Filed 12/20/17 In re K.T. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re K.T., a Person Coming Under the Juvenile Court Law.	B278590 (Los Angeles County Super. Ct. No. DK16704)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES et al., Plaintiffs and Appellants, v. DEVIN T., Respondent.	

APPEAL from an order of the Superior Court of Los Angeles County. Debra Losnick, Commissioner. Affirmed.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel and Jeanette Cauble, Principal Deputy County Counsel, for Plaintiff and Appellant Los Angeles County Department of Children and Family Services.

Lori A. Fields, under appointment by the Court of Appeal, for Appellant K.T.

Law Offices of Arthur J. LaCilento and Arthur J. LaCilento for Respondent.

* * * * * *

A juvenile court declined to exercise dependency jurisdiction over a seven-year-old girl alleged to be the victim of "sexual abuse" or to be at "substantial risk" of such abuse. The dependency petition alleged, and the evidence showed, that her father "sometimes" showered with the girl and regularly complimented her physical features; that he had once told friends that she would be a "knockout" when she was a teenager and that he would have a hard time resisting her sexually if she came on to him; and that he had previously had a positive sexual relationship with a cousin when they were both children and saw nothing wrong with incest. However, there was no evidence that the father had ever touched his daughter inappropriately. The Los Angeles County Department of Children and Family Services (Department) and the child appeal the juvenile court's refusal to exercise jurisdiction. Although we may have come to a different conclusion had this issue been presented to us in the first instance, our role on appeal is limited. We may only ask whether evidence presented below *compels* the exercise of dependency jurisdiction *as a matter of law*. For the reasons discussed below, it does not. Accordingly, we must affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. The Family

Devin T. (father) and Anatastia C. (mother) have one daughter together, K.T. K.T. was born in December 2008. K.T.

lives with father, her paternal grandmother, her uncle, and a renter; mother is homeless.

B. Referral

K.T. first came to the Department's attention in early April 2016. A caller relayed to the Department a conversation that had occurred a few days earlier. One night at a brewery and over a few glasses of wine or beer, father had told a longtime friend and an ex-girlfriend that: (1) he thought K.T. was sexually attracted to him, that he found K.T. to be attractive, and that she would only become more attractive as she matured; and (2) he "ha[d] no problems with" "incest." The caller also said that they had walked in on father a year earlier while father was dressing K.T., and K.T. "appeared distressed."

C. Initial Investigation

In the next few weeks, the Department interviewed K.T. twice, interviewed father, and interviewed paternal grandmother. K.T. consistently denied that father had ever touched her private parts. K.T. said that she "sometimes" showered with father while both were naked, but that he only washed her hair, and she only washed his upper back and legs; they did not wash one another's private parts. K.T. reported that she can dress herself, but that father would sometimes help her. K.T. further stated that she and father would sometimes hug and kiss (but with "no tongue"). K.T. also said that father complimented her "ripped" stomach and nice skin; told her she was beautiful; and said she would be pretty when she grew up. She also shared that she and father would play "mommy and daddy" by "bossing each other around."

During his interview, father admitted to making the comments at the brewery, although he said they were discussing fantasies. Father admitted that he and K.T. "sometimes"

showered together. He indicated that he and K.T. have separate bedrooms and sleep in separate beds, except that K.T. sleeps with him on the weekends. In what the interviewer perceived as a "very excited" demeanor, father said that K.T. was "an absolute knockout" who is "strong, muscular, and has beautiful long legs" and who has "a pretty face and becomes more attractive every day." Father also said that she will be a "total knockout as a teenager," indicating, "If she came onto me sexually I would have a hard time resisting her." However, he said he "feels confident he would not have sex with" K.T. now. Father admitted to a 20-year history of drinking alcohol and to using marijuana for depression, and his eyes were dilated during the interview.

II. Procedural History

A. Petition

The Department's social worker at first proceeded by way of a family maintenance program that would have left K.T. in the household with father. After consulting with her supervisors and "administration," however, the Department elected to seek removal of K.T. and to file a formal dependency petition.

