Filed 7/7/15 In re S.K. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re S.K. et al., Persons Coming Under the Juvenile Court Law.	
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Appellant, v. MARVA N., Defendant and Appellant.	B257438 (Los Angeles County Super. Ct. No. DK02156)

APPEAL from orders of the Superior Court of Los Angeles County, Amy Pellman, Judge. Affirmed.

Cristina Gabrielidis, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Mark J. Saladino, County Counsel, Dawyn R. Harrison, Assistant County Counsel and Tracey F. Dodds, Principal Deputy County Counsel, for Plaintiff and Appellant.

Appellant Marva N. (Mother) appeals the juvenile court's jurisdictional and dispositional orders. Mother contends substantial evidence did not support assertion of jurisdiction over her two sons, S.K. and M.K. She further contends the court abused its discretion in approving a reunification plan that required Mother to participate in a full drug/alcohol program with aftercare, drug/alcohol testing, a 12-step program, an anger management program, and a parenting class. We find no basis to overturn either the court's jurisdictional order or its dispositional order.

FACTUAL AND PROCEDURAL BACKGROUND

S.K., born in December 2001, and M.K., born in December 2004, lived with their father, James K. (Father), their paternal grandmother, a paternal aunt and a paternal cousin in California. In March 2011, Father had been granted sole legal and physical custody of the children by an Arizona court after Mother was incarcerated in that state. In November 2013, the children were detained by the Department of Children and Family Services (DCFS) due to Father's mental and emotional problems, which led him to make terrorist threats against the President, the grandmother and others, and rendered him unable to provide regular care for the children.[1] The court found true that the Indian Child Welfare Act (25 U.S.C. § 1901 et seq., ICWA) applied, as Mother was Hopi Indian and she and the children were registered members of the tribe.

After the detention, Mother was located in Arizona. She had been released from incarceration a few weeks earlier. She was on parole and could not leave the state. She asked that the children be sent to her or that she be allowed to send for them. The caseworker's research into her background revealed that on June 30,

[1] Although the children were removed from Father's custody, they were permitted to remain in the home of the paternal relatives.

2006, Mother was arrested for assaulting an older child, D.Q., who was then nine years old.[2] The assault occurred at a Wal-Mart in Arizona. One witness to the incident said she saw Mother punch D.Q. twice in the head with her fist and kick him once in the ribs when he went down. Another witness said Mother punched the child five times and kicked him three or four times. D.Q. told officers that Mother hit his face, arms and back, and that she had hit him and his brother before, "pound[ing] [their] heads into the walls," "kick[ing] [them] with her shoes on," and "pull[ing] [them] around by [their] hair" when she punished them.

In December 2006, Mother was indicted for aggravated assault and child abuse. In April 2008, Mother pled guilty to child abuse and was placed on probation for three years.

On September 1, 2007, before the assault case was resolved, Mother was arrested for failing to stop for a police vehicle, after driving with police cars chasing her until her car's tires were punctured by spiked "[s]top [s]ticks." When the police took her into custody, her speech was slurred and she admitted she had been drinking. Her blood alcohol was .17 percent. Records obtained by the caseworker indicated she was placed on probation for the charges arising from that incident at around the same time she pled guilty to child abuse.[3]

In December 2010, Mother was arrested and a petition was filed to revoke her probation. The petition stated she had consumed alcohol and engaged in disorderly conduct and resisting arrest in December 2010, and had failed to participate in substance abuse treatment. In March 2011, Mother's probation was

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[2] D.Q. has a different father. He and another half-brother are in a guardianship in Arizona. Mother also has a third older child being cared for by his paternal grandparents. These three children were not the subjects of the proceedings below.

[3] Records from Arizona also indicated Mother had pled guilty to disorderly conduct in 2003.

formally revoked. The court recommended that the Arizona Department of Corrections place her in a facility that provided substance abuse treatment.

As a result of the 2006 child abuse incident, Arizona's Child Protective Services (CPS) instituted a proceeding. The scant evidence before us concerning that proceeding indicates Mother was an "active participant" in a substance abuse group in April 2008, completed a parenting class in March 2008, and completed an anger management program at around the same time.[4] In October 2009, Arizona CPS prepared an update stating that Mother "was compliant with her treatment," "finished all her requirements for CPS," and "is being closed from services." The update does not indicate when the case was closed. Father reported that the family was living together when Mother was arrested for violation of her probation in December 2010.[5] A CPS worker reported that the case had been closed in May 2013, and that the two older boys were in a legal guardianship in Arizona.

At the January 22, 2014 jurisdictional hearing, Father signed a waiver of rights and pled no contest to the allegations of the petition as they related to him. With respect to Mother, the court found the following allegation true: "On or

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[4] Mother told the caseworker she had completed a parenting program, a substance abuse program and an anger management program. Mother also claimed there was no physical evidence she had abused D.Q. and said she had never driven while under the influence of alcohol until the night of her September 2007 arrest.

[5] Father reported he cared for all four children for a period after Mother's December 2010 arrest. In 2012, he moved to California with S.K. and M.K. to obtain family support and educational services for M.K., whose learning disabilities are suspected to have been caused by fetal alcohol syndrome. Father was not permitted to take the two older boys out of Arizona.

Father also told the caseworker that after Mother completed the programs required by Arizona's CPS and was reunified with her family, she continued to drink and smoke marijuana, sometimes smoking it with D.Q., who was then 12. A paternal aunt said that prior to her imprisonment, during a family visit to California, Mother had tried to put M.K. in her car and drive away with him while she was drunk.

about June 30, 2006, [Mother] . . . physically abused the children[']s] sibling [D.Q.] . . . by punching the child two times with a closed fist on the head and kicking the child in the ribs. As a result, [Mother] was convicted of felony child abuse and sentenced to three years probation. Such physical abuse of the children's sibling and [Mother's] criminal behavior endangers the children's physical and emotional health and safety and . . . creates a detrimental home environment for the children[,] placing the children at risk of physical and emotional harm and damage."[6]

Prior to the June 19, 2014 dispositional hearing, Richard England, an Indian child welfare expert with two decades of experience as a therapist/counselor for Indian children and their families, reviewed Mother's extensive criminal record, as well as the November 2013 detention report and the January 2014 jurisdiction/disposition report. He prepared a letter, entered into evidence at the hearing. England expressed the opinion that if the children were returned to either parent, "it would likely result in serious emotional or physical damage to them." He also opined that "substantial efforts were made to provide remedial services and rehabilitative programs that were designed to prevent the breakup of this Indian family and that these efforts were unsuccessful," and that the circumstances that brought the children into care "are not reflective of prevailing cultural and social standards of the Hopi Tribe, Tribal family organization, or Tribal child rearing practices."

DCFS's proposed reunification plan for Mother required her to participate in a full drug/alcohol program with aftercare, drug/alcohol testing, a 12-step program,

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[6] The court made this finding under Welfare and Institutions Code section 300, subdivision (b). It struck a similarly-worded allegation made under section 300, subdivision (j) (abuse of sibling). Counsel for DCFS did not object. (Undesignated statutory references are to the Welfare and Institutions Code.)

an anger management program and a parenting class. Counsel for Mother objected to the proposed dispositional order because she had previously completed similar programs. Father's counsel joined with DCFS in recommending the proposed plan for Mother. Father was called and testified that Mother continued to drink and use drugs after completing the CPS-required programs in Arizona, up until the day of her arrest in December 2010.

The court found by clear and convincing evidence that continued custody of the children by the parents was likely to result in serious emotional and physical danger to them and was contrary to their welfare. The court further found by clear and convincing evidence that "active efforts have been made to provide culturally-appropriate services," and that DCFS had consulted with the tribe in the development of the case plan. The court ordered Mother to participate in the reunification plan proposed by DCFS. The court specifically found that Father's testimony was credible and that Mother did not appear to have learned much from the services provided by Arizona CPS. Mother appealed.[7]

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[7] Before either party obtained a reporter's transcript of the jurisdictional hearing, respondent cross-appealed, contending the juvenile court erred in dismissing or striking the subdivision (j) allegation. Mother then obtained and submitted the transcript, pointing out in her reply that at the hearing, DCFS's counsel acquiesced in the decision to drop the subdivision (j) allegation. As respondent did not file a cross-appellant's reply brief, we presume it concedes this issue was forfeited.

Respondent also contended, prior to submission of the reporter's transcript of the jurisdictional hearing, that we should presume Mother forfeited any challenge to the jurisdictional order, as there was nothing in the record to indicate she objected to the court's findings. The transcript establishes that the court's jurisdictional findings were made over Mother's objection.

Respondent further contends we should decline to address the jurisdictional issues raised by Mother because the juvenile court's assertion of jurisdiction over S.K. and M.K. would be supported by the finding sustained as to Father, which Mother does not challenge. (See *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 [when dependency petition alleges multiple grounds for assertion that minor comes within dependency

(Fn. continued on next page.)

