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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

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

B234914

(Los Angeles County
Super. Ct. No. CK87812)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent.

v.

S. E.,

Defendant and Appellant;

LARRY K.,

Defendant and Respondent.

APPEAL from a judgment of the Superior Court of Los Angeles County. Terry T. Truong, Juvenile Court Referee. Affirmed.

M. Elizabeth Handy, under appointment by the Court of Appeal, for Defendant and Appellant.

Roland Koncan, under appointment by the Court of Appeal, for Defendant and Respondent.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel for Plaintiff and Respondent.

S. E. (mother), mother of H. E., appeals from a judgment entered under Welfare and Institutions Code section 360, subdivision (b).¹ Mother argues that the juvenile court's jurisdictional findings were not supported by substantial evidence, and that the juvenile court erred when it granted Larry K. (father) primary physical custody of H. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mother was a dependent of the court when she was a juvenile, first at approximately age four, and again when she was 17. Mother left school in junior high. Mother never reunified with her own mother, but lived with her father. H. was born in December 2009.²

1. Events leading up to the filing of the section 300 petition

On March 19, 2010, the Los Angeles County Department of Children and Family Services (DCFS) received a referral alleging that mother neglected H., took her out late at night, and smoked marijuana. At the time, mother was residing with maternal grandfather. On March 26, 2010, mother informed the investigating social worker that H. had no contact with father. Mother would not disclose father's name because she did not want him involved in the DCFS investigation.

Mother eventually left the home of maternal grandfather due to a disagreement. Mother first moved in with a friend, but when that did not work out she stayed at the Union Rescue Mission. Mother then got transitional housing at Penny Lane in North Hills in early September 2010.

¹ All further statutory references are to the Welfare & Institutions Code unless otherwise noted.

² Mother reported that she had another child, Harmony H. (born in September 2001) who resides with her father in Florida. Harmony H. is not a subject of this case.

On September 30, 2010, DCFS held a team decision making (TDM) meeting. DCFS informed mother that it had numerous concerns, including mother's history with DCFS as a child, her mental health, her past substance abuse, and her frequent moves with H. Mother agreed to participate in voluntary family maintenance (VFM) services and DCFS referred her to childcare services, family preservation services, and random drug testing.

Mother's VFM services were terminated on March 15, 2011, because mother did not adequately participate in the services. Mother's childcare services were also terminated. Mother enrolled H. in childcare on February 7, 2011, and her last date of attendance was February 22, 2011. On March 22, 2011, the owner of the childcare facility informed the social worker that she had left several messages for mother, and mother had failed to respond. Mother told the social worker that she did not want childcare services terminated because she intended to return to school. However, mother did not return to school and H. did not return to the childcare center.

Mother was terminated from her transitional housing program because of frequent absences from the residence without notice to her case manager. Mother also failed to appear for eight random drugs tests between December 30, 2010, and April 5, 2011.

DCFS held a second TDM meeting on April 14, 2011. DCFS had trouble scheduling the meeting because mother was not responsive to the social worker's messages, even after DCFS arranged transportation for her. Mother also stated at one point that H. was in Georgia with relatives, but she then admitted that H. was in her custody in California.

Mother, father, and the maternal step-grandmother attended the TDM meeting. Mother confirmed that she lost her transitional housing and stated that she had been staying with relatives. Mother and father agreed that father was a placement option and a safety plan was developed that consisted of mother submitting to an on-demand drug test that day and continuing random drug testing. Father agreed to remain involved and supportive, and mother understood that if she did not follow through with the requirements of the safety plan, there would be juvenile court intervention.

On the day of the TDM meeting, mother tested positive for marijuana. She admitted having smoked marijuana the previous day to deal with stress. On April 19, 2011, the social worker informed mother that she would immediately file a petition with the juvenile court if she missed any drug tests or tested positive. On April 21, 2011, mother failed to appear for a drug test.

Mother and H. had been staying at paternal grandmother's home since mother lost her transitional housing. On April 26, 2011, father called the social worker and let her know that mother was planning to pick up H. from the paternal grandmother's home and take her to the maternal grandparents' home, where mother was temporarily staying.