In late April 2016, the Department filed a petition asking the juvenile court to exert dependency jurisdiction over K.T. on three grounds: (1) father sexually abused K.T. or placed her at substantial risk of such (under Welfare and Institutions Code section 300, subdivisions (b)(1) and (d))[1]; (2) father has a history of substance abuse that places K.T. at substantial risk of serious physical harm (under section 300, subdivision (b)(1)); and (3) mother has a history of drug abuse that places K.T. at

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

substantial risk of serious physical harm (under section 300, subdivision (b)(1)). With regard to the sexual abuse counts, the Department alleged that: (1) father "frequently" showers with K.T. "while both were naked"; (2) father "has made inappropriate sexual comments about the child stating that the father would have a hard time sexually resisting the child, if the child were to come on to the father sexually"; and (3) "father has made statements indicating that . . . father does not believe incest is abuse."

B. Subsequent Investigation

The Department interviewed K.T. a third time. During this interview, K.T. reaffirmed that she would "sometimes" shower with father, but indicated that she would at times wear a bathing suit and would at times cover her eyes to avoid seeing his private parts. She also reaffirmed that they would sometimes kiss, but with a closed mouth. She stated that she would attend "raves" with father and that she had a rave nickname—D.J. Lightning Bunny. She said that sometimes she or her father would leave the bathroom door open when they were using the bathroom. K.T. also said that father used "wacky tabacky," and she had seen him with a "drunk look" on his face, which she demonstrated by hanging her tongue outside her mouth.

A doctor conducted a forensic medical examination of K.T. The examination showed "no sign of trauma," and thus could "neither confirm nor negate sexual abuse." Dr. Lauren Marby also conducted an evaluation of K.T. based on a forensic interview with K.T. In the written evaluation report, Dr. Marby expressed "concern[] for [K.T.'s] safety with" father, based upon father taking her to "raves" (that "typically" involve "mind-altering substances" and "significant adult sexual activity"), upon

K.T.'s statements during her interview that the accusations were "a big lie," and upon K.T.'s response to the question whether she had been told what to say during the interview (namely, that she nodded her head up and down but said "no").

Father was also evaluated. The evaluation, completed by Jessica Perez, concluded that father "presented with appropriate sexual boundaries" vis-à-vis K.T., but opined that it "appears [he] may have altered responses as he was aware of the severity that his previous responses" had spawned. Father also completed a parenting program and started weekly individual counseling sessions that involved instruction on parental boundaries, including sexual boundaries. Father's counselor reported that he "has been cooperative, engaged, and communicative during treatment" and "recommend[ed] continu[ed] . . . treatment."

The caregivers with whom K.T. was placed reported that K.T. told them that she and father would attend "raves," would sneak into other people's houses to open Christmas gifts, and would go "tagging" by the train tracks.

C. Hearings

The juvenile court held hearings over the course of three days.

Father declined to answer questions, asserting his privilege against self-incrimination. A social worker testified that father had tested negative for drugs eight times, and had submitted two tests with a diluted sample.

K.T. testified in chambers. K.T. reaffirmed that father had never touched her private parts, and said she would tell her father, "Stop. Don't do that," if he tried to touch her. She had once felt some fear that father might touch her when he was instructing her about how to wipe herself after going to the

bathroom, although his instruction was solely verbal. K.T. also said she would tell the judge if father ever tried to touch her, but would not tell her grandmother, her teacher, or a doctor. K.T. relayed that she sometimes played a game with father wherein she would chase father around the house, saying, "I want you, I want you," and he would respond, "You have me, you have me." They would also play with dolls, but the dolls would talk and make dinner for each other; the dolls would not touch one another's "private areas." K.T. also said that she would watch father "vape" in the garage, although K.T. was not allowed to step inside the garage. K.T. also said father drank alcohol, and on two occasions noted that he was "not himself" after drinking, although grandmother was there to take care of her those two times.

Father's friend and grandmother both testified that the "raves" K.T. referred to were family nights at the local park, where bands played music but the attendees had neither alcohol nor drugs.

Another social worker testified that father had a medical marijuana card.

