Filed 7/7/22 In re K.R. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re K.R. et al., Persons Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. M.F., Defendant and Appellant.	E077576 (Super.Ct.No. INJ2100028) OPINION

APPEAL from the Superior Court of Riverside County. Susanne S. Cho, Judge. Affirmed.

Neale B. Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

Gregory P. Priamos, County Counsel, Teresa K.B. Beecham and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

In this dependency case, defendant and appellant M.F. (mother) challenges the juvenile court's dispositional order denying her reunification services based on the finding that she suffers from a mental illness that renders her incapable of utilizing those services. (Welf. & Inst. Code,[1] § 361.5, subd. (b)(2).) Alternatively, mother contends the juvenile court should have exercised discretion under section 361.5, subdivision (c), to order services because that would be in the children's best interests. Mother also argues that the juvenile court abused its discretion when it denied her visitation with her children. We disagree and affirm the challenged findings and orders.

I.

BACKGROUND

In February 2021, the Riverside County Department of Public Social Services (DPSS) filed a dependency petition regarding mother's three minor children, K.R. (born June 2005), C.R. (born November 2007), and G.G. (born April 2009). The children had been removed from mother's care a few days earlier and placed with an uncle. DPSS alleged all three children came within section 300, subdivision (b)(1) (failure to protect), and that the children came within section 300, subdivision (c) (serious emotional damage).[2] According to DPSS, all three children had suffered verbal abuse by mother,

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[1] All undesignated code references are to the Welfare and Institutions Code.

[2] DPSS also alleged that G.G. came within section 300, subdivision (g)(no provision for support), based on the circumstance that her father's whereabouts were unknown. That remained true throughout the proceedings, and he is not a party to this appeal. The father of the two older children is deceased.

and mother had engaged in verbal and physical domestic violence in their presence. K.R. allegedly had suffered serious emotional damage, including "diagnoses of depression and anxiety." K.R. was pregnant, and mother had not only failed to seek out prenatal care and treatment for K.R., but also "threaten[ed] to harm [her] unborn child." Mother's abuse of C.R., including calling him names, withholding food, and threatening him if he reported abuse, caused him to become depressed and suicidal to the point that he was placed on a psychiatric hold. G.G. had become "depressed, fearful of her mother, and engag[ed] in self-harming behaviors due to the mother's ongoing emotional and verbal abuse." DPSS also alleged that mother had previously been "provided with services through Differential Response," but failed to benefit from them.

Visitation between mother and the children in advance of the jurisdictional hearing did not go well. The children expressed that they did not want to visit with mother, and they demonstrated a great deal of distress when they were brought to the DPSS office for a March 2021 supervised visit, which ultimately did not take place.

At the jurisdictional hearing, the court found all of the allegations in the first amended petition to be true. The court set a contested dispositional hearing and ordered mother to participate in two psychological evaluations. The court found that visitation with mother was detrimental to the children and ordered it suspended, but authorized DPSS to resume visitation if the children were emotionally ready for it.

Both of the psychologists who assessed mother concluded that she suffered from a mental incapacity or disorder, though they came to somewhat differing conclusions as to an exact diagnosis. William Jones relayed mother's reports that she had been diagnosed

with depression, felt considerable anxiety, had "frequent crying spells," had panic attacks, had "manic episodes which would last two to three days," "hear[d] voices of her children when they were not present," and had been in "very long out-patient treatment involving use of psychotropic medicines and psychotherapy." Jones observed her "impaired concentration" and "weak short-term and long-term memory." He indicated that he had been unable to review mother's treatment records, but, in addition to her diagnosis of depression, he opined that she "likely has a Bipolar Disorder" based on her description of "having cycles of moods." Robert Suiter conducted several psychological tests of mother, but he deemed the results of each invalid, due to her "great difficulty being open and honest with the testing." Suiter recounted mother's report that she had been taking anti-anxiety medication since 2007. He opined that mother fell within two sections of the DSM-5, Dependent Personality Disorder and Unspecified Anxiety Disorder, and he also suggested mother also "may well" have "a Bipolar Disorder."

Both of the psychologists opined that mother was not currently able to care for the children. Jones noted mother's description of "problems with control of temper" as well as "cycles of moods," including "manic or hypomanic periods," and concluded that because of mother's "emotional[] lability and anger management problems, she is not presently able to care for her three high risk children." Suiter similarly opined that "it would be detrimental" to return the children to mother's care, noting the children's reports of "frequent anger outbursts which provoked considerable emotional distress in them" and their observation that "their mother is unstable emotionally and behaviorally

and engages in verbal abuse." Her responses as to how to handle "a number of parenting situations . . . were unduly terse and generic."

