

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re M.M., a Person Coming
Under the Juvenile Court Law.

B287463
(Los Angeles County
Super. Ct. No. DK23969)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

O.M.,

Defendant and Appellant.

APPEAL from findings and orders of the Superior Court of Los Angeles County, Marguerite D. Downing, Judge. The jurisdictional order is reversed, the dispositional order is vacated, and the case is remanded with directions. Upon remand, the

juvenile court shall modify the restraining order and thereafter dismiss the petition.

Jesse F. Rodriguez, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Acting Assistant County Counsel, and Tracey Dodds, Principal Deputy County Counsel, for Plaintiff and Respondent.

In this case, dependency proceedings commenced during a lengthy, contentious family law dispute. Father O.M. contends substantial evidence did not support dependency jurisdiction over his daughter M.M. We agree and reverse the juvenile court's jurisdictional order and vacate its dispositional order.

Father also appeals from the juvenile court's restraining order against him naming his daughter as one of the protected parties; he seeks modification of that order to remove his daughter as a protected party. We agree that modification is appropriate. We therefore remand the case to the juvenile court with directions to modify the restraining order and then dismiss the petition.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Section 300 Petition*

On July 20, 2017, the Department of Children and Family Services (DCFS) filed a Welfare and Institutions Code¹ section 300 petition. At that time, M.M. was eight years old, and her

¹ Undesignated statutory citations are to the Welfare and Institutions Code.

parents had been separated for approximately three years. Their divorce was not finalized, and they shared custody of M.M. In August 2017, mother reported that her divorce from father was almost final.

A stipulated order regarding custody entered in 2013 by the family court gave father and mother shared legal custody, including the responsibility to make educational decisions. Under that order, father had physical custody every other weekend, midweek with 24 hours notice, and on any other mutually agreed upon time. Otherwise, mother had physical custody over M.M. The order required the parents to refrain from speaking in a negative or disrespectful manner regarding the other parent.

DCFS alleged that M.M. “has demonstrated mental and emotional problems and has a diagnosis of Adjustment Disorder with mixed anxiety and depressed mood, requiring therapeutic services. The child’s father . . . refuses to allow the child to receive therapeutic services to address the child’s mental and emotional problems. Such medical neglect of the child on the part of the father endangers the child’s physical health, safety, and well-being and places the child at risk of serious physical harm, damage and medical neglect.”

DCFS further alleged that father “emotionally abused the child by yelling at the child, forcing the child to visit with the father against the child’s will, forcing the child to call the father on a daily basis and threatening the child with physical discipline if the child does not call the father, and repeatedly questioning the child about the child’s mother[’s] . . . personal life. Such emotional abuse of the child by the father has caused the child emotional distress. The child has a diagnosis of

Adjustment Disorder with mixed anxiety and depressed mood, requiring therapeutic services. The father refuses to allow the child to receive therapeutic services. The child is afraid of the father and does not wish to visit with the father due to the father's emotional abuse of the child. Such emotional abuse of the child on the part of the father places the child at substantial risk of suffering serious emotional damage as evidenced by severe anxiety, depression, withdrawal, and aggressive behavior toward herself or others."

2. *Mother's Statements*

Mother² told a social worker that she and father separated because father emotionally abused her. Mother did not seek to modify the family law custody order because "she [wa]s waiting for the divorce to be finalized." According to mother, father was controlling and jealous and lacked anger management skills. Mother initially reported that father did not physically abuse her. Later, mother reported that when she was pregnant with M.M. (eight years before the dependency petition), father "smacked" her mouth causing her lip to swell.

Mother told a social worker that M.M. was afraid to visit father. Mother reported that M.M. appeared "scared, sad, and shy" after her visits with father. According to mother, M.M. worried about calling father daily because father would become angry if M.M. missed a call. Mother also reported that when father spoke to M.M., he would "interrogat[e]" M.M. about mother's social life. Mother believed that father was stalking

² Mother was not named in the petition and is not a party on appeal.

her. Mother wanted father to take parenting classes or to have supervised visits.

