Filed 10/17/17 In re W.B. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re W.B., a Person Coming Under the Juvenile Court Law.	B279288 (Los Angeles County Super. Ct. No. DK18147)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. WILLIAM B., Defendant and Appellant.	

APPEAL from an order of the Superior Court for Los Angeles County, Terry T. Truong, Commissioner. Reversed.

William Hook, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Jeanette Cauble, Principal Deputy County Counsel, for Plaintiff and Respondent.

William B. (father) appeals from the disposition order of the juvenile court, removing his son, W.B., from his custody. Finding insufficient evidence that at the time of the disposition hearing there was a substantial danger to W.'s physical health, safety, protection, or physical or emotional well-being if W. were to be placed in father's custody, we reverse the disposition order and direct the juvenile court to enter a new order placing W. in father's care.

BACKGROUND

On June 27, 2016, father was at work when he received a call from a neighbor, telling him that his wife, W's mother (mother),[1] was throwing things over the balcony of his home into the yard. Father left work, went home, and found his clothes, laptop, pictures, and television in the yard. When he went inside to talk to mother, mother came at him with a Dodgers baseball bat. Father called 911.

Sheriff's deputies arrived and pulled mother out of the home. While in the home, the deputies found a room on the first floor of the two-story home with 36 or 46 marijuana plants inside.[2] Father told the

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[1] Mother did not appeal from the jurisdiction or disposition orders; therefore, our discussion of the facts is limited to facts relevant to father's appeal.

[2] It is unclear whether there were 36 or 46 marijuana plants. The sheriff's deputy's report stated that there were "[a]pproximately 36 green leafy plants resembling marijuana . . . , 7 other plants were in the restroom and 3 plants in the closet of the room." In the detention report, the Department reported that the deputy told the social worker that there were 46 marijuana plants. In his written statement to the sheriff's deputies, father stated that he had 36 mature plants.

deputies that he had a medical marijuana card, and grew the plants for himself and his wife (who also had a medical marijuana cared), and would give extra "medicine" to GreenBridge Medical and a friend in exchange for other marijuana.

Mother was taken to Harbor UCLA Hospital for a 72-hour psychiatric hold, and father was arrested for cultivation and possession of marijuana for sale (Health & Saf. Code, §§ 11358, 11359). The Los Angeles Department of Children and Family Services (the Department) was called to take care of the two children found in the home – W. and his half-brother, Aiden K.[3] The Department returned Aiden to his father's care, and placed five-year-old W. with his paternal aunt.

The social worker spoke with father the next day. Father told the social worker that mother had been "acting weird" the previous weekend when he took the family to Lake Havasu. She was laughing randomly, yelling, and screaming. After they got home on Sunday, mother stayed up all night. Father went to work on Monday, and came home when his neighbor called him about mother throwing things over the balcony. He said that mother had kicked open the door to the room with the marijuana plants, so the door was open when the sheriff's deputies arrived. He explained that he had a prescription for medical marijuana, but mother had thrown everything out of the house, so he could not show it to the deputies. He said he had the prescription because he has asthma and allergies. The social worker asked father if

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[3] Aiden K. lives with his father, and is not a part of this case.

mother had a mental illness, and father said that she did not. When asked who picks W. up from school, father said that mother used to, but after she forgot to pick him up several times, father started picking him up. Father also stated that he is registered with the Potawatomi tribe, and that he was going to register W.

The Department filed a petition under Welfare and Institutions Code[4] section 300, subdivisions (a) and (b) with regard to W. Counts a-1 and b-3 were based on mother's attempt to strike father with a bat in W.'s presence and mother throwing objects in the house. Counts a-2 and b-4 alleged physical abuse based upon a statement W. purportedly made to the social worker that mother and father disciplined him by striking him with a belt or placing hot sauce in his mouth. Count b-1 alleged that mother and father placed W. in a detrimental and endangering situation in that 47 marijuana plants were found in the home within access of W.; the count also alleged that father was arrested for cultivating marijuana. Count b-2 alleged that mother has mental and emotional problems that endanger W.'s physical health and safety. Finally, count b-5 alleged that father has a history of substance abuse and was a current abuser of marijuana, which rendered him incapable of providing regular care of W., and that mother knew or should have known of father's substance abuse and failed to protect W.

