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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re H.B., et al., Persons
Coming Under the Juvenile
Court Law.

B280719

(Los Angeles County
Super. Ct. No. DK20104)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

M.S.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Emma Castro, Temporary Judge. (Pursuant to Cal. Const., art. VI, §21.) Affirmed.

Patricia K. Saucier, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Sally Son, Deputy County Counsel, for Plaintiff and Respondent.

Mother M.S. appeals from the juvenile court's jurisdictional and dispositional orders concerning her two children, H.B. and D.B. She contends the jurisdictional findings under Welfare and Institutions Code section 300, subdivision (b)(1)¹ are not supported by substantial evidence because she already had agreed to relinquish custody of the children to their father, A.B., by the time of the hearing. She further contends the dispositional order removing H.B. and D.B. from her custody is not supported by substantial evidence, because the juvenile court did not consider alternative options and did not state a factual basis in support of removal. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The family came to the attention of the Los Angeles County Department of Children and Family Services (DCFS) on October 17, 2016, when DCFS received a referral that mother used cocaine in front of her children, H.B. (then three) and D.B. (then one). The caller also stated that mother did not take care of the children.

A DCFS social worker made contact with the family on October 20, 2016, and documented the meeting and subsequent interactions with the family in a detention report. According to that report, mother initially denied using drugs. After agreeing to submit to a drug test, however, she admitted using marijuana the preceding weekend. Mother stated that she never used

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

marijuana around the children; she left them with their paternal grandmother (PGM) for the weekend. Mother denied using all other drugs. She told the social worker that her mother, maternal grandmother (MGM), erroneously concluded she used cocaine after finding a marijuana pipe in her bedroom.

Mother reported that she and father were no longer in a relationship. They shared custody of H.B. and D.B. pursuant to an informal arrangement. Mother further stated that she recently filed paperwork in family court in an effort to obtain a formal custody order and child support. She also told the social worker that she wanted to obtain a restraining order against father due to a history of domestic abuse. She stated that she and the children were receiving therapy to address domestic abuse issues. The social worker examined the children and did not observe any marks or bruises on them. Neither young child was able to make a statement to the social worker.

The social worker contacted mother's therapist the next day. The therapist confirmed he recently began treating the family. He described mother as "nurturing" to the children, but opined that she "definitely needs parenting skills." The therapist also relayed additional concerns about mother: she drove the children without a driver's license, she showed him a video in which father "is screaming at mother, telling her that she was using drugs," and MGM had informed him that mother was using cocaine and marijuana, hanging out with individuals who were a "bad influence" on her, and was "possibly getting involved in criminal activities such as stealing cars." Mother's criminal history report indeed included three 2016 arrests, for possession of burglary tools, vehicle theft, grand theft, and receipt of stolen property.

MGM told the social worker that mother moved in with her about six months ago, after father cheated on her and “threw [her] to the streets.” MGM described father as “not responsible,” and reported that he did not take care of or financially support the children. MGM also stated that she provided all financial support for mother and the children, that mother left the children at father’s house on weekends while she went out to party, and that the children lived with father for approximately six months before MGM took the family in. MGM never observed mother use any drugs, though she found two pipes in her bedroom.

Father told the social worker that he and mother terminated their relationship in December 2015. He reported that mother used marijuana and methamphetamine when they were dating, but told him she had stopped when she became pregnant with H.B. He believed mother was using methamphetamine with her new boyfriend and was engaging in prostitution to get money for drugs. Father showed the social worker text messages “in which two individuals are discussing drug transactions, a few were pictures from mother to the other person.” Father lived with his parents, his girlfriend, and their newborn daughter. He worked the night shift and was not usually home or awake when mother dropped off the children on weekends, so he did not notice any “red flags in mother’s behavior.”

