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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re H.K. et al., Persons Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

J.B. et al.,

Defendants and Appellants;

C.M.,

Respondent.

E056722

(Super.Ct.No. RIJ113002)

OPINION

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Pamela Rae Tripp, under appointment by the Court of Appeal, for Defendant and
Appellant K.S.

Teri A. Kanefield, under appointment by the Court of Appeal, for Defendant and

Appellant J.B.

Diana W. Prince, under appointment by the Court of Appeal, for Respondent,

C.M.

Pamela J. Walls, County Counsel, and Anna M. Deckert, Deputy County Counsel,
for Plaintiff and Respondent.

I

INTRODUCTION¹

Mother, K.S., a chronic user of methamphetamine, has five children who were born between 1997 and 2011. M.K., now deceased, was the father of the three older children.² J.F. is the father of the two younger children and is not a party to the appeal. The family was previously the subject of a juvenile dependency case between September 2006 and May 2008. The present case was initiated in June 2011.

Mother appeals the denial of her section 388 petition, seeking additional reunification services. Mother also joins J.B., the maternal grandmother (MGM), in appealing the denial of the MGM's section 388 petition, seeking placement of the two younger children with the MGM, in addition to the older children. Also party to these appeals is C.M., the de facto parent and the prospective adoptive parent of the younger children.

We have carefully reviewed the record and conclude mother was not entitled to

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

² M.K. died by suicide in May 2007 or 2008.

more reunification services, in addition to the 20 months of service already provided. We also hold the juvenile court properly denied placement of the two younger children with the MGM.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. 2006 Detention

CPS³ filed an original dependency petition in September 2006, concerning twins born in 1997; M.K., born in 2000; and I.F., born in 2006. The petition alleged the wilful or negligent failure to protect or provide (§ 300, subds. (b) and (g)) and mental illness, disability, or substance abuse. In particular, the petition alleged mother had left the children with M.K., who was homeless; the children were dirty, had head lice, and were not attending school; both parents were using drugs; M.K. had a criminal history; and J.F. had failed to provide for and protect I.F.

Mother had been living in a transitional program for homeless families. She was absent from the facility one afternoon when the children returned from school. Mother claimed she had missed the bus but she left the transitional program when she was told a CPS report would be made.

After being contacted by CPS, the paternal grandmother (PGM) said the three girls were living with the paternal aunt until M.K. could take the children to Utah. Father had been homeless for several years and was living in a tent in the PGM's backyard. The

³ Child Protective Services, Department of Public Social Services, County of Riverside.

children had stopped attending school. When the paternal aunt rescued the children, they were filthy. M.K. had multiple criminal convictions between 1997 and 2006. The children were confused about what was happening. They were dirty, had head lice, and had not bathed for days.

Mother had been the subject of five previous referrals for neglect between 1997 and 2005. CPS finally interviewed mother and J.F., who had I.F. with them. The baby was clean and healthy. Mother appeared to be using drugs. She disputed the report that she had been absent when her children returned from school. Mother denied abusing drugs or that the twins had tested positive when they were born in 1997. J.F. was unemployed and had three criminal convictions.

The court ordered the children detained in September 2006.

B. Jurisdiction and Disposition—October 2006-January 2007

In October 2006, all three parents continued to be transient and have substance abuse issues. On October 19, 2006, I.F. was placed in protective custody and diagnosed with congestion and an ear infection. In December 2006, the children had been placed in foster homes. The MGM was assessed for placement of the three girls.

None of the parents had submitted to the hair follicle tests that had been ordered by the court but mother, the paternal aunt, the MGM, and the PGM had engaged in positive visitation with the children. The parents generally seemed unmotivated toward reunification. On December 11, 2006, mother had a positive drug test.

At the contested jurisdictional hearing on January 3, 2007, the court made true

findings on the allegations under section 300, subdivisions (b) and (g).⁴

C. Proceedings from July 2007 to May 2008

In July 2007, mother regained custody of I.F. She was living in a residential treatment facility, participating in drug court, and working full time. She had saved money to rent an apartment. CPS recommended all the children be returned to mother with maintenance services. The three older children were returned to mother in November 2007. In May 2008, the juvenile court terminated its jurisdiction.

D. 2011 Detention

CPS received two other referrals concerning mother in September 2009 and January 2010.

CPS filed a reactivated original dependency petition in June 2011, concerning the four children and a fifth child, M.S., born in March 2011, whose father was also J.F. The petition alleged the wilful or negligent failure to protect or provide (§ 300, subds. (b) and (g)) and mental illness, disability, or substance abuse. In particular, the petition alleged mother was still using drugs; the family's residence was unsafe and unsanitary; and J.F. was committing drug-related crimes. The residence had a broken window, broken furniture with nails extruding, and exposed wiring. The residence appeared to be the site of drug trafficking. Mother and all five children were sharing one room. Mother tested positive for methamphetamine and amphetamine. Other residents of the house were using drugs and alcohol.

