Filed 6/14/16 In re Aurora R. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re AURORA R. et al., Persons Coming Under the Juvenile Court Law.	B263555
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. IRMA O., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK67930)

APPEAL from an order of the Superior Court of Los Angeles County, Stephen Marpet, Judge. Affirmed in part, reversed in part.

Liana Serobian, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, Interim County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Peter Ferrera, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Irma O.'s three youngest children were already dependents of the juvenile court when the court issued orders sustaining a subsequent petition (Welf. & Inst. Code, § 342)[1] and removing them from mother's custody. (§ 361, subd. (c).) Mother appeals challenging the sufficiency of the evidence to support the orders. We reverse the order sustaining the subsequent petition but affirm the removal order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The children were declared dependents of the court*.

Mother has numerous children, of which only the youngest three, Aurora, Karen, and Antonio R., ages 18, 15, and 13 respectively, are at issue in this appeal. Mother has an extensive history with the Department of Children and Family Services (the Department) dating back to 1998 and involving allegations of her abuse and neglect. At least one allegation of abuse was found to be conclusive and resulted in a dependency.

In October 2014, the juvenile court declared these three children dependents because mother's boyfriend, Carmen M., repeatedly sexually abused Karen and threatened the child if she disclosed the abuse. The court found that mother knew or reasonably should have known of the sexual abuse and failed to protect Karen because she allowed Carmen to reside in the home and have unlimited access to the child. (§ 300, subds. (b), (d) & (j).) (The original petition.) Carmen was arrested. The court released the children to mother and ordered family maintenance services to include family counseling and individual therapy for mother to address sexual abuse awareness.

Mother was uncooperative in treatment and denied the sexual abuse, according to the police, mother's therapist, and the Department. As her therapist predicted, mother wanted the case closed without addressing case issues. Mother spoke to Carmen, which re-traumatized Karen. The family emotionally abused Karen in retaliation for Carmen's arrest. Karen related that the family blamed her for the consequences of her report.

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[1] All references are to the Welfare and Institutions Code.

2. *The subsequent petition*

The Department filed the subsequent petition (§ 342) at issue a month after the dependency commenced. The section 342 petition alleged, among other things, that mother placed Aurora in a detrimental and endangering situation by providing the child with alcohol and by drinking alcohol with the child. The reason for this petition was the Department had received a report that mother was physically abusing Karen. In response, a social worker went to the house and found mother and Aurora drinking wine coolers together. Mother claimed the two thought wine coolers were juice and it was their first time drinking the coolers. Aurora said that they had seen the coolers in the juice aisle at the store and mother agreed to her suggestion to buy them. Called by the social worker, the sheriff's deputies declined to cite or arrest mother because they did not see any drinking and because the family indicated to the deputies that they did not know the drinks contained alcohol. Karen claimed that she could not take mother's abuse anymore and feared her mother. She mentioned a plan to run away from home. Antonio confirmed that mother hit Karen.

3. *The Department's reports – detention through jurisdiction hearing*

Mother had a new boyfriend, Mr. G. Mother told the social worker that the relationship was a month old and that Mr. G. only came into her house to use the bathroom. Both statements were untrue as mother had been seeing Mr. G. for three months and he spent the night at her house. Given that mother's previous boyfriend sexually abused Karen, and that mother hid her new romance from the Department, the social worker concluded mother was focused on her own needs and not on those of the children.

Mother had financial trouble. She did not work and her income was comprised solely of the children's social security money. She admitted that she was using Mr. G. for the financial support he provided.

Mother continued to insist that she did not want to participate in therapy and wanted her case closed. The therapist opined there was little chance of any meaningful change if mother did not want to cooperate and "everyone lie[d] for their convenience."

The children were undergoing trauma focused cognitive/behavior therapy, and individual therapy because of numerous concerns that required attention. Karen and Antonio appeared to have low IQs and were wetting the bed.

The Department detained the children from mother in mid-November 2014. The social workers found the house to be filthy with cockroaches crawling on the walls. The children's bedroom had a "very strong odor of urine." The children had head lice. The juvenile court ordered the children detained from mother and placed them in foster care. The court granted mother monitored visitation.