D. Ruling

The juvenile court dismissed the petition.

The court dismissed the sexual abuse counts because the evidence did not establish that K.T. had been sexually abused or that "the child is at risk of" father touching her. In support of this finding, the court pointed to: (1) the absence of any evidence of inappropriate touching; (2) K.T.'s willingness to tell a judge if any such touching occurred; and (3) the Department's initial decision "to leave the child home" with father. The court recognized that father's views about incest and his comments

about K.T. were "outside the boundaries of what most of us would think are appropriate," but declined to place much weight on them in the absence of evidence establishing that they revealed a specific intent to touch K.T. as opposed to "mere fantasy." The court also declined to place much weight on the showering because there was no inappropriate touching during the showers.

The court also dismissed the substance abuse count because (1) "[t]here was always another adult around" whenever father drank too much or used marijuana, and (2) the so-called "raves" were alcohol- and drug-free dance parties at a local public park. Finally the court dismissed the counts against mother because she was not caring for K.T.

E. Appeal

Both the Department and K.T. filed timely appeals. We denied the Department's writ petitions seeking to overturn the dismissal and to stay the dismissal.

DISCUSSION

This appeal challenges the juvenile court's dismissal of the sexual abuse and substance abuse allegations involving father.[2] In evaluating this claim, we are not allowed to take a fresh look at the evidence, to reweigh that evidence, or to decide for ourselves whether we would have dismissed the case. (*In re I.J.* (2013) 56 Cal.4th 766, 773.) Instead, we are confined to ""merely determin[ing] if there are sufficient facts to support the findings of the [juvenile] court."" (*Ibid.*) Where, as here, the juvenile court has dismissed allegations, this means that we are limited to

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[2] Neither the Department nor K.T. challenges the juvenile court's dismissal of the substance abuse allegation regarding mother.

asking: Does "'the evidence compel[] a finding in favor of [dependency jurisdiction] as a matter of law'"? (*In re Luis H.* (2017) 14 Cal.App.5th 1223, 1227; *Los Angeles County Dept. of Children & Family Services v. Superior Court* (2013) 215 Cal.App.4th 962, 967.) This is true only if the evidence in favor of jurisdiction is "'(1) "uncontradicted and unimpeached," and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support [the dismissal].'"' (*In re Luis H.*, at p. 1227, quoting *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

I. Allegations of Sexual Abuse

A juvenile court may exert dependency jurisdiction over a child if "[t]he child [(1)] has been sexually abused, or [(2)] there is a substantial risk that the child will be sexually abused." (§ 300, subd. (d); see also § 300, subd. (b)(1) [allowing for jurisdiction if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm . . . , as a result of the failure . . . of his or her parent . . . to adequately supervise or protect the child"].) As described below, the evidence does not compel a finding, as a matter of law, that K.T. was sexually abused or is at substantial risk of sexual abuse.

A. Sexual Abuse

For these purposes, sexual abuse is defined as "sexual assault or sexual exploitation" as defined in various Penal Code provisions. (§ 300, subd. (d) [incorporating the definition of "sexual abuse" in Penal Code section 11165.1]; Pen. Code, § 11165.1 [enumerating provisions].) K.T. repeatedly and consistently denied that father had ever touched her private parts or otherwise touched her inappropriately. Her testimony leaves sufficient room for the juvenile court's finding that there

was no sexual abuse. (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.)

The Department argues that K.T. was sexually abused because "sexual abuse" includes the misdemeanor crime of child molestation or annoyance, as defined in Penal Code section 647.6; that crime reaches any conduct that is objectively offensive; and father's conduct satisfies that standard. Although the Department is correct that violations of Penal Code section 647.6 constitute "sexual abuse" (Pen. Code, § 11165.1, subd. (a)), it is incorrect that the Department alleged and proved conduct that would violate that statute.