Mother wanted M.M. to attend counseling but, initially, father did not approve of counseling. The therapist did not provide services until father agreed to them. Mother described father as “responsible and hardworking” but overly “controlling.”

Mother took M.M. on a trip to Las Vegas. According to mother, father disapproved of the trip and told M.M. he was “not going to be [her] dad anymore” as a result of the trip. Further according to mother, father told M.M. that mother would go to jail for taking M.M. to Las Vegas.

Maternal grandmother supported mother’s version of events. Like mother, maternal grandmother believed that father needed to learn to control his anger and that father should refrain from questioning M.M. about mother. Maternal grandmother reported that M.M. required speech therapy after mother and father separated and that M.M. attended such therapy. M.M.’s half-brother, who lived with mother, reported that M.M. appeared scared when she would visit father.

Father sent mother numerous e-mails, which DCFS described as harassing.³ According to DCFS, “[t]hese are emails the mother has received from the father harassing mother about her personal life, expressing both his love and disgust towards

³ DCFS reported that mother received “harassing” e-mails from father. The e-mails are written in Spanish and no translation is included in the record. On that basis, the juvenile court sustained an objection to the e-mails. The juvenile court, however, considered the description of the e-mails in DCFS’s reports. No party challenges the juvenile court’s evidentiary rulings.

her, threatening to take [M.M.] from her care, asking for forgiveness, and blaming her for his health problems.”

3. *Father’s Statements*

Father disputed mother’s assertion that M.M. was afraid of him and claimed that mother was manipulating M.M. Father indicated that he wanted to speak to M.M. daily and wanted to be involved in her life. He reported that he did not ask M.M. to spy on mother but wanted to know M.M.’s whereabouts. Father reported that mother violated their custody order by taking M.M. to Las Vegas.

Father initially refused to allow M.M. to attend counseling, explaining that he believed it would “be used against him at some point.” A social worker overheard a phone call in which father was upset that mother had taken M.M. to counseling. Prior to the jurisdictional hearing, father agreed to allow M.M. to attend counseling. In September 2017, DCFS reported that father asked that M.M. be evaluated by a psychologist, rather than a “mental health therapist.” After speaking to the director of the clinic, father “signed all necessary forms for the child to receive mental health services. The child is currently receiving individual counseling.”

Father had a misdemeanor conviction for violating a court order to prevent domestic violence. DCFS asserts that the order protected father’s adult daughter. A police incident report stated that father violated his custody order by arriving 45 minutes late to pick up M.M. and returning her to mother prior to the designated time.

4. *M.M.'s Statements and Therapist's Evaluation*

Eight-year-old M.M. reported that she did not like to spend the night at father's home. She was afraid " 'because of his mood.' " M.M. also reported that father was rude to a waitress, causing M.M. embarrassment and anxiety. M.M. did not like it when father asked her questions about mother. She described father as someone who angered quickly. M.M. reported that four years earlier, father had hit her.

DCFS reported that M.M. had no medical issues and there were no medical "concerns." DCFS reported that M.M.'s therapist said that M.M. cried when asked what she did with her father. DCFS quoted M.M.'s therapist as saying that M.M. " 'is insightful, however, lacks appropriate coping skills to deal with her father's volatile behavior. [Therapist] observed client to be sad and fearful, as evidenced by client clenching hands when asking mom if she had to go with her dad that evening. In addition, client was tearful when discussing challenges with dad. Client's symptoms and behaviors are indicative of Adjustment Disorder, with mixed Anxiety & Depressed Mood. Client's symptoms include: being sad, tearful, anxious in anticipation of visits with dad, nervous that dad will be in a bad mood and will result in client being punished, client is withdrawn once she returns to mom's home. Client's symptoms are clinically significant and cause functional impairment in being unable to engage with primary support and complete daily activities.' "

In September 2017, M.M.'s therapist updated M.M.'s progress: M.M. "is making progress towards treatment goal." The therapist indicated that father "responded positively" to M.M.'s progress.

