Filed 7/10/19 In re J.K. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re J.K., a Person Coming Under the Juvenile Court Law.	B292449 (Los Angeles County Super. Ct. No. 18 LJJP00385 A-E)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MARJORIE M., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Karin Borzakian, Juvenile Court Referee. Affirmed in part and reversed in part.

Gina Zaragoza, under appointment by the Court of Appeal, for Defendant and Appellant Marjorie M.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel and Jessica S. Mitchell, Deputy County Counsel, for Plaintiff and Respondent.

The juvenile court ordered the five children of Marjorie M. (Mother) removed from her custody and placed with their respective fathers, Stefan K. and Richard B. The disposition order resulted from a single incident of domestic violence by Mother against Stefan in the home they shared with Richard and the children. There were no prior incidents of domestic violence; this was the first time Mother assaulted Stefan, who thereafter decided to move out of the family home. The children did not show any signs of abuse or neglect. After the incident, Mother engaged in meaningful efforts to manage her anger issues. Mother challenges the disposition order, contending the evidence is insufficient to support the juvenile court's decision to remove the children from her custody. We agree and reverse the order to the extent it requires Mother to remain outside the family home of Richard and the children.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and Stefan are the parents of three children: J.K. born in February 2005; S.K. born in June 2006; and I.K. born in July 2008. Mother later had two more children with Richard: D.B. born in May 2014; and M.B. born in November 2017. In 2018, Mother, Richard, Stefan and the children resided together

after Stefan became homeless.[1] Mother maintained a romantic relationship solely with Richard, her fiancé.

On the night of April 23, 2018, Los Angeles County Sheriff's deputies responded to a report of domestic violence and found Stefan bleeding from wounds to his face and head. Stefan said Mother took a swing at him during an argument, scratching his face and arm. When Stefan began to walk away, Mother struck the back of his head with an unknown object, causing a large laceration. Stefan declined the deputies' offer of an emergency protective order against Mother.

Prior to being interviewed by deputies, Mother was advised of her right to remain silent, to the presence of an attorney and, if indigent, to appointed counsel (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]), which she waived. Mother denied striking Stefan, claiming he had suffered the injuries in a bar fight before coming home that night. Mother said she and Stefan had merely argued, because his drinking made her angry. The deputies arrested Mother for felony domestic violence (Pen. Code § 273.5, subd. (a)).
Richard B. was not home at the time. During the incident, the children were in their bedrooms except for I.K., who was not at home. The eldest child, thirteen-year-old J.K., did not witness the incident, but he heard his parents arguing and came out of his bedroom. When he saw Stefan bleeding, J.K. told Mother to leave. J.K. reported that Mother left, taking the baby M.K. with her.

In June 2018, the Department of Children and Family Services (DCFS) petitioned under Welfare and Institutions Code

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[1] One of the children, I.K., lived primarily with a maternal aunt based on a private agreement between her and Mother.

section[2] 300, subdivisions (a) and (b) to have the five children declared dependent children of the juvenile court, alleging Mother and Stefan had "engaged in a violent verbal and physical altercation in the presence of the children," when Mother struck and injured Stefan with an unknown object, thereby placing the children at serious risk of danger or physical harm. Following a detention hearing, the court ordered the children to remain released to their respective fathers under the supervision of DCFS and Mother to undergo anger management classes, domestic violence counseling and substance abuse treatment while in custody on the domestic violence charge. The court then scheduled a jurisdiction/disposition hearing.

In a jurisdiction/disposition report, DCFS indicated referrals had been received in 2006, 2012, 2015, 2016 and 2017 alleging general neglect by Mother, sometimes with accompanying allegations of emotion and/or physical abuse of the children. All but one of the ensuing investigations were closed as either unfounded or inconclusive: A September 2015 referral for allegations of general neglect and at risk/sibling abuse were substantiated. DCFS also reported that from May 18, 2016 to December 21, 2016, Mother and Richard agreed to voluntary family maintenance (VMS) following a referral for failure to supervise the children and purported marijuana use. DCFS concluded while the parents continued to use marijuana, "[t]here is no nexus between [the parents'] marijuana use and the children's safety at this time, and the children appear and report

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[2] Statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

[to the social worker] to be having their basic needs of food, shelter, and safety being met."