H.B. and D.B. lived with father beginning in December 2015, after he picked them up from an apartment at which mother had left them alone. Father refused to return the children to mother when she came looking for them four days later, and they lived with him and his extended family until July 2016. At that point, father initiated custody paperwork, but

mother took the children from him at the courthouse and did not return them. Recently, during the last three months or so, mother had been dropping off the children every weekend. Father reported that mother dropped off the children dirty and without shoes, and sometimes with marks or bruises.

Mother and father both took drug tests. Father tested negative for all substances. Mother tested positive for methamphetamine and negative for all other substances, including marijuana. Mother further admitted to the social worker that she used methamphetamine the weekend after the test. Mother said she tried to stop using methamphetamine on her own but was unsuccessful and needed help. The social worker referred mother to a substance abuse program, and mother promptly made an appointment with an intake counselor. Mother volunteered to place the children with father while she underwent drug treatment. She prepared and signed a declaration consenting to DCFS's removal of H.B. and D.B. from her care and placement with father.

DCFS filed a petition under section 300, subdivision (b)(1) on October 31, 2016. It alleged that mother "has a history of substance abuse and is a current user of methamphetamine and marijuana, which renders her incapable of providing regular care for the children. On prior occasions in 2016, the mother possessed, used and was under the influence of marijuana, while the children were in the mother's care and supervision. The children are of such young age as to require constant care and supervision and the mother's illicit drug use interferes with providing regular care of the children. Such illicit drug use on the part of the mother endangers the children's physical health and safety and places the children at risk of serious physical harm,

damage and danger.”

The court held a detention hearing the same day. At the hearing, mother denied the allegations in the petition and requested that the court release H.B. and D.B. to her care. Her counsel informed the court that mother’s drug treatment program allowed children to live with their participating parents, and asserted that “there are services that can be put in place to avoid detention.” Counsel did not elaborate on what those services were. Counsel for all other parties argued that the children should remain detained from mother.

The court praised mother for taking “a good first step” by enrolling in drug treatment. It nevertheless found that continuance in mother’s care would be contrary to the children’s welfare, and that there were no reasonable means to protect the children’s physical and emotional well-being without removing them from mother. It placed the children with father. The court ordered reunification services for mother, including referrals for parenting classes and individual counseling. The court granted mother weekly monitored visitation as soon as her drug treatment program would allow her to have visitors, and ordered DCFS to increase mother’s visitation if her visits were consistent. The court set the matter for a jurisdictional and dispositional hearing in January 2017.

DCFS prepared a jurisdiction/disposition report in advance of the hearing. DCFS “made multiple attempts at contacting mother” to get a statement for the report, “to no avail.” The dependency investigator stated, “[o]n one occasion, mother picked up this DI’s call however, hung up once DI introduced herself.” The investigator was able to speak to father, who told her mother was “very addicted” to drugs and used drugs in motel rooms in

front of the children. Father also reported that mother “would give the children NyQuil to make the children sleep and she’d sneak out and use drugs.” Father was unaware of this behavior prior to separating from mother; he believed mother drugged him when they lived together because he would become very sleepy after eating food she prepared.

Father stated that, to his current knowledge, mother has had an unresolved drug problem the entire four years he has known her. He “maintains that it was his belief mother stopped after they had the child [H.B.],” and that mother’s drug use after that point was hidden from him because he worked outside the home. Mother admitted to him after their separation in December 2015 that she had continued to use drugs without his knowledge. The investigator noted that father “failed to take appropriate action to ensure the immediate safety of the children as he continued allowing mother access to the children knowing she was engaging in criminal and drug related behavior.” The investigator also asked father about the domestic abuse mother alleged. Father stated that mother fabricated the allegations “to take the kids from me.” He denied engaging in any sort of domestic abuse. Father reported the children were doing fine with him; during the six to eight months he cared for them previously, mother did not visit frequently or buy the children anything. She had not shown interest in visiting the children recently, and was inconsistent in her communications regarding visitation.

