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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

K.P.,

Defendant and Appellant.

E057899

(Super.Ct.No. RIJ120860)

OPINION

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

Rosemary Bishop, under appointment by the Court of Appeal, for Defendant and
Appellant.

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

I. INTRODUCTION

K.P. (mother) appeals from orders of the juvenile court denying her petition for a change of court order under Welfare and Institution Code section 388¹ terminating her parental rights as to minors D.D. and M.D. under section 366.26 and denying her reunification services. Mother contends the juvenile court erred in denying her reunification services under section 361.5, subdivision (b)(5), because that section applied only to the minors' half sibling, and the court failed to make specific factual inquiries and findings that might have justified the order under a different paragraph of the subdivision. Mother next contends the juvenile court abused its discretion in denying her petition for reunification services under section 388 because she had shown a substantial change in circumstances, and reunification services would have been in the best interests of minors. Finally, mother contends no substantial evidence supported the juvenile court's decision not to apply the parental bond exception to adoption. We find no prejudicial error, and we affirm.²

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² Mother has concurrently filed a petition for writ of habeas corpus (case No. E058630), which we address in a separate order.

II. FACTS AND PROCEDURAL BACKGROUND

On December 30, 2010, the Riverside County Department of Public Social Services (Department) filed a petition under section 300, subdivisions (b) (failure to protect) and (j) (abuse of sibling) to remove D.D. (born in May 2003), M.D. (born in May 2004), and their half sibling, A.R.,³ then age 21 months, from mother's custody. The petition alleged that J.M., mother's boyfriend, had inflicted severe physical harm on A.R., and mother should have known that J.M. administered inappropriate discipline but failed to intervene and allowed him to care for the children; and D.D. and D.M. were at risk of similar harm. The petition further alleged that mother abused alcohol while caring for the children.

The detention report stated that mother had brought A.R. to the hospital, where it was found that he had a skull fracture and bruises on his face, ears, and buttocks that were not consistent with any accidents. Mother stated she did not know how the child had sustained the injuries. She insisted that J.M. would never hurt the children.

³ A.R. has a different father from D.D. and M.D. The juvenile court ordered reunification services for D.D.'s and M.D.'s father, but not for A.R.'s father; thus, the matters proceeded on different timelines. In March 2011, mother gave birth to another daughter, J.P., as to whom the Department filed a petition under section 300, subdivisions (b) and (j), alleging J.P. was at risk of harm because mother was still living with J.M. and had a recent history of abusing alcohol. None of the children's fathers is a subject of this appeal, nor are J.P. and A.R. Mother's parental rights as to A.R. and J.P. were terminated in February 2012, and this court denied her appeal from that order. (Case No. E055601.) Proceedings involving the children's fathers, A.R., and J.P. will not be discussed in this statement of facts except as relevant to issues raised in mother's appeal.

However, she also stated that she allowed J.M. to discipline D.D. with a belt. Mother told the social worker she had left the children with J.M. while she went to the grocery store at about 6:00 p.m. with a friend. Before she left, she laid A.R. on her bed. When they returned half an hour later, J.M., M.D., and D.D. were playing video games. She found A.R. on the floor in her bedroom with a towel on him; he was halfway underneath the bed. She put him in the bed in the children's room. She prepared pizza and called him to eat, but she then noticed he was not eating normally, and he had bruises on his face. He threw up, and she asked the children what had happened to him; they said they did not know. She asked J.M. if he had spanked A.R., and he denied doing so. She had J.M. take her and A.R. to the hospital. Mother's friend, who had accompanied her to the store, gave a consistent report about the events. M.D. told a police officer that when mother and her friend were at the store, she heard a loud thump against her mother's bedroom door, and she had heard A.R. start crying.

J.M. later confessed that when mother was at the store, he beat A.R. with a belt to punish him, and when A.R. tried to run away, he fell and hit his head on a dresser.