⁴ An amended petition was filed on January 3, 2007.

After the children were detained, mother admitted she had been using methamphetamine. She was seeking treatment and alternative accommodations. J.F. could not provide housing. J.F., had nine criminal convictions between June 1997 and January 2011. Mother's extensive history of referrals and chronic substance abuse and J.F.'s criminal history and chronic substance abuse threatened the children's physical and emotional health.

The court ordered the children detained.

E. Jurisdiction and Disposition

In July 2011, CPS recommended services be denied under section 361.5, subdivision (b)(13), and a hearing be set to establish a permanent plan. CPS concluded that mother's chronic substance abuse, dating back to 1997, made it unlikely that mother could reunify with children.

In addition to the previous history, J.F. had a pending charge for spousal abuse on June 19, 2011. Mother had multiple offenses for Health and Safety and Vehicle Code violations. In her interview, mother admitted she had relapsed. Mother disagreed that the residence was unsafe or unsanitary. She admitted J.F. was not acting in a parental role. Mother, age 41, was living with the MGM and was unemployed. Mother wanted the children placed with the MGM who lived in a one-bedroom apartment.

The children expressed confusion and distress about being removed from mother. The two oldest children, the twins, age 13, were protective of mother and denied drug use. I.F., age four, had observed mother smoking "the green kind" of drugs.

At the jurisdictional hearing, the court denied mother's request for reunification services under section 361.5, subdivision (b)(13), and set a section 366.26 hearing for November 2011.

F. Selection and Implementation and Post-Permanency Status Review Hearings

In November 2011, CPS recommended adoption in the same placement as the permanent plan for all five children. Because the MGM's one-bedroom home had been determined to be inadequate for five children, the MGM planned to obtain a larger residence to accommodate the whole family. The caretaker for I.F. and M.S. wished to adopt them and be the legal guardian of the older girls. The older three children did not want to be adopted. I.F. was demonstrating sexualized and other kinds of inappropriate behaviors.

Mother and the MGM had been having consistent visitation with the children. Mother had enrolled in a treatment program in July 2011 and October 2011 and expected to graduate in November 2011. The court granted a continuance to locate an adoptive home.

During Thanksgiving 2011, the MGM had permitted the parents to have extended unauthorized contact with the children when they were visiting her.

As of December 2011, the MGM had moved into a larger residence. The house was certified in January 2012. The older three girls were placed with the MGM on February 1, 2012. CPS changed its recommendation to legal guardianship for the three older girls, adoption for the two younger children, and placement of all five children with the MGM.

On February 29, 2012, C.M., the foster mother for I.F. and M.S., asked to be declared their de facto parent. C.M. asserted that she could care for the children better than mother and the MGM. The court granted her status as a de facto parent.

On March 6, 2012, mother filed a section 388 petition, asking for six more months of reunification services.

In May 2012, mother was in another treatment program. She was unemployed and living off her savings but intending to become a dental assistant. J.F. was not in contact with CPS. The older children were happy living with the MGM although they wanted to return to their mother. Additionally, I.F. had demonstrated inappropriate sexualized behaviors and M.S. could not tolerate second-hand cigarette smoke in the MGM's home, which reeked of cigarettes. M.S. had sustained 30 insect bites while visiting the MGM in March and April 2012. CPS recommended the older children be placed in legal guardianship with the MGM and the younger children adopted by the de facto parent.

On May 11, 2012, the MGM filed a section 388 petition, asking that all five children to be placed with her in the larger residence. The MGM intended to have mother move in with her to help supervise the children.

In May 2012, the court denied mother's section 388 petition, finding no change of circumstances. In June 2012, the court also denied the MGM's section 388 petition, finding that the MGM's smoking, her lack of judgment, and her inability to provide transportation were all factors not in the best interests of I.F. and M.S.

Mother and the MGM appealed the court's denial of their section 388 petitions.

III

STANDARD OF REVIEW

The parties generally agree the juvenile court's ruling on a section 388 petition is subject to review for abuse of discretion. The court's factual determinations will be upheld if they are supported by substantial evidence. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.) An abuse of discretion occurs when the juvenile court exceeds the bounds of reason but the reviewing court may not substitute its decision for that of the trial court. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; *In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.)

The MGM argues the juvenile court committed legal error by denying her petition and this court should conduct an independent review. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159; *People v. Cromer* (2001) 24 Cal.4th 889, 901.) As we discuss below, there was no legal error.

IV

MOTHER'S APPEAL

Mother asserts the juvenile court abused its discretion by denying her section 388 petition after she had successfully rehabilitated herself for nearly a year between July 2011 and May 2012. As a result, the siblings would be separated.

Section 388 gives a parent a final opportunity to reinstate reunification services before the actual termination of parental rights. (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1506; *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Section 388 requires a petitioner to show by a preponderance of evidence that there are changed circumstances

or new evidence and the proposed modification is in the child's best interest. (*In re Jasmon O.*(1994) 8 Cal.4th 398, 415-416.)

