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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re E.M. et al., Persons
Coming Under the Juvenile
Court Law.

B287317
(Los Angeles County
Super. Ct. No. 17CCJPO1009)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

BREANA F.,

Defendant and Appellant.

APPEAL from findings and orders of the Superior Court of
Los Angeles County, Kristen Byrdsong, Commissioner. Affirmed.

Jamie A. Moran, under appointment by the Court of
Appeal, for Defendant and Appellant.

Office of the County Counsel, Mary C. Wickham,
County Counsel, R. Keith Davis, Assistant County Counsel, and
Kim Nemoy, Principal Deputy County Counsel for Plaintiff and
Respondent.

Breana F. (mother) appeals from the juvenile court's findings and orders regarding her daughter E.M. and son B.M. B.M. was found alone on a street corner at age 18 months while mother was intoxicated after mixing alcohol and prescription medication. Mother argues this was an isolated incident and insufficient grounds for the juvenile court to assert jurisdiction and remove the children from her care. She also argues that the court abused its discretion by terminating jurisdiction after granting legal and physical custody to the children's father Eric M. (father). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Detention Report

On October 7, 2017, at about 9:30 p.m., 18-month-old B.M. was found alone on a street corner in Los Angeles wearing a diaper and t-shirt. A witness told the police he had seen a woman carrying a child in her arms who stopped at that corner, put the child down on the ground, and walked away. The Los Angeles County Department of Children and Family Services (DCFS), respondent here, took B.M. into protective custody.

At about 3:00 a.m. the next morning, police received a call from mother reporting that B.M. had been kidnapped. When officers spoke to mother at her home, she said she had walked to a liquor store at about 4:00 p.m. the previous day a few blocks from the corner where B.M. later was found. Mother told the

officers “she had been drinking wine and took her depression medication at the same time.” She reported falling asleep at about 9:00 p.m. with B.M. next to her. When she woke up at 3:00 a.m., she discovered B.M. was gone and called the police. Mother reported that her older daughter, E.M., age seven, was staying overnight at the home of a family friend, which the police confirmed.

The police arrested mother for child endangerment. According to the police report, while at the police station mother “made a spontaneous statement and said that she had been drinking wine and also took her depression medication. . . . [She] said that she then fell asleep and that her son . . . was next to her.”

On October 8, 2017, the day after B.M. was found, a DCFS social worker interviewed mother at the jail where she was in custody. Mother said she had drunk two glasses of red wine the day before. She and B.M. were in bed together by 9:00 p.m. When she awoke at 3:00 a.m. and discovered he was gone, she thought he had been kidnapped and called the police. Mother now suspected that B.M. had managed to open the door to their home, which she said he easily could do, and went outside. Mother said she should have blocked the door with a case of water bottles to prevent this from happening.

Mother said she had been diagnosed with depression and attention deficit hyperactivity disorder (ADHD) and saw a psychiatrist once a month. She took three prescription psychotropic medications including Adderall. She said the day before, however, she had only taken a morning pill without alcohol. She “strongly denied” taking any medication with alcohol.

Mother said she sometimes smoked marijuana. She did not smoke it daily, and most recently had used it “[l]ast week.” She said she would use it outside of her home and denied having any illegal drugs or marijuana in her home. She denied having any problems with alcohol.

Mother disclosed that in 2014 she was a victim of domestic violence perpetrated by the children’s father. Mother stated she did not have an active restraining order against him. According to E.M., father did not live with mother and saw the children on weekends.

The social worker also interviewed father. He said he knew mother took psychotropic medication for depression but had never seen her take it with alcohol. He was concerned about the children’s safety with their mother; although he had never witnessed mother harm the children, about a month earlier mother had asked paternal grandmother if paternal grandmother could watch the children for at least three months “while she gets herself stable.”

Father stated he had an active family law order granting him visitation every other weekend and was paying child support. He said he had been convicted of domestic violence against mother in 2013 but his record was expunged.