5. *Jurisdictional and Dispositional Hearing*

At the jurisdictional and dispositional hearing, mother's counsel stated mother ensured that M.M. attend therapy regularly. Mother's counsel argued in favor of jurisdiction. She explained that mother "wants this case to remain open for the father to receive services." Father's counsel argued that mother coached M.M. and that father loved and supported M.M.

6. *The Juvenile Court Assumes Jurisdiction*

On September 26, 2017, the juvenile court sustained the allegations and assumed jurisdiction over M.M. M.M. was released to the care of mother. The juvenile court ordered father's visits to occur in a therapeutic setting. The juvenile court reasoned that father was in denial and was not enrolled in programming. The juvenile court explained that M.M. "is in need of counseling, which she is receiving." The juvenile court stated that father did not support M.M. attending therapy. The juvenile court further indicated that father may have anger management issues as indicated by the fact that he hit mother when she was pregnant and sent mother threatening e-mails.

The juvenile court ordered M.M. into individual counseling and conjoint counseling with father and father to submit to 10 random or on-demand drug tests. If he missed a test or tested positive for a controlled substance, father was ordered to complete a drug treatment program. The juvenile court ordered father to complete parenting and anger management classes as well. The court ordered father to undergo a mental health assessment and requested the assessor to evaluate father for psychotropic medications.

7. *Restraining Order*

Mother sought a restraining order because father constantly mailed, sent text messages, and threatened her in phone calls and e-mails. Mother claimed that father threatened her as follows: “Your time & your luck has [sic] ended and you will pay for the job you have done.” According to the request for the restraining order, father also wrote “ ‘something is coming to you sooner rather than later and then you’ll dream about me.’ ”

Mother indicated that she requested father not come to her home, but he would appear “unannounced and uninvited.” “On prior occasions, Father has forcefully grabbed mother & slapped her on the face.” With respect to M.M., the application stated that father requires her to visit and call him “against her wishes” and that he threatened to physically discipline her if she refused to call him.

On September 13, 2017, the court issued a temporary restraining order protecting mother and M.M. The order prohibited father from contacting mother by phone, text, or e-mail. It required that father stay away from mother and M.M. Father was permitted to visit M.M. twice weekly for two hours; the juvenile court required a “third party” to arrange the visits. The order also required father to stay away from M.M.’s school. On September 26, 2017, the court signed a three-year permanent restraining order.

DISCUSSION

A. Substantial Evidence Did Not Support Dependency Jurisdiction

“ ‘On appeal from an order making jurisdictional findings, we must uphold the court’s findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings. [Citation.] Substantial evidence is evidence that is reasonable, credible, and of solid value.’ ” (*In re Christopher C.* (2010) 182 Cal.App.4th 73, 84.) DCFS has the burden to show that a basis for jurisdiction exists at the time of the jurisdictional hearing. (*In re K.S.* (2016) 244 Cal.App.4th 327, 337.) We discuss the two bases for jurisdiction separately.

1. Section 300, subdivision (b)

The first sustained allegation was that father’s refusal to allow M.M. to attend therapy placed her at substantial risk of serious physical harm. Section 300, subdivision (b)(1) requires that 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 parent’s failure to provide medical treatment. (§ 300, subd. (b)(1).) “ ‘ “Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness.” ’ ” (*In re Jesus M.* (2015) 235 Cal.App.4th 104, 111.)

At the time of the jurisdictional hearing—the relevant timeframe—father had consented to therapy, M.M. was receiving

therapy, and M.M. was making progress in therapy. DCFS reported that “father has signed all necessary forms for the child to receive mental health services. The child is currently receiving individual counseling.” DCFS reported that there were no medical concerns. This undisputed evidence demonstrated the lack of substantial evidence to support jurisdiction under section 300, subdivision (b)(1). Simply put, even though father initially refused to allow M.M. to attend therapy, there was no evidence that at the time of the adjudication hearing, M.M. was at substantial risk of physical harm.

