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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

Guardianship of KYLEY C., a Minor.	B270078
E.M., Petitioner and Appellant, v. K.Z., As Guardian, etc., Objector and Respondent.	(Los Angeles County Super. Ct. No. BP158992)

APPEAL from orders of the Superior Court of Los Angeles County, Lesley C. Green, Judge. Dismissed in part and affirmed.

E.M., in pro. per., for Petitioner and Appellant.

No appearance for Respondent.

The probate court issued an order and letters appointing maternal grandmother K.Z. as guardian of her then 19-month-old granddaughter, Kyley C. The court thereafter issued an order requiring that Kyley's visits with her paternal grandmother, E.M., be supervised. Appellant E.M. asks us to reverse the guardianship order. She also challenges the order requiring supervised visits. We dismiss as untimely the portion of E.M.'s appeal challenging the guardianship order. We affirm the visitation order.[1]

FACTS

Background

Respondent K.Z.'s daughter, Nicole Z., is the mother of two children by different fathers: B.H., born in October 2010, and Kyley, born in August 2013. The whereabouts of B.H.'s father are unknown. He was not involved in the guardianship proceedings below and is not involved in this appeal.[2] Kyley's father, I.C., is appellant E.M.'s son. I.C. is not a party to the present appeal.

B.H. appears to have lived in K.Z.'s home since his birth. Meanwhile, Kyley lived with I.C. and Nicole Z. in E.M.'s home from August 2013 until early 2015.

I.C. acknowledges that he and Nicole Z. "got into trouble with the law for drug use." In November 2014, the drug court ordered I.C. to attend a program for addicts with children.

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[1] In November 2016, E.M. filed a motion in our court seeking to augment the record with filings and court orders that were generated after the date of the orders that she challenges in her current appeal. We construe E.M.'s motion to seek judicial notice, and grant the motion.

[2] B.H. is not involved in this appeal.

After two weeks, I.C. left the program and took Kyley back to E.M.'s home. At about this same time, the Los Angeles Department of Children and Family Services (DCFS) began an investigation of Kyley and her parents' drug problems.

When DCFS began its investigation, it did not initially remove Kyley from E.M.'s home. However, during DCFS's investigation, E.M. took a drug test that showed traces of methamphetamine.[3] On January 13, 2015, DCFS arranged for Kyley to live with her half-brother, B.H., in K.Z.'s home. Around this time, I.C. was sentenced on a drug offense. I.C. was incarcerated until mid-September 2015.

The Guardianship Proceedings

K.Z, acting as a self-represented litigant, filed a petition in the probate court to be appointed the legal guardian of both B.H. and Kyley. K.Z.'s petition alleged DCFS had found B.H.'s parents and Kyley's parents unfit to care for their children due to a history of drug use. Further, K.Z. alleged both children would have been placed in foster care had she not voluntarily taken them into her home.

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[3] E.M. initially questioned the DCFS social worker about the results of the drug test, asking whether the positive test result could have been caused by her using an inhaler. However, Kyley's appointed probate volunteer panel attorney, Amir Pichvai, subsequently filed a report in the probate court in which he indicated that he had spoken to E.M. about the drug test. Pichvai reported the following: "[E.M.] admitted to me that she had used methamphetamines at her sister's house during the Thanksgiving holiday allegedly to boost her energy to help her sister clean up her place. When speaking with me, [E.M.] insisted that she used meth only once, that it was 'a mistake,' that she has never been 'hooked on anything,' and that she doesn't 'do any of this stuff.' "

The probate court appointed a probate volunteer panel attorney, Amir Pichvai, to represent Kyley in the guardianship proceedings.

A month after K.Z. filed her petition, E.M., also acting as a self-represented litigant, filed a petition to be appointed as Kyley's guardian.

In April 2015, Pichvai filed a report which indicated the probate investigators generally concurred that K.Z. was suitable to serve as Kyley's guardian. The report also concluded there would be a benefit in having Kyley live with her half-brother, B.H., in K.Z.'s home. However, the report recognized E.M.'s interest in being a part of Kyley's life. In a concluding recommendation, Pichvai advised the probate court as follows:

> "On balance, although perhaps not overwhelmingly, the scale tips in favor of the legal guardianship being granted to [K.Z.,] the maternal grandmother. The paternal grandmother[, E.M.,] can remain involved with [Kyley] 'as a grandmother' through visitations provided the visits can be without rancor and [can be] emotionally and physically safe for the child. Of course, if the parents can get their life together, they also will be instrumental in the children's lives."