DCFS additionally noted Mother's prior convictions for carjacking, possession of a controlled substance device, theft, burglary and driving under the influence. Interviewed by the social worker, Mother, who was thirty-eight years old, acknowledged she had abused crack cocaine and alcohol from the ages of 21 to 28 years (2001-2008) and had been incarcerated in state prison. One of the 2006 referrals for general neglect (later deemed inconclusive) alleged Mother tested positive for marijuana and cocaine in the hospital when she delivered S.K.) While currently in custody on the domestic violence charge, Mother was taking classes on domestic violence, anger management, relapse prevention, life skills, helping women with recovery and parenting. Although Mother continued to deny harming Stefan that night, she told the social worker, "I'm gonna take my domestic violence classes, and parenting classes. I want to learn anger management so I can learn how to calm myself down and teach my kids how to approach situations when they are not positive."

In separate interviews, the three older children told the social worker they were never physically abused by Mother. J.K. said Mother disciplined the children by having them sit "in the corner or take away stuff." Eleven-year-old S.K. said Mother's form of discipline was forbidding him to go outside. Nine-year-old I.K. told the social worker that Mother disciplined the children by having them go to their bedrooms. The two youngest children – four-year-old and seven-month-old M.B. – were not interviewed. The social worker reported that M.B "appears to be well taken care of."

Richard characterized Mother to the social worker as "a great mom." He told the social worker that she "tries to do everything to keep [the children] happy and satisfied" and would not harm them.

At the jurisdiction hearing in July 2018, DCFS presented no evidence beyond the detention report, the "addendum" report and the jurisdictional/dispositional report generated in this case. The juvenile court exerted dependency jurisdiction over the five children after Mother waived her rights to a trial and pleaded no contest to the petition as amended, alleging she had engaged in a verbal and physical altercation with Stefan "in the children's home," thereby "placing [them] at risk of serious physical harm" (§ 300, subd. (b)(1)). The court accepted Mother's plea, found it had been freely and voluntary made and was supported by a factual basis and dismissed the remaining allegation.

Proceeding to disposition, the juvenile court found by clear and convincing evidence under section 361, subdivision (c), there was a substantial danger if the children were returned home to Mother and ordered them removed from her custody. In so doing, the court observed the domestic violence incident, which Mother persistently denied, was "significant and serious." The court stated it appeared that Mother had anger management issues and lacked insight into the effect of domestic violence on her children. The court also noted that alcohol was involved in this case and there was a history of referrals to DCFS and a 2016 VFM.

The court ordered the children were to be placed with their respective fathers and Mother to be permitted monitored visits and provided enhancement services, including domestic violence and parenting classes, counseling with Stefan, anger

management classes and drug rehabilitation. The court also ordered Mother was to be subject to random and on-demand drug testing. Mother timely appealed from the disposition order.

DISCUSSION

Mother contends the removal of her five children from her custody is unwarranted because clear and convincing evidence does not support the juvenile court's finding that there is a substantial danger to the children if Mother were permitted to return to the family home. We agree.

Section 361, subdivision (c)(1) limits the ability of the juvenile court to remove a child from the physical custody of the parents. The statute requires the juvenile court to find by clear and convincing evidence that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well being of the minor" "and there are no reasonable means by which the minor's physical health can be protected . . . ." This is a more stringent standard of proof than the preponderance of evidence standard required for the juvenile court to exert dependency jurisdiction over a child. (§§ 300, 355, subd. (a).) "The high standard of proof by which this finding must be made is an essential aspect of the presumptive, constitutional right of parents to care for their children." (*In re Henry V.* (2004) 119 Cal.App.4th 522, 525; see *In re Isayah C.* (2004) 118 Cal.App.4th 684, 695 [Clear and convincing evidence "requires a high probability, such that the evidence is so clear as to leave no substantial doubt"].) At the same time, jurisdictional findings constitute prima facie evidence the child cannot safely remain in the home (§ 361, subd. (c)(1)), and the parent need not be dangerous and child need not have been actually harmed

before removal is appropriate (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, disapproved on another ground in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6).

