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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re C.D. et al., Persons Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

E.D.,

Defendant and Appellant.

B283274

(Los Angeles County
Super. Ct. No. DK12212)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Akemi Arakaki, Judge. Affirmed in part; dismissed in part.

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Jeanette Cauble, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Father appeals the juvenile court's jurisdictional findings and disposition order regarding his infant daughter. Father argues that he posed no present threat of harm to daughter. We affirm because father's egregious and aberrant sexual abuse of daughter's siblings supported the court's jurisdictional findings. We also conclude that father's challenge to daughter's removal was untimely.

FACTS AND PROCEDURAL BACKGROUND

The Department of Children and Family Services (DCFS) became involved in this case because the three children in the home were exposed to domestic violence. Mother and father had two sons, who were then three and four years old. Mother also had an eight-year-old son from a prior relationship. The parents were unmarried and lived together with the three boys. Mother was pregnant with daughter, who is the only child at issue in this appeal and is father's child.

1. Jurisdiction Based on Domestic Violence

In July 2015, DCFS filed a Welfare and Institutions Code, section 300 petition alleging that mother and father engaged in violent altercations in the children's presence.¹ At that time, the juvenile court detained the three boys, who were placed in foster care. In January 2016, DCFS filed a petition with identical allegations on behalf of the infant daughter, pursuant to section 300, subdivisions (a), (b), and (j), and daughter was detained from mother's custody and placed with her paternal aunt. The parents were given monitored visits with the children.

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

At the February 2016 jurisdiction hearing, the juvenile court accepted mother's no-contest plea to both petitions alleging jurisdiction based on the domestic violence. The court found that father was daughter's presumed father. After accepting evidence and hearing argument, the juvenile court sustained the domestic violence allegations in both petitions pursuant to section 300, subdivisions (b)(1) and (j). The court declared the children dependents of the court and removed them from the parents' custody after finding that there was a substantial risk of danger if the children were returned to their parents. The court ordered monitored visitation with the parents, giving DCFS discretion to liberalize. Neither parent appealed from this dispositional order.

2. *Sexual Abuse and the Section 342 Petition*

In July 2016, the then-eight-year-old son and his four-year-old brother (almost five years old at the time) told their caregiver, a police officer, and a social worker that father had sexually abused them during unmonitored visitation. The abuse involved father touching their penises, exposing himself to the three boys, and making them lick his penis. Although the youngest brother (who had just turned four years old) initially denied the abuse, he told the social worker that father told him to lie and later stated to a medical examiner that father had touched his penis. The boys' statements regarding the abuse were largely consistent throughout the investigation. DCFS concluded that the allegations of sexual abuse were plausible because of father's access to the boys, their lack of motivation to lie, and their possession of sexual knowledge incongruent with their age. The boys received forensic medical examinations, which neither affirmed nor negated the allegations. The examiner opined that sexual abuse was highly suspected.

Following the reports of abuse, the foster mother had conflicts with father, and requested that the boys be placed elsewhere. The boys were subsequently placed in the home of a family member. When the abuse occurred, the paternal aunt had custody of daughter (as she has throughout this case) and father visited daughter at the aunt's home. There was no evidence that father sexually abused daughter.

On July 29, 2016, DCFS filed a section 342 petition on behalf of all the children, alleging that in July 2016 father sexually abused the three boys by exposing his penis to them, fondling their penises, and having the children fondle and orally copulate his penis. DCFS alleged that father's conduct placed all the children, including daughter, at risk of harm pursuant to subdivisions (b)(1), (d), and (j).

3. *Section 342 Jurisdiction and Disposition*

In February 2017, the juvenile court adjudicated the section 342 petition. The court accepted DCFS reports and reports of the boys' forensic medical examinations. The court took judicial notice of the prior sustained petitions, case plans, and minute orders. The eldest child testified to father touching his genitals and to father having him lick father's penis. The child then denied seeing father's penis and licking it, but confirmed that father asked him to lick it. The child testified that father had touched his brother's penis and showed the court how on a teddy bear. The other children were not required to testify about the allegations. Mother testified that the boys had not reported the sexual abuse to her and they were not fearful in father's presence.

DCFS requested the petition be sustained and argued that although there had been some inconsistencies in details, the boys

had been largely consistent in their description of the sexual abuse during the proceedings. The children's attorney asked the petition be sustained. Counsel asserted that father's behavior put the other children at risk. Father's counsel argued that the section 342 petition should be dismissed because there were "vast inconsistencies" in the children's stories and not enough evidence to support the petition. Mother's attorney also asked for the petition to be dismissed.