At the detention hearing, the juvenile court noted that father had already filed for a criminal protective order against mother (the

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[4] Further undesignated statutory references are to the Welfare and Institutions Code.

protective order was issued by a criminal court the following day). The court also noted that father claimed possible Indian heritage through the Potawatomi tribe, and ordered the Department to give notice to that tribe. Finally, the court found that a prima facie case for detaining W. had been made, and ordered that W. be detained with his paternal aunt.

Six weeks after the detention hearing, on August 10, 2016, the Department received a letter from the Citizen Potawatomi Nation in response to the Department's Indian Child Welfare Act (ICWA) notice. The letter stated that father was an enrolled member and that W. was eligible for enrollment. The letter also stated that if W. was removed from his home, the tribe would file an entry of appearance so it could be involved in the case. The tribe subsequently filed an entry of appearance, which stated that the tribe was doing so to monitor the case and decide whether to petition for transfer to tribal court.

Also on August 10, 2016, mother came to father's house in violation of the protective order father had obtained against her. Father called 911, and mother was arrested for violation of a domestic violence restraining order.

In a last minute information filed for the jurisdiction hearing scheduled to be held on September 6, 2016, the Department reported on a face-to-face interview the dependency investigator conducted with W. In response to the investigator's question about what happens when mother and father get mad at each other, W. said that he runs to his room and locks his door; he said that he had never seen either of them hit the other. W. also denied getting hit by anyone as discipline, and

said he just got hot sauce on his tongue. When asked about the marijuana plants found in his home, W. said that he was not allowed in that room. He said that he knew the plants had been there because he saw pictures father took when he was cleaning out the room.

The Department submitted a jurisdiction/disposition report in which it reported on separate interviews the dependency investigator conducted with father and mother regarding the allegations of the petition. With regard to the allegation that mother attempted to strike father with a bat in W.'s presence, father told the investigator that he did not know whether W. saw what happened, but W. could hear what was going on. Father explained that his and mother's arguments had never escalated into physical violence before, and that rather than engaging mother, he went downstairs and called for law enforcement. Addressing the allegation regarding inappropriate discipline, father denied ever hitting W., and mother agreed that father did not hit him; both mother and father admitted using hot sauce as a form of discipline.

Both parents also addressed the marijuana plants found in the home. Mother told the investigator that the plants were in a locked bedroom downstairs, and that only father had a key to the room. She explained that the children were never downstairs for any extended period of time, because most of the living quarters were upstairs. She did not believe that having the plants in the house was an issue because they were medicinal and were kept in a locked room. Father told the investigator that there had been two locked doors to prevent entry into the room with the plants, but they had been kicked in when he arrived home on June 27 in response to the neighbor's call about mother

throwing things out of the house. When he was interviewed on August 11, father showed the investigator the room, which had been cleared of plants. He noted that there was only one door to the room at that time, explaining that he had removed the second door, and that his elderly aunt had moved into the room. Father told the investigator that he started growing the plants a year before, to use them for himself, friends, and other patients, but he got rid of them because he "didn't want it to be a problem in getting [his] son back." When asked if he had concerns that W. could have accidentally ingested the plant, father said, "I see it as a natural plant." In any event, father denied that W. ever had access to the plants.

Finally, addressing the allegation that father had a history of substance abuse and was a current abuser of marijuana, father admitted that he uses marijuana every day, generally 10 times per day. He said that he ingests it by vaporizing, and takes two to four hits per use. He asserted that he is "a very functioning person" when using marijuana. Mother told the investigator that father had been using marijuana "forever," and had used cocaine, mushrooms, methamphetamines, and ecstasy in the past. She said that she thought he had been using narcotics recently, and she believed his use of marijuana affected his ability to parent.

