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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.K., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

K.P.,

Defendant and Appellant.

E080321

(Super.Ct.No. J294312)

OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G.

Pace, Judge. Affirmed.

Michelle D. Peña, under appointment by the Court of Appeal, for Defendant and Appellant.

Tom Bunton, County Counsel, and David Guardado, Deputy County Counsel, for Plaintiff and Respondent.

In a previous dependency, the parental rights of K.P. (mother) to her two oldest daughters were terminated. In the current dependency, involving her infant daughter M.K. (sometimes child), the juvenile court denied her reunification services, on the ground that she had failed to make a reasonable effort to treat the problems that led to the previous removal.

The mother contends that the previous dependency was based on conduct of the oldest children's father, including alcohol abuse and the commission of a sex crime, whereas the present dependency is based on her own drug abuse; thus, she argues, there is no evidence that she failed to deal with the problems that led to the previous removal. Alternatively, she also contends that the juvenile court should have ordered reunification services anyway, because they were in the best interest of the child.

In fact, however, the previous dependency was not based exclusively on the father's conduct; it was also based, in part, on the mother's conduct, including her failure to comply with court orders. Although drug abuse by the mother was not alleged as a basis for jurisdiction, there is substantial evidence that it contributed to the bases for jurisdiction that were alleged. Finally, in light of the mother's long-standing drug addiction and her failure to reunify with her older daughters, the mere fact that she had been participating in services (including drug-testing clean) did not require the juvenile court to find that reunification services were in the child's best interest.

I

STATEMENT OF THE CASE

In September 2022, the mother gave birth to M.K. Both mother and child tested positive for amphetamines. M.K. displayed drug withdrawal symptoms.

The mother had at least two older daughters, by different fathers.¹ Her parental rights to them had been terminated. M.K's father had six prior felony convictions and a lengthy history of arrests; he was in prison when M.K. was born. Accordingly, CFS detained M.K. and filed a dependency petition regarding her. She was placed in foster care.

The mother admitted using methamphetamine, including while pregnant. The father was released before the jurisdictional/dispositional hearing but failed to contact his appointed counsel or to appear.

In November 2022, at the jurisdictional/dispositional hearing, the juvenile court declared M.K. a dependent based on failure to protect and abuse of a sibling. (Welf. & Inst. Code, § 300, subds. (b), (j).)² It formally removed M.K. from the parents' custody. It bypassed reunification services for the mother, based on termination of reunification

¹ The mother said she had a third older child, and Children and Family Services (CFS) records indicated the existence of a fourth, but CFS was unable to determine their whereabouts or even their names.

² All further statutory citations are to the Welfare and Institutions Code, unless otherwise indicated.

services in a sibling's case and termination of parental rights to a sibling. (§ 361.5, subds. (b)(10), (b)(11).)

II

STATEMENT OF FACTS

A. *The Previous Dependency.*

As of May 2017, the mother was living with A.P., who was the father of one of her two older children.

CFS received a report that one of the children, who was a baby at the time, had a urinary tract infection (UTI), was vomiting, and was failing to thrive. An investigation showed that the UTI likely caused the other symptoms, and that the parents had obtained appropriate medical care for the baby. However, it uncovered A.P.'s alcohol abuse, domestic violence, and prior conviction for a lewd act on a child under 14 (Pen. Code, § 288).

CFS detained the children from A.P. only and opened a family maintenance case. The mother, however, failed to follow court orders. She failed to stay in contact with the social worker, failed to appear at hearings, failed to let the children's attorney contact them, and failed to take one child for paternity testing. When interviewed, A.P. said the mother "ha[d] lost about 30 pounds in several weeks, indicating she might be using drugs."

CFS then detained the children from the mother and filed amended petitions, alleging that A.P. abused alcohol; that he had a pattern of violent behavior, including

assault, domestic violence, and arson; that he had a lewd act conviction and was a registered sex offender; that the mother failed to protect the children from the father; that the mother failed to follow court orders; and that the mother failed to protect one of the children after the child fell on a television stand, bruising and scratching her eye area. At the detention hearing, the mother was ordered to drug test.

At the jurisdictional/dispositional hearing, the juvenile court sustained the allegations and formally removed the children from the parents' custody. It ordered reunification services, including drug testing and drug counseling for the mother.³ However, she "failed to participate in, and benefit from, these services." At the six-month review hearing, the juvenile court terminated reunification services. Finally, at the section 366.26 hearing, it terminated parental rights.