The juvenile court sustained the section 342 petition's allegations that father sexually abused the three boys, specifically that he "exposed his penis to the children[,] . . . fondled [their] penises, and had the children fondle [father's] penis." The court found that father's sexual abuse endangered the children and placed daughter at risk of serious physical harm, damage, danger, and sexual abuse. The juvenile court declared the children dependents of the court again pursuant to section 300, subdivisions (b)(1), (d), and (j).

The court reasoned that the children's statements were credible based on the circumstances of the case. The court stated: "Yes there are inconsistencies; but I keep racking my brain again and again to try to figure out why would the children say these things if they, in fact, didn't occur in some form or fashion? And, again, I go back to perhaps they were coached at the initial disclosure with regard to that. And, again, they have been replaced [i.e. removed from their initial foster care placement]. They are with a supportive family member. It appears all of those things have been ameliorated or rectified, and here we are. The children are still consistent essentially with the basis of the allegation. [¶] I understand there have been some changes as to the story, but at the end when [the eldest boy] talks about what

happened, he actually is consistent as to what happened and how it made him feel.” The court summarized that it did not appear that the report of abuse could be fabricated because multiple children made “somewhat consistent statements” and “any person who would be an influence to encourage them to be dishonest has been taken out of the picture.”

The court then addressed disposition. DCFS asked for the court’s previous placement plan to remain and that the parents receive reunification services. The children’s attorney joined. Father’s attorney asked the court to order father to participate in individual counseling instead of sexual abuse awareness counseling or sexual abuse for perpetrators, but never objected to the children’s placement. Mother asked for the children to return to her custody, or alternatively, that she have unmonitored visitation.

The juvenile court again found there was substantial danger to the children if returned to the parents. The prior suitable placement order of February 4, 2016 remained in full force and effect. The court also ordered reunification services for the parents.

DISCUSSION

Father appeals both the court’s jurisdictional findings over daughter made in connection with the section 342 petition and the removal of daughter from his custody. We address each in turn.

1. Substantial Evidence Supports Jurisdiction

Here, the court found jurisdiction over daughter pursuant to section 300, subdivisions (b)(1), (d), and (j). When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court’s jurisdiction,

“ ‘a reviewing court can affirm the juvenile court’s finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence.’ ” (*In re I.J.* (2013) 56 Cal.4th 766, 773 (*I.J.*)). In reviewing the court’s findings for substantial evidence, we draw all reasonable inferences from the evidence to support the court’s findings. (*Ibid.*) We do not reweigh the evidence or make credibility determinations. (*Ibid.*) Here, we focus our analysis on section 300, subdivision (j), as it most closely describes daughter’s case.

Section 300, subdivision (j) provides jurisdiction where there is evidence 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, as defined in those subdivisions.” In considering whether substantial evidence supports jurisdiction, the juvenile court “consider[s] the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child.” (*I.J., supra*, 56 Cal.4th at p. 773.)

In *I.J., supra*, 56 Cal.4th at page 774, the Supreme Court explained that subdivision (j) expanded the juvenile court’s exercise of jurisdiction with regard to children whose siblings have been abused as defined by section 300, subdivisions (a), (b), (d), (e), or (i). Noting subdivision (j)’s broad language, the Court stated that “ ‘the trial court is to consider the totality of the circumstances of the child and his or her sibling in determining whether the child is at substantial risk of harm, within the

meaning of any of the subdivisions enumerated in subdivision (j). The provision thus accords the trial court greater latitude to exercise jurisdiction as to a child whose sibling has been found to have been abused than the court would have in the absence of that circumstance.’” (*Ibid.*, italics omitted.) To determine whether the risk is substantial, “the court must consider both the likelihood that harm will occur and the magnitude of potential harm.” (*Id.* at p. 778.) “[T]he more severe the type of sibling abuse, the lower the required probability of the child’s experiencing such abuse to conclude the child is at a substantial risk of abuse or neglect under section 300. If the sibling abuse is relatively minor, the court might reasonably find insubstantial a risk the child will be similarly abused; but as the abuse becomes more serious, it becomes more necessary to protect the child from even a relatively low probability of that abuse.” (*Ibid.*)

Here, the first prong of subdivision (j)’s analysis has been satisfied because the trial court found that daughter’s three brothers were sexually abused pursuant to section 300, subdivision (d). The court’s finding is supported by ample statements in the record made by the three boys to their foster mother, social workers, a police officer and the medical forensic examiner that father had exposed himself to them, touched their penises, licked their penises, and made them lick his penis. To the extent father disputes the veracity of these statements, he asks this court to reweigh the evidence and make credibility assessments, which we do not do on appeal. (*Fresno County Dept. of Children and Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 646 [“We may not reweigh or express an independent judgment on the evidence. [Citation.] In this

regard, issues of fact and credibility are matters for the trial court alone.”].)