Prior to the hearing on the subsequent petition, the Department reported that Aurora denied knowing she was drinking wine, and denied having consumed alcohol before the wine-cooler incident. Yet, Aurora told her father that mother was drinking alcohol the day the social worker arrived. According to Karen, Aurora knew the wine coolers contained alcohol, but mother did not drink a lot. Antonio stated that mother and Aurora were drinking alcohol when the social worker arrived, but he had not seen them drink it before. Mother stated in Spanish that she did not know the little bottles had alcohol. They thought it was fruit juice. She did not know in what section of the market they found the bottles. She denied having consumed alcohol with Aurora before. Mother drank once in a while, and as far as she knew, Aurora did not drink. Mother was still not sure that Carmen ever sexually abused Karen. Aurora was worried that, without a boyfriend who would pay the bills, mother needed her children to support her.

The therapist expressed "great concern for all of the children in terms of their needs and how mother fails to advocate for their needs." Mother only advocated for the children when money was involved. The therapist explained that mother knew that the children were infested with lice and that Karen and Antonio wet their beds, but did nothing about it. The therapist also talked to mother about taking them to the pediatrician for an evaluation and to request speech therapy for Antonio and Karen, but mother did not do so. Meanwhile, the therapist was working with the foster mother to monitor the children's hygiene and was working with the children on safety awareness and planning

because of concerns about mother's boyfriends. The children had really grown emotionally since leaving mother.

By late January 2015, mother had moved in with Mr. G. to a one-bedroom converted garage. The Department recommended against releasing the children to mother because Mr. G., who had no identification, had not submitted to a criminal background check and Karen had been sexually abused by a previous boyfriend. Also, the new residence was "too small to give anyone the needed privacy" as there was "very little space to sit down and/or walk around."

Mother's January 22, 2015 on-demand drug and alcohol test produced a negative result.

At the jurisdiction hearing on the subsequent petition, held in January 2015, mother confirmed through a Spanish interpreter that she submitted the issue on the social worker's reports. The juvenile court sustained the count alleging that mother drank alcohol with Aurora, but dismissed the rest of the counts in the interest of justice.

4. *The disposition order removing the children*

For the disposition hearing, the Department reported that mother had stopped going to therapy shortly after the children were detained. Mother had been receiving in-home counseling until December 2, 2014. The counseling agency had informed mother by letter that, because of her frequent cancellations, it would no longer provide her in-home counseling.

The social worker told mother in early February 2015, that the plan was to return the children to her. The social worker told mother that, to regain custody, she needed to move into a new house and re-enroll in the individual counseling that was part of her case plan, and that Mr. G. had to submit to a background check.

When the Department checked up on mother the following month, she had not met all of the requirements for return of the children to her care. Mother claimed she was unable to re-enroll in therapy. Yet, the Department learned that mother had not attempted to contact the counseling agency. Mr. G. did not submit to a live-scan background check, claiming lack of an identification card.

Mother did move. By mid-March 2015, she had a three-bedroom house that she shared with Mr. G., and her adult son, Henry, so that they could share in the financial responsibilities, as mother was not employed. Henry was recently released from jail and had a criminal record that included domestic violence. Mother's visits with the children were consistent and went well. The children were happy and excited to see mother.

The children were also "ecstatic to be together and ha[d] adjusted well" in their foster placement. They "love[d] sleeping in their own beds." They were referred to an agency to address trauma symptoms related to the sexual abuse Karen endured, including sadness, anxiety, guilt, shame, grief, loss, and confusion. The children had established a good therapeutic alliance and their symptoms had decreased, although Karen and Antonio continued to wet the bed. The Department recommended that the children be suitably placed and that the court order reunification services for mother to include parent education, individual counseling to address case issues including sexual abuse awareness, family counseling, and monitored visits.

Mother tested negative for alcohol on January 6, 22, and March 4, 2015, but failed to appear six times between January 26, 2015 and March 6, 2015. Three days before the disposition hearing, mother enrolled in weekly individual therapy sessions. There is no record of attendance after her intake session.

At the disposition hearing held on March 16, 2015, the juvenile court removed the children from mother's custody, finding by clear and convincing evidence that there was a substantial danger to the children's physical and mental well-being and there were no reasonable means to protect them without removal. The court ordered family reunification services to include a parenting class and individual counseling for mother. The court also ordered mother to submit to eight random drug and alcohol tests. If any tests were missed or produced positive results, mother would have to attend a treatment program. The court ordered the children to continue counseling. Mother filed her notice of appeal.

CONTENTIONS

Mother contends there was insufficient evidence to support the order sustaining the subsequent petition (§ 342) and the order removing the children from her custody was an abuse of discretion (§ 361, subd. (c)).