The social worker reported that the home was "clean and organized with no safety hazards," and the children appeared clean and healthy with no visible signs of abuse or neglect. Mother had prior referrals to the Department in 2008 and 2009 for general neglect based on her smoking marijuana in the home, leaving her children in the care of others, and failing to arrange for adequate supervision when her daughter was injured

while under the supervision of her maternal grandmother. Those referrals had been determined to be unfounded.

At the detention hearing, the juvenile court found a prima facie showing had been made and detained the children in foster care.

The Department filed a jurisdictional/dispositional report in January 2011, in which the Department recommended that reunification services be denied to mother as to all the children under section 361.5, subdivision (b)(5). The social worker interviewed D.D., who stated that J.M. had spanked him with a belt, leaving marks and bruises on his bottom. He said mother was “there when he hits me. Sometimes she tells him to hit me.” He said mother disciplined him by just talking to him. He denied that anyone in the home drank alcohol or used drugs, but he also stated that mother and J.M. “drank alcohol to ‘probably get drunk.’” M.D. told the social worker that mother sometimes left the children home alone “and sometimes we are hungry and we can’t eat anything because we can’t cook.” M.D. said mother did not drink anymore because she was pregnant, but “when she is not pregnant she drinks a lot.” She told the social worker that when A.R. got hurt, she heard the thump and heard A.R. start to cry, she “didn’t go check on him because [she] didn’t want to get in trouble too.” She had not told anyone about J.M. hitting her brothers with a belt for the same reason. The foster mother reported that she had asked D.D. and M.D. what had happened to A.R., and they “looked at each other and then simultaneously stated, I don[’]t know[,] [a]s if they were hiding something.”

Both D.D. and M.D. told the social worker they wanted to return to mother's care. They were adjusting well to their foster placement, liked their foster home, and did not exhibit any mental health or emotional issues. The social worker concluded the children were not safe in mother's home, because mother had not addressed her parenting skills and continued to live with J.M. The forensic report stated that A.R.'s injuries were inconsistent with J.M.'s explanation of the child hitting his head on the dresser, and the injuries were "a result of being struck repeatedly and forcefully." The social worker provided mother with the phone number for Catholic Charities and advised her to enroll in a parenting class and counseling services.

At the jurisdictional/dispositional hearing, the juvenile court struck an allegation that mother had failed to obtain medical care for minors and found true the allegations under section 300, subdivisions (b) and (j). The court found by clear and convincing evidence that section 361.5, subdivision (b)(5) applied and denied reunification services for mother, finding that reunification services were not in the best interest of the children. The court did not inform mother of her right to appeal the denial of reunification services.

In March 2011, mother gave birth to a fourth child, J.P., who was removed from mother's care and placed in foster care with her siblings. Mother did not return to J.M.'s home after the birth, but went to a shelter.

In April 2011, mother filed petitions under section 388 asking the court to change its order denying her reunification services for M.D. and D.D. The petitions stated as changed circumstances that mother left J.M. and was in a safer environment. Mother also

stated she had obtained help on things she needed to know as a mother, such as how to provide for the children, and she had learned parenting skills such as appropriate discipline. As to why the change would be better for the children, mother stated that she was in a shelter home, which was a safer environment where she could provide shelter, food, clothing, and love for the children. The court denied the petitions without holding a hearing on the ground that the proposed change of order did not promote the best interests of the children.

The Department filed a status review report in July 2011. The report stated mother was consistently attending weekly supervised visitation with the children. The visits were currently positive and appropriate, although mother had initially brought J.M. to the visits, which had caused anxiety for the children. D.D. and M.D. were both doing well in school and had no behavioral issues. They were assessed and found not to be in need of counseling.