The standard of review of a juvenile court's disposition order on appeal is the substantial evidence test, "bearing in mind the heightened burden of proof." (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) We examine the record in the light most favorable to the order to determine whether any substantial evidence supports it. In so doing, we do not resolve conflicts in the evidence, reweigh the evidence or assess the credibility of witnesses. (*In re Isayah*, *supra*, 118 Cal.App.4th at p. 694.) The burden is on the appellant to establish there is insufficient evidence to support the disposition order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

Here, the juvenile court's disposition order is not supported by substantial evidence. The record fails to support the court's findings there would be a substantial danger to the children if Mother were permitted to reside with them and Richard. To be sure, we do not wish to minimize either the seriousness of the violence Mother inflicted on Stefan or its potential emotional effect on the children. Nonetheless, as county counsel acknowledges, this appears to have been an isolated incident. And, despite its seriousness, there is no evidence from which to infer that such an incident will recur. Section 361, subdivision (c) speaks to ongoing or future danger to the children. The record shows that Mother and Stefan were not intending to live together following the incident. At the time of the adjudication, Stefan had already found a room to rent to avoid being in the family home when Mother was released from custody. He also planned to find a new home in which to live with his three children.

Additionally, there is no evidence Mother and Richard had engaged in domestic violence, or the five children had witnessed any domestic violence in the home or were themselves emotionally or physically abused or neglected. Indeed, the evidence shows the children were healthy, well-adjusted, well cared for, developing appropriately and loved.

While it is a valid concern that Mother persistently denied the incident, she also spoke of her resolve to learn how to manage her anger in an interview with the social worker days before the jurisdiction/disposition hearing. During her incarceration on the domestic violence charge, Mother participated in anger management, parenting, domestic violence and relapse prevention programs.

In sum, we find no adequate evidentiary support for the juvenile court's findings concerning the risk of harm to the children if Mother were permitted to return to the family home. Further, as urged by Mother's counsel and the children's counsel at the disposition hearing, there were less drastic alternatives than requiring Mother to leave the home among them, allowing Mother to live with Richard and the children under stringent conditions of DCFS supervision such as unannounced visits. (See *In re Henry V., supra,* 119 Cal.App.4th at p. 529 ["[U]nannounced visits and public health nursing services [are] potential methods of supervising an in-home placement" to protect a child from harm, rather ordering removal from a parent's custody].)

We find the removal order particularly troubling, given the state-wide housing shortage, which has driven home prices and rents to extremely high levels. (See Gov. Code, § 65009, subd. (a)(1) ["currently a housing crisis in California"].) In Los Angeles County, for example, a University of Southern California study

reported the average monthly rent of $2,267 for an apartment in 2018 was considered unaffordable not only for low income earners but also for those residents whose incomes were at the median and 75th percentile, because they were spending 58 percent of their income on rent. According to the study, residents should only spend approximately 30 percent of their income on housing. (Southern California's Affordable Housing Crisis Not Just Limited To Low-Income Households (October 18, 2018) <https://www.bisnow.com/los-angeles/news/affordable-housing/report-southern-california-affordable-housing-crisis-not-just-limited-to-low-income-households-94062> [as of July 1, 2019].)

The record in this case reveals that housing for the three adults and five children was a motel room until they were able to secure their most recent residence, an apartment rented through a nonprofit housing assistance program. Richard worked at a restaurant, while Mother and Stefan cared for the children at home. After Mother was arrested and Stefan moved out, Richard had to stop working to stay at home with the children. Upon her release from jail, mother would have to move out of the apartment. Having lost custody of the children, she no longer qualified for the housing assistance program. Richard and the children would also have to live elsewhere, because his name was not on the lease.

At a time when 40 percent of Americans cannot afford a $400 emergency expense (The Fed - Dealing with Unexpected Expenses (May 2018) <https://www.federalreserve.gov/publications/2018-economic-well-being-of-us-households-in-2017-dealing-with-unexpected-expenses.htm> [as of July 1, 2019]), there is little reason to surmise, and no evidence in the record on

which to conclude, that Mother and Richard had access to the funds necessary to rent separate apartments. Consequently, barring homelessness, the only recourse was for each of them was to locate another housing assistance program or a motel, or to stay with different friends or relatives. In failing to address this unintended but direct effect of the removal order, both the juvenile court and DCFS upset "the balance between family preservation and child well-being struck by the Legislature" when it drafted section 361. (See *In re Jasmine G.* (2000) 82 Cal.App.4th 282, 289.)

DISPOSITION

The disposition order of July 26, 2018 is reversed to the extent it requires Mother to remain outside of the home of Richard and the children.

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CURREY, J.

We concur:

MANELLA, P. J.

WHILLHITE, J.