Respondent’s reliance on *In re R.T.* (2017) 3 Cal.5th 622 (*R.T.*) for a different conclusion is misplaced. In *R.T.*, the court held that section 300, subdivision (b)(1) “authorizes dependency jurisdiction without a finding that a parent is at fault or blameworthy for her failure or inability to supervise or protect her child.” (*Id.* at p. 624.) The high court explained that a child may be incorrigible without any neglectful conduct on the parent’s part. (*Id.* at pp. 629, 633.) In *R.T.*, the evidence suggested that R.T. “faced an ongoing risk of harm based on her increasingly self-destructive behavior, behavior that mother simply could not control.” (*Id.* at p. 634.) Here, there was no evidence that M.M. had engaged in self-destructive behavior or that M.M. engaged in behavior affecting her parents’ ability to control or otherwise take care of her.

Respondent’s argument that “[t]he risk to [M.M.] created by Father’s refusal to allow the child to participate in much needed treatment was present as of the date of the adjudication” is a non sequitur. The only support respondent cites is that when interviewed, father was concerned that the “therapy might be used against him.” The fact that father worried about whether

M.M.'s participation in therapy could be used against him does not support the conclusion that father refused to allow M.M. to participate in therapy at the time of the jurisdictional hearing. It was undisputed that, at the time of the jurisdictional hearing, M.M. was participating and progressing in therapy, and the juvenile court made an express finding of such participation.

2. Section 300, subdivision (c)

The juvenile court also assumed jurisdiction under section 300, subdivision (c). Section 300, subdivision (c) permits jurisdiction if the “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 or guardian” “[S]ubdivision (c) seeks to protect against abusive behavior that results in severe emotional damage. We are not talking about run-of-the-mill flaws in our parenting styles—we are talking about abusive, neglectful and/or exploitive conduct toward a child which causes any of the serious symptoms identified in the statute.” (*In re Alexander K.* (1993) 14 Cal.App.4th 549, 559, italics omitted.)

In re Brison C. (2000) 81 Cal.App.4th 1373 applied the section 300, subdivision (c)(1) standard. Like in this case, the dependency proceedings in *Brison* commenced during protracted family law proceedings. Nine-year-old Brison feared his father and had “suicidal ideation if forced to visit or live with him.” (*Id.* at p. 1377.) His parents’ family law dispute caused him upset, confusion, and gastrointestinal distress. (*Ibid.*) Brison’s half-brother Brian reported that father had physically and verbally abused Brian. (*Id.* at p. 1378.)

The appellate court concluded that Brison’s deep dislike and fear of his father was not significant evidence of behavior “indicative of severe anxiety, depression, withdrawal or untoward aggressive behavior.” (*Id.* at p. 1380.) The *Brison* court warned: “ ‘The juvenile courts must not become a battleground by which family law war is waged by other means.’ ” (*Id.* at p. 1382.)

Here, M.M.’s level of distress was far less than that found insufficient in *Brison*. It did not rise to the statutory standard expressed in section 300, subdivision (c).

It is true the therapist found M.M.’s clenching fists and crying were consistent with Adjustment Disorder.⁴ As father points out, however, M.M.’s therapist did not expressly diagnose Adjustment Disorder, but indicated that M.M.’s symptoms were consistent with that disorder. Even if the therapist had provided an express diagnosis, she identified no “severe anxiety [or] depression” justifying dependency jurisdiction. (§ 300, subd. (c).) Additionally, it was undisputed that at the time of the jurisdictional hearing, M.M. was responding positively to

⁴ Adjustment Disorder is the “development of emotional or behavioral symptoms in response to an identifiable stressor(s) occurring within 3 months of the onset of the stressor(s).” (American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) (DSM-5) p. 286.) “These symptoms or behaviors are clinically significant, as evidenced by one or both of the following: [¶] 1. Marked distress that is out of proportion to the severity or intensity of the stressor, taking into account the external context and the cultural factors that might influence symptom severity and presentation. [¶] 2. Significant impairment in social, occupational, or other important areas of functioning.” (*Ibid.*)

therapy. In addition, there was no evidence that M.M. was acting out or having problems at school.