In July 2011, mother filed a second section 388 petition requesting reunification services. Mother alleged the following changed circumstances: "Mother now has stable housing. She has been actively engaged in her therapy and is making good progress. She has shown insight into the issue[s] that brought this case to the attention of the court." As to the best interest of the children, mother alleged, "She is participating in consistent visitation with all of her children. The mother recently gave birth and is wanting all of her children to have a relationship not only with her but with each other." In support of the petition, mother attached handwritten documents listing her goals in therapy and

addressing child discipline; certificates indicating completion of a 10-session parenting program on April 5, 2011; letters documenting attendance at 10 therapy sessions between February 9 and June 21, 2011; an undated letter stating that mother had volunteered at a preschool throughout the school year; a letter dated March 11, 2011, stating that mother was living at a family shelter in Riverside and was going out every day to pursue employment and housing and was attending classes and had passed all random tests; a letter indicating that mother had left the shelter on June 1, 2011, but she had participated satisfactorily in shelter services while there; and a progress report from her counselor dated April 18, 2011. The progress report stated mother was “rethinking the use of corporal punishment that was used with her” as a child, and she appeared to understand the negative effect of that type of discipline. Mother wanted to use the positive discipline strategies she had learned in her parenting class and in therapy, and she appeared to understand her responsibility to protect her children. She stated she would not be in relationships with men who compromised her children’s safety, and she was “starting to understand the skills needed to take care of her children, provide for their safety, and protect them in the future.”

The juvenile court referred the section 388 petitions to the Department for investigation, and the Department filed an addendum report on August 12, 2011, recommending denial of the petitions. The report stated mother had remained with father until March 2011, when he kicked her out of the home, and she then stayed in a shelter. Mother reported she was currently living with friends, and she was not currently

employed. Mother had been visiting the children weekly for two hours and had missed three visits. During the visits, she paid more attention to her daughters and ignored D.D., which caused him great anxiety. She spoke inappropriately to the older children in telephone calls and tried to get them to tell the judge they did not want to go with their father and that their father would lock them in a room and leave them there. Mother reportedly told friends that she ““didn’t have time for the kids, but the money would be nice.”” D.D. had expressed fear about returning to her care.

The juvenile court denied the petitions after a hearing. The court commended mother for her efforts but did not find a substantial change “that would warrant a change in the previous court’s orders.” The court expressed concern about the lack of appropriate housing and stated, “if mother continues on this road, that perhaps at some future date, it may be more appropriate for the court to reconsider the granting of reunification services. [¶] But, at this time, I do not find a sufficient substantial change, or that it would be in the best interest of the children that mother be provided with reunification services.”

The Department filed a 12-month status review report in February 2012. D.D. and M.D. were on target developmentally and were in good health, except that both were receiving continuing treatment for crossed eyes. D.D. had encopresis but it was improving. He was in counseling to address the reported physical abuse by J.M., lying, and his encopresis. Both children liked their foster home and felt safe there. Mother had been visiting the children consistently for one hour each week, and the visits were

positive and appropriate. At the hearing, the juvenile court continued reunification services for the children's father and authorized placement with him on family maintenance upon completion of his case plan.

The Department filed another status report in June 2012. Mother told the social worker she was employed at a bar in Corona where she earned \$1,500 to \$2,000 per month. She shared an apartment with a female friend and paid half the rent and utilities. D.D. was continuing in therapy and was making good progress. He and M.D. were in good health and continued to do well in school. Mother had no contact with the children because she had not requested visitation during the review period. At the hearing on July 12, 2012, the court terminated reunification services for the children's father and ordered the matter set for a hearing under section 366.26.

The Department filed a section 366.26 report in October 2012. The children had recently been placed together in a prospective adoptive home after their previous caregivers declined to make a permanent commitment to them. M.D. stated she wanted to be adopted by the prospective adoptive parents. She had earlier told the social worker she did not want to be adopted "because you get to see your mom till you are 18." D.D. "was initially not comfortable with the idea of adoption by anyone, but since his placement with the prospective adoptive parents, he has been very happy." He had earlier told the social worker that he still wanted to see his "real family," and that he did not want to be adopted. By the time of the report, the children had bonded to their prospective adoptive family.