On April 27, 2011, the social worker met with mother and H. at a fast food restaurant. The social worker informed mother that she needed to inspect the maternal grandparents' home, and that if she were not able to inspect it, mother and H. would need to move out of the home.

On May 3, 2011, the social worker inspected the maternal grandfather's home and found it neat and organized. The maternal grandfather confirmed that he was permitting mother and H. to stay at his home until mother found housing. The social worker questioned mother about the drug test she had missed on April 21, 2011, and mother denied that she was required to test on that date. Mother offered to test that day; however, the social worker explained that was not an option and that DCFS would be filing a section 300 petition based on her noncompliance.

The social worker conducted a risk assessment and determined that the family was at "high risk" for future abuse due to H.'s young age and mother's history of neglect as a child. DCFS also noted that mother was homeless and had resumed smoking marijuana. However, DCFS noted that mother had been providing proper routine care for H., and had asked her family to take care of H. during her homelessness. Therefore, DCFS did not believe detention was necessary.

DCFS attached a copy of father's criminal history to its report, which indicated that father had a lengthy criminal history spanning from 1979 to 1994. Father's criminal history included arrests and/or convictions for offenses including assault with a deadly

weapon, carrying a concealed weapon, burglary, kidnapping, vandalism, trespassing, and being under the influence of a controlled substance.

2. Section 300 petition

On May 13, 2011, DCFS filed a petition on behalf of Harmony pursuant to section 300, subdivision (b). As later amended, the allegations against mother read:

“The child, [H. E.]’s mother, [S. E.] is a user of marijuana. On 04/14/2011, the mother had a positive toxicology screen for marijuana. Remedial services failed to resolve the family’s problems in that the mother failed to regularly participate in random drug testing. Such drug use by the mother places the child at risk of harm.”

DCFS also alleged that H. was at risk due to father’s criminal record and history of substance abuse.

Mother, father, and H. did not appear. The court did not make detention findings, indicating that it needed more information regarding father. The court noted, “The child is currently placed with her mother, and that remains the order of this court.” The court ordered DCFS to provide family maintenance services for mother and to provide a report for the next court date.

3. June 20, 2011 DCFS reports

DCFS provided the juvenile court with a jurisdiction/disposition report dated June 20, 2011. Mother admitted to having used marijuana in the past, but denied current usage. Mother indicated that she should be on a prescription for marijuana due to her headaches and menstrual pain. However, she stated that she would not try to get a medical marijuana card because “[y]ou guys want to take my kid away.” Mother emphasized that she had been using marijuana to ease pain and that she had the will power to stay away from it.

Father was interviewed. He stated that he had never known mother to use drugs and that they never used drugs together. Father was upset about the allegations with respect to his criminal history, since “[that] information was [from] about 20 years ago.” He resented the allegations that he was unable to care for H. since “they don’t even know

anything about me.” Father denied ever using drugs. He admitted to a charge of possession of drugs but indicated that “was a long time ago.” Father stated that he had never been married to mother, but that they were friends and their relationship was good. Father reported that he had worked as a truck driver and street maintenance worker, but that he had been unemployed for approximately two weeks. Father stated that he currently lives with his girlfriend and that H. stayed with him for two to three days about twice a month.

DCFS advised that mother was in need of an “intensive outpatient drug treatment program to address her significant drug problem.” DCFS also felt that a mental health professional should evaluate mother because she had admitted to experiencing anxiety and depression.

DCFS provided the juvenile court with an addendum report dated June 20, 2011. In it, DCFS reported that mother had tested positive for alcohol on June 7, 2011, and had missed a test on June 10, 2011. Mother had also failed to return the social worker’s telephone calls. DCFS recommended that the court detain H. from mother.

4. June 20, 2011 hearing

Mother and father were present at the June 20, 2011 pretrial resolution conference. The court found father to be H.’s presumed father. At DCFS’s request, the court dismissed without prejudice the count against father in the section 300 petition.

The court acknowledged DCFS’s recommendation that it detain H., but indicated that it was inclined to make a home-of-parents order with a family preservation referral. DCFS objected to the court’s decision not to detain the child from the mother. Father’s counsel indicated that father would be amenable to participating in parenting classes, but objected to any requirement that he drug test. Minor’s counsel submitted to the court’s tentative decision to make a home-of-parents order. Mother’s counsel requested that the matter proceed to adjudication, indicated that mother was willing to participate in family preservation, and asked that mother be permitted to drug test at a location closer to her home.