None of the juvenile court's findings supported dependency jurisdiction. The juvenile court found that father did not support counseling, but at the same time, the juvenile court stated M.M. was in fact receiving counseling. It was also undisputed that father had consented to the therapy before the jurisdictional hearing. The juvenile court noted father's anger management issues, citing mother's swollen lip eight years earlier and further harassing e-mails to mother. The earlier evidence concerned only mother; M.M. was not born when father "smacked" mother's lip, and there was no evidence M.M. was aware of the e-mails. The juvenile court stated father was not enrolled in programming. We fail to see how father's not enrolling in programming demonstrated that M.M. was at risk of severe emotional harm. Although father may have benefitted from programming, that is not the standard for exercising dependency jurisdiction, particularly given the family law court's involvement with the parents' custody of M.M.

B. The Restraining Order Improperly Includes M.M. as a Protected Person

Father challenges only the portion of the restraining order identifying M.M. as a protected person. A juvenile court is authorized to issue a restraining order under section 213.5. With respect to M.M., the application stated that father requires her to visit and call him "against her wishes" and that he threatened to discipline her physically if she refused to call him. Regardless of whether the standard of review is for substantial evidence or

abuse of discretion,⁵ we arrive at the same conclusion. Inclusion of M.M. in the restraining order was error.

Section 213.5, subdivision (a) provides that once a juvenile dependency petition has been filed, the juvenile court may issue a temporary restraining order protecting the dependent child and any caregivers of the child. (§ 213.5, subd.(a).) Indeed, it has exclusive jurisdiction to do so once a dependency petition is filed. Section 213.5, subdivision (a)(1) provides in pertinent part: “After a petition has been filed pursuant to Section 311 to declare a child a dependent child of the juvenile court, and until the time that the petition is dismissed or dependency is terminated, upon application in the manner provided by Section 527 of the Code of Civil Procedure or in the manner provided by Section 6300 of the Family Code, if related to domestic violence, the juvenile court has exclusive jurisdiction to issue ex parte orders (1) enjoining any person from molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, making annoying telephone calls as described in Section 653m of the Penal Code, destroying the personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the child or any other child in the household; and (2) excluding any person from the dwelling of the person who has care, custody, and control of the child.” Thus, under section 213.5, the juvenile court had authority when the petition was filed to issue the restraining order father now challenges as to M.M.

⁵ *In re N.L.* (2015) 236 Cal.App.4th 1460, 1465-1466 [most but not all courts apply substantial evidence standard of review].

The allegations that father required M.M. to call and visit under threat of discipline did not support including M.M. as a protected person in the restraining order. There was no evidence that the threat of discipline put M.M.'s safety in peril absent a restraining order. There was no evidence father engaged in any threatening conduct in M.M.'s school or during child care to justify a stay away order from M.M.'s school or child care. The restraining order application generally concerned conduct directed only at mother outside of M.M.'s presence. It described no conduct suggesting that father jeopardized M.M.'s safety. "Issuance of the restraining order was not proper unless failure to issue the order might jeopardize the safety" of M.M. (*In re C.Q.* (2013) 219 Cal.App.4th 355, 365; see also *In re N.L.*, *supra*, 236 Cal.App.4th at p. 1467.) It was thus error to include her as a protected person in the restraining order.

DISPOSITION

The jurisdictional order is reversed. Without jurisdiction, the juvenile court lacked authority to enter its dispositional order. (*In re Jesus M.*, *supra*, 235 Cal.App.4th at p. 114.) The dispositional order is vacated. The case is remanded to the juvenile court.

The juvenile court is ordered to modify the permanent restraining order by (1) deleting M.M.'s name from the list of protected persons, (2) removing the prohibition that father stay away from M.M.'s school or child care, and (3) removing the restriction that father's visits must be supervised. In all other respects the restraining order is affirmed.⁶

⁶ Father does not contest the restraining order's provisions protecting mother. We observe father's visitation must be

The juvenile court is directed to dismiss the petition after it modifies the restraining order. Nothing in this disposition prevents DCFS from filing a new petition, if warranted, based on facts occurring after the jurisdictional and dispositional orders.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

JOHNSON, Acting P. J.

CURREY, J.*

conducted in a manner consistent with the portions of the restraining order we have affirmed.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.