Mother had not visited the children between March and June 2012, but she resumed once a month visits in August. The social worker recommended against future visitation, explaining that mother “has not maintained consistent visitation with the children and when she had visits, the quality of the interaction was poor.” D.D. and M.D. were in general good health, were doing well in school, and were friendly and sociable.

The Department filed a preliminary adoption assessment in November 2012. The prospective adoptive parents were good friends of the couple who were adopting A.R. and J.P., and both sets of parents were supportive of maintaining sibling contact. The prospective adoptive parents were willing to participate in visitation and exchange of photographs with mother as long as it is safe and in the children’s best interest.

M.D. and D.D. were thriving since being placed in the prospective adoptive home. The prospective adoptive parents were committed to raising the children and understood their responsibilities. D.D. stated he understood adoption to mean that ““you get new parents and when you turn 18 you can go live with your “real” parents.”” The social worker stated she had clarified what adoption meant, and D.D. said he wanted to be adopted by the prospective adoptive parents. M.D. defined adoption as ““when you get new parents because you were removed from your parents and you don’t get to see mom and dad.””

In December 2012, mother filed a section 388 petition requesting reunification services and vacation of the section 366.26 hearing. With respect to changed circumstances, the petition stated: “Since the beginning of this endeavor [mother] has

transformed from a young naïve girl to a mature mother who understands the importance of protecting her children.” The petition stated mother “has completely removed herself and has severed all contact with the individual who caused the circumstances that [led] to the dependency,” and had “obtain[ed] and completed parenting classes and individual counseling which has provided her with alternatives to corporal punishment,” and have taught her “how to adequately protect her children.” In addition, mother had “maintained suitable housing and a job for the past year.” She had retained private counsel who intended to involve experts to assist her “in formulating a plan for the return of the children,” and she was willing to take additional classes and counseling.

With respect to the best interest of the children, the petition stated that D.D. was then nine years old and M.D. was eight years old, and mother and the children had a strong bond. Mother had made “frequent visitations,” and before the dependency, the children had lived all their lives with her. They had been in their prospective adoptive home for only two months and had not yet established any permanent bond with the family, and it was premature to assume the adoption would proceed and be successful.

Mother attached certificates showing she had completed 15 hours of parenting classes between February and April 2011 and was “in the process of signing up” for additional classes. She had also completed 10 hours of counseling between February and June 2011. She stated: “Since my counseling sessions and time spent away from my children, I am absolutely sure that using spanking as a form of punishment or against bad behavior is not the way at all.” Now I understand that use of other methods such as

taking away the children's privileges or social time with their friends is more productive to change their behavior." Finally, she stated she had had a steady job for the past year and had maintained a suitable home.

In December 2012, the juvenile court held a hearing on mother's section 388 petition. Mother testified she had completely severed her relationship with J.M. and had no contact with him whatsoever. She testified she had initially stayed with him because she was seven months pregnant and did not want to go to a shelter home where she would have to get up at 5:00 a.m. and could not return until 3:00 p.m. At the time of the hearing, she had had a job for over a year, and she had a two-bedroom apartment. Before taking classes, she believed spanking was appropriate because her mother had done it. After taking classes, she learned that spanking did not teach children anything, and it was better to put them in "time out" and talk to them about why they got into trouble. She visited D.D. and M.D. while she was at the shelter home, but she had once been denied visitation for three or four months. She attended 10 counseling sessions at Catholic Charities in 2011, and she was still attending weekly counseling sessions at Higher Grounds. She had taken 10 extra parenting classes since 2011. She testified that she had been having monthly visitations, but had been denied visitations since November. On cross-examination, she testified she had never attended a domestic violence class. She testified as to how she had benefitted from services: "It taught me a different perspective on how to punish my kids, just—I really don't know how to put it in words. I have learned a lot. I have learned to take my time, not to get too mad. To go to a different

room, cool off and then go back to what I was doing. And, you know, put them in time out and stuff like that.” With respect to her choice of partners, the services had made her “think twice if [she] should hang out with people that [she] used to,” and to “stop and think: Is this the safest thing for my kids.” The trial court found that mother’s circumstances had not “changed to such an extent that would justify changing the current court order,” and stated it would not be in the children’s best interests to remove them from their current placement and return them to mother. The court therefore denied mother’s section 388 petition. The court then found the children adoptable, found that no exception to adoption applied, and terminated parental rights.

