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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re L.W., a Person Coming Under the Juvenile Court Law.	
FRESNO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. J.M., Defendant and Appellant.	F065651 (Super. Ct. No. 0096951-3) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Mary Dolas, Commissioner.

Conness A. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kevin Briggs, County Counsel, William G. Smith, Deputy County Counsel for Plaintiff and Respondent.

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After her two sons were removed from her care, appellant J.M. (mother) was denied reunification services under Welfare and Institutions Code section 361.5,

subdivision (b)(10) and (11).[1] Mother contends that the statutory exceptions permitting bypass of reunification services did not apply to her because she made a reasonable effort to address the problems that led to the removal of her older daughter in two previous dependency cases and the problems that have led to the removal of her sons in the current case are different.

We disagree and affirm the court's order.

FACTUAL AND PROCEDURAL HISTORIES

Mother is developmentally delayed and suffers from cerebral palsy. She is reported to be high functioning and is able to live on her own. She has two sons, J.S., born in 2009, and L.W., born in 2011. This direct appeal relates to her younger son, L.W. At the time the dependency petition was filed in the current case, mother and her sons were living with L.W.'s father, R.W. J.S.'s biological father is F.S. Mother also had a daughter, K.M., who was born in 1999; mother's parental rights to K.M. were terminated in 2010.

On March 20, 2012, the Fresno County Department of Social Services (Department) filed a section 300 petition on behalf of J.S. and L.W. alleging failure to protect (§ 300, subd. (b)) and abuse of a sibling (§ 300, subd. (j)). The Department alleged that mother had a substance abuse problem with methamphetamine and marijuana that negatively affected her ability to provide regular care, supervision, and protection for her sons, and she provided care while under the influence. Drugs and drug paraphernalia were found in the home within the boys' reach. It was alleged that R.W. also had a substance abuse problem, and he used drugs in L.W.'s presence and provided care for L.W. while under the influence.

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

As to mother, the Department further alleged that she previously had neglected her daughter K.M. After receiving court-ordered services, including parenting classes and mental health treatment, mother failed to reunify with K.M, and her parental rights were terminated.

The Department prepared a detention report, which was submitted to the court on March 21, 2012. According to the report, J.S. and L.W. came to the Department's attention when community health nurse Lori Wood called social worker Kevin Moua on March 16, 2012. Wood makes home visits to patients with large wounds, such as gunshot wounds. She went to the home of mother and R.W. to see R.W., who had a large open abscess on his left arm. R.W.'s wound was gushing blood and blood was on the floor. Wood reported that mother and R.W. appeared to be under the influence. She saw needles left out within reach of J.S. and L.W. There were dirty needles by the microwave and on the shelves where the family kept baby food and formula.

After receiving Wood's referral, Moua, accompanied by a Fresno police officer, went to the home of mother and R.W. J.S. and L.W. were in the living room watching television. Moua noted that they looked dirty and their clothes were dirty. The home was in disarray with clothes, shoes, toys, diapers, and other items strewn across the floor. The bathroom was filled with dirty diapers and had a rancid smell. Electrical appliances, car seats, and other household items were piled up in the kitchen and could have toppled on the boys.

The police officer saw marks on R.W.'s arm from intravenous drug use. R.W. said he used methamphetamine and marijuana daily and mother used every other day. He said he was on probation for receiving stolen property. Mother reported that she started using methamphetamine and marijuana two months earlier. She used marijuana daily and methamphetamine every other day. A needle was found in mother's purse, and there was a jar of marijuana next to the television. R.W. also produced a jar of methamphetamine. Mother and R.W. were arrested. The detention report noted that "there was a concern that

[drugs] may have been sold out of the home as there were many unexplained visitor[s] while law enforcement was present."

At the detention hearing on March 21, 2012, the juvenile court found a prima facie showing that J.S. and L.W. were persons described in section 300 and ordered them removed from the home of mother and R.W. J.S. and L.W. were placed together in a foster family agency home. At the jurisdictional hearing on May 30, 2012, mother and R.W. submitted to an amended petition[2] on the basis of the social workers' reports, and the court found the allegations of the amended petition true.

A disposition report was submitted to the court on June 20, 2012. The Department recommended that the juvenile court deny mother reunification services under section 361.5, subdivision (b)(10) and (11). According to the report, the boys' older half-sister K.M. had been removed from mother's care due to general neglect issues; reunification services were terminated because mother did not demonstrate the ability to comply with all of her services; and mother's parental rights to K.M. were terminated.