B. The Current Dependency.

In the current dependency, the allegations as to the mother were that:

"B-1) The mother . . . has an untreated substance abuse problem which impairs her ability to provide adequate care, supervision and protection for the child . . . , which places the child . . . at risk of abuse and/or neglect."

³ The mother states: "Her services included counseling and parenting. [Citation.] Her case plan did not state anywhere that she obtain drug treatment and counseling specifically" The case plan, however, is in the record. It specifies as a "service objective[]" that the mother "[s]tay free from illegal drugs and show your ability to live free from drug dependency. Comply with all required drug tests." (Capitalization altered.) It also specifies as a "client responsibilit[y]" that the mother obtain counseling "to address . . . possible drug related behavior" (Capitalization altered.)

“J-4) The mother . . . had two (2) prior children . . . who were removed from the custody of [the mother] . . . and were not successfully reunified, [the mother] was ordered family reunification services by [the] Court but failed to participate in, and benefit from, these services. [The mother]’s parental rights were terminated . . . and [the children] were subsequently adopted. This failure to complete and benefit from Court ordered services in the prior dependency case places the child . . . at risk of abuse and/or neglect.”

The mother told a social worker that she started using methamphetamine “occasional[ly]” in high school.⁴ When her two older children were living with her, she was “clean,” but after they were adopted, she started using again. While she was in a relationship with M.K.’s father, she stopped again, but when he was arrested, she started again. She had been using methamphetamine “for the past few years, . . . approximately once per week.”⁵ She admitted using methamphetamine while pregnant.

The mother enrolled in an in-patient drug treatment program. It also offered parenting classes and counseling. One day after enrolling, she tested positive for

⁴ The mother said she had been out of high school since 2006. However, she also gave her birth date as 1997.

⁵ The father was arrested shortly before the mother learned that she was pregnant with M.K. Thus, her statements that (1) she had stopped using methamphetamine and started again only after the father was arrested, and (2) she had been using methamphetamine once a week or so “for the past few years” could not both be true.

methamphetamine, but two tests after that were negative.⁶ She completed the program. Her next drug test after that was also negative.⁷

The mother visited regularly, and her visits were appropriate. She was participating regularly in both counseling and parenting classes.

III

THE BYPASS FINDINGS

A. *General Legal Background.*

As a general rule, whenever a child is removed from a parent’s custody, the juvenile court must order that the parent be provided with reunification services. (§ 361.5, subd. (a).) There are a number of statutory exceptions to this rule. (§ 361.5, subds. (a), (b).) The exceptions listed in section 361.5, subdivision (b) are commonly called the “bypass’ provisions.” (E.g., *D.T. v. Superior Court* (2015) 241 Cal.App.4th 1017, 1033.) We are concerned with two of these bypass provisions.

Section 361.5, subdivision (b)(10) applies when “the court ordered termination of reunification services for any siblings or half siblings of the child because the parent . . . failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent . . . and . . . this parent . . . has not subsequently made a

⁶ A test in between was positive, but with the notation “low amounts due to teeth decay — not a return to use.”

⁷ Another scheduled drug test was listed as a no-show. However, the mother submitted a photo of the testing location, showing that it had been closed.

reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from that parent”

Section 361.5, subdivision (b)(11) applies when “the parental rights of a parent over any sibling or half sibling of the child had been permanently severed, . . . and . . . this parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from the parent.”

A bypass finding must be made by clear and convincing evidence. (§ 361.5, subd. (b).)

“[I]f the juvenile court finds a provision of section 361.5, subdivision (b), applies, the court ‘shall not order reunification for [the] parent . . . unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child.’ [Citation.] ‘The burden is on the parent to . . . show that reunification would serve the best interests of the child.’ [Citation.]” (*In re I.A.* (2019) 40 Cal.App.5th 19, 24.)

“We review an order denying reunification services under subdivision (b) of section 361.5 for substantial evidence. [Citation.] . . . [W]e do not make credibility determinations or reweigh the evidence. [Citation.] Rather, we ‘review the entire record in the light most favorable to the trial court’s findings to determine if there is substantial evidence in the record to support those findings.’ [Citation.] In doing so, we are mindful of the higher standard of proof required in the court below when reunification bypass is ordered.” (*Jennifer S. v. Superior Court* (2017) 15 Cal.App.5th 1113, 1121-1122.)