The investigator also spoke to father’s mother (PGM) and stepfather, with whom he lived. “Both reported that mother has been using illicit substances for a long period of time and prior to the children’s detention, mother would drop the children off with

PGM and disappear for hours.” They also both reported mother had not visited the children in approximately three weeks, and “the children were regularly unkempt or not fed appropriately when they were with mother.” Father’s stepfather told the investigator “he attempted to advise mother on multiple occasions as to her conduct and the risks she places her safety and the children’s safety in, however, mother paid him no mind.”

DCFS concluded mother “has an unresolved substance abuse problem which impedes on [*sic*] her ability to provide adequate care for the children.” It further noted that “concerns remain as to mother’s current willingness to address her illicit drug use given that she has not maintained contact with DCFS nor has she enrolled into any of the recommended services,” especially in light of the children’s young ages. DCFS recommended that both parents participate in services to enhance their knowledge of the impact untreated substance abuse can have on children. DCFS requested the court sustain the allegations in the petition, remove the children from mother, and place them with father.

At the adjudication hearing, the court admitted the detention and jurisdiction/disposition reports into evidence. DCFS’s counsel argued the allegations should be sustained. She argued that mother admitted to using both marijuana and methamphetamine and tested positive for the latter. She also pointed the court to examples of “risky behavior” father attributed to mother, including trading sex for drugs and using drugs in front of the children, as well as his family’s observations that the children were “unkempt and not fed appropriately” while in mother’s care. The children’s counsel joined her arguments. He also requested that the children receive play therapy and

other services while in father's care. Father's counsel joined these arguments, but requested that the case be closed because father had the support of his family and was willing to obtain services without the aid of DCFS.

Mother's counsel argued the petition should be dismissed. She contended DCFS failed to prove a nexus between mother's drug use and harm to the children and reiterated mother's assertions that she did not use drugs in the children's presence. She additionally called into question the credibility of father's claims about mother's behavior, describing them as "self-serving" and attributing them to acrimony between the parents. Mother's counsel also argued, however, that mother "is opposed to terminating jurisdiction today" and wanted to receive services to reunify with the children.

The court found the allegations in the petition true by a preponderance of the evidence. It concluded that father's accusations were based not on acrimony or speculation but rather upon his "having shared a home in common with the children and the mother." It found "mother's statements pretty self-serving" and noted her practice of giving the children "excessive NyQuil" so she could go out.

The court found father to be a previously noncustodial parent seeking custody under section 361.2, subdivision (a), and further found by clear and convincing evidence that placement with him would not be detrimental to the children. The court accordingly ordered the children placed with father and ordered services for both parents. The court ordered monitored visitation for mother, with discretion to DCFS to increase the frequency of her visits if she visited the children consistently.

Mother timely appealed.

DISCUSSION

I. General principles and standard of review

Section 300, subdivision (b)(1) provides that a child comes within the jurisdiction of the juvenile court if the child “has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, . . . or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent’s or guardian’s . . . substance abuse.”

A child within the jurisdiction of the court may be declared a dependent. The court may remove a dependent child from a parent’s home if it finds by clear and convincing evidence that the child cannot remain in the home safely. (§ 361, subd. (c); see also *In re Henry V.* (2004) 119 Cal.App.4th 522, 528-529.) The court must state the facts on which the decision to remove the child is based. (§ 361, subd. (d).) If, as in this case, there is a previously noncustodial parent who wishes to take custody of the child, the court must place the child with that parent unless it finds that such placement would be detrimental to the child. (§ 361.2, subd. (a).) The court then has the option to terminate jurisdiction or make such placement subject to its continued supervision of the child. (See § 361.2, subds. (b)(1)-(b)(3).) In the latter case, “the court may order that reunification services be provided to the parent or guardian from whom the child is being removed, or the court may order that services be provided solely to the parent who is assuming physical custody in order to allow that parent to retain later custody without court supervision, or that services be

provided to both parents” (§ 361.2, subd. (b)(3).) The court is required to make a finding articulating the basis of its determinations under section 361.2, subdivisions (a) and (b). (§ 361.2, subd. (c).)