The disposition report documented mother's prior history with the Department and the juvenile court. In April 2000, the Department received a referral reporting general neglect of K.M. by mother and K.M.'s father, W.M. It was reported that K.M. had diarrhea for a week and might be dehydrated. She was prescribed medication, but mother was not giving the medication to K.M. The referral was substantiated for general neglect and the family received voluntary family maintenance services from June 15 to August 29, 2000. In August 2000, a referral was received alleging drug use and domestic violence in the home. A juvenile dependency petition alleged that mother failed to protect K.M. from W.M.'s violent behavior and substance abuse. W.M. used

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[2]Mother submitted on the amended petition, which deleted the allegation that she failed to comply with the services. She agreed to the allegation: "Despite receiving Fresno County Department of Social Services court ordered services …, which included parenting classes and mental health treatment, [mother] failed to reunify with [K.M.]"

methamphetamine and marijuana and had a history of angry outbursts and assaultive behavior. K.M. was initially removed from the home in August 2000, and she was found to be a dependent of the court in September 2000. Mother and W.M. were married at that time and were able to reunify with K.M. in about April 2002.

In January 2009, K.M. was again removed from mother due to general neglect issues. The juvenile court found true allegations that mother had allowed her live-in boyfriend, F.S., to control her life and exploit her by taking her money, denying mother and K.M. food when he was angry with them, and subjecting them to verbal abuse. The home was found to be dirty and smelling of animal urine; it was cluttered; and there were no working utilities. In addition, there were concerns that K.M. was malnourished, her hygiene was poor, and she was frequently infested with lice. In April 2009, the court ordered reunification services for mother, including parenting classes, a mental health evaluation and any recommended treatment, and a domestic violence evaluation and any recommended treatment. Mother failed to reunify with K.M., and a permanent plan of adoption was ordered in September 2010.

The Department also reported that, in the current case, mother acknowledged her need for substance abuse treatment and enrolled herself in an outpatient treatment program. Mother visited her sons twice a week, and the visits went well with no problems reported.

On August 8, 2012, the juvenile court held a contested disposition hearing. Counsel for J.S. and L.W. submitted on the Department's report and recommendation that mother not receive reunification services. Mother objected to the Department's recommended disposition and testified on her own behalf.

Mother testified that K.M. was removed from her in 2009 because someone reported that her child was starving, and when the Department investigated, her house was dirty and had no power. At that time, mother was ordered to take parenting classes and attend counseling. She testified that F.S. took advantage of her and told her she was

slow and disabled. She got a restraining order against F.S. that was still in effect. Mother testified that F.S. starved K.M. and she would be afraid that he would do the same thing to J.S. F.S. is J.S.'s biological father and sought reunification services in this case.

Mother described what she learned in parenting class. She learned about nutrition and discipline and learned "mostly give them lots of love." In domestic violence classes, she learned not to go back to a partner who puts his hands on her or takes advantage of her. Previously, W.M. (K.M.'s father) had put his hands on her and dragged her across the floor. Mother started a substance abuse program in April 2012 and had not had any dirty drug tests. She also tried to enroll in a parenting class. Mother testified that if she could have done things differently, she would have left R.W. when she saw the signs of drugs in the house. She testified that she felt like she had changed a lot and had grown up a lot since starting her substance abuse program.

In cross-examination, mother testified that when K.M. was removed in 2000, W.M. was using drugs. She had parenting classes and learned about the need to protect her child. Mother agreed that K.M. was taken away because she did not protect her from W.M. and his drug use. Mother began using drugs when she met R.W. She knew that drugs could cause her to lose her children. R.W. did not encourage her to use drugs, but she wanted to "be a part of it," meaning she wanted to party with him.

Mother admitted that she knew what she was doing was not right. Mother was a client of the Central Valley Regional Center (CVRC), which helped her with daily tasks such as paying bills and going grocery shopping. She has had a CVRC worker since 2000, but she did not tell the worker about her drug use, explaining, "[the worker is] the kind of person [who] will report to CPS, the County." Mother agreed that she learned about keeping her house clean and safe in her parenting classes.

Mother's family had told her that W.M. was bad and she should not be with him. Similarly, her family had warned her against F.S. and R.W., but she did not listen to them. Asked why she stayed with R.W. when she knew he was doing drugs, mother responded

that she honestly did not know. She believed R.W. was a really good father even though he used drugs and left needles around the house within reach of the children. Mother agreed that when she reunified with K.M. the first time, her reunification services addressed the concept that it is not good to be around somebody using drugs.

Mother's attorney argued that mother should receive reunification services because she had made reasonable efforts to treat the problems that had led to K.M.'s dependency cases. Those cases dealt with domestic violence, and there was no allegation that mother used drugs. Mother learned to avoid domestic violence situations, but she became involved with R.W. and began taking drugs. In the current case, there was no domestic violence or alleged controlling behavior by R.W.

The Department's attorney argued that the problems leading to the removal of K.M. included drug use in the home. She pointed out that mother had exposed K.M. to drug use and subsequently received reunification services, and in the current case, she exposed her two younger children to the same kind of environment. More generally, the attorney argued, mother puts "the men in her life before she puts her children in her life."

