Filed 12/16/15 In re Amir J. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In Re Amir J., a Person Coming Under the Juvenile Court Law. _____ LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. Nicole B., Defendant and Appellant.	B262161 (Los Angeles Country Super. Ct. No. DK08471)

APPEAL from a orders of the Superior Court of Los Angeles Country, D. Zeke Zeidler, Judge. Affirmed.

Nicole Williams for Defendant and Appellant.

Mary C. Wickham, Interim County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Kimberly Roura, Deputy County Counsel, for Plaintiff and Respondent.

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Nicole B. (Mother) appeals from the jurisdictional and dispositional orders pertaining to her child, Amir J. (Amir). Mother argues that there was no substantial evidence to sustain the amended petition or dispositional order. Mother argues in the alternative that the court erred in sustaining the petition because R.J. II (Father) is capable of caring for the child. The orders are affirmed.

FACTUAL AND PROCEDURAL SUMMARY

In September of 2010, the parents obtained a custody order in a family law case granting legal custody of Amir (born March 2003) to both parents and primary physical custody to Mother. According to the order, Amir was to visit Father during summers. At some point later Mother moved with Amir to South Dakota. In May 2014, Amir was sent to his maternal grandmother's (Grandmother) house in Wilmington, and then to Father's house in Los Angeles for the summer. On September 2, 2014, Father dropped Amir off at his maternal uncle's house in California. A short while later, the uncle dropped Amir off at Grandmother's house. The record is unclear whether Father provided a plane ticket for Amir to return to South Dakota. There is some evidence that Father lacked funds to send the child home. When Grandmother asked Mother to come get Amir, Mother stated that she did not have the funds to retrieve him. It is undisputed that whatever the reason, Amir continued to live with Grandmother into September 2014.

Grandmother attempted to enroll Amir in school in Los Angeles, but lacked the necessary paperwork to do so. Grandmother called Mother for custody papers. According to Grandmother, Mother refused to send the paperwork, but Mother denied this.

On September 23, 2014, the Los Angeles County Department of Children and Family Services (DCFS) received a referral concerning Amir. A social worker visited Grandmother, who reported that Amir had been visiting for the summer, and Father had no money to send Amir home.

Grandmother told the social worker that Mother treated Amir worse than she did her other children. Grandmother said Amir was deprived of food and often forced to

stand in a corner for hours at a time as punishment. She said Amir reported having bruises from being hit and that, in 2013, Amir called her to report that Mother had punched him in the stomach, leaving a bruise. She stated that during that phone call she told Amir to tell someone else, because she was too far away to do anything.

The social worker interviewed Amir in private. Amir told the social worker that he had been required to stand in the corner from the time he woke up to the time he went to bed, with breaks only for meals or bathroom visits. He said that Mother hit him with a belt and a sandal, and that he had a mark on his bottom from being hit by Mother. He also said that Mother would sometimes punish him by sending him to bed without dinner.

The social worker interviewed Mother by telephone. When asked how she disciplines Amir, Mother said "it depends on what he does" and "I don't beat my child." She denied abusing Amir or sending him to bed without eating. Mother said that Amir received "behavioral services" at school, but would not provide details. Mother disclosed that Amir had a warrant for his arrest in South Dakota, but refused to say why. Mother "was planning to leave South Dakota next weekend," since her lease would expire at the end of October. She was planning to move to California, but refused to provide further details. The social worker contacted South Dakota Child Protective Services (CPS) to inquire about reports of abuse. CPS said that there was no indication that Amir was being abused because he had not been home since May 2014, and that CPS could not provide an investigation history since the previous allegations were not substantiated.

The social worker spoke to Father and told him that Amir was still in California. Father stated that he was "[not] sa[ying] [he] wasn't going to take care of him but right now [he was] not in a situation to take care of [Amir]." Father refused to tell the social worker where he was living.

After speaking with Father, the social worker advised Grandmother to seek legal guardianship of Amir. Grandmother made an attempt to do so, but after about one month decided not to seek guardianship.

DCFS filed a petition to detain Amir from both parents under Welfare and Institutions Code section 300, subsections (a) and (b),[1] based on physical abuse and abandonment by Mother and abandonment by Father.