“In reviewing the jurisdictional findings and disposition, we look to see if substantial evidence, contradicted or uncontradicted, supports them. [Citation.] In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court’s determinations, and we note that issues of fact and credibility are the province of the trial court.’ [Citations.]” (*In re R.T.* (2017) 3 Cal.5th 622, 633.) “The juvenile court has broad discretion in crafting a disposition pursuant to a child’s best interest.” (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1179.)

II. Jurisdictional Findings

Mother contends the jurisdictional findings were not supported by substantial evidence because father was caring capably for the children at the time of the jurisdictional hearing and the children therefore were no longer at risk. She further asserts that the juvenile court “should have dismissed the petition, staying the order until custody was awarded to Father in family court.” We disagree.

“The basic question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm.’ [Citation.]” (*In re A.S.* (2011) 202 Cal.App.4th 237, 244; see also *In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1396.) The court may consider past events in deciding whether a child presently requires the court’s protection. (*In re N.M.* (2011) 197 Cal.App.4th 159, 165.) “A parent’s “[p]ast

conduct may be probative of current conditions” if there is reason to believe that the conduct will continue.’ [Citation.]” (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1216 (*Christopher R.*).) “[A] juvenile court should consider the nature of the conduct and all surrounding circumstances. It should also consider the present circumstances, which might include, among other things, evidence of the parent’s current understanding of and attitude toward the past conduct that endangered a child, or participation in educational programs, or other steps taken, by the parent to address the problematic conduct in the interim, and probationary support and supervision already being provided through the criminal courts that would help a parent avoid a recurrence of such an incident. The nature and circumstances of a single incident of harmful or potentially harmful conduct may be sufficient, in a particular case, to establish current risk depending upon present circumstances.” (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1025-1026.) “[T]he court need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child.” (*Christopher R., supra*, 225 Cal.App.4th at p. 1216.)

Here, the court found true allegations that H.B. and D.B. were at risk of substantial physical harm due to mother’s substance abuse. Mother contends that could not be the case, because the children were no longer in her care at the time of the jurisdictional hearing. This contention fails. A child may come within the ambit of section 300, subdivision (b)(1) if he or she “has suffered” serious physical harm or illness, even if the imminent danger to him or her has been abated by virtue of detention away from the parent. More relevant here, the court considers not only the present circumstances (and location) of the

child, but also the present and past circumstances of the parent, and whether there is reason to believe past conduct will continue. (*Christopher R.*, *supra*, 225 Cal.App.4th at p. 1216.)

Evidence showed that mother's substance abuse adversely affected her parenting and judgment and placed her young children at risk of harm: mother left the children unsupervised and did not return for them for four days, she gave them NyQuil so they would remain asleep while she used drugs, and she dropped them off at father's home for days at a time, unfed and unkempt. Mother admitted she had a drug problem and took the initiative by entering treatment, but her efforts at remedying the situation stopped there. At the time of the hearing, mother actively was avoiding DCFS and had not provided any updated information about her progress in the rehabilitation program. She likewise demonstrated limited interest in maintaining a relationship with the children, going weeks without visiting them or calling father to inquire about their wellbeing. The court reasonably could conclude from this constellation of facts that the children remained at risk at the time of the hearing and that jurisdiction was warranted.

Mother argues that her case is analogous to *In re A.G.* (2013) 220 Cal.App.4th 675 (*A.G.*). We are not persuaded. In *A.G.*, the children lived with their mother and father. The father was the children's primary caregiver, and the family also had a nanny. (*A.G.*, *supra*, 220 Cal.App.4th at p. 678.) The mother suffered from a mental illness that caused her to experience and act on auditory hallucinations; DCFS became involved with the family after the police responded to calls of the mother yelling at the neighbors, running through sprinklers, and lying in the middle of the street. (*A.G.*, *supra*, 220 Cal.App.4th at p. 677.)

