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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

SONYA J. et al.,

Defendants and Appellants.

B271071

(Los Angeles County
Super. Ct. No. DK15459)

APPEAL from an order of the Superior Court of Los Angeles County, Philip L. Soto, Judge. Reversed and remanded with directions.

Kate M. Chandler, under appointment by the Court of Appeal, for Defendant and Appellant Sonya J.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and Appellant Richard T.

Mary C. Wickham, County Counsel, R. Keith Davis,
Assistant County Counsel, and Brian Mahler, Associate County
Counsel for Plaintiff and Respondent.

Ginger T. was detained from her parents in February 2016 when she was five months old. At the time of detention, there was evidence that Ginger and her mother had tested positive for amphetamines and methamphetamines at Ginger's birth, that the family was homeless and living in a squalid van, that father had been arrested for domestic violence against mother, and that the parents had run out of formula for Ginger and were giving her water from a dirty bottle. The only basis for jurisdiction pled in the juvenile dependency petition, however, was that Ginger "demonstrates failure to meet developmental milestones and adequate weight gain." The juvenile court sustained the petition as to inadequate weight gain only, and both parents appealed.

Because there was not substantial evidence that Ginger failed to gain adequate weight, we reverse the jurisdictional finding and resulting dispositional order. However, because the record suggests that other valid grounds may exist for the juvenile court to assume jurisdiction over Ginger, we remand this matter to the juvenile court to allow the Los Angeles County Department of Children and Family Services (DCFS) to file a new petition if appropriate, or, alternatively, to seek dismissal of this proceeding.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Detention

A. September 2015 Referral

Ginger, born in September 2015, is the child of Sonya J. (mother) and Richard T. (father). She came to the attention of DCFS when she and mother tested positive for amphetamines and methamphetamines at Ginger's birth. Mother denied any illegal drug use, but said she had taken Tylenol and Nyquil to help her sleep. Mother and father tested negative for any drugs six days later, and a technician told the children's social worker (CSW) that some over-the-counter drugs such as Nyquil can trigger a false positive for methamphetamines/amphetamines.

Mother and father were reported to be eager to receive help from DCFS, but failed to maintain contact with the agency or to follow through with any of its recommendations. DCFS made several attempts to contact the family, but ultimately closed the referral as inconclusive because it could not locate the family.

B. February 2016 Referral

In February 2016, when Ginger was five months old, DCFS received a report that mother and father were homeless and living out of their van. The parents were receiving meals from a homeless shelter, and the shelter employees were concerned because Ginger was very small and did not engage or respond when given attention. Specifically, shelter employees reported that Ginger did not respond to her name, react to physical stimuli, make eye contact or follow movement with her eyes, or respond to attempts at vocal engagement. Further, the shelter's security guard reported hearing mother screaming profanities at father.

DCFS was not initially able to locate the family, but it contacted a community medical clinic where Ginger had been seen by a doctor in late December 2015, when she was almost four months old. A supervisor said that according to the physician's notes, Ginger had weighed slightly over 10 pounds and appeared to be able to see, vocalize, and grab objects.

On February 5, 2016, the juvenile court found a prima facie case for detaining Ginger and issued a protective custody warrant for her, and bench warrants for mother and father.

The family was located and Ginger was detained on February 8. A CSW reported that the van where the family was living was filthy and cluttered with trash, and Ginger was also filthy and had an unpleasant odor. Further, "[c]hild had a small bottle next to her that had misty white water in it. CSW asked parents if that is child's water and father stated that it is child's formula and that they came to the shelter to get more formula as they didn't have any more. The water in the bottle looked like residue of formula that was dissolved with water and the bottle itself was dirty." The CSW bathed and fed Ginger, reporting that "[t]he baby was very hungry and drank 8 ounces of formula very quickly."

A public health nurse (PHN) observed Ginger on February 8, and reported that she was babbling and moving all extremities, had good control of her head, and tracked moving objects with her eyes but did not try to reach for them. She was reported to be small, but healthy and well-nourished.

II.