The two psychologists had somewhat different opinions, however, of whether mother might be able to benefit from services. Suiter opined that "it is most unlikely" that mother "would be able to benefit from services in the foreseeable future." His view was that she has "virtually no insight" into the "difficulties she has parenting her children and how to remediate those difficulties." Jones tentatively opined that mother "could likely benefit from continued psychotherapy and psychiatric treatment," but qualified that opinion with the observation that it was "difficult to ascertain" whether that was the case "without being able to see her treatment records." He also noted that she had "limited empathy" with her children and "does not appear to fully recognize their emotional vulnerability."

At the contested dispositional hearing, the juvenile court declared the children dependents. It ordered the minors removed from mother's custody and declined to order mother to receive reunification services, invoking the bypass provision of section 361.5, subdivision (b)(2). The court commented that it was "really not in the best interest of the children to reunify with the mother, given the emotional harm and physical harm and history in this case." It further found that there was "detriment in the relationship" between mother and the children and denied visitation. However, the court authorized DPSS to arrange therapeutic visitation between mother and the two younger children if they were in therapy, were emotionally stable, and were willing to have contact with

mother. It authorized DPSS to arrange supervised visitation between mother and K.R. if the child requested it.[3]

II.

DISCUSSION

Mother asserts that insufficient evidence supports the juvenile court's order denying her reunification services under section 361.5, subdivision (b)(2). She also argues that even if that bypass provision applied, the juvenile court should have found reunification services were in the children's best interest under section 361.5, subdivision (c). Finally, mother contends the juvenile court's no-contact order was an abuse of discretion. We are not persuaded by these arguments.

A. Denial of Reunification Services

We find sufficient evidence in the record to support the juvenile court's decision to apply the bypass provision of section 361.5, subdivision (b)(2).

Dependency cases carry a presumption that parents will receive family reunification services. (§ 361.5, subd. (a).) The presumption "implements the law's strong preference for maintaining the family relationship if at all possible." (*In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 474; see § 202, subd. (a) ["reunification of the minor with his or her family shall be a primary objective"].) Nevertheless, "in certain situations, attempts to facilitate reunification do not serve and protect the child's interests." (*Baby Boy H.*, at p. 474.) Statutes authorizing the denial of reunification

[3] The court found it was not in the children's best interest to set a section 366.26 hearing.

services are often referred to as "bypass" provisions. (*In re T.G.* (2015) 242 Cal.App.4th 976, 989.)

The bypass provision in Welfare and Institutions Code section 361.5, subdivision (b)(2), is commonly referred to as the mental disability exception, and its application draws upon not only the subdivision itself but also Welfare and Institutions Code section 361.5, subdivision (c)(1), and Family Code section 7827.

Reunification services need not be provided if the court finds by clear and convincing evidence from any two experts " 'that a parent or parents suffer a mental incapacity or disorder that renders the parent or parents unable to care for and control the child adequately.'" (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880, quoting Fam. Code, § 7827, disapproved on other grounds in *Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1010, fn. 7; see section 361.5, subd. (b) [requiring clear and convincing evidence]; Fam. Cod §7827, subd. (c) [requiring "the evidence of any two experts" to support a mental disability finding].) Additionally, section 361.5, subd. (b)(2), requires a finding that the mental disability "renders the parent or guardian incapable of utilizing those services" and "subdivision (c) of section 361.5 speaks to the proof required under subdivision (b)(2) and provides in relevant part: 'When it is alleged . . . that the parent is incapable of utilizing services due to mental disability, the court shall order reunification services unless competent evidence from mental health professionals establishes that, even with the provision of services, the parent is unlikely to be capable of adequately caring for the child.' " (*In re Joy M.* (2002) 99 Cal.App.4th 11, 17.)

Cases decided about 20 and 30 years ago have interpreted the statutes to require that two experts must agree that the parent has a mental disability rendering the parent incapable of caring for the child, but their reports need not agree on the likelihood that the parent could be rendered capable. In *In re Catherine S.* (1991) 230 Cal.App.3d 1253, 1257-1258, the exception had been applied based on evidence offered by only one licensed psychologist. It held that evidence from more than one licensed health professional must establish "the underlying mental disability itself" under section 361.5, subdivision (b)(5). (*Id*. at p. 1258; see *In re Rebecca H.* (1991) 227 Cal.App.3d 825, 841 [two experts did not testify as to a mental disability].) But stated that a "lesser standard" of evidence from "competent mental health professionals" applied to support the finding of whether the parent would be unlikely to be capable of caring for the child with the provision of services. (*Catherine S.*, at p. 1257.)

