Filed 11/29/17 In re B.A. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re B.A., A Person Coming Under the Juvenile Court Law.	B278847 (Los Angeles County Super. Ct. No. DK19193)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. AMBER F., Defendant and Appellant.	

APPEAL from order of the Superior Court of Los Angeles County, Robert S. Draper, Judge. Affirmed.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Amber F. appeals from the juvenile court's jurisdictional and dispositional order regarding her daughter, B.A. She challenges the juvenile court's adjudication of dependency based on her substance abuse, arguing it was not supported by substantial evidence. She argues the court erred as a matter of law in ordering B.A. removed from her custody. We disagree and affirm.

FACTUAL AND PROCEDURAL SUMMARY

Appellant first came to the attention of the Department of Children and Family Services (DCFS) in June 2016 when she was found at a house to which a shooter had fled after killing a young woman. Appellant had been using methamphetamine and caring for a friend's children at this house. DCFS discovered that appellant also had a child, B.A. (born in March 2009), who lived with appellant's mother in another city. The maternal grandmother had taken care of B.A. since she was an infant. B.A. was not present with appellant when she was found in the home to which the shooter fled. DCFS commenced an investigation into B.A.'s welfare.

Appellant had used methamphetamine "every couple of days" for approximately two and a half years. She told a social worker she was homeless. Although both she and the maternal grandmother took care of B.A, she stated she never had been under the influence of drugs while B.A. was in her care. She

agreed with a social worker who characterized the arrangement as appellant leaving B.A. with maternal grandmother so that she could "run the streets and abuse drugs."

When B.A. was interviewed by DCFS, she stated appellant slept over at the maternal grandmother's house and sometimes took her to school. She said when appellant "went away," "she didn't go away for a long time." In a later DCFS interview, B.A. stated appellant was "always coming and going" but usually would stay with her for only "a little bit at a time . . . [s]he would stay like maybe one or two or three [days]." Other adults residing with B.A., such as the maternal aunt and maternal cousin's fiancée, echoed this characterization of appellant as coming and going from the house.

B.A. knew drugs were "things that you smoke" that "make people act 'funny and weird'" but said she had never seen appellant or anyone else under the influence of drugs. She later stated that she did not know what drugs were. The maternal grandmother and maternal aunt both stated that appellant was not allowed to use drugs or be under the influence in their home.

The maternal grandmother had a history of substance abuse and was a registered controlled substance offender. She had not used drugs for approximately 10 years. She had unsuccessfully attempted to gain legal guardianship of B.A. in the past.

B.A. was healthy and showed no signs of abuse. She was performing well academically and had received school certificates for perfect attendance and student of the month. B.A. wanted to stay with the maternal grandmother.

DCFS filed a Welfare and Institutions Code section 300 petition in September 2016.[1] The petition alleged that appellant's substance abuse placed B.A. at substantial risk of physical harm under section 300, subdivision (b)(1). Specifically, DCFS alleged that appellant cared for B.A. while under the influence of illicit drugs. It was further alleged that appellant made an inappropriate plan by placing B.A. with the maternal grandmother, who had a history of substance abuse and was a registered controlled substance offender. Allegations also were made regarding the conduct of B.A.'s father.

At the September 2016 detention hearing, the court ordered B.A. detained and temporarily placed with the paternal grandmother. At the October 2016 jurisdictional and dispositional hearing, the court found the allegation regarding appellant's substance abuse true. It also found the allegations against B.A.'s father true. The court struck the allegation that appellant had made an inappropriate plan. The court said it regretted that DCFS had made the allegation because the maternal grandmother had "taken wonderful care of [B.A.]"

At the same hearing, the court ordered B.A. removed from her parents' custody and returned to the maternal grandmother's care. The court offered to discuss continuing disposition so that legal guardianship with the maternal grandmother could be pursued, but appellant's, father's, and minor's attorneys stated the parties had agreed to removal and reunification services.

This appeal followed.

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[1] All further statutory references are to the Welfare and Institutions code.

DISCUSSION

I

Appellant challenges the court's finding that B.A. is subject to jurisdiction under section 300, subdivision (b)(1). She argues there is a lack of substantial evidence to support the finding, in particular because her substance abuse did not place B.A. at substantial risk of harm as B.A. was safe in maternal grandmother's care. We disagree.

In reviewing for substantial evidence, we draw all reasonable inferences in favor of the court's findings without reweighing credibility or resolving evidentiary conflicts. (*In re Liam L.* (2015) 240 Cal.App.4th 1068, 1087.)