Mother had previously been referred to DCFS in 2011 out of concern that mother was leaving E.M. alone at times when she went out. DCFS reported that the allegation was substantiated although there is no indication that DCFS took any further action.

2. Section 300 Petition and Detention

DCFS filed juvenile dependency petitions for E.M. and B.M. under Welfare and Institutions Code section 300 et seq.¹ The petitions alleged under section 300, subdivision (b), that mother had failed to supervise or protect adequately her children on three bases: (1) mother's arrest for child endangerment when B.M. was found alone on a street corner after mother had consumed psychotropic medication and alcohol (count b-1); (2) mother's "history of substance abuse" and "current use[] of marijuana" (count b-2); and (3) mother's "mental and emotional problems, including a diagnosis of depression and ADHD" (count b-3). The petitions also alleged under section 300, subdivision (j) that any abuse or neglect as to one child created a substantial risk of abuse or neglect as to the other child, and repeated the allegations regarding mother's arrest for child endangerment in support (count j-1).²

The juvenile court ordered the children detained and placed with father. Mother was granted monitored visitation and referred to parenting classes, individual counseling, and weekly drug testing.

3. Jurisdiction/Disposition Report

A DCFS social worker spoke with E.M. on December 4, 2017, who stated, "My mom would go to sleep upstairs or was on her phone and I would watch my brother. I would give him food

¹ Further unspecified statutory references are to the Welfare and Institutions Code.

² The petitions originally alleged that father also had failed to protect the children. The petitions were amended to remove this allegation.

and change his diaper. Sometimes he had poop. He knows how to open the door and go outside. Two times I had to bring him inside because he opened the door and went out. My mom was upstairs sleeping.”

Father was interviewed again. He said he and mother had been romantically involved off and on for seven years but had never lived together. She had taken medication throughout that period. She would occasionally drink wine. He did not think she had a problem with alcohol and was not aware of any illegal drug use. He said, as he had in his earlier interview, that mother had asked paternal grandmother to take the children to live with her but had changed her mind.

The social worker traveled the route from mother’s home to the corner where B.M. was found and noted that the corner was three blocks away and required her to cross two streets. The social worker found it “highly unlikely that the child walked that distance by himself and was able to cross t[w]o major streets on his own. It is apparent that the child was taken there by his mother.”

DCFS requested orders removing the children from mother and terminating jurisdiction with a family law order granting physical custody of the children to father and joint legal custody to father and mother.

A letter from mother’s psychiatrist stated that mother had “a current diagnosis of Attention Deficit Disorder, Major Depressive Disorder, [and] Acute Stress Reaction” for which she was prescribed “Adderall XR 30 mg one daily, Adderall XR 10 mg one daily, Celexa 20 mg one daily, Klonopin 0.5 mg two times daily, [and] Trazodone 50 mg two at bedtime.”

Last minute information filed with the court stated that mother failed to appear for three required drug tests.

4. Adjudication

At the adjudication hearing, mother asked that the section 300 petitions be dismissed in their entirety or, in the alternative, that mother be granted reunification services. Father asked that the court terminate jurisdiction with a family law order granting him sole legal and physical custody. E.M. and B.M.'s counsel relayed E.M.'s desire to reunify with her mother and requested the court retain jurisdiction, but requested that father take sole custody if the court terminated jurisdiction.

The court sustained the petitions in full as to mother. The court awarded father sole legal and physical custody of both children and granted mother monitored visits. The court ordered jurisdiction terminated but stayed that order pending receipt of a juvenile custody order. The custody order was filed January 5, 2018.

Mother timely appealed.

DISCUSSION

I. Sufficient Evidence Supported All Four Alleged Bases For Jurisdiction

Mother argues that the evidence was insufficient to sustain any of the counts alleged in the section 300 petitions. We disagree.

DCFS asserted four counts under section 300, subdivisions (b)(1) and (j)(1). As relevant here, section 300, subdivision (b)(1) allows the juvenile court to assert jurisdiction over a child upon a finding that "[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 failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse.”