The court declined to detain H. from mother, but ordered that “H. be placed with both of her parents with primary physical [custody] to [father].”

5. July 13, 2011 addendum/supplemental report

DCFS provided the juvenile court with an addendum/supplemental report dated July 13, 2011. It included a summary of mother’s drug tests between December 30, 2010 and June 16, 2011. Mother missed 17 tests, produced one positive test for alcohol, one positive test for marijuana, and one negative test.

6. July 13, 2011 hearing

The adjudication hearing took place on July 13, 2011. Mother testified that the last time she smoked marijuana was April 24, 2011. She stated that she smoked marijuana to treat pain associated with her menstrual cycle. Mother stated that nothing bad happened to H. when she smoked marijuana, but that she had completely stopped smoking it and was willing to refrain from alcohol use as well.

On cross-examination, mother admitted that she cared for H. while under the influence. However, mother stated that H. was never in danger, and that mother had kept up with H.’s medical appointments and immunizations. Mother denied that she had been homeless or living on the streets before DCFS became involved. Mother stated that she had not been able to see H. since the court released the child to father’s care on June 20, 2011, because she and father were not getting along.

After mother testified, mother’s counsel and minor’s counsel asked the court to dismiss the section 300 petition and argued that there was no nexus between mother’s marijuana use and her care of H. County counsel asked the court to sustain the petition, take jurisdiction of H., and proceed to disposition.

The court found that H. was at risk due to mother’s history of not participating in drug testing and the difficulty that DCFS had in working with mother to ensure H.’s safety. The court found count (b)(1) of the petition to be true, and sustained the section 300 petition against mother, as amended.

However, the court did not declare H. a dependent of the court. Instead, the court ordered informal supervision of the family pursuant to section 360, subdivision (b). The

court stated, “The home-of-parents order remains. Primary custody to [father]. I would think that [DCFS] is going to want [mother] to continue to test . . . and to complete a parenting course for toddlers.”

The court set a progress hearing for January 12, 2012, and stated it was not ordering father to participate in services.

On July 13, 2011, mother appealed from the court’s July 13, 2011 orders.

DISCUSSION

I. Jurisdictional findings

At the jurisdiction hearing, the court made a true finding as to count 1 of the amended petition under section 300, subdivision (b). The allegation stated that mother is a user of marijuana, that she has failed to regularly participate in random drug testing, and that her drug use placed H. at risk of harm.

This finding is reviewed for substantial evidence. (*In re Mariah T.* (2008) 159 Cal.App.4th 428, 438.) Substantial evidence consists of evidence that is “reasonable, credible, and of solid value,” which would allow a reasonable trier of fact to reach the conclusion that the trial court reached. (*In re Christina A.* (1989) 213 Cal.App.3d 1073, 1080.) If there are conflicts in the evidence, they are to be resolved in favor of the respondent. (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393.) All legitimate inferences must be indulged to uphold the verdict. (*In re Marco S.* (1977) 73 Cal.App.3d 768, 781.)

Mother argues that DCFS failed to meet its burden of presenting sufficient evidence that it was necessary for the court to protect H. from harm. Citing *In re Alysha S.* (1996) 51 Cal.App.4th 393, 397, mother argues that the purpose of dependency proceedings is to protect the child, not punish the parent. Further, the child may only come under the jurisdiction of the court so long as it is necessary to protect the child. (*In re Janet T.* (2001) 93 Cal.App.4th 377, 388.) Mother states that the first question before the court was whether H. was in need of protection. There were no allegations that H. suffered neglect, that she was ever unsupervised or unprotected in the care of mother, or that there was any substantial risk of harm in the future. Because there was no evidence

of a serious risk of harm, mother argues, the jurisdictional finding should not have been sustained.

Mother admits that H. was very young and vulnerable, and that mother was struggling with instability, homelessness and substance abuse. However, mother claims, this information was insufficient to make a finding that H. was at serious risk of harm within the meaning of section 300 to justify the court's informal supervision. Specifically, mother argues that mother's marijuana use did not lead to a substantial risk of harm to H. Mother claims that H. was healthy and on target developmentally, and that there was no evidence she was not being properly cared for by mother.