On August 22, 2012, the juvenile court denied mother services for reunifying with her two sons under section 361.5, subdivision (b)(10) and (11). The court explained that its conclusion was "based on a finding that there was a sibling previously removed due to substance abuse and domestic violence and the pattern of mother being involved with partners who abuse substances and engage in domestic violence and the fact that she's not demonstrated her ability to resolve those issues given the fact that she has participated in previous reunification services."

In addition, the court ordered reunification services for R.W. and denied services for F.S. As to J.S., the court ordered a section 366.26 hearing. Mother challenged the order denying reunification services as to J.S. by writ petition, and this court affirmed the court's order in *J.M. v. Superior Court* (Nov. 30, 2012, F065653 [nonpub. opn.]). Mother

challenges the court's order denying reunification services as to L.W. by this direct appeal.

DISCUSSION

When a child is removed from parental custody, the juvenile court is required to order reunification services for the child and the child's parents unless the court finds by clear and convincing evidence that the parent is described by any of the 16 exceptions set forth in section 361.5, subdivision (b). (§ 361.5, subds. (a) & (b)(1)-(16).) These exceptions to the general rule reflect the Legislature's recognition that in some cases it may be fruitless to provide reunification services. (*In re Allison J.* (2010) 190 Cal.App.4th 1106, 1112.) When an exception applies, "the general rule favoring reunification is replaced with a legislative presumption that reunification services would be '"an unwise use of governmental resources."' [Citations.]" (*Ibid.*) As courts have observed, "[i]t is reasonable for the state, before expending its limited resources for reunification services, to distinguish between those who would benefit from such services and those who would not." (*In re Christina A.* (1989) 213 Cal.App.3d 1073, 1080.)

Section 361.5, subdivision (b), provides in relevant part:

> "Reunification services need not be provided to a parent … 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 … 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 that, according to the findings of the court, this parent has not subsequently made *a*

> *reasonable effort to treat the problems that led to removal* of the sibling or half sibling of that child from the parent." (Italics added.)

We review the juvenile court's order denying reunification services under section 361.5, subdivision (b), for substantial evidence. (*R.T. v. Superior Court* (2012) 202 Cal.App.4th 908, 914.) On appeal, mother contends, first, there was no substantial evidence that she failed to make a reasonable effort to treat the problems that led to K.M.'s removal, and, second, the juvenile court applied an incorrectly high standard in determining that she had not made reasonable efforts. We are not persuaded.

In her first contention, mother acknowledges that reunification services were terminated and her parental rights to K.M. were severed, but she argues that the allegations of the two dependency petitions relating to K.M. were different from the allegations in the current case. The prior petitions alleged only failure to protect from physical abuse and domestic violence and did not allege drug abuse on the part of mother. Her treatment plan in those cases had focused on domestic violence and parenting.

The "problems that led to removal" of section 361.5, subdivision (b)(10) and (11), however, are not limited to the allegations made in the prior dependency petitions. *In re Lana S*. (2012) 207 Cal.App.4th 94 is instructive on the issue of what matters may be considered "problems that led to removal." In *In re Lana* S., the prior dependency petitions had alleged physical abuse and domestic violence but had not alleged drug abuse. The mother claimed that she had made a reasonable effort to treat the problems that led to prior dependency proceedings because she ended her relationship with her abusive boyfriend. As a consequence, the mother argued, she could not be denied reunification services in the current proceeding based on lack of reasonable effort to treat her drug problem. (*Id.* at p. 107.) The reviewing court rejected the mother's argument. The court reasoned:

> "Interpreting section 361.5, subdivision (b)(10) and (11) in the manner [the mother] urges—to restrict the term 'problems that led to removal' to problems alleged in the petition—would lead to an absurd

> result. [The mother's] drug abuse has been a recurrent theme. It unquestionably posed a problem throughout the prior proceedings because it was a substantial component of her service plan. '"[T]he focus of reunification services is to remedy those problems which led to the removal of the children." … A social services agency is required to make a good faith effort to address the parent's problems through services, to maintain reasonable contact with the parent during the course of the plan, and to make reasonable efforts to assist the parent in areas where compliance proves difficult.' [Citation.] [The mother's] failure to reunify with her older children was based, at least in part, on her failure to submit to or satisfactorily complete drug testing and treatment.
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> "To avoid an absurd result, we construe the term 'problems that led to removal' in section 361.5, subdivision (b)(10) and (11) to include drug abuse, even though it was not alleged in the petitions. The legislative intent is to promote the interests of children, and conserve limited resources, by not ordering services when parents have demonstrated in prior proceedings that they would be fruitless. [¶] Moreover, substantial evidence supports the finding that after her parental rights were terminated in the prior proceedings, [the mother] did not make a reasonable effort to treat the problem." (*In re Lana S.*, *supra*, 207 Cal.App.4th at p. 108.)