Section 300, subdivision (j)(1) allows the juvenile court to assert jurisdiction over a child upon a finding that “[t]he child’s sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected”

“‘In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings and disposition, we determine if substantial evidence, contradicted or uncontradicted, supports them. ‘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.’ [Citation.] ‘We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.] ‘ “[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate].” ’ ’ ’ ’ ” (*In re I.J.* (2013) 56 Cal.4th 766, 773.)

A. Counts b-1 and j-1

Counts b-1 and j-1 both were based on B.M. being found alone on a street corner. Mother argues that this evidence was

insufficient to support jurisdiction because it was an isolated incident, neither E.M. or B.M. was harmed, and there was no other indication of abuse or neglect.

We hold the evidence was sufficient to support counts b-1 and j-1. Construing the evidence in the light most favorable to the court's determinations, mother, after taking prescription medication along with alcohol, put her 18-month-old son down on the sidewalk three blocks from their home and left him there. She apparently did not realize what she had done until many hours later when she called the police. Mother's conduct put her son at great risk of serious harm, even if through good fortune B.M. was uninjured.

This was not, as mother contends, an isolated incident. There was other evidence that mother was not supervising or protecting her children adequately. E.M. told the social worker that mother would sleep and leave B.M. in his seven-year-old sister's care, requiring E.M. to feed her brother and change his diapers. On two previous occasions when mother was asleep, B.M. managed to open the door and leave the house; in both cases it was E.M., not mother, who brought him back inside.

Mother's conduct posed a risk to E.M. as well. Although perhaps not as vulnerable as her brother, E.M. nonetheless required supervision and protection, and should not have been put in the role of caregiver to her brother. The evidence supported a finding that mother neglected E.M. as well as B.M., or at the very least that mother's neglect of B.M. put E.M. at risk of similar neglect as required under section 300, subdivision (j).

B. Count b-2

Given our holding that the juvenile court properly asserted jurisdiction based on counts b-1 and j-1, we "need not consider

whether any or all or the other alleged statutory grounds for jurisdiction are supported by the evidence.” (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 (*Alexis E.*)). Mother has requested we address the other counts, however, because they are pertinent to the juvenile court’s dispositional orders and may have ramifications in future proceedings. We exercise our discretion to do so, although we conclude sufficient evidence supported all four counts. (See *In re I.A.* (2011) 201 Cal.App.4th 1484, 1493 [appellate court has “discretion to consider alternative jurisdictional findings”).)

Count b-2 alleged, in relevant part, that mother “has a history of substance abuse and is a current user of marijuana, which renders the mother incapable of providing regular care and supervision of the children. On 10/7/17, the mother consumed the mother’s psychotropic medications with alcohol, while the child [B.M.] was in the mother’s care and supervision.” Mother argues the evidence was insufficient to show a history of substance abuse: According to mother, she only used marijuana occasionally and always outside the home, and there was no indication she had ever mixed prescription drugs and alcohol before the day B.M. was found on the street corner.

We agree with mother that there was insufficient evidence that she abused marijuana (now a legal drug in California), and no evidence that her use of marijuana affected her ability to care for her children. (See *Alexis E.*, *supra*, 171 Cal.App.4th at p. 453 [parent’s lawful use of marijuana, without more, is insufficient grounds for juvenile court to assert jurisdiction over children].) Mother admitted to the police, however, that she mixed alcohol and prescription drugs. The resulting intoxication apparently was severe enough to lead her to abandon her child on a street

corner and not realize it until many hours later. The court properly could consider this “substance abuse.” While arguably a single established incident of substance abuse does not constitute a “history,” mother also missed three required drug tests, and “a missed drug test, without adequate justification, is ‘properly considered the equivalent of a positive test result.’” (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1384.) Thus, there was sufficient evidence to support the allegations in count b-2.

C. Count b-3

Count b-3 alleged, in relevant part, that mother “has mental and emotional problems, including a diagnosis of depression and ADHD, which renders the mother incapable of providing regular care for the children. On prior occasions, the mother failed to take the mother’s psychotropic medication as prescribed.” Mother argues that the evidence showed only that she had been diagnosed with mental health conditions, for which she was receiving treatment and taking medication. Mother contends there was no evidence that she had a history of failing to take her medication or that she would fail to do so in the future, nor any evidence that her mental conditions posed a risk to her children.