Substantial evidence likewise supports the second prong—that there is a substantial risk daughter will be sexually abused by father. Here, father sexually molested daughter’s three older siblings, who were ages eight, four, and four at the time of the abuse allegations. Fondling, exposing himself to the children, and forcing them to orally copulate him constitute extreme and egregious acts of abuse against these young children. “[S]exual or other serious physical abuse of a child by an adult constitutes a fundamental betrayal of the appropriate relationship between the generations. . . . When a parent abuses his or her child, ... the parent also abandons and contravenes the parental role. Such misparenting is among the specific compelling circumstances which may justify state intervention, including an interruption of parental custody.” (*In re Kieshia E.* (1993) 6 Cal.4th 68, 76-77.)

Father argues that there was no risk of abuse to daughter because “[t]here was no evidence father ever sexually abused [daughter]. [Daughter] never lived with father. [Daughter] did not reside with her brothers. [Daughter] was not present when the alleged abuse occurred. [And], [daughter] was an infant female and thus not similarly situated to [her brothers].”

We disagree with father’s characterization of the risk to daughter. Where the parent’s behavior is so aberrant and egregious, there is a substantial risk to the child, regardless of her sex. In *I.J.*, the Supreme Court analyzed the threat to a boy where his older sister was sexually abused. There, the Supreme Court explained that “[a]lthough the danger of sexual abuse of a female sibling in such a situation may be greater than the danger of sexual abuse of a male sibling, the danger of sexual abuse to

the male sibling is nonetheless still substantial.’ [Citation.] The juvenile court need not compare relative risks to assume jurisdiction over all the children of a sexual abuser. . . .” (*I.J.*, *supra*, 56 Cal.4th at p. 780.)

As we stated above, father’s conduct constituted egregious abuse of the three older siblings. That daughter is four years younger and a different sex than her siblings does not eliminate the substantial risk to her created by father’s history of aberrant sexual abuse. In fact, daughter’s infancy makes her more vulnerable and defenseless to such abuse. The magnitude of the harm in this situation is so great that the risk to daughter is substantial, even if the probability of a sexual assault might be low. (*I.J.*, *supra*, 56 Cal.4th at p. 778 [“the more egregious the abuse, the more appropriate for the juvenile court to assume jurisdiction over the siblings”].)

Also, the fact that daughter did not live with her brothers or father, and was not present for the abuse does not eliminate the risk. “[T]he fact that a child is currently protected from . . . abuse simply because the child already is under the jurisdiction of the juvenile court cannot preclude the court from finding, based upon new evidence of past abuse, that the child remains at risk of abuse. The question to be asked in such a case is whether, in the absence of the state’s intervention, there is a substantial risk that the child will be abused.” (*In re Carlos T.* (2009) 174 Cal.App.4th 795, 806.) As explained above, there is substantial evidence of a present substantial risk to daughter.

2. *The Appeal of the Removal Order is Untimely*

Father appeals the court’s disposition order that followed its order sustaining the section 342 petition, arguing that the court erroneously removed daughter from his custody. DCFS

moved to dismiss this portion of father's appeal as untimely, arguing that the removal order was entered a year before father's appeal. We agree and grant DCFS's motion to dismiss this portion of the appeal.

"A timely notice of appeal, as a general matter, is 'essential to appellate jurisdiction.'" (*People v. Mendez* (1999) 19 Cal.4th 1084, 1094.) "In general, an appealable order that is not appealed becomes final and binding and may not subsequently be attacked on an appeal from a later appealable order or judgment." (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421; *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150.)

Daughter was removed from father's custody in an order made on February 4, 2016, in conjunction with the court's initial jurisdictional findings based on domestic violence. Father did not appeal this order. Daughter has remained in the custody of the paternal aunt throughout these proceedings and was never returned to father's custody. Although the court conducted a subsequent disposition hearing in conjunction with the section 342 petition on February 17, 2017, the resulting disposition order merely reiterated the court's original findings and kept the initial removal order in full force and effect.

The removal issue thus became final in 2016, and the present appeal (filed in March 2017) of that issue is untimely because it is well beyond the 60-day timeframe for an appeal. (California Rules of Court, rule 8.406(a)(1).) An "unappealed disposition or post-disposition order is final and binding and may not be attacked on appeal from a later appealable order." (*In re Meranda P., supra*, 56 Cal.App.4th at p. 1150.) Father cannot now revive the issue by challenging the subsequent disposition order, which reiterated the court's earlier findings. (See *In re*

Shaun R. (2010) 188 Cal.App.4th 1129, 1139.) This portion of his appeal is dismissed.

DISPOSITION

We affirm the court's judgment finding jurisdiction over daughter. We dismiss the appeal of the disposition order removing daughter from father's custody.

RUBIN, J.

WE CONCUR:

BIGELOW, P.J.

GRIMES, J.