On April 13, 2015, the probate court granted K.Z.'s petition to be appointed Kyley's guardian. The court granted E.M. visitation, but left it to K.Z. and E.M. to resolve the details of the schedule. The court observed that the case appeared appropriate for mediation, and invited the parties to advise the court of any interest in participating in mediation, including a probate bar program that was available without charge. Ultimately, the court entered a minute order indicating that E.M. was "to visit

with Kyley on alternate weeks," with the schedule "to be worked out by grandparents."

Over the next few months, there were numerous filings by both grandmothers. E.M. sought to enforce the visitation rights she had been granted, and K.Z. sought an order either stopping all visitation by E.M. or placing restrictions on E.M.'s visits.

In June 2015, the probate court conducted a hearing on the visitation issues. A probate court attorney recommended that the parties be sent to conciliation court to establish a schedule for visitation. The probate attorney further opined that Kyley should not be deprived of a relationship with one grandmother because the two grandmothers could not get along. After listening to K.Z. and E.M., the court set a follow-up hearing for August 24, 2015, and ordered the parties to mediation.

E.M. thereafter filed an application for an order to show cause as to why K.Z. should not be held in contempt for not allowing E.M. to have visits with Kyley. E.M. also filed documents in which she asked the probate court to modify its orders and appoint E.M. as Kyley's guardian. In this same time period, the probate court received a filing indicating the parties had been unable to reach an agreement at mediation.

At the August 24, 2015 follow-up hearing, E.M. requested that the court appoint her as Kyley's guardian. Alternatively, she requested unmonitored, regular visits with Kyley. K.Z. informed the court that DCFS "gave [her] strict orders" that neither Kyley's parents nor E.M. could have unsupervised visits with Kyley. Further, K.Z. stated her belief that E.M. was using drugs, an accusation E.M. denied. At the end of the hearing, the court set a further hearing, and re-appointed Pichvai to represent Kyley. The court ordered Pichvai to investigate the competing

assertions about visitation, and to prepare a report for the court's consideration.

In early October 2015, Kyley's father, I.C., filed a petition to terminate K.Z.'s guardianship.

In late October 2015, Pichvai filed a report indicating he had been informed that I.C. would be withdrawing his petition to terminate K.Z.'s guardianship. The report stated the ongoing visitation issues were the result of K.Z.'s concerns that E.M. used drugs around the time Kyley was born. Pichvai informed the court that E.M. had tested positive for drugs during DCFS's initial investigation. More recently, Pichvai had asked E.M. to take a random drug test. E.M. took two drug tests, but only after a two or three week delay. Both tests were negative for drugs. In conclusion, Pichvai submitted the following summary and recommendation to the probate court:

> "In the end, it is unclear whether [E.M.] is a regular drug user. There is information to substantiate both sides. Certainly, there are two recent clean drug tests in [E.M.]'s favor. On the other hand, the tests occurred two weeks after first requested, and all traces [of drugs] would have disappeared from [E.M.]'s urine by that time. What is also disconcerting is that [E.M.] had similarly delayed testing for DCFS in December 2014. Moreover, [E.M.] has resisted a hair follicle test by alleging that it costs more than it actually does, and by contending the test covers a longer period of time than it does. Under these facts, I remain concerned about [Kyley]'s safety and welfare if the court ordered unsupervised visitation for [E.M.] I would recommend a hair

follicle test at this time which would give the court a 90-day window going back to approximately early August 2015 as a prerequisite to any unsupervised visits."

On December 4, 2015, the probate court ordered that E.M. would have supervised visits with Kyley two times a month at times left to K.Z.'s discretion. The court decided not to grant E.M. unmonitored visits with Kyley, at least in part because E.M. had declined to take a hair follicle drug test.

E.M. filed a notice of appeal following the probate court's order of December 4, 2015.

DISCUSSION

I. E.M. Cannot Contest the Court's Appointment of K.Z. as Kyley's Guardian

An order granting letters of guardianship is an appealable order. (See Prob. Code, § 1301, subd. (a).) " 'If a judgment or order is appealable, an aggrieved party *must* file a *timely* appeal or forever *lose* the opportunity to obtain appellate review.' [Citation.]" (*Norman I. Krug Real Estate Investments, Inc. v. Praszkver* (1990) 220 Cal.App.3d 35, 46.)

Here, the probate court issued an order and letters appointing K.Z. as Kyley's guardian on April 13, 2015. E.M. did not file a notice of appeal until February 2, 2016. Even assuming the outside 180-day time limit for filing a notice of appeal applied to E.M.'s present appeal (see Cal. Rules of Court, rule 8.104), E.M.'s notice of appeal was untimely. E.M. contends this is a "technical error" which we should overlook. We cannot. We do not have appellate jurisdiction to consider any of E.M.'s claims of error related to the court's guardianship order. (See, e.g., *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins.*

Agency, Inc. (1997) 15 Cal.4th 51, 56 ["The time for appealing a judgment is jurisdictional; once the deadline expires, the appellate court has no power to entertain the appeal"].)

