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1711, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.)

Although a claim of ineffective assistance of counsel is usually raised by way of writ of habeas corpus, it may be effectively raised as part of an appeal in the rare case where the appellate record demonstrates "there simply could be no satisfactory explanation" for trial counsel's action or inaction. (*People v. Pope* (1979) 23 Cal.3d 412, 426; *In re S.D.* (2002) 99 Cal.App.4th 1068, 1077-1078.)

Claims of ineffective assistance of counsel may be raised from orders ante-dating the section 366.26 termination of parental rights order in certain circumstances. (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1256-1257.)

B. Appellant was provided with ineffective assistance of counsel.

On October 1, 2003, appellant personally completed and signed a notice of intent to file a petition for writ review challenging the juvenile court's orders at the six-month review hearing. (CT 1001.) However, when she attempted the file the document with the court clerk, she was incorrectly informed that the notice had to be signed by her attorney. (CT 926, 1001.) Appellant immediately contacted attorney Cibula, who signed a new notice without pointing out the clerk's misinformation. (CT 1014, 1016, 1018.) Later that day, appellant returned to the courthouse and filed the new notice without signing the document herself. (CT 926, 1001.)

Because the notice that was ultimately filed was not signed by appellant, on October 31, 2003, this Court directed appellant to explain why the notice failed to comply with California Rules of Court, rule 39.1B(f). (CT 1029.) A deadline of November 10, 2003 was set to receive response by letter or brief. (CT 1029.)

Appellant's counsel never clarified the simple misunderstanding, and did not seek to cure the error by submitting a new notice signed by appellant. Instead, on November 12, 2003,

appellant's counsel filed a brief which dedicated twenty-five pages to opposing the juvenile court's assumption of jurisdiction over the minors, and questioning the services provided by the Department. (CT 1032-1049.) The misdirected and untimely response by appellant's counsel resulted in this Court's dismissal of appellant's writ petition. (CT 1012, 1032.)

There is no satisfactory explanation for trial counsel's failure to ensure appellant's notice of intent to file a writ petition was filed correctly. (*People v. Pope, supra,* 23 Cal.3d. at p. 426.) Even more disturbing is counsel's failure to appropriately respond to this court's request for an explanation of non-compliance with rule 39.1B(f). Counsel's actions clearly fell below an objective standard of reasonableness under prevailing professional norms. (*People v. Pope, supra,* 23 Cal.3d at p. 426; *In re Emilye A., supra,* 9 Cal.App.4th at p. 1710.)

It is also clear that appellant's trial counsel's shortcomings resulted in substantial prejudice. (*In re Emilye A., supra,* 9 Cal.App.4th at p. 1711, quoting *Strickland v. Washington, supra,* 466 U.S. at p. 688, 694.)

The single most important aspect of appellate representation undertaken on behalf of indigent parents is not the appeal from the .26 hearing, but the preparation of the writ petition challenging the termination of reunification services. (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1255.) Because appellant's notice was filed incorrectly, and because appellant's counsel failed to correct the error, appellant was effectively robbed of the chance to challenge the juvenile court's orders entered at the six-month review hearing, including orders terminating her reunification services.

Because of counsel's failure, the six-month review hearings may be challenged now. (*In re S.D., supra,* Cal.App.4th at p. 1077-1078.)

II

AT THE SIX-MONTH REVIEW HEARING, INSUFFICIENT EVIDENCE SUPPORTED THE COURT'S ORDER CONTINUING THE MINORS PLACED OUTSIDE PARENTAL CARE.

On September 25, 2004, during a six-month review hearing, the juvenile court found that the return of the minors to appellant's care was detrimental to their well-being, and continued the minors placed

outside appellant's home. (CT 922; RT 410-411.) Because appellant regularly participated with her case plan, and because no substantial evidence existed to show that the return of the minors to appellant's care was detrimental, the court's continued removal was error.