Dependency jurisdiction is properly asserted with respect to a child who has suffered, or who is at substantial risk of suffering, serious physical harm due to "the inability of the parent or guardian to provide regular care for the child due to the parent's . . . substance abuse." (§ 300, subd. (b)(1).) Substance abuse which impairs a parent's judgment while caring for a child constitutes neglect under section 300, subdivision (b). (*In re A.F.* (2016) 3 Cal.App.5th 283, 290-292.)

The juvenile court found true allegations that appellant had a substance abuse problem and that she "was under the influence of illicit drugs while the child was in the mother's care and supervision." These conclusions are supported by evidence demonstrating that appellant's drug problem was severe and that she had unlimited access to B.A. on a regular basis.

Appellant admitted she had a severe substance abuse problem, and had used methamphetamine "every couple of days" for approximately two and a half years. Although B.A., appellant, the maternal grandmother, and the maternal aunt

denied that appellant ever had been under the influence while caring for B.A., the juvenile court reasonably could have chosen not to credit their statements, and questioned how the maternal grandmother and aunt were able to verify that appellant was no longer under the influence when she came home from "run[ning] the streets and abus[ing] drugs." The court also could have reasonably doubted that appellant was a reliable judge of her own level of impairment.

B.A. stated that appellant sometimes took her to school and slept over at the maternal grandmother's house. She said that when appellant "went away," "she didn't go away for a long time." She said that, although appellant would stay with her only for short periods of time, she was "always coming and going." Others living in the home also described appellant as coming in and out of the house. Appellant described caring for B.A. as a shared responsibility, stating "[m]e and my mom would take care of [B.A.]" It is reasonable to infer from these statements that appellant regularly had unfettered access to B.A., creating a risk under section 300, subdivision (b)(1). (See *In re Cole Y.* (2015) 233 Cal.App.4th 1444, 1447 [father who, among other things, allowed a current drug abuser "unlimited access" to children placed them at risk of substantial harm under subdivision (b)(1)].)

Because appellant's drug problem was severe and she regularly had unfettered access to B.A., the juvenile court reasonably inferred that appellant was under the influence when she cared for B.A., meeting the standard for neglect under section 300, subdivision (b)(1). (*In re A.F.*, *supra*, 3 Cal.App.5th at pp. 290-292.) This conclusion also is supported by appellant's

admission that she cared for other children while under the influence of methamphetamine.

Beyond the past risk to which appellant had exposed B.A., there also was a substantial risk that appellant would use illicit drugs while caring for her in the future. As the juvenile court stated, because appellant retained full legal rights over B.A., there was nothing stopping her from taking the child from the maternal grandmother. The maternal grandmother and aunt stated they kept appellant's drug problem away from B.A. As admirable as their efforts may have been, the maternal grandmother did not have the legal authority to assure B.A. would be insulated from the dangers of appellant's substance abuse.

Appellant cites cases in which parents left their children with competent caregivers, precluding a finding of neglect under section 300, subdivision (b). (*In re Antonio F.* (1978) 78 Cal.App.3d 440, 452 (*Antonio F.*), disapproved by *In re Laura F.* (1983) 33 Cal.3d 826, 830-831 [applying an earlier version of the Welf. & Inst. Code, finding mother who left children with another woman for five years did not commit neglect because "'neglect . . . is rebutted by leaving the child in an environment where he is known to be getting good care'"]; see also *In re Andrew S.* (2016) 2 Cal.App.5th 536, 542 (*Andrew S.*) [finding incarcerated father whose children were with their mother did not commit neglect because § 300, subd. (b) does not authorize assumption of jurisdiction over an "otherwise well-cared-for child simply because an absent parent has not provided support"].) These cases are distinguishable because appellant did not "leave" B.A. with maternal grandmother. Appellant was not an "absent parent." She slept in the same house as B.A. on a regular basis,

was "always coming and going," and regularly took B.A. to school. Unlike the parents in *Andrew S.* and *Antonio F.*, appellant remained involved in B.A.'s life in a manner which placed the child at risk.

Appellant also cites *In re Rocco M.* (1991) 1 Cal.App.4th 814, 824, disapproved on other grounds by *In re R.T.* (2017) 3 Cal.5th 622, 627-630, for the proposition that "'the fact that a child has been left with other caretakers will not warrant a finding of dependency if the child receives good care.' [Citations.]" This statement does not help appellant because the jurisdictional finding was not based on the fact that B.A. was in maternal grandmother's care, but on appellant's substance abuse and the risks it presented to B.A.