E.M.'s challenges to the probate court's December 2015 visitation order rest on a different footing. It is well established that a trial court's ruling on a request to modify a family court judgment as to custody and visitation is appealable as an order made after judgment. (See, e.g., *Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1377.) We see no reason why this principle should not also apply in a guardianship proceeding with visitation issues. Because E.M. promptly filed her notice of appeal following the probate court's December 2015 visitation order, she may challenge that order.

II. The Visitation Order Was Appropriate

E.M. contends the probate court erred in issuing the visitation order allowing her only monitored visits with Kyley. We find no error.

A. Standard of Review

A judgment or order of the lower court ""is *presumed correct*."" (See *Guardianship of K.S.* (2009) 177 Cal.App.4th 1525, 1529-1530, italics in original; quoting *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Because lower court decisions are presumed to be correct, the burden is on the appellant to demonstrate error. (*Ibid.*)

We review the lower court's factual findings by applying the substantial evidence test. (See *Guardianship of L.V.* (2006) 136 Cal.App.4th 481, 487.) Under this test, we must view the evidence in a light most favorable to the lower court's decision, resolving all conflicts in the evidence, and drawing all reasonable inferences from the evidence, in support of that court's findings.

(*Ibid.*) "In short, we review the evidence but do not weigh it; we defer to the trial court's findings to the extent they are supported by substantial evidence." (*Ibid.*)

B. E.M. Cannot Contest Issues Regarding DCFS

E.M. contends DCFS wrongfully removed Kyley from her home. Because all of E.M.'s arguments concerning DCFS relate only to the probate court's decision to appoint K.Z. as Kyley's guardian rather than E.M., we do not consider them. As discussed above, E.M. may not contest any issues concerning K.Z.'s appointment as Kyley's guardian because E.M. did not file a timely notice of appeal.

C. E.M. Has Not Shown That the Probate Court Violated Her Right to Due Process

E.M. challenges all of the probate court's rulings in the guardianship proceedings based on a claim that the court violated her right to due process. We reject several of these arguments because they relate only to the probate court's order appointing K.Z. as guardian and, therefore, as discussed above, we may not consider them in this appeal. Limiting our focus to the probate court's December 2015 visitation order, we conclude E.M.'s arguments do not support reversal of that order.

1. Claims Not Properly Raised Here Because E.M. Did Not File a Timely Notice of Appeal

As explained in Section I of this opinion above, we do not have jurisdiction to address E.M.'s challenges to the order appointing K.Z. as guardian. Thus, we do not consider E.M.'s arguments that: 1) the guardianship proceedings were initiated under "false pretenses"; 2) Kyley's father, I.C., did not receive proper notice of K.Z.'s guardianship petition or filings related to the appointment proceedings; 3) Kyley's parents consented to

have E.M. serve as Kyley's guardian; and 4) Pichvai misstated the law in his initial report to the probate court, submitted in advance of the hearing at which K.Z. was appointed guardian.

These arguments concern only the probate court's initial guardianship order. Because E.M. did not file a timely appeal from the guardianship order, we do not have jurisdiction to address these arguments.

2. E.M. Has Not Shown That Pichvai Had a Conflict of Interest Justifying Reversal of the Visitation Order

E.M. contends Pichvai had a conflict of interest in representing Kyley because he has an active, long-term business relationship with DCFS. E.M. asserts Pichvai has represented the agency in dozens of court cases. To the extent E.M.'s conflict of interest claim relates to visitation issues, she has failed to show a conflict of interest justifying reversal of the probate court's December 2015 visitation order.

E.M.'s argument is not supported by any references to the record reflecting an action or statement by Pichvai that suggests he had a conflict of interest. (See, e.g., *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379 (*Grant-Burton*) [arguments in a brief must be supported by references to the record, including page citations, absent which an appellate court may disregard the argument].) E.M. similarly has not identified any instance in which Pichvai failed to act in Kyley's interests. That E.M. disagrees with Pichvai's reports does not establish a conflict of interest. We decline to find that an appointed attorney has a conflict of interest with a child client based merely on the fact that the attorney has prior professional experience in cases involving DCFS.

3. E.M.'s Claim That She did Not Have Enough Time to Prepare for Hearings is Not Sufficient To Reverse the Visitation Order

E.M. asserts she did not receive Pichvai's reports until the evening before, or the morning of, hearings. She argues: "Considering [E.M.] had no legal representation, this was not enough time to analyze the reports and rebut or explain the discrepancies in the reports." These arguments do not mandate reversal.