Likewise, in this case, the problems that led to K.M.'s removal are not restricted to the problems alleged in the previous juvenile dependency petitions. The Department argues that, given her history, the two main problems mother needed to make reasonable efforts to treat were: (1) her inability to protect her children from the negative effects of substance abuse, and (2) her inability to provide a safe, healthy home environment.

We agree that an important aspect of the first dependency case involving K.M. was drug use in the home, and the evidence supported a determination that she did not make a reasonable effort to address this problem. Mother testified that K.M. was taken away from her because she did not protect K.M. from W.M. and his drug use. Mother agreed that she had learned as part of her reunification services that it is not good to be around people who use drugs, and she admitted that she knew that drugs could cause her to lose her children. Yet, when asked why she stayed with R.W. even though he used drugs, she

said she did not know. Further, mother chose to begin taking drugs even though she had learned from her reunification services to protect her children from drug use.

We also agree that a significant theme of the second dependency case involving K.M. was mother's inability to provide a safe and healthy home, and the evidence supported a determination that she did not make a reasonable effort to address this problem. When K.M. was removed from mother's care the second time, the home was found to be dirty, smelling of animal urine, cluttered, and without utilities. K.M. was malnourished and had frequent bouts of lice. Mother agreed that she had learned about keeping her house clean and safe in her parenting classes. Despite the parenting classes, in the current case, mother's home was found to be in disarray with household items piled in the kitchen in a precarious fashion, the bathroom had a rancid smell, there were needles within reach of J.S. and L.W., and the boys were dirty and wearing dirty clothes.

In addition, we agree with the Department attorney's observation at the contested hearing that mother puts "the men in her life before she puts her children in her life." Certainly, a recurrent theme of the three dependency cases is mother's unwillingness or inability to protect her children from the bad behavior of her domestic partners.

Mother attempts to distinguish *In re Lana S.*, observing that, unlike the parent in that case, mother had no history of drug abuse during K.M.'s two prior dependency proceedings. Mother incorrectly relies on the specific facts of *In re Lana S.* and avoids the broader principle. Here, it is not that mother's own drug use led to the removal of K.M.; rather, it was her inability to protect K.M. from the negative effects of drug use in the home.[3] And, as we observed in J.S.'s case, "mother ignores the unchanging dynamic

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[3]We reject mother's argument, made in her reply brief, that the juvenile court mischaracterized the prior dependency proceeding because the court stated "there was a sibling previously removed due to substance abuse and domestic violence …." This is a correct statement. In fact, mother testified that K.M. was taken away because mother did not protect her from W.M. and his substance abuse. The court did not state or imply that the prior dependency cases were the result of drug use by mother.

that required K.M. and [J.S.'s] removal; namely her abdication of her parental responsibility in favor of a relationship." (*J.M. v. Superior Court, supra*, F065653, p. 4.)

For all these reasons, we conclude that substantial evidence supports the juvenile court's determination that mother failed to make a reasonable effort to treat the problems that led to the removal of K.M.

We also reject mother's second contention—that the juvenile court's implicit finding that she had not made a reasonable effort to address the problems that led to the removal of K.M. was incorrectly based on a higher-than-required standard. Mother cites the court's statement, "[Mother has] not demonstrated her ability to resolve those issues given the fact that she has participated in previous reunification services." Mother asserts that it was improper for the court to require that she "resolve" her issues because the statute only requires her to make "a reasonable effort to treat the problems that led to removal," not resolve or cure the problems. (See *R.T. v. Superior Court, supra*, 202 Cal.App.4th at p. 914 ["The reasonable effort requirement focuses on the extent of a parent's efforts, not whether he or she has attained 'a certain level of progress'"].)

"[A]lthough success alone is not the sole measure of reasonableness, the *measure* of success achieved is properly considered a factor in the juvenile court's determination of whether an effort qualifies as reasonable." (*R.T. v. Superior Court, supra*, 202 Cal.App.4th at p. 915.) Here, it was reasonable for the court to consider mother's failure to address the problem of allowing drug abuse in the home in determining that her effort was not reasonable. We do not read the court's observation that mother has not demonstrated an ability to resolve the problem to mean that it was applying a standard higher than "a reasonable effort." We further observe that mother did not object at the time the court made this statement. Had she done so, the court could have addressed any perceived error. Now, mother asks this court to assume that the juvenile court applied the wrong standard. Without more convincing evidence to the contrary, however, we assume

the juvenile court applied the correct legal standard. (See Evid. Code, § 664; *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913-914.)

DISPOSITION

The juvenile court order is affirmed.

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Wiseman, Acting P.J.

WE CONCUR:

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Kane, J.

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Detjen, J.