At the November 2014 detention hearing, the court determined that Father was the child's presumed father. Amir was released to Father subject to orders that he cooperate with DCFS.

According to the DCFS report for the jurisdictional and dispositional hearing, Amir told the social worker in December 2014 that '"[t]he bruises are not true,"' but that '"[m]ost of it is true. I would stay in the corner from the time I woke up and broke to use the bathroom or eat. I would get tired from standing."' Amir said "he was not hit with a belt often and was mostly hit with the shoe." Amir said that Father did not know about the abuse. Amir did not know why he never told Father about the abuse.

Father told the social worker in December 2014 that he was unaware of the alleged physical abuse, and only knew that Mother made Amir stand '"in the corner. I thought it was for five minutes or so. [Amir] never told me about any abuse. The grandmother never told me. Mother didn't tell me."' Father said he wanted sole custody of Amir, and that he and his wife were both employed by Los Angeles County and financially able to care for Amir.

Grandmother spoke to the social worker in December 2014. She said that Mother was upset that grandmother had filed for legal guardianship and for that reason was not speaking with her. Mother moved and did not provide a new phone number to Grandmother. Grandmother said that she loved her daughter but did not believe that Amir should return to her care. According to Grandmother, Mother is '"just mean. There are rules for Amir and no rules for the other children. He is not allowed to play and had no books and no toys. It saddens me to say that is my daughter treating him this way."' She knew Mother deprived Amir of food and made him stand in the corner for long periods of time because Amir told her so and she witnessed it on occasion when

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

visiting Mother. Amir would have to ask permission to use the bathroom and the other children did not. Grandmother thought that Amir was '"[a]lways on punishment,"' and that is why he continues to act out.

At a contested adjudication and disposition hearing in February 2015, the DCFS report was admitted into evidence. DCFS moved to dismiss count b-2 without prejudice (alleging Father's unwillingness and inability to provide for Amir's needs), and to strike the allegations against Father in counts a-1 and b-1 (both for failure to protect). The court granted the motion, thus eliminating all allegations against Father.

Mother testified by phone that she never struck Amir with a fist, nor a belt, nor a sandal. She denied ever striking Amir in a way that left a bruise or other mark. She denied withholding food as punishment. She did make Amir go to the corner as a punishment, but he did not have to stand the entire time. He would have to read from a book and then write about what he had read. The longest she had him stand was 30 minutes to an hour. She testified that Amir had made other reports of having no food and being hit with a belt, and had said that he made these reports because he wanted to live with Father.

Mother testified that she had spanked Amir in the past, over a year before the hearing, with an open hand and over Amir's underwear. She said it caused redness, but no swelling, welts, or marks. She would spank him once for each year of his age, but had stopped because it was not effective in changing Amir's behavior. She admitted that Amir was punished more than the other children because he was older and should set an example, and because he got into trouble more often than the others.

After the hearing, the petition was further amended so that the allegations in counts a-1 and b-1 are identical: "On prior occasions, the child [Amir's] mother, physically abused the child and used inappropriate forms of discipline. The child is afraid of the mother, due to ongoing physical abuse of the child by the mother. Such physical abuse of the child by the mother endangers the child's physical health, safety and well-being, creates a detrimental home environment and places the child at risk of physical harm, damage, danger, physical abuse and failure to protect."

The court sustained both counts of the amended petition against Mother, and awarded legal custody to both parents, with primary physical custody to Father. The court then terminated jurisdiction as to Amir "subject to further proceedings re financial responsibility per WIC 903, and stayed pending" receipt of a custody/visitation order. Mother's appeal followed.

DISCUSSION

I

In reviewing the sufficiency of the evidence on appeal we consider the entire record to determine whether substantial evidence supports the court's findings. (*In re Savannah M*. (2005) 131 Cal.App.4th 1387, 1393.) We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or weigh the evidence. Rather, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if other evidence supports a contrary finding. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52–53.) Substantial evidence, however, is not synonymous with any evidence. (*In re Savannah M*., *supra*, 131 Cal.App.4th at p. 1393.) Although substantial evidence may consist of inferences, those inferences must be products of logic and reason and must be based on the evidence. Inferences that are the result of mere speculation or conjecture cannot support a finding. (*Id.* at pp. 1393–1394.)