As an initial matter, E.M. provides no citations to the record in support of her factual assertion about when she received Pichvai's reports. As a result, we find she has not demonstrated error. (*Grant-Burton, supra,* 99 Cal.App.4th at p. 1379.)

Further, E.M. has not established what evidence or arguments she would have tried to present to the probate court had she been able to review Pichvai's reports earlier. Instead, E.M. argues *Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535 requires per se reversal of the probate court's orders. We disagree.

In *Judith P.*, the Court of Appeal examined Welfare and Institutions Code section 366.21, subdivision (c), which requires that, in a dependency case, the social services agency shall provide a parent a copy of its report for a case review hearing at least 10 days before the hearing. The court held that section 366.21, subdivision (c), means what it says, and that a failure to provide a timely report is an infringement of a parent's right to due process notice. The court found the due process violation mandated reversal of orders issued at the review hearing. In coming to this conclusion, the court of appeal noted the

dependency system is subject to strict constitutional protections "because it operates, in many cases, to deprive parents and children of their constitutional rights to parent and of their right to be raised by their families of origin." (See *Judith P., supra*, 102 Cal.App.4th at p. 545.)

In the present case, two grandparents are involved in a dispute over visitation with their granddaughter. This is not a dependency case that could result in the termination of a parent-child relationship. Accordingly, we find that, at most, E.M.'s argument raises only a procedural error. For the reasons discussed above, we conclude appellant has not shown that the error, if any, prejudiced her. Absent an affirmative showing of prejudice, we will not reverse the lower court's decision.

4. The Probate Court Did Not Delegate Its Authority to K.Z.

E.M. claims Pichvai and the probate court allowed K.Z. to make decisions "that were not hers to make." It appears E.M. is asserting K.Z. wrongly demanded that E.M.'s visits with Kyley had to be supervised, and that Pichvai and the probate court erred in delegating their duties to decide visitation issues to K.Z. We find no error.

The subject of whether E.M.'s visits had to be supervised was placed at issue shortly after the probate court appointed K.Z. as Kyley's guardian in April 2015. The issue was subject to protracted filings and proceedings until the court issued its final order in December 2015. The record does not support E.M.'s claim that control over visitation was wrongly delegated to K.Z. Instead, the record shows the court ultimately decided that E.M.'s visits had to be supervised because of its concerns over E.M.'s possible drug use. That E.M. disagrees with the court's

perspective does not establish the court abandoned its duty to decide the issue.

5. Dependency Court Jurisdiction Was Not Mandatory

E.M. contends that, because K.Z. used "unfit parent" language in her petition to be appointed as Kyley's guardian, the probate court had a duty to refer the case to DCFS. E.M. argues that if DCFS determined Kyley's parents were unfit, the agency would have been required to file a dependency court case. E.M. argues this is preferred because parents in dependency court have the right to counsel and reunification services are provided.

E.M. relies on *In re Kaylee H.* (2012) 205 Cal.App.4th 92 (*Kaylee H.*) in support of her argument that the dependency court, not the probate court, should have taken charge of protecting Kyley's interests, including the issue of visitation. *Kaylee H.* does not support E.M.'s position.

In *Kaylee H.*, the parents of a young child recognized they had drug abuse problems and arranged for a relative to seek appointment as the child's guardian while the parents worked on resolving their problems. On receiving the guardianship petition, the probate court referred the child's situation to the county social services agency for an investigation. After completing an investigation, the social worker decided not to file a dependency petition pursuant to section 300, finding that the guardianship arrangements were sufficient to protect the child's interests. (*Kaylee H., supra*, 205 Cal.App.4th at pp. 97-98.) After receiving the social worker's report indicating that a section 300 dependency petition would not be filed, the dependency court expressed its concerns about the mother proceeding in probate

court without legal counsel, and ordered the social services agency to file a section 300 petition, which the agency did. The dependency court dismissed the guardianship proceeding, found the allegations in the section 300 petition to be true, and removed the child from parental custody. (*Id*. at pp. 97-100.) The father appealed.

The Court of Appeal reversed the dependency court's orders. It found the dependency court had abused its discretion by not considering whether a section 300 petition was necessary to protect the child, rather than the guardianship proceedings. The Court of Appeal remanded the matter with directions to the lower courts to reinstate the guardianship proceedings. (*Kaylee H., supra*, 205 Cal.App.4th at pp. 105-110.)

