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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

KELSIE R.,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF
CALIFORNIA, CONTRA COSTA
COUNTY

Respondent;

CONTRA COSTA COUNTY,
CHILDREN AND FAMILY SERVICES
BUREAU,

Real Party in Interest.

A143116

(Contra Costa County
Super. Ct. No. J14-00585)

Petitioner Kelsie R. seeks extraordinary writ relief from an order of the Superior Court of the County of Contra Costa denying family reunification services and scheduling a Welfare and Institutions Code section 366.26¹ permanency hearing for her daughter, Lucille D. Kelsie contends the juvenile court's order denying reunification services was unsupported by substantial evidence, specifically, that there was insufficient evidence she resisted substance abuse treatment within the meaning of section 361.5, subdivision (b)(13). She also contends the juvenile court erred in allowing an unsworn witness to make a statement on the record at the contested disposition hearing. Having reviewed the petition on the merits, we deny relief.

¹ All statutory references are to the Welfare and Institutions Code.

BACKGROUND

The Petition

In December 2011, mother Kelsie and father Joshua D. went to a motel room with their three-month-old daughter, Lucille.² They proceeded to smoke methamphetamine and pass out, leaving Lucille unattended overnight. They were arrested for being under the influence of a controlled substance and child endangerment, Lucille was removed from their care, and the Contra Costa County Children and Family Services Bureau (Bureau) filed a section 300 petition alleging they both had a serious and chronic substance abuse problem that impaired their ability to care for, supervise, and protect Lucille. (Case no. J11-01677.)

Both parents were provided reunification services and reunified with Lucille under a family maintenance plan. Kelsie was unable to maintain her sobriety, however, and relapsed in March 2013, which resulted in Lucille's detention from her and the termination of her family maintenance services. In February 2014, Joshua was granted full physical and legal custody of Lucille, and the dependency proceeding was terminated.

In May 2014, just three months after the conclusion of that dependency proceeding, the family again came to the Bureau's attention when Joshua failed to pick Lucille up from day care. A day care staff member called Joshua, who sounded lethargic or intoxicated. He said he would come get Lucille but he never showed up, and Lucille's grandmother eventually picked her up and took her home. The following day, Joshua again failed to pick Lucille up from day care. This time, the day care center contacted the police. A police officer called Joshua, who again sounded lethargic or incapacitated and claimed he was having an anxiety attack and could not pick up his daughter. The officer told him that if he did not pick her up, she would be taken into protective custody. When

² Joshua has not petitioned for extraordinary relief, and we thus omit details concerning him unless relevant to the issues before us.

Joshua failed to show up, Lucille was taken into protective custody and placed in the same foster home where she resided during the prior dependency proceeding.

On May 28, 2014, the Bureau initiated the present dependency proceeding with a section 300 petition that alleged Joshua had a chronic substance abuse problem that impaired his ability to adequately parent Lucille. It further alleged Kelsie also had a history of substance abuse and failed to reunify with Lucille in the prior dependency proceeding.

Jurisdiction

In the Bureau's jurisdiction report, the social worker related that she had visited Joshua at his home on May 27. Joshua acknowledged that the first dependency proceeding resulted from his and Kelsie's methamphetamine use. He completed his treatment program and reunified with Lucille, although he acknowledged "on and off" marijuana use since the closure of the case. He initially denied using other drugs for the past two years, but when asked again about recent drug use, admitted using methamphetamine the day Lucille was detained and cocaine two days before that. He blamed his relapse on stress due to job loss, raising Lucille as a single parent, and mental health issues.

The social worker also spoke with Kelsie. Kelsie acknowledged she and Joshua used methamphetamine "pretty heavily" prior to the first dependency. She claimed she reunified with Lucille and was offered family maintenance. She relapsed in April 2013, however, and her family maintenance services were terminated. Joshua continued with family maintenance and was given full custody of Lucille.

Kelsie informed the social worker that she was participating in a year-long recovery program and had tested clean since January. She had also completed a three-month drug diversion program.

At a June 5, 2014 jurisdictional hearing, the court sustained allegations that Joshua had a chronic substance abuse problem that impaired his ability to adequately parent Lucille and that Kelsie had a history of substance abuse and failed to reunify with Lucille during the previous dependency proceeding.

