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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

K.R.,

Petitioner,

v.

THE SUPERIOR COURT OF ALAMEDA  
COUNTY,

Respondent;

ALAMEDA COUNTY SOCIAL  
SERVICES BUREAU, et al.,

Real Parties in Interest.

A143099

(Alameda County Super.  
Ct. Nos. 0J14022787 &  
0J14022788)

Petitioner K.R. (Mother), mother of ten-month-old twins, petitions this court to set aside the juvenile court's order continuing the twins' out-of-home placement, bypassing reunification services, and setting a Welfare and Institutions Code section 366.26 hearing to select and implement a permanent placement plan.<sup>1</sup> For the reasons stated below, we deny the petition.

**FACTUAL AND PROCEDURAL BACKGROUND**

Mother prematurely delivered twins via cesarean section in March, 2014. At birth each of the twins weighed less than three pounds, and were admitted to the neonatal intensive care unit at Alta Bates Medical Center. The boy tested positive for cocaine and

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<sup>1</sup>All further unspecified statutory references are to the Welfare and Institutions Code.

the girl tested positive for cocaine and opiates. Mother tested positive for cocaine, opiates, and methadone. She reported that she had been taking 70 milligrams of methadone per day “for a long time.” During her pregnancy, she had only had two prenatal visits. A medical social worker assigned to the twins’ case described them as “high risk babies,” with “no wiggle room for neglect” upon discharge from the hospital.

According to the detention report filed May 1, 2014, the medical assessment of the twins was ongoing, but it was believed that the boy had a hole in his heart and some dysmorphic traits in his hands. There is a dispute about how often the mother visited the twins after her discharge while they remained in intensive care. The Alameda County Social Services Bureau (the agency) reported that she visited the children three times. Mother testified that she visited them several times per week during the twins’ two and one-half months in intensive care.

The May 1 detention report summarizes Mother’s prior contacts with the police. She was arrested for urinating in a liquor store. She went to her friend’s place of employment and threatened physical harm; and, she was arrested for heroin possession. In the course of that arrest she admitted using heroin during her pregnancy. Finally, she was arrested on an outstanding warrant.

The petition alleged that Mother’s history of substance abuse interfered with her ability to care for the twins, that she lacked the ability and capacity to care for them due to their complex medical conditions, and that her mental health problems also contributed to her inability to care for them. The petition alleged that Mother had a history of being unable to care for a prior child due to her substance abuse. In a prior dependency, the twins’ sibling, D.M., was removed from Mother’s care and her parental rights to D.M. were terminated after 18 months of reunification services.

The May 1 detention report also provided some details regarding D.M., citing the August 2011 dependency petition. Mother reportedly left D.M. with other caretakers, claiming she would soon return, but did not return for a day or two. Between August 5 and 13, 2011, Mother left D.M. with her roommate, who had two male friends “who thought it was funny” for the baby to drink alcohol. It was also noted that Mother had a

history with child protective services when she was a minor, that there were concerns about her mental health, and that she had a developmental delay which may have contributed to her history of depression and periods when she could not be located. In September 2011, D.M. was removed from Mother and a supplemental petition was filed in his case. The supplemental petition alleged that Mother had taken D.M. and left the home of her maternal great grandparents, notwithstanding the fact that she had been ordered to live there as part of her family maintenance program.<sup>2</sup> She had a history of unstable housing and was unable to provide D.M. a stable and safe home. She had not engaged in case plan services and she was considered a flight risk after she threatened to leave with D.M. if he were released to her.

In the twins' case, on May 2, 2014, the juvenile court found that continuing them in Mother's home was "contrary to the child[ren]'s welfare." The factual basis for the juvenile court's findings was that Mother "has substance abuse and mental health problems that interfere with her ability to provide adequate care for the minors" and that she lacked "the capacity and ability to provide care for the minors due to their complex medical problems." The court also ordered reunification services to "be provided as soon as possible . . . if appropriate" and set an uncontested hearing for May 15, 2014.

The day before the May 15 hearing the agency filed its jurisdictional/disposition report, recommending that the twins be declared dependents of the court and placed out of the home. It further recommended that services be bypassed due to Mother's failure to reunify with D.M. after more than 18 months of services and the fact that her parental rights to D.M. were terminated on March 6, 2014. Mother requested a contested hearing.

At the contested hearing the case worker testified that the twins were doing well in their foster placement, and exhibited age-appropriate development. The case worker had no direct contact with Mother for approximately two months. She had heard via the maternal grandmother that Mother had entered Chrysalis, a drug treatment program, for a

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<sup>2</sup>At her August 27, 2014 hearing, Mother testified that she had been kicked out of the home by her grandfather.

few days. The morning of the hearing she learned that Mother had found housing in Manteca. She testified that although Mother initially visited the children twice, she had not visited at all for approximately two months prior to the hearing. At one scheduled visit the case worker texted Mother and she responded that she was on her way. But she never arrived. Although the worker asked Mother to confirm her visits to be sure the children would be available, Mother stopped communicating with the worker. During the two months before the hearing, Mother never contacted the social worker for an update regarding the children's status.