III. DISCUSSION

A. Denial of Reunification Services

Mother contends the juvenile court erred in denying her reunification services under section 361.5, subdivision (b)(5)⁴ because that section applied only to the minors’ half sibling, A.P., and the court failed to make specific factual inquiries and findings that would have justified the order under a different subsection.

⁴“(b) 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: [¶] . . . [¶] (5) That the child was brought within the jurisdiction of the court under subdivision (e) [severe physical harm] of Section 300 because of the conduct of that parent or guardian.” (§ 361.5, subd. (b)(5).)

1. Appealability

Mother failed to file a timely appeal from the disposition order denying her reunification services, but she contends the order is nonetheless appealable because the juvenile court failed to advise her of her right to appeal. (Cal. Rules of Court, rule 5.590, subd. (a).) The Department concedes that the record is silent regarding any advisement of that right. We will therefore consider the merits of mother's appeal from the disposition order.

2. Analysis

The Department concedes the juvenile court erred in basing its order on section 361.5, subdivision (b)(5), which by its terms did not apply to D.D. and M.D. but only to A.R., as a child under the age of five who had been subjected to severe physical abuse. The Department argues, however, that the same result could have been reached under section 361.5, subdivisions (b)(6)⁵ and (b)(7).

⁵ The juvenile court may deny a parent reunification services if it finds “[t]hat the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of . . . the infliction of severe physical harm to . . . a half sibling by a parent or guardian, as defined in this subdivision, and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent or guardian. [¶] . . . [¶] A finding of the infliction of severe physical harm . . . may be based on, but is not limited to, deliberate and serious injury inflicted to or on a child's body or the body of a sibling or half sibling of the child by an act or omission of the parent or guardian, or of another individual . . . with the consent of the parent or guardian. . . .” (§ 361.5, subd. (b)(6).)

Because section 361.5, subdivision (b)(6) requires factual findings and an express order (§ 361.5, subd. (k)),⁶ which the Department concedes were not made, we will focus our analysis on subdivision (b)(7), under which the juvenile court may deny reunification services if it finds by clear and convincing evidence “[t]hat the parent is not receiving reunification services for a sibling or half sibling of the child pursuant to paragraph . . . (5) . . .” (§ 361.5, subd. (b)(7)). Mother does not challenge the denial of services as to A.P. under section 361.5, subdivision (b)(5). It was thus undisputed that section 361.5, subdivision (b)(7) applies to the other children.

Section 361.5, subdivision (c) provides that the juvenile court “*shall not order reunification* for a parent . . . described in paragraph . . . (7) . . . of subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child.” (Italics added.) Section 361.5, subdivision (i) states: “In determining whether reunification services will benefit the child pursuant to paragraph (6) or (7) of subdivision (b), the court shall consider any information it deems relevant, including the following factors:

“(1) The specific act or omission comprising . . . the severe physical harm inflicted on the . . . child’s . . . half sibling.

⁶ “(k) The court shall read into the record the basis for a finding of . . . the infliction of severe physical harm under paragraph (6) of subdivision (b), and shall also specify the factual findings used to determine that the provision of reunification services to the offending parent . . . would not benefit the child.” (§ 361.5, subd. (k).)

“(2) The circumstances under which the abuse or harm was inflicted on the . . . child’s . . . half sibling.

“(3) The severity of the emotional trauma suffered by the child or the child’s sibling or half sibling.

“(4) Any history of abuse of other children by the offending parent or guardian.

“(5) The likelihood that the child may be safely returned to the care of the offending parent or guardian within 12 months with no continuing supervision.

