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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re S.W.,

a Person Coming Under the Juvenile
Court Law.

B240966

(Los Angeles County
Super. Ct. No. CK90610)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

K.S.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Patricia Spear, Judge. Reversed.

Patti L. Dikes, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Appellant.

INTRODUCTION

K.S. (Mother) appeals from a jurisdictional/dispositional order declaring her son, S.W., to be a dependent child of the court under subdivisions (b) and (j) of Welfare and Institutions Code section 300,¹ removing him from her custody (§ 361, subd. (b)), placing him in the custody of his presumed father, S.W., Sr. (Father), and terminating jurisdiction. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and Father are not married and did not live together. They had one child, seven-year-old S.W. In September 2011, Mother had a second child, Ethan K., by another man.

On the morning of October 23, 2011, Mother awoke and found Ethan, who had been sleeping in her bed, unresponsive. Mother and a neighbor initiated CPR and called 911. Paramedics arrived and took Ethan to the hospital, where he was pronounced dead.

The deputy coroner reported that the night before, Mother had drunk a significant amount of tequila. She went to sleep in her bed with Ethan on her chest. The bed was lined with soft bedding and pillows. When mother awoke the following morning, Ethan was face down on the bed, with Mother's hand on his back. Law enforcement officers who responded to the scene observed that Mother smelled of alcohol and was "clearly intoxicated." Her blood alcohol level was .08, meaning that her blood alcohol level would have been between .18 and .20 when she went to sleep. Investigators found a grocery bag filled with empty tequila bottles in the home.

On October 24, a social worker from the Department of Children and Family Services (DCFS) attempted to visit Mother, but Mother was not home. The social worker left a grief counseling packet. The social worker went to S.W.'s school. The principal

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

stated that S.W. had good attendance and supportive father and paternal grandmother. S.W., who was not home at the time of his brother's death and did not yet know about it, was polite, bright and happy. He told the social worker that he had two homes, one with each parent, and he spoke positively about both parents and felt safe with them. He exhibited no signs of abuse, did not know about alcohol and was unaware of any changes in Mother's behavior after having any kind of drinks.

Mother contacted the social worker after returning home and agreed to have S.W. stay with Father until the investigation into Ethan's death was completed. The social worker discussed the need for a safety plan, but Mother refused to sign any paperwork.

The social worker also visited Father's home. Neither Father nor the paternal grandmother had ever noticed Mother having alcohol on her breath or appearing to be intoxicated. The paternal grandmother noted that Mother had appeared to be tired since Ethan's birth. Father's and the paternal grandmother's only concerns about Mother's mental health had to do with stalking behavior toward Father and possible domestic violence involving Ethan's father.

DCFS filed a petition under subdivisions (b) and (j) of section 300 on November 3, alleging that S.W. was at risk of serious physical harm or illness due to Mother's alcohol abuse, which prevented her from providing appropriate care to Ethan and thus also posed a risk to S.W.

At the November 3 detention hearing, S.W. was detained from Mother's custody and released to Father. The juvenile court granted Mother monitored visitation.

In the December 12 jurisdiction/disposition report, DCFS noted that there was no prior child welfare history for S.W., but Mother had a child welfare history as a result of sexual abuse by her stepfather. DCFS interviewed Father, who had no firsthand knowledge regarding Ethan's death or any substance abuse by Mother. He reported that S.W. had told him about fights between Mother and Ethan's father.

The paternal grandmother reported that she picked S.W. up at a gathering of Mother's family October 22, 2011 at about 9:00 p.m. in order to babysit him. There was a lot of alcohol on the table. The paternal grandmother had agreed to serve as a monitor

for Mother's visitation with S.W. She reported that Mother was arriving late, was possibly under the influence of alcohol, and sometimes brought other people with her and spent time texting during the visit.

Mother had enrolled in a program at The New You Center, Inc., which provided parenting classes, random alcohol testing and individual counseling. Because the center was not approved, DCFS was assessing its appropriateness.

The coroner had not yet issued a report as to the cause of Ethan's death. Ethan's physician indicated the presumed cause of death was Sudden Infant Death Syndrome (SIDS).

On January 20, 2012, DCFS reported that visitation was going well. Mother was continuing to attend counseling sessions at The New You Center. The program director reported that Mother did not present addictive behaviors, and all of her random tests had been negative. At a hearing on that date, the juvenile court continued the matter to obtain the coroner's report and ordered DCFS to address terminating jurisdiction with a family law order.

On February 24, DCFS reported that it had received the Coroner Investigator's Narrative and Autopsy Report. While the initial investigation concluded Ethan's death was a homicide because Mother had been drinking and co-slept with Ethan, "no evidence of trauma was found at autopsy." The coroner stated: "Accidental layover from bedsharing cannot be proven or ruled-out, nor can other mechanisms of asphyxia. The cause of death is listed as sudden unexplained infant death. It is undetermined whether external factors are involved. The manner of death is undetermined."

For the jurisdiction/disposition hearing on March 6, DCFS filed a report recommending sustaining the petition based on evidence of Mother's intoxication, the many alcohol containers found at her house, as well as an open bottle of Oxycodone. DCFS opined that due to her intoxication, Mother "utilized gravely negligent judgment" by placing Ethan in bed with her, with soft bedding on the bed.

DCFS stated that Father was parenting S.W. appropriately and was not in need of services. Father hoped that Mother would comply with her programs and get the help she

needed, so that they could resume joint legal and physical custody of S.W. DCFS did not believe it was necessary to retain jurisdiction over the matter, as Mother had enrolled in programs to address the issues which led to DCFS involvement.