On cross-examination the social worker testified that the allegations found to be true in the original petition involving D.M. did not explicitly include substance abuse allegations. However, she also testified that she knew Mother used drugs during her reunification period with D.M. She recalled that Mother tested positive for cocaine and also missed a number of urine tests. Based on her review of her notes, the case worker testified that Mother had participated in a drug treatment program during D.M.'s reunification period and that her drug use was a factor in her failure to reunify with him.

Mother testified that she visited the twins several times per week while they were hospitalized. After the children were discharged, she visited them twice. She stopped visiting because she lived far away from the twins and transportation to the visits was difficult. She had a negative emotional reaction to the fact that the case worker involved in the twins' case had been responsible for her losing D.M., so she stopped visiting.

Mother confirmed that while substance abuse was not a factor in the decision to remove D.M. from her, it was the reason he was not returned. She also testified that since her parental rights to D.M. were terminated, she participated briefly in two substance abuse programs: the Chrysalis, an inpatient program that she claimed drove her crazy and made her want to use more drugs, and Second Chance, an outpatient program that she was in for about three weeks until she moved out of the area. She considered her move away and her independent search for an outpatient drug program the primary things she had done to address her substance abuse.

Mother also testified that she found stable housing. She had her own room, living with her step-grandmother, a cousin, and three uncles in a “kid-friendly,” four-bedroom house. She anticipated that her housing would be stable, but had been living in her new home less than a week at the time of the hearing.

As part of the intervention in the D.M.’s case, Mother had engaged in medical evaluations, psychiatric evaluations, two psychological evaluations, individual counseling and parenting classes. However, Mother had not been in any individual counseling since D.M.’s case ended.

Following the hearing, the juvenile court found the Mother’s “mental health condition and her substance abuse were the underlying problems that existed during the reunification services that were provided . . . during the time that her parental rights were terminated as to [D.M.]. And it is her untreated, unresolved substance abuse problems that are involved in this case that the minor is here today—the minors having been born positive for drugs. And had the mother resolved or made a reasonable effort to resolve her substance abuse problem, this case would not have been brought.” The court concluded that the agency had satisfied its burden of proof under section 361.5, subdivisions (b) (10) and (11),<sup>3</sup> and found that pursuant to section 361.5, subdivision

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<sup>3</sup>Section 361.5, subdivision (b) provides “Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following:

[¶] . . . [¶]

(10) That the court ordered termination of reunification services for any siblings or half siblings of the child because the parent or guardian failed to reunify with the sibling or half sibling after the sibling or half sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision (a) and that, according to the findings of the court, this parent or guardian 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 that parent or guardian.

(11) That the parental rights of a parent over any sibling or half sibling of the child had been permanently severed, and this parent is the same parent described in subdivision (a), and that, according to the findings of the court, this parent has not subsequently made a

(b)(13)<sup>4</sup> the mother had an extensive history of drug abuse and had at least twice failed or refused to comply with an available program required by previous case plans. Reunification services were denied, and the court set a section 366.26 hearing to consider a permanent plan.

On September 19, 2014, Mother filed her notice of intent to file a writ petition in the superior court. She filed this petition challenging the juvenile court's order on November 12, 2014. We issued an order to show cause the following day. After the briefing was completed, oral argument was deemed waived on December 9, 2014.

### DISCUSSION

We review an order denying reunification services under section 361.5, subdivision (b) pursuant to the substantial evidence standard. (*Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96.) Our task “is to determine whether the record discloses substantial evidence which supports the juvenile court’s finding . . . .” (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th 758, 762.) We do not reweigh the evidence or resolve conflicts in the record. (*James B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1021.) “The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.” (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1394, *citing Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652.)

Under both section 361.5, subdivisions (b)(10) and (11) there is a two-pronged test. The first prong requires a showing that the parent previously failed to reunify with a reasonable effort to treat the problems that led to removal of the sibling or half sibling of that child from the parent.”

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<sup>4</sup>Section 361.5, subdivision (b)(13) provides an additional basis for bypassing reunification services: “That the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court’s attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible.”

sibling or half-sibling of a child. Mother concedes that first prong is fulfilled here. Thus, our inquiry focuses on the second prong which requires an identical inquiry under both subdivisions. The juvenile court considers whether Mother failed to make “a reasonable effort to treat the problems that led to the removal of the sibling.” (§ 361.5, subds. (b)(10) & (11).) In assessing whether Mother’s efforts were reasonable, the juvenile court is to consider the duration, extent, and context of her efforts, in addition to the measure of success achieved. (*R.T. v. Superior Court* (2012) 202 Cal.App.4th 908, 914–915.)