The general rule of *Kaylee H*. is that dependency proceedings are not necessarily required to address parental unfitness when a guardianship is sufficient to protect the child's safety, protection, and well-being. Depending on the circumstances, the intervention of the dependency court may not be necessary or authorized (*Kaylee H., supra,* 205 Cal.App.4th at p. 106), and a guardianship proceeding will be appropriate to protect a child's interests.

Kaylee H. is not helpful to E.M. because she has not shown that Kyley's interests were not being protected in the guardianship proceedings. Stated in other words, E.M. has not shown that a dependency case was necessary to protect Kyley's interests.

6. Misstatements of Fact in Pichvai's Reports, if Any, Do Not Mandate Reversal of the Probate Court's Visitation Order

E.M.'s final due process argument is that Pichvai made a series of misstatements of fact in various reports he submitted to the probate court. The thrust of E.M.'s argument is that Pichvai "wasn't giving the whole picture. Instead, he provided a very subjective view." E.M.'s argument appears to be an attempt to re-litigate the weight of the evidence in support of the probate court's ultimate visitation decision. As a reviewing court, we do not reweigh the evidence or re-assess credibility. Because evidence in the record supports the probate court's decision to place parameters on E.M.'s visitation with Kyley, we will not reverse its decision. (*Guardianship of L.V.*, *supra*, 136 Cal.App.4th at p. 487.)

III. E.M. Has Not Shown Error Associated With the Issue of Drug Testing

E.M. contends the probate court's order that she have supervised visits with Kyley is tainted with constitutional error. E.M. argues Family Code section 3041.5 (hereafter section 3041.5), which she believes is the basis for the court's visitation order, is unconstitutional. She cites *Deborah M. v. Superior Court* (2005) 128 Cal.App.4th 1181 (*Deborah M.*) in support of her argument. We find no constitutional error.

As relevant to E.M.'s arguments, section 3041.5 reads:

> "In any . . . guardianship proceeding brought under the Probate Code, the court may order any person who is seeking . . . visitation with a child who is the subject of the proceeding to undergo testing for the illegal use of controlled substances and the use of

> alcohol if there is a judicial determination based upon a preponderance of evidence that there is the habitual, frequent, or continual illegal use of controlled substances or the habitual or continual abuse of alcohol by the . . . person seeking visitation in a guardianship. . . . The court shall order the least intrusive method of testing for the illegal use of controlled substances or the habitual or continual abuse of alcohol by . . . the . . . person seeking visitation in a guardianship. *If substance abuse testing is ordered by the court, the testing shall be performed in conformance with procedures and standards established by the United States Department of Health and Human Services for drug testing of federal employees*. . . ." (Italics added.)

The court in *Deborah M., supra,* did not find section 3041.5 unconstitutional. In *Deborah M.*, divorced parents initiated family court proceedings over competing claims: mother sought to increase father's child support obligation, while father requested a change in custody based on his assertion that mother was using drugs. The family court denied father's request for a change of custody, but conditioned the denial on mother taking a hair follicle drug test. (*Deborah M., supra,* 128 Cal.App.4th at pp. 1185-1186.) Mother filed a petition for writ of mandate in which she argued the family court "erred in ordering her to have a hair follicle drug test under section 3041.5(a), as that section only allows urine tests." (*Id*. at p. 1187.) The Court of Appeal granted the petition. The Court of Appeal ruled that, because section 3041.5, subdivision (a), requires court-ordered drug testing to conform to federal drug testing protocols, and because

the federal drug testing protocols in effect at that time only allowed for urine tests, it followed that the family court erred when it ordered mother to take a hair follicle test. (*Id*. at p. 187, and see pp. 1188-1194.) In short, *Deborah M*. did not address or decide a constitutional question. E.M. offers no other legal authority or argument to support her claim of constitutional error.

IV. Father's Interest in Terminating K.Z.'s Guardianship is Not Grounds for Reversing the Probate Court's Visitation Order

In the final section of her opening brief, E.M. advises us that Kyley's father was released from incarceration in September 2015, and that, since his release, he has taken all necessary steps to regain custody of his daughter. E.M. describes the efforts by Kyley's father to remain drug-free and employed as he works on his relationship with Kyley.

This information does not demonstrate how the probate court erred in ordering that E.M.'s visits with Kyley be supervised. Even assuming current circumstances exist for a further court order either terminating K.Z.'s guardianship, or changing visitation parameters, any issues involving such changes are not properly before us in E.M.'s present appeal.

DISPOSITION

E.M.'s appeal is dismissed insofar as she challenges the probate court's orders appointing K.Z. as Kyley's guardian. The court's order requiring E.M. to have supervised visits with Kyley is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.