DCFS filed a section 300 petition alleging that the mother's mental illness rendered her incapable of providing care for the children. (*Id.* at p. 678.) The juvenile court sustained the petition and ordered the children removed from the mother, but then terminated jurisdiction and ordered the children placed with father under a family law order. (*Id.* at p. 682.)

The court of appeal reversed. It held that harm to the children or the risk thereof could not be presumed from the mere fact of mother's mental illness. (*A.G., supra.*, at p. 684.) Moreover, the court continued, "Father has shown remarkable dedication to the minors," was "able to protect them from any harm from Mother's mental illness," and always ensured that he or another responsible adult (the nanny) was present when mother was around the children. (*Id.* at pp. 684, 686.) Therefore, the appellate court concluded, the juvenile court erred by sustaining the petition rather than dismissing the petition and staying the order until father obtained a family law order awarding him custody. (*Id.* at p. 686.) Mother contends the court should have done the same here.

A.G. is distinguishable from this case, however, because this case involved an allegation stemming from a parent's substance abuse, not mental illness. Unlike a finding of mental illness, "the finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of harm" if the children are "of such tender years that the absence of adequate supervision and care poses an inherent risk to their physical health and safety." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 767.) Mother provided no evidence to refute that presumption, which applied in this case because the children were toddlers. Moreover,

nothing in *A.G.* “purported to authorize a juvenile court to skip the evidentiary hearing on jurisdiction or to apply a rule of abstention just because a nonoffending parent could gain custody of the child in an ongoing family court proceeding.” (*In re Nicholas E.* (2015) 236 Cal.App.4th 458, 465.) The children’s temporary placement with father here did not eliminate the risk mother’s substance abuse posed to them in the future. Sufficient evidence supported the court’s jurisdictional findings.

III. Dispositional Order

The court ordered the children removed from mother and placed with father under section 361.2, subdivision (b)(3). Mother contends this was error because the court failed to state its factual basis for doing so, and failed to consider reasonable means for protecting the children without removing them from her. Specifically, she argues the court should have “allowed Father to retain physical custody of the children without removing them from Mother.” We disagree.

Section 361, subdivision (d) requires the court to “state the facts on which the decision to remove the minor is based.” DCFS acknowledges that the court did not make formal factual findings in this case. It argues, however, that the error was harmless. We agree. “[C]ases involving a court’s obligation to make findings regarding a minor’s change of custody or commitment have held the failure to do so will be deemed harmless where ‘it is not reasonably probable such finding, if made, would have been in favor of continued parental custody.’ [Citations.]” (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1218.) Here, the evidence before the court demonstrated that mother had a substance abuse problem that placed the children at risk, refused to cooperate or speak with DCFS, and disengaged from the children. It is not

reasonably probable that the court would have found that placement with mother at this time would have been in the children's best interests.

Mother nevertheless contends the error was prejudicial because "there were less drastic alternatives to removal." She further argues the court's finding to the contrary, that there were no reasonable means to protect the children without removing them from her custody, was not supported by substantial evidence. We disagree. The substantial evidence supporting jurisdiction over the children also supported the finding that removal was necessary to protect the children.

Mother further asserts that the court disregarded section 361, subdivision (c)(1)(B), which requires the court to consider "[a]llowing a nonoffending parent or guardian to retain physical custody as long as that parent or guardian presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm." This provision was not relevant here, however. Father could not "retain physical custody" of the children; prior to the initiation of this case, father was not a custodial parent. (*In re Miguel C.* (2011) 198 Cal.App.4th 965, 970.) In fact, mother previously and unexpectedly had taken the children from him. Ordering the children removed from mother was a reasonable step to ensure that mother did not repeat that conduct and that the children would remain safe while she received treatment for her substance abuse issues.

DISPOSITION

The jurisdictional and dispositional orders are affirmed.

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COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.