A. The law related to the termination of reunification services.

Section 366.21, subdivision (e) provides "At a review hearing held six months after the dispositional hearing, the court shall order the return of the child to the physical custody of his or her parent unless the court finds, by a preponderence of evidence, that the return of the child to his or her parent would create a substantial risk of detriment to the safety, protection, or physical or emotional well being of the child. (*Dawnel D. v. Superior Court of Orange County* (1999) 74 Cal.App.4th 393, 397.)

A parent's failure to participate regularly in court ordered treatment programs constitutes prima facie evidence that return would be detrimental. (§ 366.21, subd (f); *Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 763-764.) However, a parent is not required to demonstrate perfect compliance with the reunification

program. (*Dawnel D. v. Superior Court of Orange County, supra*, 74 Cal.App.4th at p. 397-398.)

Although compliance with the reunification plan is certainly a pertinent consideration when making a finding of detriment, the court must also consider the progress the parent has made towards eliminating the conditions leading to the out-of-home placement. (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 704; *In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1141-1142.)

Additionally, at a review hearing, a trial judge can consider: whether changing custody will be detrimental because severing a positive loving relationship with the foster family will cause serious, long-term emotional harm; properly supported psychological evaluations which indicate return to a parent would be detrimental to a minor; whether the natural parent maintains relationships with persons whose presence will be detrimental to the ward; instability in terms of management of a home; difficulties a minor has in dealing with others such as stepparents; limited awareness by a parent of the emotional and physical needs of a child; failure of a minor to have lived with the natural parent for long periods of time and the manner

in which the parent has conducted himself or herself in relation to the minor in the past. (*Constance K. V. Superior Court, supra*, 61 Cal.App.4th at p. 704-705.)

More than the social worker's conclusion and recommendation that such a substantial risk of detriment exists is required to satisfy the burden of proof. (*In re Heather P.* (1989) 203, Cal.App.3d 1214. 1227-1228.)

B. No substantial evidence supported the juvenile court's order continuing the minors placed outside appellant's care.

Here, appellant regularly participated in and substantially complied with her case plan. She maintained consistent visits, completed courses in parenting, domestic violence, and anger management, and was assessed as not needing services for substance abuse or mental health. (CT 289, 568; RT 187-190.)

During the review hearing, the Department indicated appellant had failed to undergo a psychological evaluation. (RT 166.) However, SW Minser testified that appellant was never formally referred to an evaluation, so if it was necessary, the problem was the Department's failure to provide reasonable services, not appellant's

failure to comply with them. (RT 166; *In re Candace P.* (1994) 24 Cal.App.4th 1128, 1131 [If a parent is deprived of an adequate reunification program, it is no defense to show that the parent was so irresponsible that the program would not have had a chance of success]; *In re Daniel G.* (1994) 25 Cal.App.4th 1205, 1216 [The Department may not give up on a case without really trying].)

Appellant did fail to follow up on a referral to a second parenting class. However, this fact alone did not constitute a prima facie showing of detriment, as appellant was not required to demonstrate perfect compliance with the reunification program. (*Dawnel D. v. Superior Court of Orange County, supra*, 74 Cal.App.4th at p. 397-398.)

Indeed, because appellant demonstrated substantial compliance with her case plan, an order continuing removal of the minors from appellant's care required the court to find, by a preponderance of evidence, that the return of the minors would create a substantial risk of detriment to their safety, protection, or physical or emotional well being. (*Dawnel D. v. Superior Court of Orange County* (1999) 74 Cal.App.4th 393, 397.) Here, no substantial evidence of detriment

existed.

At the hearing, the court expressed that the crux of its finding was that appellant had maintained a relationship with father through jail visits. (RT 409-410.) However, appellant only visited father a handful of times in an environment that posed absolutely no danger to herself or the minors. Moreover, the six-month review hearing took place in September 2003, and appellant's last visit with father was in April 2003. (CT 824, 922.)

