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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re Ashley J., et al. Persons Coming  
Under the Juvenile Court Law.

B290025

(Los Angeles County  
Super. Ct. No. 17CCJP02730)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

EDUARDO J.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County. Martha Matthews, Judge. Affirmed in part and reversed in part.

Gina Zaragoza, under appointment by the Court of Appeal,  
for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles,  
Acting Assistant County Counsel, and Veronica Randazzo,  
Deputy County Counsel, for Plaintiff and Respondent.

\* \* \* \* \*

In this juvenile dependency case, the juvenile court exerted jurisdiction over Ashley J. (Ashley) and Carla J. (Carla) due to domestic violence between their parents that put them at risk of physical harm and of emotional abuse. On appeal, Eduardo J. (father) argues that insufficient evidence supports these jurisdictional findings. Substantial evidence supports the juvenile court's jurisdictional finding based on emotional abuse to Ashley, but does not support the court's finding based on risk of physical harm as alleged and argued below. Accordingly, we affirm in part and reverse in part.

## **FACTS AND PROCEDURAL BACKGROUND**

### **I. Facts**

#### **A. *Family background***

Father and Edith L. (mother) have been together since 1997, and they married in 2007. They have four children—adults Eduardo (born 1997) and Jocelyn (born 1999), and minors Ashley (born 2003) and Carla (born 2007).

#### **B. *Domestic violence in the home***

Father and mother have a long history of domestic violence. Between 1997 and 2014, the violence was physical: In 1997, father pushed mother when she was pregnant with Eduardo, and father tried to choke her and threatened to kill her in May 2014. After the 2014 incident, mother briefly moved out of the family home but was forced to move back shortly thereafter due to finances. Since her return, mother tries to avoid father by leaving the house (either to sleep on the streets or walk around)

when father gets home from work late at night and returning in the morning. When father and mother do see each other, however, they often get into verbal arguments over finances or mother's whereabouts at night; father accuses her of seeing other men and calls her a "slut."

Mother also has a contentious relationship with Jocelyn. In early November 2017, Jocelyn and mother got into an argument over household chores and ended up punching one another. Carla and Ashley broke up the fight and called the police. Father tells all four children not to listen to mother, and father admitted that prior to Jocelyn's fight with mother, he told Jocelyn that she should hit mother.

As a result, the "family dynamic" at home is "very hostile" and "tense."

### **C. Ashley's "cutting"**

Starting in late 2015, Ashley began to cut her arms, wrists, hands, and legs with paper clips, bobby pins, and other household items. In September 2016 and May 2017, Ashley was involuntary held in a mental facility because she was considered a danger to herself.

Ashley initially told a social worker that she cuts herself because "it is the only thing she has control over" because she does not have "control over . . . school bullying and the fighting in [her] home," but later said the cause was "school" and "other stuff" and that she did not know if it was related to the fighting at home. Mother initially told a social worker that Ashley cut herself due to "a combination of school bullying and the hostile environment at home," but later said it was due just to the bullying. Father told the social worker that Ashley cut herself because of bullying at school because, in his view, the home

environment could not be the cause because none of the other children were cutting themselves. Ashley's therapist reported that Ashley was cutting herself because she was being bullied at school.

## **II. Procedural Background**

In December 2017, the Los Angeles County Department of Children and Family Services (the Department) filed a petition asking the juvenile court to exert dependency jurisdiction on three grounds: (1) mother's and father's "history of engaging in violent altercations in the presence of the children," which placed Ashley and Carla at substantial risk of serious physical harm (making dependency jurisdiction appropriate under Welfare and Institutions Code section 300, subdivision (a) and subdivision (b)(1))<sup>1</sup>; (2) Ashley's exposure to the "detrimental home environment with ongoing verbal and physical altercations among family members" put Ashley "at substantial risk of suffering serious emotional damage" (making dependency jurisdiction appropriate under section 300, subdivision (c)).

In early April 2018, the juvenile court held a combined jurisdictional and dispositional hearing. At that hearing, the court ruled that jurisdiction was appropriate on some grounds but not others. The court rejected jurisdiction under subdivision (a) of section 300 because the "most recent incident of physical violence" between mother and father was in 2014; thus, this case lacked the "frequent physical fighting that could cause the children to get harmed if they were accidentally in the middle of it." The court nonetheless sustained jurisdiction based on the

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

identical allegation under subdivision (b)(1) of section 300 without any further discussion. The court also sustained jurisdiction over Ashley under subdivision (c) of section 300, explaining that Ashley’s “mental health issues are very serious” as well as “dangerous,” and attributable to the “constant environment of conflict and hostility at home.” The court ordered the children to remain in the parents’ home.

Father filed this timely appeal.

### **DISCUSSION**

Father argues that the juvenile court’s jurisdictional findings are not supported by sufficient evidence. In evaluating this claim, we ask whether substantial evidence—that is, evidence “which is reasonable in nature, credible and of solid value”—supports the grounds alleged as the basis for dependency jurisdiction. (*In re R.C.* (2012) 210 Cal.App.4th 930, 941.)

#### **I. Jurisdiction over Ashley**

Substantial evidence supports the juvenile court’s exertion of dependency jurisdiction over Ashley pursuant to section 300, subdivision (c). Under that provision, jurisdiction is appropriate if a child “is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent.” (§ 300, subd. (c).) Emotional damage (or risk thereof) may arise as a result of a parent’s conduct if (1) the parent’s action or inaction *itself* causes the emotional harm, or (2) the emotional harm has some other cause but the parent is “unable . . . to provide adequate mental health treatment.” (*In re Alexander K.* (1993) 14 Cal.App.4th 549, 557.) Ashley’s long-standing conduct in cutting herself is substantial evidence

that she is suffering serious emotional damage, and both she and mother admitted that this conduct stems in part from the “hostile” environment at home.