Child molestation and annoyance "requires proof of the following elements: [(1)] [t]he defendant engaged in conduct *directed at a child*; [(2)] [a] normal person, without hesitation, would have been disturbed, irritated, offended, or injured by the defendant's conduct; [(3)] [t]he defendant's conduct was motivated by an unnatural or abnormal sexual interest in the child or in children generally; and [(4)] [t]he child was under age 18 at the time of the conduct." (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1161, italics added.) The second element is evaluated objectively: "The defendant's observable conduct, on its own, must unhesitatingly irritate or disturb a *reasonable* person; in evaluating it, [a court] may not consider either the defendant's intent or the child's subjective discomfort." (*Id.* at p. 1162, italics added; see also *People v. Lopez* (1998) 19 Cal.4th 282, 290-291 (*Lopez*).)

Of the three acts the Department alleges as the basis for the sexual abuse counts in its petition, only one of them was "directed" at K.T.—that is, his showering with her. The other two allegations involve father's statements to other adults

(regarding his inability to resist K.T. if she came on to him sexually and his beliefs about incest), not to K.T herself. So we are left with the question: Does a father's conduct in "sometimes" (not, as the petition alleges, "frequently") showering with his seven-year-old daughter constitute misdemeanor child molestation and abuse *as a matter of law*? Our Supreme Court has recognized that what may be objectively offensive when done between strangers may be "objectively inoffensive" between relatives. (*Lopez*, *supra*, 19 Cal.4th at p. 291.) Different families and, indeed, different cultures, take different approaches to what is and is not appropriate when it comes to bathing. Because "the goal of juvenile dependency law is not to impose a state-mandated philosophy of parenting" (*Patricia W. v. Superior Court* (2016) 244 Cal.App.4th 397, 429), we decline to pronounce that the type of showering that occurred in this case—which, as noted above, involved no touching of genitalia and no arousal by the adult party—constitutes, as a matter of law (and thus, in each and every case), a crime and hence a basis for dependency jurisdiction.

B. Substantial Risk of Sexual Abuse

A juvenile court may also exert dependency jurisdiction over a child if "there is a substantial risk that the child will be sexually abused" (§ 300, subd. (d)); the "'court need not wait until a child is . . . abused . . . to assume jurisdiction and take the steps necessary to protect the child.' [Citation.]" (*In re I.J.*, *supra*, 56 Cal.4th at p. 773.)

On the whole, the evidence that K.T. was at "substantial risk" of sexual abuse was not uncontradicted *and* of "such a character and weight as to" compel a finding of such risk. There is certainly evidence that could have supported a finding that

K.T. was at substantial risk of sexual abuse: Father told his friends that he thought K.T. would be a "knockout" as a teenager, that he would have a hard time resisting her if she came on to him, and that he had no moral qualms about incest. He also regularly complimented K.T. on her physical attributes and "sometimes" showered with her. But there was also evidence cutting the other way: Father and one of his friends said father's comments about K.T. and incest were fantasy shared after several drinks, not statements of intent he would act on; father affirmed he would not have sex with K.T. now; father never touched K.T. inappropriately, even during the showers; and K.T. told the judge that she would tell father, "Stop. Don't do that," if he had tried to touch her inappropriately. This conflicting evidence presents a close question, but does not compel a finding of substantial risk. Indeed, the fact that the Department itself was not of one mind on whether to seek removal of K.T. tends to show that this is an issue upon which reasonable minds can disagree, rather than one on which there is only one answer as a matter of law.

The Department and K.T. raise what boil down to two arguments in response. First, they assert that there was "every indication . . . that father's sexual attraction to [K.T.] would result in sexual contact with her"; that the juvenile court was wrong to focus on the absence of any inappropriate touching; that K.T.'s statement that she would report any touching only to a judge, but not her grandmother or teacher, was proof that K.T. would submit to the abuse; and that father was "grooming" K.T. by getting her comfortable with being naked with him during the showers. None of these facts, however, alters the fundamental truth that the evidence in this case cuts both ways on the

question of substantial risk and thus does not compel a finding in favor of jurisdiction. Yet that is the only question before us. The Department and K.T. are in effect asking us to reweigh that evidence and to come to a different conclusion which, again, we may not do.