By the time of the review hearing, appellant has sucessfully dealt with issues involving domestic violence, and was even engaged to man who had *no criminal past and no tendencies toward domestic violence*. (CT 289; RT 197-190.) Her domestic violence counselor reported appellant "seemed to take the information to heart and gained a lot of insight and knowledge into the damage domestic violence does to herself and her children." (CT 289.) A handful of visits with father, which occurred in a protected environment approximately five months before the hearing, did not show the minors would be in danger if returned to appellant, and was insufficient to justify continued removal.

Although not specifically addressed by the court, it is possible to imply that the juvenile court also gave weight was given to the observations of appellant's parenting skills mentioned in the Department's status review reports. (See *Constance K. V. Superior Court, supra*, 61 Cal.App.4th at p. 704-705.) Specifically, SW Minser reported that appellant had not benefitted from her parenting class, put her needs before those of the minors, and did things like put regular rubber bands in the minors' hair, refused to play with blocks, and talked about her tan. (CT 736.)

However, the notion a parent has not internalized the parenting doctrines espoused by the supervising social service agency does not necessarily mean a minor is at risk in that parent's care. (*In re Jasmine G.* (2000) 82 Cal.App.4th 282, 288-291.) SW Minser's trivial observations of appellant's "inadequate" parenting skills also failed to show the minors would be at risk of any substantial harm if returned to appellant's care.

This case originated as a result of domestic violence between appellant and father. Appellant complied with her case plan and ameliorated the problems that initiated the court's assumption of

jurisdiction. Because no substantial evidence showed the return of the minors to appellant's care would be detrimental to them, the court's continued removal at the six-month review hearing was error.

III

NO SUBSTANTIAL EVIDENCE SUPPORTED THE JUVENILE COURT'S TERMINATION OF APPELLANT'S REUNIFICATION SERVICES AT THE SIX-MONTH REVIEW HEARING.

On September 25, 2003, at a section 366.2, subdivision(e) six-month review hearing, the juvenile court terminated appellant's reunification services. (CT 922; RT 410-411.) Because appellant substantially complied with the terms of her case plan, and gave the court no reason to believe she could not reunify with the minors within the next six months, the court's termination of services was error. This is true regardless of the fact that the case had reached the eighteen-month statutory limit for reunification services.

A. The law related to the termination of reunification services at a section 366.21(e) review hearing.

At the six-month hearing for a child who was under the age of

three when initially removed from a parent's custody, the court must determine if "there was a substantial probability that the child may be returned to his or her parent. (*Dawnel D. V. Superior Court of Orange County, supra,* 74 Cal.App.4th at p. 398-399; *In re Candace P.* (1994) 24 Cal.App.4th 1128, 1132-1133.) Section 366.21, subdivision (e) expressly requires the court to determine whether "there is a substantial probability that the child may be returned to his or her parent *within six months*. (*Ibid.*) If the court concludes such a probability exists, it shall continue the case to the twelve-month permanency hearing. (*Ibid.*) The plain language of the statute demonstrates the Legislature's intent the court look at a full six-month period, regardless of when the twelve-month period would expire in a particular case, when it makes that determination. (*Ibid.*)

Passage of twelve-month review hearing date does not convert a review hearing into an eighteen month review hearing. (*In re Ricky H.* (1992) 10 Cal.App.4th 552, 556, fn. 2.) Section 366.22 only applies when the case has been continued pursuant to section 366.21, subdivision (g)(1), which in turn can only occur after the court finds at a section 366.21, subdivision (f) hearing, either "that there is a

substantial probability that the minor will be returned to the physical custody of his or her parent or guardian within six months or that reasonable services have not been provided to the parents." (*Ibid.*)

B. No substantial evidence supported the lower court's termination of appellant's reunification services

As demonstrated in Argument "II", appellant regularly participated with her reunification plan, and no substantial evidence existed showing that the placement of the minors in her care would be detrimental. It follows then, that the court's finding appellant was not capable of reunifying with the minors within the next six months, or "within a reasonable amount of time," as the court put it, was even less supported. (RT 410.)