“(6) Whether or not the child desires to be reunified with the offending parent or guardian.

The Department concedes the juvenile court failed to expressly state the specific factors that were applicable to whether the children would benefit from reunification services for mother. However, the jurisdictional report contained information relevant to those factors, and we presume the juvenile court considered that information. Under section 361.5, subdivision (c), the juvenile court could not order reunification services unless it found by clear and convincing evidence that such services would be in the best interest of the children. Instead, the juvenile court denied reunification services as *not* in the children’s best interest. We conclude the juvenile court’s reference to section 361.5, subdivision (b)(5) was therefore harmless.

B. Denial of Section 388 Petition

Mother next contends the juvenile court abused its discretion in denying her petition for reunification services under section 388 because she had shown a substantial

change in circumstances and reunification services would have been in the best interests of minors.

1. Standard of Review

We review the juvenile court's denial of a section 388 petition under the deferential abuse of discretion standard. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 316, 318-319.)

2. Analysis

Under section 388, the parent requesting modification of a prior court order has the burden of showing, by a preponderance of the evidence, either new evidence or changed circumstances that make modification in the best interests of the child. (*In re Andrew L.* (2004) 122 Cal.App.4th 178, 190.)

The juvenile court found that mother had failed to show her circumstances had "changed to such an extent that would justify changing the current court order." The court also found that it would not be in the children's best interest to move them from a good, loving adoptive home, and the court was not convinced that mother could protect them.

We commend mother for making significant progress during the dependency, in that she obtained her own counseling services and took parenting classes, among other things. However, even if we accept for purposes of argument that mother has shown changed circumstances, we are not persuaded that the trial court erred in holding that granting the petition would be in the children's best interests.

Mother argues that at the time of the denial of her petition, the children had been in the prospective adoptive home for only two months. However, the prospective adoptive parents were good friends of the couple who had adopted the children's siblings, and the children had a pre-existing relationship with them as a result of sibling visits. The prospective adoptive parents were supportive of continuing the sibling contact as well as contact with other birth relatives.

Moreover, at the time of the hearing on the petition, the children had been in the dependency system for nearly two years. Although mother initially visited them weekly and missed only three visits before March 2012, her visitation later became inconsistent. In summer of 2012, she missed three months of visits. In July 2012, the trial court authorized the Department to reduce visits to once per month. Mother resumed monthly visits in August. On September 21, 2012, the children reported that they saw mother "sometimes." There was ongoing telephone contact between mother and the children except for a period when calls were suspended after mother discussed the children's father with them. Mother argues that some of the limitations on her visitation were because of confusion by the social workers and foster family. However, the social worker testified that she had never denied mother her visitation, and mother had not contacted her to let her know she was not getting her visits.

We conclude the juvenile court did not abuse its discretion in denying the petition on the ground that a change in the order would not be in the children's best interests.

C. Parental Bond Exception

Mother contends no substantial evidence supported the juvenile court's decision not to apply the parental bond exception to adoption.

The Legislature has expressed a preference for adoption as a dependent child's permanent plan unless "(B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) The parent has the burden of proof to demonstrate both prongs (regular visitation and benefit to the child) of the statutory exception to adoption. (*In re Daisy D.* (2006) 144 Cal.App.4th 287, 291.)

As discussed above, the record does not show that mother availed herself of all the opportunities that were offered to her to visit the children. Moreover, even if we assume mother satisfied the regular visitation prong, the parent-child relationship that must exist to trigger the application of the statutory exception must be sufficiently strong that the child would suffer detriment from its termination (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418), and the benefit from continuing that relationship must "outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) Mother has not shown such a relationship or such benefit from continuing it. At the hearing on her petition, she discussed doing homework, playing games, and going on outings with the children before

the dependency began. However, she provided no evidence of how the parental relationship had continued during the dependency. We conclude the juvenile court did not err in finding the parental bond exception inapplicable.

IV. DISPOSITION

We affirm the orders appealed from.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

KING

J.

MILLER

J.