Appellant also argues the court erred as a matter of law when it stated that making an appropriate plan for a child is not a defense to a jurisdictional finding under section 300, subdivision (b)(1). We disagree.

The proper interpretation and application of a statute to undisputed facts are questions of law, which we review de novo. (*In re R.C.* (2011) 196 Cal.App.4th 741, 748.)

In its jurisdictional order, the court stated:

> "When the defense to the allegations of a petition is that the parent made an appropriate plan and the plan was to leave the child with the maternal grandmother, that is a defense in a case where the only allegation is the parent is incarcerated and failed to make a plan. It is not a case that defeats jurisdiction under 300(b) on any other grounds."

This is a correct statement of the law. Making an appropriate plan is a defense to an allegation that an

incarcerated parent is incapable of making arrangements for his or her child under section 300, subdivision (g). (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 696.) In this case, no allegation was made under section 300, subdivision (g). Appellant stretches the meaning of the court's words, arguing that it improperly failed to consider that appellant had made an appropriate plan. But the court plainly did consider this, stating moments later that "[i]t was a good plan." Nonetheless, the court found B.A. remained at substantial risk due to appellant's regular and unfettered access to the child.

The juvenile court properly found that B.A. was at substantial risk of physical harm due to appellant's substance abuse.[2]

II

Appellant argues the juvenile court erred by ordering B.A. removed from her custody under section 361, subdivision (c)(1). We disagree.

Initially, we note that appellant's attorney agreed to the court's dispositional order before it was issued. When asked if appellant preferred to continue the disposition or receive an order of removal and reunification, appellant's attorney told the court to proceed with its tentative removal order, stating "we prefer to not continue disposition." When asked again about the tentative

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[2] Because we find that jurisdiction over B.A. is properly based upon appellant's conduct, we need not consider her argument that she has standing to appeal the jurisdictional findings based on father's conduct. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762 [where one jurisdictional finding is supported by substantial evidence, a reviewing court need not consider whether other jurisdictional findings are supported].)

order of removal and reunification, appellant's attorney stated "yes, that would -- is what mother would want at this stage."

"'[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.' [Citations.]" (*In re Paul W.* (2007) 151 Cal.App.4th 37, 58.) This rule applies in dependency cases. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338.) Appellant's attorney arguably made a tactical decision, realizing that her most important obligation to her client was to place B.A. back with the maternal grandmother. If so, appellant forfeited the issue and cannot now obtain reversal of the dispositional order to which she did not object.

We also find that the removal order was justified. Appellant relies on section 361, subdivision (c), which provides in relevant part that "[a] dependent child shall not be taken from the physical custody of his or her parents . . . *with whom the child resides at the time the petition was initiated*, unless" certain requirements are met. (§ 361, subd. (c), italics added.) Under this statute, removing a child from a parent who does not "reside" with the child at the relevant time is error. (*In re Dakota J.* (2015) 242 Cal.App.4th 619, 627-630.) Appellant argues that she did not "reside" with B.A. at the time the petition was filed.

The juvenile court did not specify which statute it relied upon in removing custody from appellant. It did not mention section 361, subdivision (c)(1) in either its oral pronouncement or its minute order. It did not apply the factors required under subdivision (c)(1) by making findings that the child faced a substantial danger if returned home and that no other reasonable means were available to protect the child.

Regardless of whether the court had the power to issue the order pursuant to section 361, subdivision (c)(1), it had the power to do so pursuant to section 361, subdivision (a)(1) and section 362, subdivision (a). Unlike subdivision (c)(1) of section 361, subdivision (a)(1) applies to "any parent," not solely to parents with whom the child resides. (*In re Julien H.* (2016) 3 Cal.App.5th 1084, 1090.) It authorizes the court to "'limit the control to be exercised over the dependent child by *any parent*" (*Ibid.*, italics added.) Similarly, section 362, subdivision (a) authorizes the court to "make any and all reasonable orders for the . . . custody" of a child adjudged a dependent of the court. Under these statutes, the court had a clear legal basis for its dispositional order removing B.A. from appellant's custody. (*In re Anthony Q.* (2016) 5 Cal.App.5th 336, 353-356 [although juvenile court did not have power to remove under § 361, subd. (c)(1), court had power to remove under § 361, subd. (a)(1) and § 362, subd. (a)]; see also *In re Julien H.*, *supra*, at pp. 1089-1090.)

Appellant does not argue that the removal order was unsupported by the evidence and we find no legal error in the dispositional order. We affirm.

DISPOSITION

The order is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.