Even if appellant's failure to enroll in a parenting class, and the trivial observations of the Department regarding appellant's parenting "inadequacies," could be interpreted as constituting detriment at the time of the six-month review hearing, they certainly did not qualify as problems that could not be resolved within the next six months, and it was highly probable that appellant could complete a parenting class.

At the review hearing, the court stated appellant had forfeited

her opportunity to reunify because "now for the sake of the children we have to move on to a different stage in the process." (RT 410.) Apparently, the court was referring to the fact that by the time the six-month review hearing was held, the eighteen-month statutory reunification period had expired. However, the court was wrong to treat the hearing as the end of the road for services.

Section 361.5, subdivision (a) permits a total of eighteen months of services after the date the minor was detained. (*Dawnel D. V. Superior Court of Orange County, supra,* 74 Cal.App.4th at p. 399.) Here, the minors were removed in March of 2002, and the six-month review hearing did not take place until eighteen months later in September of 2004. (CT 12, 922.)

However, considering that section 366.21 subdivision (e) requires the court look at a full six-month period, regardless of when the twelve-month period would expire, in this case, it is apparent that section 366.21 (e), and section 361.5(a) conflict. (*Ibid.*)

Case law has yet to address this conflict, but appellant urges this court to find that section 366.21, subdivision (e) overrides the statutory limit on reunification services detailed in section 361.5,

subdivision (a). This is because the court's failure to hold regular review hearings should not be permitted to prejudice appellant. By failing to hold hearings on schedule, the court could not evaluate or redirect appellant's progress. Moreover, the court could not evaluate the sufficiency of the Department's reunification services.

Allowing section 366.21, subdivision (e) to prevail over section 361.5, subdivision (a) also falls in line with existing case law which prohibits the court's conversion of the six-month review hearing into an eighteen-month, section 366.22 review hearing. (*In re Ricky H., supra,* 10 Cal.App.4th at p. 556, fn. 2.) If the court cannot extend services in compliance with section 366.21, subdivision (e), in a case such as this, the six-month review hearing is necessarily converted into a eighteen month review hearing under section 366.22, and the review process set forth by the legislature is undermined. (*Ibid.*)

If the Court accepts the preeminence of 366.21, subdivision (e), it is clear that reunification services should not have been terminated by the juvenile court. Nevertheless, if it is determined that section 366.21, subdivision (e), and *Dawnel D.,* do not override the eighteen month statutory limit to reunification services, the termination of

services was still unsupported because the court had discretion to continue the hearing to allow for reunification. The case of *In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1797-1799, demonstrates that reunification services may be extended beyond the eighteen month limit in the rare instances where the juvenile court determines the best interests of the minors are served by such an extension.

Here, the minors were bonded to appellant, and at the time of the review hearing, and the "barriers" to reunification were very minimal. Moreover, like in *Elizabeth R.*, circumstances beyond appellant's control caused the six-month review hearing to be held and an unusually late point in the proceedings. (*Ibid.*)

If the court truly felt that appellant needed to enroll in a parenting class to correct her "inadequacies" before having the minors placed in her care, the best interests of the minors demanded it order a short continuance to allow appellant to do so. (*Ibid.*) If the matter had been continued, it is apparent appellant was capable of reunifying with the minors in a very short period of time. (See *In re Julian L.* (1998) 67 Cal.App.4th 204, 208 [Although a minor's interests and rights are the focus of the .26 hearing, a short

continuance of that hearing does not negatively affect the minor].)

IV

THE JUVENILE COURT ABUSED ITS DISCRETION BY FAILING TO APPLY THE SECTION 366.26, SUBDIVISION (C)(1)(A) EXCEPTION TO THE TERMINATION OF PARENTAL RIGHTS.

On June 11, 2004, the juvenile court terminated appellant's parental rights without finding section 366.26, subdivision (c)(1)(A) applied. (CT 1147; RT 526.) Because appellant maintained consistent visits with the minors, and because a significant bond existed between them, the court's failure to invoke the (c)(1)(A) exception to the termination of appellant's parental rights was an abuse of discretion.