B. “*The Problems That Led to Removal.*”

The mother contends that there is insufficient evidence that she did not make reasonable efforts to correct the problem that led to the removal of her older children.

Preliminarily, she argues that the juvenile court did not expressly make its bypass findings by clear and convincing evidence. She has forfeited this argument by failing to raise it under a separate heading, as required. (Cal. Rules of Court, rule 8.204(a)(1)(B); *GRFCO, Inc. v. Superior Court* (2023) 89 Cal.App.5th 1295, 1312.)

It lacks merit in any event. “Absent evidence to the contrary, we presume that the trial court knew the law and followed it. [Citations.]” (*People v. Ramirez* (2021) 10 Cal.5th 983, 1042.) “[T]he rule encompasses a presumption that the trial court applied the proper burden of proof in matters tried to the court. [Citations.]” (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913-914, fn. omitted.)

The mother’s main argument is that the problems that led to the removal in the previous case did not include the drug abuse that led to the filing of this case; thus, her drug abuse was not evidence of failure to make a reasonable effort to treat those problems.

However, “the problems that led to removal” are not limited to the problems alleged in the prior petition. (*In re Lana S.* (2012) 207 Cal.App.4th 94, 108 (*Lana S.*)

In *Lana S.*, the current dependency petition alleged that the mother abused drugs and left drug paraphernalia within the reach of the children. (*Lana S., supra*, 207 Cal.App.4th at p. 104; see also *id.* at pp. 100-102.) Her three older children had been

removed from her custody due to physical abuse and domestic violence. (*Id.* at pp. 98-99.) However, there had been concerns about substance abuse. She was required to drug test; she tested positive once and missed tests. She was also asked to enroll in in-patient drug treatment, but she refused. She was kicked out of a residential drug treatment program. (*Id.* at p. 99.)

The appellate court held that there was sufficient evidence that the mother had not made a reasonable effort to treat the problems that led to prior removal: “[The mother]’s failure to reunify with her older children was based, at least in part, on her failure to submit to or satisfactorily complete drug testing and treatment. [¶] To avoid an absurd result, we construe the term ‘problems that led to removal’ in section 361.5, subdivision (b)(10) and (11) to include drug abuse, even though it was not alleged in the petitions. The legislative intent is to promote the interests of children, and conserve limited resources, by not ordering services when parents have demonstrated in prior proceedings that they would be fruitless.” (*Lana S.*, *supra*, 207 Cal.App.4th at p. 108.)

By contrast, in *In re D.H.* (2014) 230 Cal.App.4th 807, the father’s parental rights to older children were terminated ““as a result of unsafe and unhealthy living conditions.”” (*Id.* at p. 810.) The current dependency alleged alcohol abuse, which caused the father to “bec[o]me violent” with one of the younger children. (*Id.* at p. 811.) It was also reported that the father engaged in domestic violence with the mother. (*Ibid.*)

The appellate court concluded that the juvenile court erred by finding that the section 361.5, subdivision (b)(10) and (b)(11) bypass provisions applied. (*In re D.H.*,

supra, 230 Cal.App.4th at pp. 815-817.) It explained: “The record reflects only that the half siblings were removed because they were living in ‘unsafe and unhealthy conditions’; those problems were not addressed in the case with the half siblings, and parental rights were terminated. The record does not, however, reflect that those unsafe and unhealthy conditions were caused by father’s alcohol use, anger management problems or domestic violence — the problems that led to D.H.’s and T.H.’s removal.” (*Id.* at p. 816.)

Here, in the previous dependency, A.P. reported that the mother might be using drugs, as she had lost 30 pounds in a matter of weeks. The mother labels this a “guess[]” on his part; however, it is a reasonable inference. There is no other explanation in the record for her sudden weight loss. She admitted having used methamphetamine off and on since high school. “[A] matter of weeks” necessarily referred to the period after CFS filed the initial petition; during this time, the mother was violating court orders by avoiding contact with the court and with the social worker. Although the mother denied using methamphetamine while she had custody of her older children, it is a logical conclusion that, under the stress of the dependency, she started using again.

Moreover, the previous dependency was not based exclusively on A.P.’s behavior. It was also based on the mother’s failure to protect the children from him; on her violation of court orders; and on her failure to protect the child whose eye area was injured, by obtaining medical care and/or by putting a corner guard on the television

stand. It was the mother's violation of court orders that prompted CFS to file an amended petition and to remove the two older children from her.