Petition

A juvenile dependency petition, filed February 5, 2016, alleged pursuant to Welfare and Institutions Code, section 300,

subdivision (b) as follows: “[Mother] and [father] have failed to provide appropriate care and supervision of the child. The child demonstrates failure to meet developmental milestones and adequate weight gain. Such failure to provide appropriate care and supervision of the child by the parents endangers the child’s physical health and safety, and places the child at risk of serious physical harm, damage and danger.”¹

III.

Jurisdiction and Disposition

A. Reports

DCFS reported that father had a lengthy criminal history that dated back to 1990 and included prior arrests and convictions for corporal injury on a spouse, drug possession, and robbery.

DCFS interviewed father telephonically on March 8, 2016. Father said he, mother, and Ginger had been living in their van, with friends, and in hotel rooms. He denied Ginger ever had not been properly fed. He and mother had run out of formula the day Ginger was detained, but were going to get more from a public agency.

Father denied that mother used drugs, but said she may have tested positive for methamphetamines because she had been exposed to people who used drugs. Father admitted using methamphetamines more than ten years earlier. He denied domestic violence with mother, but admitted they had had one incident where she startled him awake and he hit her. Following

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

that incident, he was arrested for domestic violence and spent time in jail. He also admitted being on probation for theft.

Mother told the CSW that Ginger was “forming words,” laughed, and giggled. According to mother, Ginger could not sit independently, but could roll over. Mother denied Ginger had been dirty at the time of detention, insisting she had just bathed Ginger and dressed her in clean clothes, and said there were always diapers and formula for Ginger.

Mother said that she and father had had a single incident of domestic violence, as a result of which she suffered a swollen eye and facial discoloration. She told DCFS: “I nudged [father] asking for a cigarette. He hit me in the face with his hand. I woke him up out of his sleep. I was frightened. He started going after me. I felt he was angry. I was scared. I saw a lady walking down the street. I went up to her and asked to use the phone and called [the] police.” Mother stated this incident occurred in October 2014.

Mother admitted to a 2012 conviction for driving under the influence of alcohol, but denied any current drug or alcohol abuse. Mother did not know why she tested positive for methamphetamines when Ginger was born, but said it may have been because she and father were living at a muffler shop in a trailer.

Mother said she was not working due to depression, anxiety, and stress-related issues. She reported suffering from physical pain throughout her body, including her bones, muscles, feet, and legs, as a result of rheumatoid and muscular arthritis. Mother said she had no income and no family or friends to whom she could turn for support.

Ginger's foster mother reported that during an initial medical exam on February 10, 2016, the physician had concerns about the small size of Ginger's head and scheduled a follow-up appointment.

B. Hearing

Immediately prior to the March 15, 2016 jurisdiction/disposition hearing, mother filled out a "Parental Notification of Indian Status" that said she was or may be a member of, or eligible for membership in, the Cherokee tribe. Father denied any Indian heritage. At the hearing, mother told the court that her great-grandmother had been half-Cherokee, and that she was a registered member of the Cherokee tribe. Mother did not know her great-grandmother's full name or date of birth, but said she believed she could get the information by talking to her family. The court instructed DCFS to investigate and to give appropriate notice under the Indian Child Welfare Act (ICWA).

Both parents denied the allegations of the petition. Mother testified that she took Ginger for a well-baby visit on December 28, 2015, and that the doctor had no concerns about Ginger's development. Until Ginger's detention, mother fed her soy baby formula on demand. There was never a time that Ginger needed to eat and there was no formula.

On cross-examination, mother acknowledged that she had tested positive for amphetamines when she gave birth to Ginger, but said she was not using any narcotics at that time.² Mother

² Mother's counsel objected to county counsel's questions about mother's narcotics use on the ground that they were beyond the scope of the petition.

said she had not observed Ginger to have any developmental delays. To the contrary, at two months old, Ginger was able to play a counting game in which “I [mother] would say, ‘one,’ and [Ginger] would hold up one [finger]. And I would hold up [another] one and say, ‘two,’ and she would hold up two. And we were proceeding to count up to ten like that.” Mother said no one other than the foster mother had ever told her that Ginger had a small head.