Curtis F. v. Superior Court (2000) 80 Cal.App.4th 470, 474, fn.1, reflected these standards in a case where two experts explicitly or implicitly agreed that a parent had a mental disability, but the "conclusions about [the parent's] prospects were not identical." (*Id*. at p. 474.) *Curtis F.* held that there is "no requirement that both experts must agree a parent is unlikely to benefit from services." (*Ibid*.) "Instead, the statute requires a showing only of evidence proffered by both experts regarding a parent's mental

disability, evidence from which the court then can make inferences and base its findings." (*Curtis F.*, at p. 474.)[4]

We review the juvenile court's decision to bypass reunification services under the substantial evidence test. (*Curtis F.*, *supra*, 80 Cal.App.4th at p. 474.) Thus, we must determine if there is any evidence that is reasonable, credible, and of solid value to support the juvenile court's findings. (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.) We must "account for the clear and convincing standard of proof when addressing a claim that the evidence does not support a finding made under this standard," as we do here. (*Conservatorship of O.B.*, *supra*, 9 Cal.5th at p. 1011.) Nevertheless, our review is deferential to the juvenile court's role as the trier of fact: "When reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable fact finder could have found it highly probable that the fact was true. In conducting its review, the court must view the record in the light most favorable to the prevailing party below and give appropriate deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn

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[4] We agree with the dissent to the extent that, when decided, *Curtis F*. reached a debatable conclusion in construing the statute not to require that the two experts agree that the parent is unlikely to benefit from services. But the case has been cited many times in the ensuing decades, with no case declining to follow it and without the Legislature amending the statute to abrogate it. In the circumstances, we find it an established interpretation of the statute. (See 16 Witkin, Summary of Cal. Law (11th ed. 2022) Juvenile Court Law, § 384 ["requirement may be met even though both experts do not unequivocally recommend against providing reunification services"].)

reasonable inferences from the evidence." (*Conservatorship of O.B., supra*, 9 Cal.5th at pp. 1011-1012.)

The evidence here was sufficient to support the juvenile court's finding that a mental disability rendered mother unable to care for the children and unlikely to be capable of doing so even if she were provided with reunification services. (§ 361.5, subds. (b)(2), (c)(1).) Both Jones and Suiter opined that mother had a mental incapacity or disorder (*Sheila S. v. Superior Court*, *supra*, 84 Cal.App.4th at p. 880), though they offered somewhat different diagnoses. Suiter opined that mother fell within two sections of the DSM-5, Dependent Personality Disorder and Unspecified Anxiety Disorder, and he suggested mother also "may well" have "a Bipolar Disorder." Jones relayed mother's reports that she had been diagnosed with depression, and added his conclusion that she "likely has a Bipolar Disorder" based on her reported "cycles of moods." Both relied on mother's reported history. Jones conveyed that she reported considerable anxiety, "frequent crying spells," panic attacks, "manic episodes which would last two to three days," "hear[ing] voices of her children when they were not present," and "very long out-patient treatment involving use of psychotropic medicines and psychotherapy." Suiter reported that mother stated that she had been taking anti-anxiety medication since 2007. The experts attempted their own tests, with Jones observing her "impaired concentration" and "weak short-term and long-term memory." Suiter conducted several psychological tests of mother, but he deemed the results of each invalid, due to her "great difficulty being open and honest with the testing."

Both psychologists provided opinions connecting mother's mental disorder to a present inability to adequately care for the children. (*Sheila S. v. Superior Court*, *supra*, 84 Cal.App.4th at p. 880). Jones concluded that because of mother's "emotional[] lability and anger management problems, she is not presently able to care for her three high risk children." Suiter similarly opined that "it would be detrimental" to return the children to mother's care, noting the children's reports of "frequent anger outbursts which provoked considerable emotional distress in them" and their observation that "their mother is unstable emotionally and behaviorally and engages in verbal abuse." Mother provided "unduly terse and generic" responses to Suiter as to how she would handle parenting situations.