Mother asserts the evidence is insufficient to sustain the petition under either subdivision (a) or (b) of section 300. Jurisdiction under section 300, subdivision (a) requires that "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian. For the purposes of this subdivision, a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child or the child's siblings, or a combination of these *and other actions* by the parent or guardian which indicate the child is at risk of serious physical harm." (§ 300, subd. (a), italics added.)

Mother argues this finding is not supported by substantial evidence because Amir did not suffer serious injury and there was no evidence of a threat of future harm. We disagree.

In reviewing the record, we defer to the court's credibility determinations. Therefore, we presume the court credited Amir's initial statements that Mother struck him with a belt and a sandal, leaving a mark. We presume the court credited Grandmother's statement that she was told of an incident in which Mother punched Amir in the stomach, leaving a bruise. We also presume the court did not accept as credible either Mother's testimony regarding how she disciplined Amir or Amir's later recantation of earlier statements.

We conclude the evidence supports a reasonable conclusion that Mother had performed those acts, and there was substantial risk that serious harm would occur in the future. Notwithstanding Mother's testimony that she no longer spanked Amir, she admitted that Amir's punishment became more severe as he got older. The court may have determined that Mother was falsely denying the abuse, and therefore was likely to do it again. These factors support a reasonable conclusion that there was a substantial risk that the child would suffer serious nonaccidental physical harm if left in Mother's custody.

Mother argues that striking a child with a belt or shoe that leaves a mark on the buttocks is a minor injury that is distinguishable from the more serious injuries in *In re Alvin R.* (2003) 108 Cal.App.4th 962, 966 [child whipped with belt, causing welts and deep bruises] and *In re C.D.* (2003) 110 Cal.App.4th 214, 217–218 [child whipped with belt, kicked and slapped, causing bloody tooth, black eye, severe bruising and swelling]. Even assuming that a mark on the buttocks is not a serious injury, Mother's argument fails to consider that "a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted[.]" (§ 300, subd. (a).) The law does not require a court to wait for a more serious injury to occur, because society has a legitimate interest in protecting children who are at substantial risk of future harm. "The idea that state authority can be mobilized only after the fact is untenable." (*In re Eric B.* (1987) 189 Cal.App.3d 996, 1003.)

Mother also points out that South Dakota CPS elected not to intervene. The juvenile court is not bound by the South Dakota CPS decision to take no action. The record is silent as to the extent of that agency's investigation, the extent of Amir's cooperation, and whether the investigation was interrupted by Amir's departure to California in May 2014. The juvenile court apparently gave little weight to the South Dakota CPS's decision. We decline to reweigh this evidence. (*In re Casey D., supra,* 70 Cal.App.4th at pp. 52–53.)

"When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction . . . if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence." (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.) Since jurisdiction was proper under section 300 subdivision (a), we need not address jurisdiction under subdivision (b). "[A]n appellate court may decline to address the evidentiary support for any remaining jurisdictional findings once a single finding has been found to be supported by the evidence. [Citations]." (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1492.)

II

Mother argues that even if jurisdiction was proper, there is insufficient evidence to order Amir's removal from her custody under section 361. "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 of any of the following . . . [¶] (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." (§ 361, subd. (c)(1).) This can be summarized as two elements: (1) unless removed from Mother's custody the minor is or would be in substantial danger and (2) there are no reasonable means by which the minor may be protected without removal.

DCFS argues that because Amir was living with Father at the time of the hearing, and had not lived with Mother for 6 months, he did not "reside with" Mother at the time the petition was initiated. Section 17.1 defines the residence of a minor as "(a) The residence of the parent with whom a child maintains his or her place of abode or the residence of any individual who has been appointed legal guardian or the individual who has been given the care or custody by a court of competent jurisdiction[.]" (§ 17.1, subd. (a).) "Custody" is defined in this section as "the legal right to custody of the child unless that right is held jointly by two or more persons, in which case 'custody' means the physical custody of the child by one of the persons sharing the right to custody." (§ 17.1, subd. (b).) The family court order of 2010 gave legal custody to both parents and primary physical custody to Mother. Since Mother has primary physical custody under the order, she has "custody" for purposes of section 17.1. And since Mother is an "individual who has been given the care or custody [of Amir] by a court of competent jurisdiction[,]" her residence is also Amir's residence under section 361, subdivision (c). (See *In re R.D.* (2008) 163 Cal.App.4th 679, 686–687 [under § 17.1, county of residence of dependent child's legal guardian determines county of residence of dependent child].)