Mother said she and father did not have housing, but that she and Ginger could live with her godmother in Long Beach. She was not currently living with her godmother because father was not welcome in her godmother’s home and “[w]e wanted to be a family together.” Mother had not yet spoken to her godmother about moving in with her.

The parties stipulated that if called to the stand, father would testify that father’s brother had offered to allow the family to stay with him for a month.

Following testimony, mother’s counsel asked that the petition be dismissed because “we still do not have any documentation from a doctor that this child has failure to thrive; that this child is not meeting her developmental milestones or adequately gaining weight.” Counsel noted that in December 2015, Ginger’s pediatrician observed that Ginger smiled, vocalized, appeared able to see, and was able to grasp things. Results from a more recent medical assessment were still pending, so “to say that . . . the child has a small head circumference or that the child has special needs is a mischaracterization of the facts.” Further, counsel said she would “object to this court amending to proof.” She further argued “that a parent has the right to have notice of the specific

facts upon which this petition is based and procedural due process requires notice and an opportunity to be heard.”

Father’s counsel joined mother’s request to dismiss, noting that “county counsel made a great argument if you have a different petition. Unfortunately, he doesn’t have a different petition. And the key is what [mother’s counsel] said. That’s what petitions are all about. . . . [They] give the parents notice of what is going to be brought up during the hearing and what they have to defend when they get here.”

The court denied the motion to dismiss the petition, concluding that juvenile dependency petitions “don’t need the specificity that you are arguing they need. . . . [¶] [A]n amendment that says that these folks are being abusive or neglectful and this child [is] underweight is enough.” The court credited mother’s testimony that “the child was counting and mirroring,” and therefore said DCFS had not established that Ginger had failed to reach developmental milestones. However, the court said it would “not . . . turn a blind eye to” mother’s drug use, the domestic violence between the parents, and the child’s inadequate weight gain, finding that “those are all issues that go to the inability to adequately parent and putting the child at serious risk of harm in the future.” The court therefore struck the language of the petition alleging failure to reach developmental milestones, and otherwise sustained the petition.

The court ordered Ginger placed with the parents, finding that DCFS had not demonstrated by clear and convincing evidence that there were not reasonable means to keep her safe with her parents. The court ordered the parents to submit to six random drug tests, attend parenting classes for special needs children, attend individual counseling, and submit to

unannounced home visits. Finally, the court ordered compliance with ICWA: “The mother is ordered to be interviewed and notices to be given to the appropriate tribe and band. And a non-calendared report is to be provided to all counsel with regards to notices. And all counsel will have discretion to walk the matter on for appropriate setting of any hearing with regards to ICWA.”

Mother and father timely appealed from the March 15, 2016 order.

CONTENTIONS

The parents contend: (1) substantial evidence does not support the sole sustained allegation of the petition, i.e., that Ginger failed to gain adequate weight; (2) the jurisdictional order cannot be affirmed based on a theory not pled in the petition; and (3) the matter must be remanded for failure to comply with the notice provisions of ICWA.

DISCUSSION

I.

Legal Standards

Section 300, subdivision (b)(1) provides that a child is subject to juvenile court jurisdiction if 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 failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent’s or guardian’s mental illness, developmental disability, or substance abuse.”

In the trial court, DCFS has the burden to establish the jurisdictional facts by a preponderance of the evidence. (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1014.) On appeal, “ ‘we must uphold the [trial] court’s [jurisdictional] 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.]’ ” (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022.)

II. Analysis

To reiterate, the sustained petition stated: “[Mother] and [father] have failed to provide appropriate care and supervision of the child. The child demonstrates failure to meet developmental milestones and adequate weight gain. Such failure to provide appropriate care and supervision of the child by the parents endangers the child’s physical health and safety, and places the child at risk of serious physical harm, damage and danger.”

Mother and father contend that substantial evidence did not support the sole jurisdictional fact alleged in the sustained petition—that Ginger “demonstrates failure to meet developmental milestones and adequate weight gain.” We agree.³

³ County counsel urges that mother forfeited her right to challenge the legal sufficiency of the petition because she failed to file a demurrer prior to the adjudication hearing. Not so. Mother’s challenge is not to the facial sufficiency of the petition, but rather to the sufficiency of the evidence to support the allegations of the sustained petition. Thus, mother was not required to demur to the petition.