Finally, the expert reports and other circumstances contained adequate support for the trial court's conclusion that, even with the benefit of services, mother was not reasonably likely to *become* capable of caring for them adequately. (See *Curtis F. v. Superior Court*, *supra*, 80 Cal.App.4th at p. 474.) Mother had already been receiving mental health treatment for a lengthy time period, but nevertheless continued to engage in the behaviors leading to the dependency. Since 2007, that treatment included not only psychotherapy but also prescription medication. Mother had also previously received, but failed to sufficiently benefit from, services provided through DPSS's "Differential Response" program, as alleged in the dependency petition and found true by the trial court. The juvenile court did not err in concluding that provision of further services would be futile, as mother had already demonstrated that she was incapable of benefiting from them.

Mother's arguments in support of a different conclusion focus on isolated aspects of the record that could support a different conclusion or certain arguable ambiguities or conflicts in the evidence. In all, however, we find these arguments are insufficient on appeal. (See *Conservatorship of O.B., supra*, 9 Cal.5th at pp. 1011-1012.) Viewed from an appropriately deferential perspective, the juvenile court's inferences from the evidence and conclusions were reasonable, so we may not disturb them.

B. *Best Interests of the Children*

Mother contends that even if the section 361.5, subdivision (b)(2) bypass provision applies, the juvenile court should have exercised discretion under section 361.5, subdivision (c), to order reunification services on the ground that it would be in the minors' best interests to do so. We reject this argument for several reasons.

First, the argument is forfeited. At the dispositional hearing, mother did not make the argument she is now raising. "A party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court. [Citations.] Forfeiture, also referred to as 'waiver,' applies in juvenile dependency litigation and is intended to prevent a party from standing by silently until the conclusion of the proceedings." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 221-222.)

Moreover, even if not forfeited, the argument is not persuasive. Her argument rests on the premise that DPSS failed to prove that section 361.5, subdivision (b)(2), applies. As discussed above, we reject that premise. As such, as mother acknowledges, section 361.5, subdivision (c)(2), is inapplicable. Specifically, section 361.5, subdivision (c)(2), provides: "The court shall not order reunification for a parent or

guardian described in paragraph (3), (4), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), or (17) of subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child." Thus, section 361.5, subdivision (b)(2), is excluded from the purview of section 361.5, subdivision (c)(2). Where services are bypassed pursuant to section 361.5, subdivision (b)(2), it is section 361.5, subdivision (f), that applies. That subdivision requires only that the court determine if a hearing under section 366.26 shall be set, and if so, to conduct the hearing within 120 days after the dispositional hearing unless the other parent is receiving reunification services. (§ 361.5, subd. (f).) It does *not* require or authorize an inquiry into whether reunification would be in the best interests of the child, even though section 361.5, subdivision (b)(2), applies. Mother's suggestion that the "reasoning involved" in section 361.5, subdivision (c), should be applied, even where the subdivision is, strictly speaking, "inapplicable," is without merit. (See *In re Austin P.* (2004) 118 Cal.App.4th 1124, 1129 [" '[I]f the statutory language is not ambiguous, then we presume the Legislature meant what it said, and the plain meaning of the language governs.' "]; *In re David* (2012) 202 Cal.App.4th 675, 682 [" 'Appellate courts may not rewrite unambiguous statutes' " or "rewrite the clear language of [a] statute to broaden the statute's application"].) Mother has therefore failed to show error.

C. *Visitation*

Finally, mother contends the juvenile court's no-contact order constituted an abuse of discretion. We disagree.

Generally, when the juvenile court places a dependent child in foster care and orders family reunification services for a parent, it must also order visitation between the parent and child "as frequent as possible, consistent with the well-being of the child," with the caveat that "[n]o visitation order shall jeopardize the safety of the child." (§ 362.1, subd. (a)(1)(A), (B).) That general rule, however, does not apply when reunification services are denied under the bypass provisions of section 361.5, subdivision (b). In such cases, it is within the discretion of the court to deny visitation, as it is no longer integral to an overall plan of reunification. (*In re J.N.* (2006) 138 Cal.App.4th 450, 459 (*J.N.*).) The court *may* continue to permit the parent to visit, even though a bypass provision has been applied, unless it finds that visitation would be detrimental to the child. (§ 361.5, subd. (f).)