At the March 6 hearing, Dr. Noelle Reid, Ethan's pediatrician, testified as to Ethan's health, the risks of co-sleeping and SIDS. She noted that co-sleeping increased the risk of SIDS, and that there could be a genetic predisposition to SIDS. She also stated that if a parent is inebriated, it is not safe to co-sleep. Additionally, there should not be extra materials such as pillows and blankets on the bed.

The maternal grandmother testified that SIDS ran in both sides of her family. One of Mother's siblings had died of SIDS.

Dr. Anthony Shaw, a pediatric surgeon and expert in child abuse, testified that he had reviewed Ethan's medical records, including the coroner's report. He saw no evidence of smothering or asphyxiation as a cause of death. He also testified regarding a genetic predisposition to SIDS.

The juvenile court noted that "this is a very sad situation and a baby died. We can't know what might have happened had he been sleeping in a crib, or [had Mother been] sober as opposed to having been drinking, [whether she] would have heard something, if [she] might have awakened earlier, or if [she] had not been with all those pillows and stuff."

The court further noted that the coroner could not determine the cause of death, whether it was SIDS or something else. But it found that Mother "clearly had to be under the influence at the time she went to bed," and "given the family history of SIDS, and given the bed and given [Mother's] drinking," the allegations of the petition were true. "[Mother] was under the influence while the child was under Mother's care and supervision. And she couldn't provide adequate care and supervision for this sibling due to alcohol intoxication."

Further, given that Father was non-offending and S.W. was well cared for, the juvenile court decided to terminate jurisdiction with a family law order. "I think it

adequately protects Mother, and I think that Mother will make progress.” Mother did not need to be in court but “needs to deal with her drinking.”

The juvenile court therefore declared S.W. to be a dependent child of the court under subdivisions (b) and (j) of section 300 and found a substantial danger to S.W. without removal from Mother’s custody under section 361, subdivision (b). It ordered that Father have legal and physical custody of S.W. with visitation for Mother, and it terminated jurisdiction.

DISCUSSION

Sufficiency of the Evidence to Support the Jurisdictional Findings

The juvenile court’s jurisdictional findings must be supported by a preponderance of the evidence. (§ 355; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248.) We review the court’s findings under the substantial evidence test. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193; *In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1319.) We will uphold the findings if they are supported by reasonable, credible evidence of solid value. (*Matthew S.*, *supra*, at p. 1319.) In determining whether substantial evidence supports the findings, we view the evidence in the light most favorable to the findings, noting that questions of fact and credibility are the exclusive province of the juvenile court. (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 564; *In re Tania S.* (1992) 5 Cal.App.4th 728, 733.) We do not reweigh the evidence or exercise our independent judgment. (*In re Ricardo L.*, *supra*, at p. 564; *In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.)

“A jurisdictional finding under section 300, subdivision (b) requires: ““(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) ‘serious physical harm or illness’ to the child, or a ‘substantial risk’ of such harm or illness.” [Citations.] The third element ‘effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur).’ [Citation.]” (*In re James R.* (2009) 176 Cal.App.4th 129, 135.)

While “evidence of past conduct may be probative of current conditions, the court must determine ‘whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm.’ [Citations.] Evidence of past conduct, without more, is insufficient to support a jurisdictional finding under section 300. There must be some reason beyond mere speculation to believe the alleged conduct will recur. [Citation.]” (*In re James R.*, *supra*, 176 Cal.App.4th at pp. 135-136.)

Here, there was no evidence of past harm to S.W. due to alcohol abuse by Mother. The evidence showed only that on October 22, 2011, Mother became intoxicated, and her intoxication may have contributed to Ethan’s death.

Thereafter, Mother voluntarily enrolled in a program at The New You Center. As of January 20, 2012, Mother was continuing to attend counseling sessions at The New You Center. The program director reported that Mother did not present addictive behaviors, and all of her random tests had been negative.

That Mother recognized the inappropriateness of her actions and took voluntary steps to correct them supports a finding that at the time of the hearing, there was no risk of harm to S.W. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1381; see *In re A.J.* (2011) 197 Cal.App.4th 1095, 1106.) Additionally, while there was evidence of empty alcohol containers at Mother’s home, there was no evidence that she was regularly intoxicated while S.W. was home, rendering her incapable of caring for him.

DCFS “did not show with specificity” how S.W. was at risk of harm in the future. (*In re James R.*, *supra*, 176 Cal.App.4th at p. 137.) The evidence of Ethan’s death while Mother was intoxicated is insufficient to sustain a finding under subdivision (b) of section 300 as to S.W. (*Id.* at pp. 136-137.)

Similarly, under subdivision (j) of section 300, DCFS must show both that the child’s sibling has been abused or neglected and that the child in question is at substantial risk of abuse or neglect. (*In re Ricardo L.*, *supra*, 109 Cal.App.4th at p. 566.) Again, the evidence of Mother’s intoxication and Ethan’s death is insufficient to support a jurisdictional finding as to S.W. absent evidence that Mother currently posed a substantial risk of harm to S.W. (*In re Alexis S.* (2012) 205 Cal.App.4th 48, 55.)

We conclude that the jurisdictional order is not supported by substantial evidence and must be reversed. The dispositional order and any subsequent orders therefore are moot. (*In re Ricardo L.*, *supra*, 109 Cal.App.4th at p. 569.)

DISPOSITION

The jurisdictional/dispositional order is reversed.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.