A. The law related to application of section 366.26, subdivision (c)(1)(A) exception to the termination of parental rights.

As this Court is abundantly aware, when the permanent plan of adoption is contemplated at the section 366.26 hearing, the exceptions to termination of parental rights are few. (§366.26, subd.

(c)(1)(A)-(E).) The only exception *over which a parent has control* is that found in subdivision (c)(1)(A). It requires a parent show he or she has maintained regular contact and the child would benefit from continuing that contact. (*In re Derek* W. (1999) 73 Cal.App.4th 823, 826-827; *In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373 [parent bears the burden of proof].)

Case law has defined subdivision (c)(1)(A)'s term "benefit" to mean that the juvenile court must determine whether preserving a positive parental relationship, outweighs the benefit a child would gain from an adoptive home. (*In re Cliffton B.* (2000) 81 Cal.App.4th 415, 424-425; *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154-1156; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 [It would make no sense to forego adoption in order to preserve parental rights, in the absence of a real parental relationship].)

Specifically, there must be a showing a parent has developed, or maintained, a strong parental bond with the child, typical of day-to-day contact, such that the minor would be greatly harmed if parental contact were terminated. (*In re Zachery G.* (1999) 77 Cal.App.4th 799, 810; *In re Casey D.* (1999) 70 Cal.App.4th 38, 50-

51; *In re Autumn H.* (1994) 27 Cal.App.4th 567; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411.) Despite the intonations of various opinions otherwise, this standard is virtually impossible for a parent to meet because the case law interpretation reduces the section 366.26 analysis to a "comparison of households" test, under which almost any adoptive home will trump continuing a child's relationship with an errant parent. (See e.g., *In re Cliffton B., supra,* 81 Cal.App.4th at pp. 424-425; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1342.)

Nevertheless, occasionally, a parent will be found to have met the extraordinary burden placed upon him or her under the decisional law interpretation of section 366.26, subdivision (c)(1)(A). (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206-1209.) The present matter is such a case.

B. Standard of review for abuse of discretion challenges.

Where, as here, a discretionary power is inherently, or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal except upon a showing the court exercised discretion in an "arbitrary, capricious or

patently absurd manner that resulted in a manifest miscarriage of justice." (*Constance K. v. Superior Court, supra,* 61 Cal.App.4th 689689; accord *In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) That does not mean a decision must be "utterly irrational" to qualify as an abuse of discretion. The court in *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297, held that "the scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action ....' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion."

In considering whether the juvenile court abused its discretion, this Court must view the evidence below in the light most favorable to the trial court's order, drawing every reasonable inference and resolving all conflicts in favor of the prevailing party. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545; *In re Katrina C.* (1988) 201 Cal.App.3d 540, 547.) It is not the task of the reviewing court to reweigh the evidence, or to express an independent judgment thereon. (*In re Stephanie M.* (1994) 7 Cal.4th at 295, 318.)

C. *The court abused its discretion by failing to invoke subdivision (c)(1)(A).*

Here, appellant consistently visited the minors, and the record does not show a single missed visit during this two year dependency case. (CT 89, 185, 290, 579, 726, 1092.) It is also clear from the record that appellant maintained a strong parental bond with the minors. (CT 289, 568.)

During both the six-month review and the section 366.26 hearing, SW Pearson, the social worker who supervised the bulk of appellant's visits, reported that appellant had demonstrated growth in her ability to parent, and opined the minors were indeed bonded to her. (RT 102, 105-107, 449-455.) The minors ran to appellant at the beginning of visits, called her "mom," and frequently hugged and kissed her. (RT 449.)