**The Bureau's Request For Judicial Notice of Records From
Case No. J11-01677**

Prior to the disposition hearing, the Bureau filed a request for judicial notice of the following six documents from the prior dependency proceeding:

The December 13, 2011 section 300 petition alleging that Kelsie and Joshua had used methamphetamine when Lucille was in their care and that they had serious and chronic substance abuse problems that impaired their ability to care for her.

The January 6, 2012 jurisdiction order sustaining allegations that both parents had serious and chronic substance abuse problem that impaired their ability to care for, supervise, and protect Lucille.

The February 15, 2012 disposition order providing reunification services to both parents.

The August 6, 2012 review hearing order continuing family reunification services.

The May 9, 2013 jurisdiction order on a section 387 supplemental petition sustaining an allegation that Kelsie relapsed in March, and ordering that Lucille be detained from her.

The February 27, 2014 order granting Joshua sole legal and physical custody of Lucille.

Disposition

In a disposition report prepared on June 25, 2014, the Bureau described Kelsie's troubled childhood, noting that her biological father was not a part of her life when she was younger, her stepfather having adopted her when she was three years old. When she was nine years old, she and her twin sister were both sexually abused by their mother, who served more than four years in prison. Kelsie did not see her mother again until she was 18 years old, and she was raised by her stepfather, who was verbally, physically, and emotionally abusive. Her stepfather, like her biological father, had substance abuse issues.

According to the report, Kelsie began drinking alcohol when she was 14 years old and using methamphetamine when she was 15 years old. When she was 16, she

completed a month-long residential substance abuse program and remained clean for three years. She dropped out of school and ran away during her junior year of high school. She and Joshua met in November 2010.

Kelsie denied drug use while she was pregnant with Lucille, but acknowledged she resumed using after Lucille was born because she was depressed. She admitted heavy methamphetamine use with Joshua when Lucille was three months old. She reunified with Lucille after nine months, but relapsed in April 2013. Services were terminated for Kelsie in May 2013, and Joshua was granted custody of Lucille.

Kelsie reported that she had been enrolled in an inpatient treatment program at La Casa Ujima for three weeks, and she claimed five months of sobriety.

In terms of “Assessment/Evaluation,” the Bureau summarized:

“Both parents have extensive substance abuse histories and are currently in inpatient substance abuse treatment programs ([Kelsie] is at Ujima East, [Joshua] is at Pueblo Del Sol). [Joshua] also has a history of having mental health issues for which he has been treated via therapy and psychotropic medications. The parents’ substance abuse has clearly had a profoundly negative impact on Lucille’s psyche. The Bureau has received reports from both Lucille’s day care/school, and her foster care provider, including that Lucille has increasingly demonstrated aggressive/assaultive tendencies and self harming behaviors (picking at her eyebrows, forcing herself to vomit) that warrant therapeutic intervention.

“Service providers have described both parents as intelligent, thoughtful and caring. Although this worker’s interaction with the parents has been limited, this worker is inclined to agree with the aforementioned description. This worker assesses both [Kelsie] and [Joshua] as being young, thoughtful and sincere individuals who desire to do better and want what’s best for their daughter, Lucille. It is also this worker’s assessment that the parent’s addiction and their choices compelled by their addiction, has had a dramatic and long lasting effect on Lucille and her sense of well-being. While this worker is inclined to robustly support these parents and their desire to reunify with their

daughter, it is this worker's belief that the risk of relapse is far too great and consequences for Lucille far too severe."

With that, the Bureau recommended that the court deny reunification services to both parents pursuant to section 361.5, subdivision (b)(13) and set the matter for a section 366.26 permanency hearing.

The juvenile court held a contested disposition hearing on September 17. After counsel announced their appearances, the court asked members of the audience to identify themselves. Lucille's foster mother was in the audience and identified herself, after which she spoke about the changes in Lucille's behavior she had noticed since the last dependency proceeding, describing in detail Lucille's fear of abandonment and anger. She also commented on Lucille's strong bond with her father and the lack of a bond between her and her mother. She then urged the court to ensure a slow transition for Lucille if the Bureau were to move her.³

The court then heard testimony from a wraparound facilitator and accepted into evidence case notes regarding the parents' visits with Lucille. Testimony from the parents came by way of offers of proof from their respective counsel. As to Kelsie, her counsel offered that she would testify as follows if called and sworn: "She is currently still in Casa Ujima in the inpatient program. She has been there for I believe 3 months at this time and—more than 3 months, actually. She is planning on extending her time there in part because she is now enrolled in Shelter, Inc., and could be getting housing any time from now to 90 days from now.