In the previous dependency, at the detention hearing, the mother was ordered to drug test. Thus, it appears that, in CFS's opinion, drug use was contributing to one or more of the multiple alleged failures on her part. At the jurisdictional/dispositional hearing, she was once again ordered to drug test. The juvenile court in this case could reasonably conclude that the mother's drug abuse was among the problems that led CFS to remove the two older children.

The mother does not claim that, *if* drug abuse was a problem that led to the removal, she made a reasonable effort to treat the problem. In the previous dependency, although her services included drug testing and counseling, it was reported that she "failed to participate in, and benefit from, these services."

She admitted that, after the two older children were adopted, she returned to using methamphetamine. Once again, her usage was off and on; however, it is incontrovertible that she used methamphetamine while pregnant with M.K., causing the child to be born drug-addicted and to suffer withdrawal symptoms. This is ample evidence of failure to make a reasonable effort.

C *"Reunification Is in the Best Interest of the Child"*

Alternatively, the mother also contends that the juvenile court erred by failing to find that reunification was in the best interest of the child.

The mother forfeited this contention by failing to argue below that reunification was in the child's best interest. (*D.T. v. Superior Court, supra*, 241 Cal.App.4th at p. 1032, fn. 10.) Separately and alternatively, however, we also address it on the merits.

We review the juvenile court's implied rejection of a best interest finding under the substantial evidence standard. (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 600.) However, because the mother had the burden of proof, "it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment." [Citation.] Rather, 'the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law,' that is, whether the evidence supporting Mother's position 'was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." [Citation.]' [Citations.]" (*In re Raul V.* (2022) 82 Cal.App.5th 290, 300-301.)

The mother adduces her excellent performance in services in this case. She was participating regularly in counseling and parenting classes. She had completed an in-patient drug treatment program. Most significantly, after one dirty test only one day after she enrolled in the program, she had tested clean; as she puts it, as of the jurisdictional/dispositional hearing, she "had been clean for 74 days."

Against that, however, must be weighed a history of addiction going back to high school, including a history of relapses. "It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform." (*In re Kimberly F.*

(1997) 56 Cal.App.4th 519, 531, fn. 9.) In addition, the mother failed to reunify with her two older children.

Finally, there was no evidence that M.K. had any particular bond with the mother. M.K. had been removed at birth. While the mother’s visitation was reportedly “appropriate,” there was no evidence of the quality of the interaction between the mother and the child. Thus, the juvenile court could properly decline to find, by clear and convincing evidence, that reunification would be in M.K.’s best interest.

The mother asserts that, at a jurisdictional/dispositional hearing, the focus is on family preservation. However, “[o]nce reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.’ [Citation.]” (*In re Celine R.* (2003) 31 Cal.4th 45, 52.) For this purpose, the bypass finding was the equivalent of an order terminating reunification services. (See *In re N.F.* (2021) 68 Cal.App.5th 112, 121 [“As to the best interests element, after the court has *bypassed* or terminated reunification services . . . , the focus of the case shifts,” italics added].) This shift of focus is evident from section 361.5 itself, as it assigns to the mother the burden to show that reunification services were not inconsistent with the child’s best interest. (Cf. *In re Zacharia D.* (1993) 6 Cal.4th 435, 447 [termination of reunification services shifts burden to parent to prove changed circumstances].)

The mother likens this case to *In re G.L.* (2014) 222 Cal.App.4th 1153 (*G.L.*). There, however, the juvenile court found that the best interest exception *did* apply. (*Id.* at pp. 1155, 1162-1163.) The appellate court merely held that that finding was supported

by substantial evidence. (*Id.* at pp. 1163-1166.) *G.L.* does not speak to whether the juvenile court would have *erred* if it found that reunification was *not* in the child’s best interest. (See *Jennifer S. v. Superior Court, supra*, 15 Cal.App.5th at p. 1125 [distinguishing *G.L.* on this ground].) Indeed, *G.L.* also specifically stated, “there is evidence in the record supporting the opposite finding . . . including [the mother]’s long history of drug abuse and her failure to reunify with her other children.” (*In re G.L.*, at p. 1166.) Thus, *G.L.* affirmatively supports our conclusion that the juvenile court here did not err.

IV

DISPOSITION

The orders appealed from are affirmed.

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RAMIREZ

P. J.

We concur:

McKINSTER

J.

MILLER

J.