Social science literature reveals that protecting minors from the harm of unnecessarily terminating a fundamental parental relationship is integral to their well-being as children, adolescents, and adults. (See *Risk, Vulnerability, and Resilience: An Overview*, in The Invulnerable Child (Anthony and Cohler eds., 1987) pp 3-48; and Sameroff, *Model of Developmental Risk*, in Handbook of Infant

Mental Health (Zeanah ed., 1992) p 1-13 [the disruption of a child's initial attachments may have devastating long-term affects upon the child's future emotional development.)

Through both testimony at the section 366.26 hearing, and Department reports, SW Wemette provided the court with an opinion that contradicted SW Pearson's statements. However, as to the current status of the minors bond to appellant, SW Wemette possessed little credibility.

As this Court is aware, assumptions and conclusionary statements of social workers regarding the adoptibility of a child are not evidence. (*In re Kristin W.* (1990) 222 Cal.App.3d 234, 253.) Moreover, while it must be assumed the social worker acted in a professional and neutral manner when making her report (*In re Robert* A. (1991) 4 Cal.App.4th 174), history has shown that social services agencies are not neutral parties in dependency proceedings, can be subject to bureaucratic influences, and may not always act in a minor's best interest. (*Los Angeles County Dept. Of Children etc. Services v. Superior Court* (1995) 37 Cal.App.4th 439.)

By the time of the 366.36 hearing, SW Wemette had not

observed the minors with appellant in approximately eight months. (RT 499-502.) Moreover, SW Wemette had a tenuous relationship with appellant, and frequently attended social gatherings with the foster family. (CT 386-397, 736; RT 496-499.) Although the court found SW Wemette to be credible, court's stated conclusion was wrong. Her testimony could not be considered as objective or timely as that of SW Pearson, and her opinion did not overcome the evidence showing the minors had maintained a deep bond to appellant. (RT 524-525.)

Because the minors demonstrated a fundamental relationship with appellant, the court should have invoked the (c)(1)(A) exception to ensure the minors bond was not artificially destroyed through an unnecessary termination of parental rights order.

V

THE JUVENILE COURT ERRED BY FAILING TO EXERCISE ITS DISCRETION TO ORDER A BONDING STUDY BETWEEN APPELLANT AND THE MINORS AT THE SECTION 366.26 HEARING.

Assuming, arguendo, that SW Wemette's testimony was

sufficient to support the juvenile court's bypass of the section 366.26, subdivision (c)(1)(A) exception to the termination of parental rights, it was, nevertheless, not reconcilable with the statements made by SW Pearson, and the court should have exercised its discretion to order a bonding study to determine the exact nature of the minors' bond to appellant.

A. The law related to a failure to exercise discretion.

The primary consideration in child custody determinations is the best interest of the welfare of the child. (*Schlumpf v. Superior Court* (1978) 79 Cal.App.3d. 892, 900.) Consequently, the court should avail itself of all evidence which might bear on the child's best interest. (*Guadalupe A. v. Superior Court* (1991) 234 Cal.App.3d 100, 106; *In re Michael W.* (1997) 54 Cal.App.4th 190, 196.)

Where evidence of a familial bond is disputed, a bonding study may be appropriate. (See *In re Lorenzo C., supra,* 54 Cal.App.4th 1330; See *In re Eric A.* (1999) 73 Cal.App.4th 1390, 1394, fn. 4.) However, the decision to require one or more fact finding expert witnesses is a matter of discretion. (*In re Jennifer J.* (1992) 8 Cal.App.4th 1080, 1084.)

The court's exercise of discretion is seldom overruled. (*Nadler v. Superior Court* (1967) 255 Cal.App.2d. 523, 524-525.) However, where a court makes any finding without necessary evidence upon which to exercise discretion, such failure is not "harmless error." (*In re Nemis M.* (1996) 50 Cal.App.4th 1344, 1355.) Therefore, the failure of the trial court to consider all the evidence is a failure to exercise discretion and requires reversal of the determination. (*Schlumpf v. Superior Court, supra,* 79 Cal.App.3d. at p. 900.)