DISCUSSION

The court asserted jurisdiction under section 300, subdivision (b), which allows a finding of dependency where 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. Mother contends the evidence did not support the court's finding of a substantial risk of serious physical harm to S.K. and M.K. because the abuse of D.Q. on which it was based occurred years ago, and she resolved that behavior by completing substance abuse, anger management and parenting programs in Arizona. She further asserts the court overstepped its bounds in its dispositional order directing her to participate in a full drug/alcohol program with aftercare, drug testing, a 12-step program, an anger management program and a parenting class, again contending that her completion of similar programs in the Arizona CPS proceeding rendered them unnecessary. For the reasons discussed, we disagree.

The three elements supporting assertion of jurisdiction under section 300, subdivision (b) are: "'(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.'" (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1396.) The third element "effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious

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court's jurisdiction, reviewing court can affirm juvenile court's finding of jurisdiction over minor if any one of enumerated bases for jurisdiction is supported by substantial evidence].) Appellate courts generally exercise discretion to reach the merits of a challenge to a jurisdictional finding where, as here, it "(1) serves as the basis for dispositional orders that are also challenged on appeal [citation]; (2) could be prejudicial to the appellant[;] or [(3)] could potentially impact the current or future dependency proceedings [citations] . . . ." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762.)

physical harm in the future . . . ." (*Ibid*.) Past conduct is "'probative of current conditions'" if "there is reason to believe that the conduct will continue." (*In re S.O*. (2002) 103 Cal.App.4th 463, 461.) "[A] court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child or the child's siblings, or a combination of these and other actions by the parent or guardian which indicate the child is at risk of serious physical harm." (§ 300, subd. (a); see *In re Rocco M*. (1991) 1 Cal.App.4th 814, 823 [finding "guidance" in this language for determining what constitutes a substantial risk of serious harm under subdivision (b)].) On appeal, the juvenile court's jurisdictional findings are reviewed for substantial evidence, viewing the evidence in the light most favorable to the juvenile court's order. (*In re S.O*., *supra*, 103 Cal.App.4th at p. 461.)

Once a child is properly adjudged a dependent of the juvenile court, section 362 empowers the court to issue dispositional orders directing parents or guardians to participate in counseling or education programs in order to reunify with their children. (§ 362, subd. (d).) "The court has broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order in accord with this discretion." (*In re Christopher H*. (1996) 50 Cal.App.4th 1001, 1006.) "The juvenile court has authority to require a parent to submit to substance abuse treatment as part of a reunification plan as long as the treatment is designed to address a problem that prevents the child's safe return to parental custody." (*In re Nolan W*. (2009) 45 Cal.4th 1217, 1229.) Provided the reunification plan is reasonable, designed to eliminate the conditions that led to the court's finding that the child is a person described by section 300, appropriate for the family, and based on the unique facts of that family, it will be upheld on appeal. (*In re Nolan W*., *supra*, 45 Cal.4th at p. 1229.)

Here the evidence established that Mother severely beat her nine-year old son D.Q. in public. At the time, D.Q. told officers that punishment of this kind was a regular occurrence, and that Mother pushed his and his younger brother's heads into walls, kicked them, and pulled them around by their hair. The evidence also demonstrated Mother's longstanding alcohol problem. She was arrested for disorderly conduct in 2003. In 2007, she drove drunk and led police officers on a lengthy chase. In 2010, her probation was revoked for engaging in disorderly conduct, consumption of alcohol and resisting arrest. Prior to the revocation of her parole and her 2010 incarceration in Arizona, she had to be dissuaded from driving drunk with M.K. in California.

Mother attempts to persuade us that these matters were resolved in the Arizona proceeding and by her past participation in substance abuse, anger management and parenting programs. The record indicates she completed these programs in 2008 or 2009. However, Father reported that she drank and smoked marijuana from the time the family was reunited until her arrest in December 2010. Moreover, she continued her abuse of D.Q. by smoking marijuana with him during that period. She also attempted to drive drunk with M.K. Mother points out that there have been no further allegations of child abuse or drunkenness after 2010. She cannot claim credit for her behavior during this period because during most of it -- December 2010 to October 2013 -- she was imprisoned. The serious physical child abuse and substance abuse in Mother's past, leading to multiple arrests and criminal charges from 2003 to 2010, constituted substantial evidence to support the court's finding that there was a substantial risk the children would suffer serious harm in her care. The court could reasonably conclude that Mother's past conduct was likely to continue, and that she could safely be reunified with her young children only after completing services approved by DCFS.

DISPOSITION

The jurisdictional and dispositional orders are affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.