Despite mother's arguments, we find that the evidence is sufficient to sustain the juvenile court's finding that H. was at substantial risk of harm. As explained in section 300.2, the Legislature's intention in enacting section 300 was not only to ensure the safety of children who are currently being abused or neglected, but to "ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." Further, the Legislature specified, "[t]he provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child." (§ 300.2).

Mother admitted that she had used marijuana regularly in the past. She also admitted to being under the influence of marijuana while caring for H. As the court noted, due to H.'s very young age, H. would not be able to tell people if she were in danger or if she had ever been harmed while under mother's care.

The court also noted mother's "failure to . . . comply with [DCFS]." The court felt that mother's "no-shows on the testing," and the difficulty that DCFS had experienced in trying to work with mother to ensure H.'s safety, supported a decision that H. was at risk of harm.

We find that the juvenile court's jurisdictional findings have a sufficient factual basis in the evidence. Substantial risk of harm to H. was shown. The court's true finding as to the allegations under section 300, subdivision (b), is therefore affirmed.

II. Custody order

Despite its true finding as to the allegations in section 300, subdivision (b), the court declined to declare H. a dependent of the court. Instead, it ordered that DCFS “supervise the family on an informal basis” pursuant to section 360, subdivision (b). The court further ordered “primary custody” to father.

Mother argues that the juvenile court had no jurisdiction to make custody orders as part of its disposition orders. The order placed mother at a distinct disadvantage, and impaired mother’s fundamental rights as the custodial parent. Mother points to California Rule of Court, rule 5.695, which authorizes the juvenile court to take one of several steps at a dispositional hearing. As one of those options, the juvenile court may: “[p]lace the child under a program of supervision as provided in section 301 and order that services be provided.” (Cal. Rules of Court, rule 5.695(a)(2).) However mother points out, there is no option which permits the court to order informal supervision under section 360, subdivision (b) and grant primary custody to a noncustodial parent. Mother argues that granting primary custody to the father was simply not one of the options available to the court absent a declaration that H. was a dependent of the court.³

DCFS has declined to address this issue.⁴ However, father has filed a responsive brief. Father argues that the juvenile court’s order that father have primary, yet shared custody with mother was less drastic than other options available under the circumstances and also ensured the safety, protection, and physical and emotional well-being of H.

On our own motion, we have taken judicial notice of the juvenile court’s order of January 12, 2012, detaining the child from mother pursuant to section 319. We invited

³ Under California Rules of Court, rule 5.695(a)(7)(B), if the juvenile court declares the child a dependent of the court, the court may remove physical custody from the parent or guardian, and order custody to the noncustodial parent.

⁴ In a letter dated November 15, 2011, DCFS informed this court that it advocated for the juvenile court to take jurisdiction over H., declare her a dependent of the court, and detain H. from mother’s custody. Therefore, DCFS explained, it would not be taking a position regarding the juvenile court’s decision to proceed pursuant to section 360, subdivision (b).

the parties to submit letter briefs on the question of whether the custody order of July 13, 2011, is moot in light of this subsequent order. We conclude that it is.

Under section 319, a child may be detained from parental custody upon a prima facie showing that he or she comes within section 300, continuance in the parents' home would be contrary to his or her welfare, there is "substantial danger to the physical health of the child . . . and there are no reasonable means by which the child's physical or emotional health may be protected without removing the child from the parent's or guardian's physical custody." (§ 319, subd. (b)(1).)

The order of July 13, 2011, removing primary custody from mother was not a detention order. However, now that there has been a detention order (Jan. 12, 2012), and detention findings have been made as to mother, there is no effective relief that we can provide her. (See *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 566 ["A question becomes moot when, pending an appeal from a judgment of a trial court, events transpire which prevent the appellate court from granting any effectual relief"].) Even if the court's July 13, 2011 order was error, the child cannot now be returned to mother's primary custody. The child has been detained from mother, and mother has not sought review of the January 12, 2012 detention order.

The question of whether the court had jurisdiction to remove custody from mother as part of its dispositional order on July 13, 2011, is moot.

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD