Filed 7/26/17 In re M.P. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re M.P., a Person Coming Under the Juvenile Court Law.	B279395 (Los Angeles County Super. Ct. No. DK20056)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.G., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Philip L. Soto, Judge. Affirmed.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Stephanie Jo Reagan, Principal Deputy County Counsel, for Plaintiff and Respondent.

No appearance for Minor.

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M.G. (mother) appeals the juvenile court's orders exerting dependency jurisdiction over her one-year-old daughter M.P. and removing M.P. from her custody. We conclude that substantial evidence supports both orders, and that mother's challenge to the removal order is also moot because the juvenile court subsequently returned M.P. to her custody. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Mother and Marlon P. (father) began dating in 2014. In February 2016, mother gave birth to M.P.

In June 2016, father slapped mother in the face while she was holding then-four-month-old M.P. in her arms. Soon after mother put M.P. down, father hurled maternal grandfather's wheelchair at mother and maternal grandmother. The wheelchair's impact knocked out one of maternal grandmother's teeth and bruised mother. Mother did not immediately report the incident to police.

Police learned of the incident a few days later, and mother obtained a 30-day restraining order against father. However, mother did not renew the order because she still wanted to see father. Instead, she resumed her relationship with father behind her parents' backs because she wanted father to see M.P.; she allowed father to impregnate her again; and she thereafter moved back in with him.

Soon after moving back in together, in October 2016, father and mother got into a verbal argument. It escalated. Father pushed mother out of their bedroom, causing her to bang her leg against a piece of furniture. Mother was two months pregnant at the time and, according to father, was holding M.P. in her arms (mother denied holding M.P.). Again, mother did not call the police. Instead, she called her sister to come and pick up M.P. Mother's sister arrived and called the police, but not before father struck mother in the face.

Father and mother later referred to father's conduct as an "accident," and father maintained mother was lying about the incidents.

II. Procedural Background

The Los Angeles County Department of Children and Family Services (Department) filed a petition asking the juvenile court to exert dependency jurisdiction over M.P. because (1) mother and father's history of domestic violence placed M.P. at "substantial risk" of sustaining "serious physical harm," both "nonaccidentally" (under Welfare and Institutions Code section 300, subdivision (a))[1] and due to the "failure or inability" of mother and father "to adequately supervise or protect" M.P. (under section 300, subdivision (b)(1)); and (2) father's history of abusing alcohol constituted a "failure or inability" "to adequately supervise or protect" M.P. (under section 300, subdivision (b)(1)).[2]

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

2 The Department also sought to exert dependency jurisdiction due to father's altercation with maternal

Father pleaded no contest to the allegations in criminal court.

Mother disputed the allegations. At the hearing on jurisdiction, mother testified that she had been housed in a shelter for a few months, had attended domestic violence and parenting classes on a weekly basis, now understood the "red flags" of an abusive relationship, and had no intention of getting back together with father. The parties also stipulated that father, if called to testify, would testify that he, too, had no desire to reunite with mother.

The juvenile court sustained dependency jurisdiction due to mother's conduct. In so ruling, the court explained that it did not "find . . . mother's assertions today to be credible." The court also found, by clear and convincing evidence, that leaving M.P. in mother's custody put M.P. at "substantial risk of detriment to [her] safety, protection, physical, [and] emotional well-being." The court issued a three-year restraining order to keep father away from mother.

Mother filed a timely notice of appeal.

DISCUSSION

Mother argues that the juvenile court's orders exerting jurisdiction over M.P. and removing her from mother's custody must be overturned. The Department contends that we need not reach either issue because father's plea independently supports the juvenile court's jurisdiction over M.P. We first address the threshold issue of mother's standing to appeal.

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grandmother, but the juvenile court did not sustain jurisdiction on that basis.

I. Standing

Because dependency jurisdiction attaches to *the child* rather than to her parents, a finding of jurisdiction remains valid "'"as long as there is one unassailable jurisdictional finding, [even if] another might be inappropriate."'" (*In re D.M.* (2015) 242 Cal.App.4th 634, 638-639, quoting *In re D.P.* (2014) 225 Cal.App.4th 898, 902.) Invoking this general principle, the Department argues that father's uncontested plea provides an ample basis for the juvenile court's jurisdiction over M.P. and renders it unnecessary for us to assess mother's challenges. However, this general principle is not without exception, and appellate courts retain the discretion to reach a parent's jurisdictional challenges notwithstanding an unassailable finding otherwise supporting jurisdiction if, among other instances, the challenged jurisdictional finding (1) "serves as the basis for dispositional orders that are also challenged on appeal" (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762), or (2) might impact future dependency proceedings (*In re D.P.*, at p. 902). Both instances are present here. The jurisdictional finding underlies the removal order mother also challenges, and the juvenile court's finding that mother's conduct placed M.P. in a position of "nonaccidentally" being subject to serious physical harm "has the potential to impact future dependency proceedings." (*Ibid.*)

II. Jurisdiction

Among other grounds, a juvenile court may exert dependency jurisdiction over a child if (1) "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent" (§ 300, subd. (a)), or (2) "[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 . . . to adequately supervise or protect the child" (§ 300, subd. (b)(1)). Exposing a child to domestic violence can risk the nonaccidental infliction of serious physical injury under subdivision (a) of section 300 (*In re Giovanni F.* (2010) 184 Cal.App.4th 594, 598-599 (*Giovanni F.*)), and can constitute a failure to protect a child from the risk of such injury under subdivision (b) (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194). Because dependency jurisdiction turns on the risk to the child ""at the time of the [jurisdictional] hearing"" (*In re M.M.* (2015) 240 Cal.App.4th 703, 719 (*M.M.*)), the propriety of jurisdiction due to a child's exposure to domestic violence under subdivisions (a) and (b) of section 300 turns on whether "the violence is ongoing or likely to continue." (*In re Daisy H.* (2011) 192 Cal.App.4th 713, 717 (*Daisy H.*); *In re M.W.* (2015) 238 Cal.App.4th 1444, 1453-1454 (*M.W.*).) We review the juvenile court's factual findings regarding risk, like all of its factual findings, for substantial evidence. (*M.M.*, at pp. 719-720.)

The juvenile court's finding that the risk of domestic violence between mother and father was likely to continue is supported by substantial evidence. Father engaged in domestic violence in June 2016, and mother did not report the incident to police. Once the incident came to the attention of the police, mother allowed the 30-day restraining order to lapse, secretly resumed her relationship with father, moved back in with him, and all the while expressed a desire to continue father's involvement in her life and in M.P.'s life. Mother put M.P. back in harm's way, as M.P. was in mother's arms during the October 2016 incident. What is more, mother minimized father's conduct by referring to his acts as an "accident." Although prior domestic

violence is not enough by itself to create a future risk to a child (*M.W.*, *supra*, 238 Cal.App.4th at pp. 1453-1454), past events have "probative value in considering" current risk (*In re Janet T.* (2001) 93 Cal.App.4th 377, 388) and here, mother's willingness to expose herself and, critically, M.P., to father's violence a second time is evidence of a risk that she will do so again.

Mother raises two objections to this reasoning. First, she emphasizes that there is no risk of future domestic violence because she testified that she and father had not talked in two months and that she had no interest in resuming a relationship with him. However, the juvenile court found her testimony not to be credible. Absent proof that her testimony was """physically impossible or inherently improbable""" (neither of which is true here), we may not """reweigh . . . or reevaluate [her] credibility.""" (*People v. Prunty* (2015) 62 Cal.4th 59, 89.)

Second, mother asserts that this case is analogous to *In re Jonathan B.* (2015) 235 Cal.App.4th 115 and *Daisy H.*, *supra*, 192 Cal.App.4th 713. We disagree. In each of those cases, the appellate court concluded that there was insufficient evidence of current risk to a child based on previous incidents of domestic violence between the parents. (*In re Jonathan B.*, at pp. 117-121; *Daisy H.*, at pp. 715-717.) However, in each of those cases, the children had not been present during the prior incident of domestic violence, the violence had occurred five years (in *In re Jonathan B.*) or two to seven years (in *Daisy H.*) prior to the jurisdictional hearing, and the victimized parent had reported the incident to the authorities. None of these facts is true here, and the absence of each fact only serves to increase the risk of further incidents in the future.

Mother also points out, and the Department concedes, that the juvenile court misspoke at the hearing when it declared that jurisdiction was appropriate under subdivisions (a) through (j) of section 300, rather than just subdivisions (a) and (b). Because the court's written orders reflect the proper basis for jurisdiction, those orders need not be modified.