The only evidence that Ginger was not gaining adequate weight was (1) at her four month check up in late December 2015, Ginger weighed only four pounds more than she weighed at birth, and (2) the shelter workers told DCFS that in February 2016, when Ginger was about five months old, she appeared to be a newborn because she was so tiny. This evidence was insufficient to sustain the court's jurisdictional finding. In the absence of any information about normal or expected weight gain, Ginger's four pound increase during her first four months does not establish that her weight gain was "inadequate." And the shelter workers' observations of her appearance at five months, while concerning, are not substantial evidence of inadequate weight gain because they were based on Ginger's appearance only, not on information about her actual or expected weight.

Perhaps recognizing its failure to prove the sole factual allegation of the sustained petition, DCFS urges us to consider additional evidence of neglect described in its reports. Such evidence includes: (1) mother and Ginger tested positive for methamphetamines and amphetamines at Ginger's birth; (2) father engaged in domestic violence against mother; (3) when she was detained, Ginger was filthy, the parents had run out of baby formula, and the family was living in a trash-strewn van; (4) mother was not working due to depression, anxiety, and stress-related issues; and (5) mother said she had no income and no family or friends to whom she could turn for support.

These facts are extremely concerning and may well provide an adequate basis for juvenile court jurisdiction under section 300, subdivision (b). However, none of these facts was pled, and thus none is a basis for sustaining *this petition*. "[F]undamental . . . due process' requires '[n]otice of the specific facts upon which

removal of a child from parental custody is predicated' in order to 'enable the parties to properly meet the charges.' [Citation.]" (*In re J.O.* (2009) 178 Cal.App.4th 139, 152, fn. 13.) "A bare recital of the conclusionary words of the statute does not suffice as notice." (*In re Jeremy C.* (1980) 109 Cal.App.3d 384, 397.) Accordingly, the juvenile court could not properly consider unalleged conduct in making the jurisdictional finding. (*In re J.O.*, *supra*, 178 Cal.App.4th at p. 152, fn. 13.)

We note that a juvenile court may amend a dependency petition to conform to the evidence received at the jurisdictional hearing to remedy immaterial variances between the petition and proof. (§ 348; Code Civ. Proc., § 470.) Here, however, the juvenile court did not amend the petition to conform to proof. Moreover, even had it done so, we would be bound to reverse because the basis on which the juvenile court sustained the petition—the positive drug tests and domestic violence between mother and father—was fundamentally different than the parental misconduct alleged. (See *In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1041–1042 ["[T]he ability to amend according to proof plays an important role in the overall dependency scheme. If a variance between pleading and proof . . . is so wide that it would, in effect, violate due process to allow the amendment, the court should, of course, refuse any such amendment."]; see also *In re Andrew L.* (2011) 192 Cal.App.4th 683, 689 [same].)

Of course, our conclusion that DCFS "failed to prove the grounds it asserted or to assert the grounds it might have proved" (*In re Janet T.* (2001) 93 Cal.App.4th 377, 392) does not mean DCFS cannot try again. It is entirely possible that valid grounds exist for the juvenile court to assume jurisdiction over Ginger and, indeed, it may be in Ginger's best interests for the court to

do so. Further, during the pendency of this appeal, new circumstances may have arisen or new information may have come to light that could affect the juvenile court's evaluation of any new petition filed by DCFS.

We therefore do not dismiss the dependency action, but instead reverse the jurisdictional findings and dispositional order, and remand this matter to the juvenile court to allow DCFS to file a new petition if appropriate, or, alternatively, to seek dismissal of this proceeding. In any further proceedings on remand, the juvenile court should give appropriate weight to all information available concerning Ginger's and the family's current circumstances.

In light of our conclusion, we need not reach the parents' contentions that the juvenile court erred in issuing a disposition order without first ensuring compliance with ICWA.

DISPOSITION

The jurisdictional findings and dispositional order are reversed and the matter remanded to the juvenile court for further proceedings consistent with this opinion.

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EDMON, P. J.

We concur:

ALDRICH, J.

LAVIN, J.