DISCUSSION

1. *The order sustaining the subsequent petition is not supported by substantial evidence.*

When a child has already been declared a dependent of the juvenile court and the social services agency learns of new facts or circumstances, other than those under which the original petition was sustained, sufficient to declare the child to be described by section 300, the agency must file a subsequent petition. (§ 342.) The standard of proof for the subsequent petition is the same as that required for an original petition, a preponderance of the evidence. (Cal. Rules of Court, rule 5.560(b); *In re Heather A.* (1996) 52 Cal.App.4th 183, 193; § 342 ["All procedures and hearings required for an original petition are applicable to a subsequent petition filed under this section."].) We review the juvenile court's findings for substantial evidence. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1649.)

Mother contends there was insufficient evidence to support the order sustaining the subsequent petition (§ 342) because jurisdiction was premised on a single incident. We agree.

Subdivision (b)(1) of section 300 authorizes dependency jurisdiction when "[t]he child [(1)] has suffered, *or* [(2)] 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 . . . , *or* by the inability of the parent . . . to provide regular care for the child due to the parent's . . . substance abuse. . . ." (Italics added.)

The sustained allegations in the subsequent petition, that are different from those in the original petition, are that "On 10/27/2014, . . . mother, Irma O[.], placed the child

Aurora in a detrimental and endangering situation by providing the child with alcohol and consuming alcohol with the child."

There are no allegations in either the original or the subsequent petition that mother is a substance abuser. Rather, mother drank once in a while. Hence, there is nothing in the record to show that Aurora was at risk of "serious physical harm or illness" because of mother's consumption of alcohol. (§ 300, subd. (b)(1).)

As alleged in the petition itself, the record contains only one incident involving alcohol. Mother denied having consumed alcohol with Aurora prior to October 27, 2014. Both Karen and Antonio denied ever seeing mother and Aurora consume alcohol before that incident. Karen confirmed that mother did not know the wine coolers contained alcohol. The sheriff's deputies took no action when summoned because they did not see Aurora consuming alcohol and they believed the claims of Aurora and mother that they did not know the coolers contained alcohol. Even though mother and Aurora did drink wine coolers together on October 27, 2014, that fact alone is an insufficient basis to sustain the subsequent petition because there is no allegation or evidence that Aurora "has suffered serious physical harm or illness" from this single event. (§ 300, subd. (b)(1).)

The Department does not really defend the allegations on appeal. Rather than to argue harm from the consumption of alcohol, the Department argues only that this event is simply more in mother's ongoing history of "neglectful parenting" and "failure to . . . properly parent her children." However, the original petition already alleged mother's neglect and failure to protect Karen from Carmen's sex abuse.

Nor is there any evidence of "a substantial risk" that Aurora "*will* suffer, serious physical harm or illness," the alternative prong in section 300, subdivision (b)(1). (Italics added.) Aurora does not drink alcohol. Otherwise, there is nothing to indicate that Aurora was at "substantial risk" of suffering "serious physical harm or illness" in the

future as a result mother's failure "to adequately supervise or protect" her from alcohol.[2] (*Ibid.*)

Notwithstanding our conclusion here, all three children remain dependents of the juvenile court based on the original petition based on Carmen's repeated acts of sexual abuse and mother's failure to protect Karen. (§ 300, subds. (b), (d) & (j).)[3]

2. *The removal order was not an abuse of discretion.*

When the Department seeks to remove a child from parental custody on a subsequent petition, the court applies the procedures and protections of section 361. (See *In re Barbara P*. (1994) 30 Cal.App.4th 926, 933 ["By statute, all procedures and hearings required for an original petition also apply to a subsequent petition"].) Section 361, subdivision (c)(1) reads in relevant part, "A dependent child shall not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence . . . [¶] (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody."

"Before the court may order a child physically removed from his or her parent, it must find, by clear and convincing evidence, that the child would be at substantial risk of harm if returned home and that there are no reasonable means by which the child can be protected without removal. [Citations.]" (*In re Cole C*. (2009) 174 Cal.App.4th 900,

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[2] Given the evidence does not support the finding that Aurora or her siblings were at risk of "serious physical harm or illness" from this one-time event, it is unnecessary to determine what brand of wine cooler mother and Aurora were drinking, or to address mother's argument that wine coolers contain less alcohol than other beverages.

[3] Aurora had already reached the age of 18 by the time mother filed her opening brief in this appeal. However, the appeal is not moot because the juvenile court may retain jurisdiction over a dependent until she reaches the age of 21 years. (§ 303; *In re D.R.* (2007) 155 Cal.App.4th 480, 486.)