The evidence was sufficient to support the allegations of count b-3. While commendable that mother was seeking treatment for her mental conditions, the evidence that she was mixing her prescription medication with alcohol showed that she was not managing her conditions properly. This created serious risk of harm to her children, whom she was unable to supervise while intoxicated by the mix of medication and alcohol. Thus, her mental conditions, and her improper use of the medication

necessitated thereby, were interfering with her ability to care for her children properly.

There were other signs as well that mother was struggling, including E.M.'s statement that mother would leave E.M. to care for B.M. while mother slept, and father's statement that mother had asked paternal grandmother to take the children for several months "while she gets herself stable." While this latter statement would not by itself be sufficient to support the allegations under count b-3, in context the court could reasonably infer that whatever stability mother sought included emotional stability. The court properly asserted jurisdiction based on count b-3.

II. Mother Forfeited Her Challenge To The Court's Order Removing The Children And Sufficient Evidence Supported The Court's Order

Mother argues that the evidence was insufficient to justify removing her children from her care. This argument is forfeited because mother did not object to removal in the juvenile court; her counsel only challenged jurisdiction by seeking to dismiss the section 300 petitions. In the alternative to dismissal, mother's counsel requested reunification services, but did not argue that the children should remain with mother even if the court sustained the petitions.

"[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293 (*S.B.*)) "Dependency matters are not exempt from this rule." (*Ibid.*) Although "application of the forfeiture rule is not automatic," "the appellate court's discretion to excuse forfeiture should be

exercised rarely and only in cases presenting an important legal issue.” (*Ibid.*)

Here, the case does not present an important legal issue, but only the factual question whether the evidence was sufficient to support the court’s conclusion that removing the children was appropriate. We see no basis to excuse forfeiture.

Mother argues she did not forfeit the issue of removal. She contends that because she challenged jurisdiction, a challenge that if successful would have led to termination of the proceedings and return of the children to her care, she necessarily also challenged removal. The analysis of jurisdiction and removal, however, are doctrinally separate and require different evidence and argument.

As to jurisdiction, mother argued, in essence, that she had not put her children at risk and was capable of caring for them. To challenge removal, she would have needed to show that despite the finding that she had put her children at risk, there no longer was “a substantial danger” to the health and safety of the children or there were “reasonable means by which the minor’s physical health c[ould] be protected” short of removing the child from the parent’s physical custody. (§ 361, subd. (c)(1).) Mother made no such arguments, and the juvenile court was not obliged to import them from mother’s arguments challenging jurisdiction, particularly when mother’s counsel did not contest removal and asked only for reunification services.

Even if mother’s challenge had been preserved, it would fail on the merits. As we referenced earlier, a juvenile court may order children removed from a parent’s custody upon a finding by clear and convincing evidence that “[t]here is or would be a substantial danger to the physical health, safety, protection, or

physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody.” (§ 361, subd. (c)(1).) Here, the evidence showed that mother was mishandling the medication necessary to address her mental health issues by mixing it with alcohol, leading to intoxication so severe that she abandoned her child without realizing it. This, in addition to the evidence that mother previously had left B.M. in her young daughter's care while mother slept and B.M. had escaped the home on two occasions, was sufficient to support a finding of substantial danger to the children. Given that the mother's inability to supervise and care for the children was the source of the danger, the court properly could conclude that there were no reasonable means to protect the children while they were in mother's custody.

Mother again argues that the episode in which B.M. was left alone on the street was “isolated in nature” and any problems with mother mixing alcohol and prescription medications “would seem to be easily corrected by mother ceasing to do so,” absent some indication that mother had a drinking problem. Mother contends that any problems with B.M. escaping the home could be resolved with a child-proof lock of some kind. These arguments understate the severity of mother's inattention to her children, which was not isolated but repeated. Mother had not installed safeguards despite B.M.'s two previous escapes. The juvenile court was entitled to be suspicious of any suggestion that the mixing of alcohol and medication was a one-time accident given that mother had been taking prescription drugs for many

years and presumably would be experienced with the proper way to take them. Mother's arguments are unavailing.