B. The juvenile court should have exercised its discretion to order a bonding study.

Here, at the section 366.26 hearing, the court was presented with two very different social worker opinions regarding the bond between appellant and the minors. SW Pearson, as she had in the past, testified that the minors were bonded to appellant, that the visits were positive, that the minors called appellant "mom," and that Kasity had occasionally asked to go home with appellant. (RT 109, 449-455.) Conversely, SW Wemette stated that the minors were not bonded to appellant, and that Kasity was anxious during visits and frequently wanted to end the visits early. (RT 499-506.)

Despite the juvenile court's statements to the contrary, the differences in the social workers' testimonies were not "subtle," and could not be logically reconciled. (RT 524-525.)

In the midst of such contradictory testimony, the court could not effectively assess the bond between the minors and appellant, and therefore, could not accurately determine the applicability of the (c)(1)(A) exception to the termination of parental rights. (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575 [the court must balance the strength and quality of the natural parent/child relationship against the security and sense of belonging to a new family].)

By failing to order a bonding study, and making an order without clear and necessary evidence upon which to exercise discretion, the court committed reversible error. (*In re Nemis M.* (1996) 50 Cal.App.4th 1344, 1355.)

VI

THE JUDGEMENT MUST BE REVERSED BECAUSE THE NUMEROUS ERRORS COMBINED TO CREATE A HIGHLY PREJUDICIAL CUMULATIVE EFFECT.

Here, the numerous errors occurring at both the six-month

review hearing and the selection and implementation hearing, combined with appellant's ineffective counsel, prejudicially damaged appellant and the minors' reciprocal interests in the family relationship. The cumulative effect of these errors rendered the final decision terminating appellant's parental rights a nullity.

Although reported decisions are relatively rare, the general principle has been stated succinctly:

"Sometimes, the record disclosed a number of errors which individually might have been relatively unimportant and unsubstantial. However, where the errors take place continuously, their cumulative effect may be highly prejudicial and ground for reversal. This is particularly true of misconduct of counsel court or jury." (*Andrews v. County of Orange* (1982) 130 Cal.App.3d 944, 960.)

As characterized by the strikingly similar *In re David D.* (1984) 24 Cal.App.4th 941, 951-953:

Here, one error was compounded upon another, resulting in a situation analogous to putting these children on a train with only one destination.

Like the minor in *In re David D.*, the numerous errors in this case resulted in the minors being placed on a one way train toward the termination of parental rights. Appellant was ineffectively represented, which resulted in an inability to challenge the erroneous orders entered at the six-month review hearing. By the time of the section 366.26 hearing, her chances of reunification were severely reduced, but even after demonstrating the applicability of section 366.26, subdivision (c)(1)(A) appellant's parental rights were terminated.

The obvious prejudicial effect of these cumulative errors is demonstrated by the end result of this case. Again, this case began as a result of domestic violence. By the time of the 366.26 hearing, appellant had not engaged in domestic violence in over two years. Nevertheless, the numerous errors were effective in keeping the minors separated from appellant and ultimately destroying the family's relationship.

CONCLUSION.

For the foregoing reasons, appellant respectfully requests that the orders be reversed.

Dated: 30 November 2004.

Respectfully submitted:

_____

Konrad S. Lee

CERTIFICATE OF NUMBER OF WORDS.

(California Rules of Court, rule 14(c)(1).)

By my signature below, I certify this Brief contains 8939 words, including footnotes, as counted by the word count function of counsel's word processing program.

Dated: 30 November 2004.

_____

Konrad S. Lee

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PROOF OF SERVICE

(By Mail)

I, the undersigned, say that I am over the age of 18 years and not a party to the within action or proceeding; that my business address is 23441 Golden Springs Drive, Diamond Bar, CA 91765.

That on 30 November 2004, I personally served a copy of the papers to which this proof of service is attached, namely:

APPELLANT'S OPENING BRIEF

by mailing a copy thereof by depositing said copy enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box addressed as follows:

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Executed this 30 November 2004. I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct.

_____

Konrad S. Lee