917; *In re John M.* (2012) 212 Cal.App.4th 1117, 1126.) "The parent need not be dangerous and the child need not have been actually harmed for removal to be appropriate. The focus of the statute is on averting harm to the child. [Citations.] In this regard, the court may consider the parent's past conduct as well as present circumstances. [Citation.]" (*In re Cole C., supra*, at p. 917.) Although in the juvenile court, clear and convincing evidence of abuse or neglect is necessary to remove a child from a parent's physical custody, on appeal, we apply the substantial-evidence standard of review to determine whether there was clear and convincing evidence supporting the removal order. (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.)

Here, the record contains ample evidence that mother has failed at every turn to address her children's needs since the original petition was sustained. She persists in denying or doubting that Karen was continually sexually abused, even after Carmen was arrested and admitted having committed the abuse, and even though the children were in trauma focused therapy because of it. Mother contacted Carmen, which re-traumatized Karen who contemplated running away. Mother refused to participate in therapy and lied that she had tried to re-enroll;[4] she was unconcerned by the fact that her teenage children were wetting the bed even though their bedroom stank of urine; she did not take the children to the pediatrician despite the therapist's instruction; she ignored the children's head lice; and she did not request speech therapy for Karen and Antonio as suggested by the therapist. Instead, mother commenced another relationship and has moved in with a man solely for his money. Mr. G. has not yet submitted to a criminal background check,[5] notwithstanding mother's children have already suffered extreme trauma from her last

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[4] Although mother did finally re-enroll in counseling three days before the disposition hearing, there is no documentation of her participation or progress, which is particularly relevant given her history of cancelling sessions.

[5] Mother's attorney stated at the hearing that "mother says the boyfriend has given his fingerprints." However, neither the fingerprints nor the criminal background check results are in the record and "[i]t is axiomatic that the unsworn statements of counsel are not evidence." (*In re Zeth S.* (2003) 31 Cal.4th 396, 413-414, fn. 11.)

boyfriend's conduct. Mother is fully aware of the danger her involvement with Mr. G. poses to the children because she lied to the Department about how long and how intimate her relationship was with him. Mother lives with her son Henry who potentially has a disqualifying criminal conviction, or at least a history of violence. Mother's conduct since the Department's most recent involvement with this family has led the therapist and the police to opine that the children are at serious risk in mother's custody. Meanwhile, since their removal, the children are ecstatic, happy, thriving, and healthy. Manifestly, the record supports the juvenile court's finding by clear and convincing evidence that there is a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the children if they were returned home.

Nor is there any question that no alternative disposition existed short of removal. (§ 361, subd. (c)(1).) The family had been receiving preservation services since the original petition was sustained. Such services had not worked and did not protect the children. Since their removal, the therapist reported that they have been growing healthier than they would be had they stayed in mother's care.[6]

Mother contends that the juvenile court committed reversible error by failing to state on the record the facts on which it based its removal decision. (§ 361, subd. (d) ["The court shall state the facts on which the decision to remove the minor is based"].)

The juvenile court's failure to state the facts on the record was error. (*In re Jason L.*, *supra*, 222 Cal.App.3d at p. 1218, citing *In re B. G.* (1974) 11 Cal.3d 679, 699.)

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[6] We note that no supplemental petition (§ 387) was filed. However, the absence of a supplemental petition does not affect mother's rights in this case because mother had notice and appeared at the disposition hearing, and the juvenile court properly based its removal order on clear and convincing evidence in the record. (See *Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1077 ["standard for removal on supplemental petition is the same as removal on an original petition: the agency must show by 'clear and convincing evidence . . . [t]here is a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor' "]; cf. *In re Barbara P.*, *supra*, 30 Cal.App.4th at pp. 933-934 [recognizing differences between subsequent and supplemental petitions but concluding same reunification rules should apply to both].)

However, the failure to make findings required by section 361, subdivision (d) is deemed harmless when " 'it is not reasonably probable such finding, if made, would have been in favor of continued parental custody.' [Citations.]" (*In re Jason L.*, *supra*, at p. 1218.) Mother was not prejudiced. The juvenile court's disposition order was supported by clear and convincing evidence and so it is not probable, even had the court stated the facts on the record, that mother would have retained custody of the children.

DISPOSITION

The order sustaining the subsequent petition (§ 342) is reversed. The order removing the children from mother's custody (§ 361, subd. (c)(1)) is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

HOGUE, J.*

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