III. The Court Did Not Abuse Its Discretion In Terminating Jurisdiction And Granting Custody To Father

Mother challenges the juvenile court's decision to terminate jurisdiction and grant legal and physical custody of the children to father. We reject this challenge.

Section 361.2 governs placement of a child with a parent "with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300," a definition that applies to father in this case. (§ 361.2, subd. (a).) If a child is deemed removable under section 361, and the parent with whom the child was not residing requests custody, "the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a).)

Once the child is so placed, the court has three options under section 361.2, subdivision (b). Under the first option, the court may grant legal and physical custody to the parent, with the noncustodial parent granted "reasonable visitation" at the court's discretion. (*Id.*, subd. (b)(1).) "The court shall then terminate its jurisdiction over the child," and the custody order "shall continue unless modified by a subsequent order of the superior court." (*Ibid.*) Under the second option, the court maintains jurisdiction, orders a home visit of the custodial parent, and takes further action depending on the outcome of that visit. (*Id.*, subd. (b)(2).) Under the third option, the court maintains jurisdiction and provides reunification or other

services to one or both parents, with full custody to be determined in later review hearings. (*Id.*, subd. (b)(3).) A court's choice of one of these three options is reviewed on appeal for abuse of discretion. (*In re K.B.* (2015) 239 Cal.App.4th 972, 981 (*K.B.*); *In re Nada R.* (2001) 89 Cal.App.4th 1166, 1179.)

Here, the court did not abuse its discretion in choosing to grant father sole legal and physical custody and terminate jurisdiction. Father was nonoffending, desired custody of the children, and there was no evidence that he could not provide a good home for them. (See *K.B.*, *supra*, 239 Cal.App.4th at p. 982 [no abuse of discretion to grant full custody to "nonoffending parent who strongly desired custody" of a child "and had the ability to provide [the child] with a healthy, loving environment"].) Indeed, no one, including mother, objected to placement of the children with father.³

Mother makes no substantive argument challenging the court's decision to terminate jurisdiction, and thus gives us no basis to reverse that order. Instead, mother argues that the court should have granted her joint custody because it was in the children's best interest. She points to the fact that she had always been the children's primary caregiver, and the children were healthy and well-nourished with no indication of abuse. Mother contends that she, unlike father, knows the children's healthcare history. Mother also notes father's prior conviction for domestic violence and argues that denying her joint custody

³ This was true even though, according to the detention report, mother expressed concern to the social worker that DCFS "would release children to father and father would neglect and/or possibly 'whip' them." Mother did not repeat these concerns to the juvenile court.

“removes a layer of safety these children need, particularly in light of the juvenile court’s decision to withdraw social worker supervision.”

These arguments are unavailing. As we have discussed throughout this opinion, there was strong evidence that at the time the court terminated jurisdiction, mother was not capable of supervising and protecting her children. The fact that the children were well-nourished and free of physical blemishes does not override that evidence. We observe that as to B.M. at least, only luck intervened to prevent B.M. from being injured when his mother left him alone on a city street.

To the extent father is unfamiliar with the children’s healthcare history, this can be remedied through communication with the children’s physicians or by other means. As for father’s domestic violence conviction, mother at no point argued to the juvenile court that this disqualified father from taking custody, nor did she or any other party argue that the juvenile court should maintain jurisdiction to supervise father. Mother may not raise that objection for the first time on appeal. (*S.B.*, *supra*, 32 Cal.4th at p. 1293.) Moreover, there was no evidence that father ever directed any violence towards the children. The juvenile court acted within its discretion to grant father sole legal and physical custody as permitted by section 361.2, subdivision (b)(1).

DISPOSITION

The findings and orders are affirmed.
NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.