III. Removal

A juvenile court may remove a child from her parent only if it finds, by clear and convincing evidence, that (1) "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the [child] if the [child] were returned home," and (2) "there are no reasonable means" short of removal "by which the [child's] physical health can be protected." (§ 361, subd. (c)(1).) We review the juvenile court's findings underlying its removal orders for substantial evidence. (*M.M.*, *supra*, 240 Cal.App.4th at pp. 719-720.) Although it remains unsettled whether our review for substantial evidence must take into account the clear and convincing evidence standard (compare *In re Ashly F.* (2014) 225 Cal.App.4th 803, 809 [applying higher standard on appeal] with *In re J.S.* (2014) 228 Cal.App.4th 1483, 1492-1493 [disregarding higher standard on appeal]), we will sidestep the conflict by using the higher standard.

A. Mootness

On June 14, 2017, the juvenile court returned M.P. to mother's custody. Because this makes it impossible for us to grant mother meaningful relief regarding her challenge to the juvenile court's initial removal order, her appeal of that order is now moot. (E.g., *In re Raymond G.* (1991) 230 Cal.App.3d 964, 967.)

B. Merits

Even if we reached the merits of mother's challenges to the juvenile court's removal order, those challenges lack merit. They fall into two categories—procedural and substantive.

1. Procedural challenges

Mother raises two procedural challenges.

First, she asserts that the juvenile court impermissibly placed the burden of proving removal onto her and that this error automatically requires us to overturn the removal order. (See *In re Marriage of Schwartz* (1980) 104 Cal.App.3d 92, 96 ["the error with respect to the burden of proof is, itself, sufficient to mandate a reversal"].) To be sure, the Department is the party that bears the burden of proof in establishing jurisdiction and removal. (*Giovanni F.*, *supra*, 184 Cal.App.4th at p. 598.) But the juvenile court in this case understood this. In making its ruling, the court found "by clear and convincing evidence [that] *the Department* has demonstrated that" the requirements for removal were met. Mother points to the court's statement that mother "ha[d] not demonstrated to this court and the evidence I've gotten from the Department has been very clear to this court that you did not understand the child protective aspects of this case and were not willing to do that and wanted to return to the father." Taken in context, this statement reflects the court's view that the Department had proven the risk to M.P. from her continued residence with mother and that mother had not rebutted the evidence presented by the Department. The court did not shift the burden of proof.

Second, mother argues for the first time in her reply brief that the juvenile court was wrong to reason that its finding of jurisdiction constituted a prima facie case for removal. To be

sure, *In re Cole C.* (2009) 174 Cal.App.4th 900, 917 expressly provides that "jurisdictional findings are prima facie evidence that [a] child cannot safely remain in the home," and the court cited subdivision (c)(1) of section 361 for this proposition. That section, mother correctly observes, says that a prima facie case for removal arises only from a violation of subdivision (e) of section 300—not *all* of section 300's subdivisions. (§ 361, subd. (c)(1).) But mother's quarrel with *In re Cole C.* is not relevant to this case because the juvenile court did not rely on any prima facie presumptions. What is more, mother's attack on *In re Cole C.* overlooks that its basic proposition—namely, that the (jurisdictional) finding that a parent has put a child at substantial risk of serious physical harm is also evidence to support a (removal) finding that leaving the child with that parent would place her "physical health" in "substantial danger"—is true irrespective of the language in section 361, subdivision (c)(1) regarding prima facie evidence.

2. Substantive challenges

Mother raises two substantive challenges to the juvenile court's removal order.

First, mother argues that M.P.'s "physical health" would not be placed in "substantial danger" if M.P. were returned home because father had not yet hurt M.P. This argument ignores that the "focus" of dependency law "is on *averting* harm to the child." (*In re T.V.* (2013) 217 Cal.App.4th 126, 135-136, italics added.) A juvenile court need not wait for a child to be "actually harmed" before intervening. (*Giovanni F.*, *supra*, 184 Cal.App.4th at p. 598.) For the reasons noted above, the requisite danger was established in this case.

Second, mother contends that there was insufficient evidence that alternatives short of removal would not protect M.P. Specifically, mother says she could have lived in a shelter with M.P. However, the juvenile court also had evidence before it that mother's prior attempt to separate from father was unsuccessful and resulted in a second pregnancy and a second incident in which she put M.P. directly in harm's way. This evidence is substantial.

DISPOSITION

The orders of the juvenile court are affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
CHAVEZ

_____, J.*
GOODMAN

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