There is substantial evidence in this record that Mother failed to make reasonable efforts to treat the problems that led to D.M.’s removal. Her unstable housing and mental health issues were important factors in that removal. Yet, within a week of the contested hearing in this case, Mother moved to a new home that she anticipated would be stable. Living in a place without encountering significant problems for less than a week does not, without more, indicate that one has obtained stable housing.

Similarly, although Mother made some progress with mental health treatment since D.M.’s removal, she received no individual psychotherapy since that case terminated. Given mother’s history which includes bizarre and threatening behavior, yelling, screaming and cursing at people, and difficulty engaging with others, her failure to continue individual counseling beyond the termination of D.M.’s case indicates that reasonable efforts to treat the problems that led to his removal did not continue.

Most importantly, however, is Mother’s drug abuse. Both twins tested positive for drugs at birth. Mother attended an outpatient drug program for approximately three weeks and an inpatient program for a few days. Mother reports that she has been able, from time to time, to stop using drugs. Once she stopped using for about one and one-half years. Another time she stopped using drugs for about three months. However, she admitted using drugs within two weeks of the contested hearing in this case. Moreover, she considers her move to Manteca and an independent search for a drug program to her liking to be her most significant efforts at sobriety. This is not evidence that Mother has made a “reasonable effort” at drug treatment.

Mother, however, argues that drug abuse was not an issue that was alleged in the earlier petition or led to the removal of D.M. So, she argues, her drug abuse should have no bearing on whether to deny services in this case. Mother reads the requirement that she failed to make a reasonable effort to treat the problems that led to the removal of her first child too narrowly. In *In re Lana S.* (2012) 207 Cal.App.4th 94, 108 (*Lana S.*), “ ‘problems that led to removal’ ” was construed to include drug abuse even though drug abuse was not alleged in the petition. There drug treatment was a “substantial component” of the mother’s service plan. It was clear that her failure to submit to or satisfactorily complete drug testing and treatment was a factor leading to her failure to reunify with her older child. Thus, the court considered her addiction, manifested in the earlier case, and in part responsible for her failure to reunify, within the scope of “problems that led to the removal” of the other child as stated in section 361.5, subdivision (b). (*Ibid.*)

Here, the case worker testified based on her notes that Mother was in a drug treatment program during the reunification period with D.M. She also testified that during the pendency of D.M.’s case Mother tested positive for cocaine and missed a number of drug tests and these were factors in her failure to reunify with her older child. Mother acknowledges that her drug use was a reason why D.M. was not returned to her. Thus, under the standard enunciated in *Lana S.* if Mother’s drug use, even though not alleged in the petition, was a significant reason she did not reunify with D.M., it can serve as a basis to bypass reunification efforts in this case. Mother’s efforts to deal with her addiction fall within the second prong necessary for the application of section 361.5, subdivisions (b)(10) and (11).

Finally, the juvenile court also based its order on section 361.15, subdivision (b)(13) due to Mother’s extensive history of drug abuse and her previous failures or refusals to comply with a program required by previous case plans. In response Mother asserts that there was no showing her drug use was “extensive, abusive or chronic.” She says she delivered two other children two to three years older than the twins who did not

test positive for drugs.<sup>5</sup> But Mother reported taking methadone “for a long time,” suggesting that her drug use was extensive. No matter how extensive her drug use may have been in fact, we have no hesitation in concluding that her drug use was abusive and addictive. Each of her twins was born with positive drug tests. She had failed at least three drug programs: the one that she engaged in during the reunification period with D.M. and two more recently. She reported using drugs within two weeks of the hearing in this case.

We acknowledge that Mother has made some progress, including her recent move to what she hopes will be stable housing. She has attended parenting class, started individual counseling (as part of D.M.’s case), undergone psychological evaluation, and started on psychotropic medication. But the question before us is whether she has made reasonable efforts to resolve the issues that led to the removal of D.M. in the prior dependency. Those issues included finding stable housing, treating her mental health issues, and treating her substance abuse. Her efforts were fragmented and sporadic and cannot be characterized as reasonable. Moreover, Mother has a documented history of substance abuse and failed or refused to complete at least two substance abuse programs. The petition is denied.

### **DISPOSITION**

We deny the petition for an extraordinary writ. Because the section 366.26 hearing is set for January 15, 2015, our decision is immediately final as to this court. (Cal. Rules of Court, rules 8.452(i), 8.490(b)(2)(A).)

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<sup>5</sup>Although not clearly specified, presumably one of these other two children was D.M., who was ultimately removed from Mother’s care. The record also indicates that Mother arranged for another child to live with her maternal grandmother.

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Siggins, J.

We concur:

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McGuinness, P.J.

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Pollak, J.