Section 361.5, subdivision (f), does not set forth a specific standard the juvenile court must apply when it exercises its discretion to permit or deny visitation between a child and a parent who is not receiving reunification services. (*In re J.N.*, *supra*, 138 Cal.App.4th at p. 459; § 361.5, subd. (f).) "The Legislature instead has left this determination to the court's discretion for the narrow group of parents described in section 361.5, subdivision (f), who have been denied reunification services at the outset." (*In re J.N.*, at p. 459.) However, the "best interests of the child is certainly a factor the court can look to in exercising its discretion to permit or deny visitation." (*Ibid.*)

" ' "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial

court." ' " (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) This standard requires that we apply a "very high degree of deference to the decision of the juvenile court." (*In re J.N.*, at p. 459.)

In this case, the juvenile court expressly found "detriment in the relationship between mother and children," such that it could not order visitation. The court authorized therapeutic visitation or supervised visitation once the children were willing to have contact with mother and they stabilized and felt comforted. However, the court emphasized that it was "not interested in coaxing or pressuring the children right now to force them to have contact when they are clearly not willing, not able emotionally right now to do that."

The court's finding of detriment is amply supported by the record. The verbal and emotional abuse alleged by the department and found true by the juvenile court is disturbing, and well justifies concern that further contact with mother would only expose the children to further abuse. Jones opined that mother continued to show limited empathy toward the children and did not appear to fully recognize their emotional vulnerability. Similarly, Suiter concluded that mother had an inadequate understanding of the nature of the concerns regarding the children and was "prone to deny and rationalize the problems they described." Additionally, the children were all old enough to have their opinions considered on the issue of visitation, and they plainly expressed, on multiple occasions, that they did not want to visit with mother. When the children were brought to DPSS offices for a visit, they were so distressed that the visit did not even take place. On this record, it was well within the bounds of reason for the trial court to decline

mother's request that visitation be ordered, while authorizing supervised visitation to be implemented if and when the children were emotionally ready for it and willing. Mother has not demonstrated any abuse of discretion.

III.

DISPOSITION

The judgment is affirmed.

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RAPHAEL
J.

I concur:

FIELDS
Acting P. J.

[*In re K.R. et al.,; DPSS v. M.F.*, E077576]

MENETREZ, J., Dissenting.

Appellant M.F. (Mother) argues that the record does not contain substantial evidence to support the juvenile court's order bypassing reunification services under subdivision (b)(2) of Welfare and Institutions Code section 361.5. (Unlabeled statutory references are to this code.) I agree for the following two reasons.

First, subdivision (b)(2) of section 361.5 provides that reunification services for a mentally disabled parent may be bypassed if the parent's mental disability "renders the parent or guardian incapable of utilizing those services." The record contains no evidence that Mother is incapable of utilizing reunification services. The evidence shows only that the prospects for successful treatment of Mother's mental condition are poor. The evidence thus supports a reasonable inference that Mother is unlikely to benefit from services enough to reunify. But the record contains no evidence that mother is *incapable* of *utilizing* such services.

Second, I would decline to follow *Curtis F. v. Superior Court* (2000) 80 Cal.App.4th 470 (*Curtis F.*), which held that reunification services for a parent may be bypassed under subdivision (b)(2) of section 361.5 in the absence of evidence from two experts that the parent meets the requirements of the statute. Subdivision (b)(2) of section 361.5 incorporates the evidentiary requirements of Family Code section 7827. (*In re Catherine S.* (1991) 230 Cal.App.3d 1253, 1257-1258; *In re Rebecca H.* (1991) 227 Cal.App.3d 825, 838-840.) Family Code section 7827 provides that evidence from two appropriately qualified experts "is required to support a finding under this section,"

which includes a finding that the parent is "likely to remain [mentally disabled and hence incapable of caring for the child] in the foreseeable future." (Fam. Code, § 7827, subds. (c), (b).) It is unreasonable to interpret subdivision (b)(2) of section 361.5 as (1) incorporating the evidentiary requirements of Family Code section 7827, but (2) not requiring support from two experts for the conclusion that the parent will remain mentally disabled for the foreseeable future, and (3) not requiring the experts to agree that the parent is unlikely to benefit from services. I accordingly agree with the leading treatise in this area that *Curtis F.*'s "cursory conclusion is subject to substantial question." (Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2022) § 2.129[3][b][ii].) It is undisputed that the evidence here is insufficient without *Curtis F.*

I consequently agree with Mother that the record does not contain substantial evidence supporting the juvenile court's order bypassing her. I therefore respectfully dissent.

MENETREZ

J.