While we agree with Mother that section 361, subdivision (c) is applicable, we disagree with her argument that its elements have not been met. On the first element, our analysis is the same as it was for jurisdiction under section 300, since the jurisdictional findings of the court are prima facie evidence that the child cannot remain in the home. (See e.g. *In re J.S.* (2014) 228 Cal.App.4th 1483, 1492.) As to the standard, "[t]he 'clear and convincing' standard is for the edification and guidance of the juvenile court. It is not a standard for appellate review. [Citation.] '"The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.' [Citations.]" [Citation.] "Thus, on appeal from a judgment required to be based upon clear and convincing evidence, 'the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied. . . .' [Citation.]" [Citation.]' [Citation.]" (*Id.* at p.1493,

quoting *In re J.I.* (2003) 108 Cal.App.4th 903, 911.) There is substantial evidence to affirm the court's ruling.

On the second element, the court made an explicit finding that there was no reasonable alternative to removal, but did not discuss any rejected alternatives. As Mother had primary physical custody, she could not have been removed from the home under section 361, subdivision (c)(1)(A). Nor could Father be allowed "to retain physical custody," as he did not have physical custody to retain. (See § 361, subd. (c)(1)(B).)

Mother argues that instead of removing Amir from her physical custody, the juvenile court should have considered requiring Amir to live with Mother at Grandmother's house. Her argument carries little weight in light of her current residence in Arizona. Moreover, there is no evidence that Grandmother is willing to take Mother and Amir into her home. According to the report for the jurisdictional and dispositional hearing, Mother was angry with Grandmother, who did not believe Amir would be safe in Mother's custody, and Mother and Grandmother were not on speaking terms.

Mother's reliance on *In re Jeannette S.* (1979) 94 Cal.App.3d 52 is misplaced. In that case, Jeanette, a dependent child, was removed from the custody of both her mother (Margery), an offending parent, and father (Frank), a noncustodial and nonoffending parent. Margery appealed the dispositional order removing Jeannette from both parents, arguing that Jeannette should have been placed with Frank. Margery asserted that even if Frank were incapable of caring for Jeannette by himself, he had offered a suitable alternative of living with his in-laws, who would be able to assist him with the care and supervision of the child. The appellate court reversed the dispositional order and remanded for a new hearing to consider this alternative arrangement. *Jeannette S.* does not compel a different result because the existing dispositional order—placing Amir with Father, a noncustodial and nonoffending parent—matches the placement that the mother in *Jeannette S.* was seeking.

III

In the alternative, Mother argues that because Father was nonoffending and able to take care of Amir, the dependency court should not have taken jurisdiction. This argument raises a question of law, which we review de novo.

Mother cites *In re A.G.* (2013) 220 Cal.App.4th 675, in which an offending mother was living with her children and their nonoffending father. The court in that case ruled that the evidence showed the father was, and always had been, capable of adequately protecting the children. Because of the father's ability to alleviate any risk, the minors were never in danger, and therefore the dependency court should not have exercised jurisdiction. (*Id.* at 686.) Mother argues that where, as here, the father is capable of protecting the child, the court should not exercise jurisdiction.

A.G. is distinguishable. In that case the court found that section 300 subdivision (b) had not been satisfied. The father was living in the same household with the minors, thus eliminating any risk of harm to the minors, *even if the court had not intervened*. In the present case Father was no longer living with Mother and was not present to protect the child. At the time of his interview with DCFS, Father apparently was unaware the abuse was occurring. Absent the court's intervention in this case, Mother would have been entitled to physical custody of Amir under the family court order, and Father would have remained unable to protect Amir.

We agree with Mother that dependency courts should not be used to make custody decisions *when it is not necessary* to protect the minor. But this is a case where substantial evidence of that necessity has been shown. That distinguishes it from *In re John W.* (1996) 41 Cal.App.4th 961, cited by Mother, where the dependency court found there was insufficient evidence to sustain an abuse allegation, but entered a custody order nonetheless.

DISPOSITION

The orders are affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.