Father offers two arguments in response.

First, he notes that Ashley, mother, and Ashley’s therapist all reported that Ashley was cutting herself due to the bullying at school. This is true, but ignores that Ashley and mother had previously said that Ashley was cutting herself *also* due to the turmoil at home. Father is inviting us to give greater credence to Ashley’s and mother’s more recent statements than to their older statements. Because we must resolve all evidentiary conflicts in favor of the court’s jurisdictional finding (rather than against it) (*In re Roxanne B.* (2015) 234 Cal.App.4th 916, 920), we decline father’s invitation to reweigh the evidence.

Second, father contends that Ashley is no longer suffering emotional damage or at risk of suffering emotional damage because she had not cut herself for the three months prior to the jurisdictional hearing and because Ashley was in therapy. We reject this contention. Ashley’s recent cessation of self-inflicted harm is encouraging, but does not dispel the harm (and risk of harm) still posed by mother’s and father’s ongoing verbal arguments. The harm and risk of harm remain. Ashley’s participation in therapy is also encouraging, but the therapist herself indicated that the therapy is “still a work in progress.”

Because jurisdiction over Ashley is appropriate under subdivision (c) of section 300, we have no occasion to examine whether it is also appropriate under subdivision (b). (*In re Ashley B.* (2011) 202 Cal.App.4th 968, 979 [“As long as there is one unassailable jurisdictional finding, it is immaterial that another might be inappropriate”].)

## II. Jurisdiction over Carla

### A. *Jurisdiction under section 300, subdivision (b)*

Substantial evidence does not support jurisdiction over Carla under section 300, subdivision (b). Under that provision, jurisdiction is appropriate if a “child has suffered, or there is a substantial risk that the child will suffer, serious physical harm . . . as a result of the . . . inability of . . . her parent . . . to adequately . . . protect” her. (§ 300, subd. (b)(1).) The risk of harm must exist at the time of the jurisdictional hearing. (*In re M.W.* (2015) 238 Cal.App.4th 1444, 1453.) A child is at substantial risk of suffering serious physical harm when she is present in a household with “ongoing domestic violence.” (*Id.* at pp. 1453-1454; *In re Heather A.* (1996) 52 Cal.App.4th 183, 194; *In re John M.* (2013) 217 Cal.App.4th 410, 419.) But if the domestic violence is remote in time and not likely to recur, the risk of physical harm arising from it is no longer substantial. (*In re M.W.*, at p. 1455; *In re J.N.* (2010) 181 Cal.App.4th 1010, 1025-1026.) The juvenile court in this case declined to exercise jurisdiction under subdivision (a) of section 300 because the last domestic violence incident was nearly four years earlier, such that there was no longer a danger that “the children” might “get harmed if they were accidentally in the middle of” “frequent physical fighting.” The court’s finding of a lack of risk of physical injury applies with equal force to the allegation under subdivision (b) of section 300.

The Department makes two arguments to salvage this finding.

First, it points to father’s comments that he treats mother “fair[ly]” and that mother is to blame for all of the conflict in the house, and on that basis asserts that father’s refusal to recognize

his own contribution to the problem makes it unlikely he will change his behavior. (Accord, *In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1044 [“denial is a factor often relevant to determining whether persons are likely to modify their behavior in the future without court supervision”].) However, father’s perceived lack of self-awareness does not speak to whether Carla is at risk of physical harm when mother and father have for nearly four years argued without escalating those verbal disagreements into physical fights.

Second, the Department contends that Carla remains at risk because father encouraged Jocelyn to hit mother, such that father may be engaged in domestic violence by proxy. This may or may not be a viable theory, but it was never alleged in the petition and never argued to the juvenile court. The petition’s allegation under section 300, subdivision (b) was aimed solely at the harm arising from domestic violence between mother and father—not mother and Jocelyn (as encouraged and emboldened by father). The Department’s arguments below were confined to these allegations. Although a juvenile court may amend a dependency petition to conform to the proof offered at the hearing (*In re David H.* (2008) 165 Cal.App.4th 1626, 1640), that power does not apply when doing so would prejudice the other party (*ibid.*) and certainly does not permit what the Department requests in this case—namely, allowing an amendment for the first time on appeal to allege a theory never alleged or argued below.

**B. *Jurisdiction under section 300, subdivision (c)***

Jurisdiction is also not appropriate over Carla under subdivision (c) of section 300 because the Department’s petition only sought to invoke this provision over Ashley. What is more,



the juvenile court's oral explanation of its jurisdictional finding under this provision only pertained to Ashley. The court's minute order nevertheless purported to declare Carla to be a dependent by virtue of section 300, subdivision (c). If we compare what the juvenile court said to the minute order, the minute order appears to be wrong. But even if we accept the minute order as being accurate, it is invalid because Carla was never alleged in the sole subdivision (c) count of the petition. Carla's exposure to the domestic strife in the household may or may not put her at risk of serious emotional damage, but the Department did not so allege, did not so prove, and did not so argue. Nor did the juvenile court ever amend the petition to add Carla to this allegation. We decline to amend the allegation on appeal.

#### **DISPOSITION**

The jurisdictional findings regarding Carla under counts b-1 and c-1 are reversed and vacated without prejudice to the Department filing new allegations regarding Carla. Otherwise, the orders are affirmed.

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\_\_\_\_\_, J.  
HOFFSTADT

We concur:

\_\_\_\_\_, P. J.  
LUI

\_\_\_\_\_, J.  
ASHMANN-GERST