Mother contends there was substantial evidence to support a finding of changed circumstances because she had completed a treatment program and was in a sober living facility at the time of the hearing in May 2012. Mother also argues the children's best interest would be served by granting her additional services. She maintains the preservation of the parental bond and the family unit is especially compelling in view of the express wishes of the older three girls to return to their mother with their younger siblings. (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1121.)

Respondents counter that mother has not demonstrated changed circumstances. We agree. Since 1997, mother has been a chronic drug user for 15 years with intermittent periods of abstinence. Her problems resurfaced in 2003, 2004, 2005, 2006, 2009, and 2010. Mother received an array of services between 2006 and 2008 when she was under court supervision. Nevertheless by mid-2011, she had relapsed again and was using methamphetamine, while living with five children in one bedroom in a filthy, dangerous house, where the other occupants were using and selling drugs. Although mother may have stopped using drugs between July 2011 and May 2012, mother was unemployed and had unrealistic plans to train to become a dental assistant. Ten months of sobriety offered no promise against future lapses in view of mother's long history of failures.

Furthermore, little or nothing about mother's situation in May 2012 constituted changed circumstances justifying additional reunification services and more delay in a permanent plan for any of the children. (*In re Edward H.* (1996) 43 Cal.App.4th 584,

594.) The two younger children, now seven and two, would especially benefit from permanency with the de facto parent who had provided them with the only stability in their lives. There was no abuse of discretion in denying mother's section 388 petition.

V

THE MGM'S APPEAL

Both mother and the MGM argue the trial court erred by not placing all the children, including I.F. and M.S., with the MGM, citing section 361.3, giving relatives preferred placement.

At the time of the detention hearing in June 2011, the MGM requested placement of the children and CPS placed them temporarily in two different foster homes, subject to later placement under section 361.3. The mother and the MGM repeatedly requested placement of the children with the MGM, who had moved to a larger residence. The MGM planned to smoke outside or to give up smoking.

The MGM contends on appeal the juvenile court never made the proper analysis under section 361.3 for removal from a temporary placement. Instead, the MGM maintains the court incorrectly analyzed only the best interests of the younger children, when it was one of several factors to be considered under section 361.3, subdivision (a). In *In re Antonio G.* (2007) 159 Cal.App.4th 369, 373, 379, the appellate court found reversible error when a grandmother sought placement and the full criteria for placement with a relative was not considered.

As an additional argument, mother contends that, under section 16002, all the children should be placed together as part of a sibling set—unless it was contrary to their

safety or well-being, not simply an issue of their best interests. (*In re A.S.* (2012) 205 Cal.App.4th 1332, 1340-1342.)⁵ Mother disputes there were any risks to I.F. and M.S. from the MGM smoking.

The parties disagree on whether the MGM and mother forfeited the arguments based on sections 361.3 and 16002 by not raising them in their petitions below. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338; *In re Christina L.* (1992) 3 Cal.App.4th 404, 416.) Nevertheless, we agree with respondents that the arguments lack merit.

Many other factors, other than smoking, justified the denial of the MGM's section 388 petition requesting placement of I.F. and M.S. The de facto parent cites the Thanksgiving 2011 incident, during which the MGM violated the limits imposed on contact by the children with mother and J.F. The MGM's conduct on this occasion was consistent with her express opinion that mother should be allowed to raise her own children and the MGM's announced intention of having mother live with her, meaning that I.F. and M.S. would not be protected from mother.

There was also evidence in the record that I.F.'s sexualized behavior may have been prompted by movie depictions and by seeing mother and J.F. engaged in such activity. I.F. also suffered from other behavioral problems, as well as pressure exerted against him by his older sisters, so that "his brain keeps screaming in his head." The record included information that, when M.S. was first placed in foster care at age five

⁵ We deny the respondent county's motion to augment the record or take judicial notice, filed in this court on December 12, 2012, to include a postjudgment order dated October 30, 2012. (*In re A.S.*, *supra*, 205 Cal.App.4th at p. 1339.)

months, she was developmentally impaired and could not lift her head or roll over. Later, during a spring visit with the MGM, M.S. suffered from congestion and multiple insect bites. There were also significant concerns about how the MGM, who could not provide transportation, would be able to bring the children to school or medical and therapy appointments without relying on other people, especially non-family members.

Taken altogether, we agree it was contrary to the best interest, including the safety and well-being, of I.F. and M.S., to grant the MGM's section 388 petition. (*In re A.S.*, *supra*, 205 Cal.App.4th at pp. 1341-1342.)

VI

DISPOSITION

The juvenile court did not abuse its discretion or commit legal error when it denied mother's petition seeking additional services or the MGM's petition requesting placement of I.F. and M.S.

We affirm the orders and judgment of the juvenile court.

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CODRINGTON

J.

We concur:

KING

Acting P. J.

MILLER

J.