"She is planning on participating in aftercare. She is looking both at La Casa Ujima and A Chance For Freedom and any other possible aftercare facility that I might know of.

"She did receive an award at Ujima that is not your typical certificate of completion. She actually was voted the [¶] . . . [¶] [m]ost improved parent.

³ While it is evident from the context who was speaking, the reporter's transcript identified the foster mother as "person in audience."

“Visits have gone well. She does acknowledge that there is an initial reluctance and [Lucille] has to warm up to mom. But I believe that those case notes will reflect that mom is very age appropriate.”

At the conclusion of the hearing, the court denied reunification services and set a section 366.26 selection and implementation hearing for January 7, 2015.

Kelsie filed a timely notice of intent to file a writ petition.

DISCUSSION

Substantial Evidence Supports The Juvenile Court’s Order Denying Kelsie Family Reunification Services

It has been said that “[i]t is difficult, if not impossible, to exaggerate the importance of reunification in the dependency system.” (*In re Luke L.* (1996) 44 Cal.App.4th 670, 678.) Despite this, the Legislature has determined that in certain circumstances, efforts to reunify a family would be “ ‘fruitless.’ ” (*In re Levi U.* (2000) 78 Cal.App.4th 191, 200; *Deborah S. v. Superior Court* (1996) 43 Cal.App.4th 741, 750.) Section 361.5, subdivision (b) identifies 16 such circumstances, providing that the court need not order reunification services—in other words, the parent may be bypassed—when it finds clear and convincing evidence that any of the circumstances applies. As pertinent here, subdivision (b)(13) provides that a parent may be denied reunification services when he or she “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 [the] 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.”

As can be seen, section 361.5, subdivision (b)(13) establishes two bases for denying reunification services: one, where the parent with a history of chronic drug abuse has resisted court-ordered treatment during the three years preceding the filing of the dependency petition, or, two, where the parent has previously been provided but has failed to take advantage of available rehabilitation services. Here, the court’s denial of

reunification services to Kelsie was grounded in the first basis—that she resisted treatment when she relapsed during the first dependency proceeding. We review the court’s finding in this regard for substantial evidence (*Cheryl P. v. Superior Court* (2006) 139 Cal.App.4th 87, 96), “which requires us to determine whether there is reasonable, credible evidence of solid value such that a reasonable trier of fact could make the findings challenged.” (*In re Brian M.* (2000) 82 Cal.App.4th 1398, 1401.) We conclude substantial evidence supports the juvenile court’s denial of reunification services for Kelsie.

As an initial matter, there can be no doubt that Kelsie had “a history of extensive, abusive, and chronic use of drugs or alcohol” (§ 361.5, subd. (b)(13).) Twenty-four years old at the time of the September 2014 disposition hearing, Kelsie began drinking alcohol when she was 14 years old and using methamphetamine when she was 15. She went to a treatment program when she was 16 years old and was clean for three years, suggesting that by 19 years old, she was abusing substances again. Although she initially denied using drugs while pregnant with Lucille (when she was 20 and 21 years old), she later acknowledged marijuana, acid, and alcohol use during her pregnancy. She admitted “heavy” methamphetamine use when Lucille was three months old, she continued to use methamphetamine, methadone, and marijuana after Lucille’s December 2011 detention, and she relapsed in March 2013.

Additionally, the evidence showed that Kelsie was ordered by the court to complete a substance abuse treatment plan. Her case plan from the first dependency proceeding was a part of the record, and it required her to successfully participate in and complete an outpatient substance abuse treatment program.

The question, then, is whether the evidence showed that Kelsie “resisted” this court-ordered treatment. What constitutes resistance to treatment within the meaning of section 361.5, subdivision (b)(13) has been the subject of numerous cases we find instructive here. For example, in *Randi R. v. Superior Court* (1998) 64 Cal.App.4th 67, the court rejected the mother’s argument that resistance in this context encompassed “only conduct which constitutes ‘ ‘an opposition by direct action or quasi forcible

means.” [Citation.]’ ” (*Id.* at p. 73.) Similarly, the court in *Karen S. v. Superior Court* (1999) 69 Cal.App.4th 1006 held that resistance to treatment encompasses passive, as well as active, conduct, such that a return to substance abuse following completion of a rehabilitation program could constitute resistance within the meaning of section 361.5. (*Id.* at p. 1010.)