Even if we were to examine these further facts more closely, none of them compels a finding of substantial risk: The absence of sexual contact is relevant to show the disconnect between father's beliefs and his willingness to act on them; K.T. said she would only report any inappropriate touching to a judge, but also said she would tell her father, "Stop," in the first instance. There was no testimony regarding grooming; to the contrary, K.T.'s discomfort at the idea of father touching her while learning to use the bathroom and her conduct in covering her eyes sometimes to avoid seeing father's private parts undercuts the notion that she was comfortable with being touched sexually or always comfortable being naked with him.

Second, K.T. argues that the juvenile court was not at liberty to disregard the two forensic reports indicating some "concern" for K.T.'s safety with father. Although expert witnesses may certainly offer opinions regarding whether a child is at substantial risk (e.g., *In re Brian R.* (1991) 2 Cal.App.4th 904, 913-914), those opinions are not binding upon the court because such opinions invade the province of the juvenile court to decide for itself the ultimate issue of whether there is a substantial risk of sexual abuse. (See *In re R.T.* (2017) 3 Cal.5th 622, 628 [noting element of risk].) Further, the two reports do not on their face conclusively opine that K.T. is at substantial risk of sexual abuse. Ms. Perez's evaluation indicates that father's profession of appropriate sexual boundaries to her was

different from what he initially told his friends and the social worker; she does not speak to whether this change is the product of deception or instead the product of learning (from the counseling sessions) that he should abandon his prior views. Dr. Marby's "concern" for K.T.'s "safety" was inextricably bound up with her view that father was taking K.T. to "raves" rampant with "mind-altering substances" and "significant adult sexual activity," but it was subsequently clarified that what K.T. called "raves" were family nights at the local park. And even the recommendation of father's counselor that he continue treatment did not entail or indicate any risk to K.T.

In sum, the evidence would certainly have supported a finding that K.T. was at substantial risk of sexual abuse, but did not *compel* that conclusion. Accordingly, we have no power to disturb the juvenile court's resolution of this issue.

II. Allegation of Substance Abuse

A juvenile court may exert dependency jurisdiction if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of . . . the inability of the parent . . . to provide regular care for the child due to the parent's . . . substance abuse." (§ 300, subd. (b)(1).) This provision requires proof that (1) the parent is a substance abuser, and (2) the child has suffered, or is at substantial risk of suffering, serious physical harm. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 768.)

It was undisputed that father had been using alcohol and marijuana for 20 years. Even if we assume that this history makes father a substance abuser, the evidence does not compel a finding that K.T. is at substantial risk of suffering serious physical harm. (It is undisputed that K.T. has not already

suffered any such harm). In this context, proof of risk can be established in one of two ways: (1) by showing an "identified, specific hazard in the child's environment"; or (2) by showing that the child is of tender years, which presumptively establishes risk until and unless that presumption is rebutted. (*In re Drake M.*, *supra*, 211 Cal.App.4th at pp. 766-767; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) K.T. is now eight years old, so she is not a child of tender years. (Cf. *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1219 [children "six years old or younger" are considered "of tender years"].) The evidence of an "identified, specific hazard" is conflicting. To be sure, K.T. watched father ingest "wacky tabacky" in the garage, watched him drink alcohol, and reported on two occasions seeing him personally incapable of caring for her. A parent's incapacity to care for his child can place that child at substantial risk of physical harm. But a parent's abuse of drugs alone, even in his child's presence, is not enough to establish risk (see *In re Alexis E.* (2009) 171 Cal.App.4th 438, 453; *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1004), and K.T. was not left unsupervised the two times father had become incapacitated because her grandmother was present to care for her (cf. *In re Rocco M.*, at p. 824 ["the fact that a child has been left with other caretakers will not warrant a finding of dependency if the child receives good care"]). K.T. points to evidence that she and father would attend "raves," would go "tagging," and would burgle houses to open Christmas gifts, but there is no evidence that any of these activities was related in any way to father's use of alcohol or marijuana, and the evidence affirmatively indicates that the "raves" were not. Where, as here, the evidence cuts either way, it does not compel a finding of substantial risk as a matter of law, and we may not

gainsay the juvenile court's evaluation of that conflicting evidence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