Laura B. v. Superior Court (1998) 68 Cal.App.4th 776 further explained that resistance to treatment is demonstrated when “a parent has previously undergone or enrolled in substance abuse rehabilitation. Then, during the three years prior to the petition being filed, the parent evidenced behavior that demonstrated resistance to that rehabilitation. Such proof may come in the form of dropping out of programs, but it may also come in the form of resumption of regular drug use after a period of sobriety.” (*Id.* at p. 780.) The court noted, however, that not every relapse evidences resistance to treatment, explaining that any parent “could experience a brief relapse . . . but immediately resume treatment,” and such behavior “would not necessarily prove resistance.”⁴ (*Ibid.*)

Here, the evidence showed that Lucille had been removed from her parents’ care in December 2011 because their serious and chronic drug abuse impaired their ability to care for their infant daughter. The court ordered reunification services, and the case plan required both parents to, among other things, participate in and complete an outpatient substance abuse treatment program. Despite Kelsie’s initial success that led to reunification with Lucille, she relapsed in March 2013, missing seven drug tests in March, April, and May. As of June 2014, Kelsie was claiming five months of sobriety, which suggests at best she was clean by January 2014. There is no evidence in the record that between her March 2013 relapse and her 2014 sobriety—a period of at least nine

⁴ *Randi R.*, *Karen S.*, and *Laura B.* all examined the meaning of “resisted” treatment under section 361.5, subdivision (b)(12), the antecedent version of subdivision (b)(13) of section 361.5. Section 361.5 was amended, effective October 10, 2001, without substantive change, renumbering subdivision (b)(12) as (b)(13). (Stats. 2001, ch. 653, § 11.3, p. 4123.) In 2002, subdivision (b)(13) was amended to replace “prior treatment” with “court-ordered treatment.” (Stats. 2002, ch. 918, § 7, p. 4512.)

months—Kelsie took any steps to regain her sobriety. And this clearly was not a one- or two-day relapse, followed by an immediate attempt to regain sobriety. Rather, the evidence showed a resumption of regular drug use after a period of sobriety, which was precisely what the court in *Laura B.* cited as an example of resistance to treatment. (*Laura B.*, *supra*, 82 Cal.App.4th at p. 1402.)

Kelsie argues that the record contains substantial evidence that she is “amenable” to treatment, not resistant to it. In support, she cites evidence that at the time of the September 17, 2014 contested disposition hearing, she had been in an inpatient substance abuse program for over three months, had received an award for most improved parent, and was transitioning to a clean and sober living environment. While any progress Kelsie makes towards achieving and maintaining sobriety is commendable, amenability to treatment is not relevant to a section 361.5, subdivision (b)(13) analysis. And we agree with the *Randi R.* court, which concluded the Legislature did not intend that a “parent could repeatedly go through the motions of rehabilitation just long enough to regain custody of his or her child only to immediately revert to substance abuse and avoid the denial of services.” (*Randi R.*, *supra*, 64 Cal.App.4th at p. 73.)

Finally, as to Kelsie’s argument that the juvenile court committed reversible error by allowing a “person in audience”—Lucille’s foster mother—to make an unsworn statement at the disposition hearing, Kelsie failed to object below. She thus forfeited her right to raise the issue on appeal. (*In re Heather H.* (1988) 200 Cal.App.3d 91, 96 [failure to object to adequacy of oath at trial forfeits the issue on appeal]; see also *People v. Boyette* (2002) 29 Cal.4th 381, 423–424 [a party who fails to object to testimony at the time a witness is called to testify forfeits any objection]; *People v. Mattson* (1990) 50 Cal.3d 826, 853–854 [“A judgment will not be reversed on grounds that evidence has been erroneously admitted unless ‘there appears of record an objection to or a motion to exclude or to strike the evidence that was timely made’ ”].)

DISPOSITION

The petition of mother Kelsie R. for extraordinary writ relief is denied on its merits. (Cal. Rules of Court, rule 8.452(h)(1).) This decision is final as to this court forthwith. (*Id.*, rule 8.490(b)(2)(A).)

Richman, J.

We concur:

Kline, P.J.

Stewart, J.