The jurisdiction hearing was continued for six weeks, to October 18, 2016. Four days before the continued hearing, the Department filed an amended petition that added an additional count under section 300, subdivision (b). That count, count b-6, alleged that mother had a

history of substance abuse, and had a positive toxicology screen for amphetamine and methamphetamine.

In a supplemental report filed for the continued hearing, the Department reported that mother was arrested twice since the last hearing, and had been placed on a psychiatric hold at Community Hospital of Long Beach for two weeks. The report also stated that the dependency investigator contacted father on October 6, to ask about his enrollment in services. Father told the investigator that he was not enrolled because his attorney told him the court had not ordered it, but he said he was willing to participate in services; he also noted that the criminal court recently ordered him to complete a parenting program.[5] Finally, the Department reported that father continued to visit W., that the social worker had no concerns regarding his visits, and that W. enjoyed seeing father during his visits.

In addition to the supplemental report, the juvenile court received the affidavit of an expert witness on behalf of the Citizen Potawantomi Nation. The witness stated that she was an expert on the delivery of services to Citizen Potawatomi Nation families and traditional child

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[5] The report attached as an exhibit the minute orders from father's criminal case showing that, in accordance with a plea agreement, the prosecutor moved to dismiss two counts -- for planting/harvesting cannabis (Health & Saf. Code, § 11358) and for possession of cannabis for sale (Health & Saf. Code, § 11359) -- leaving only a single count of willful harm to a child (Pen. Code, § 273a, subd. (b)) alleged against him. The court granted the prosecutor's motion to dismiss, ordered father to complete six months of parenting classes, set the matter for a probation and sentencing hearing in six months, and ordered father to bring proof of completion of the parenting classes to that hearing.

rearing practices of the Nation. She expressed her opinion that it was in W.'s best interest to be in the care of the Department, concluding that W. "would be at imminent risk of physical or emotional harm" if he were returned to his parents' custody at that time. Although the witness stated that she reviewed "the case file," she did not identify the contents of the file she reviewed. She also did not specifically identify the source of the risk to W., i.e., whether it related to mother's conduct, father's conduct, or both.

At the jurisdiction hearing held on October 18, 2016, the juvenile court admitted into evidence the detention report, the jurisdiction/disposition report, the last minute information, and the supplemental report; no party presented any testimony. Father's counsel asked that the petition be dismissed as to father for lack of evidence of current risk of harm to W. Counsel noted that W. never had access to the plants because they were in a fully insulated room with two locked doors, in a part of the house in which W. did not spend any extended period of time, and that father subsequently had disposed of the plants. For these same reasons, counsel requested that in the event the court found jurisdiction, it should return W. to father's care. Counsel for the Department argued that returning W. to father's care would be premature because the Department was unable to verify that father got rid of the marijuana plants,[6] it was unsure whether father

[6] This appears to be incorrect. The jurisdiction/disposition report states that on August 11, 2016, father showed the dependency investigator the room where the marijuana plants had been growing, and that father's elderly aunt was occupying the room.

could keep W. safe from mother,[7] and there was no evidence that father had taken the parenting class ordered by the criminal court.[8]

The juvenile court dismissed both counts alleged under section 300, subdivision (a), as well as counts b-4 (alleging physical abuse, i.e., that mother and father hit W. with a belt and placed hot sauce in his mouth) and b-5 (alleging that father's use of marijuana rendered him incapable of providing regular care for W.). It sustained counts b-1, b-2, b-3, and b-6, with certain amendments not relevant to this appeal. The only sustained count for which father was an offending parent was count b-1, which alleged (as amended) that he and mother "placed the child in a detrimental and endangering situation in that 47 [*sic*] marijuana plants were found in the child's home within access of the child. Such a detrimental and endangering home environment established for the child by the mother and . . . father endangers the child's physical health and safety and places the child at risk of serious physical harm, damage and danger."

Moving on to the disposition, the juvenile court found by clear and convincing evidence that there was a substantial danger to W.'s physical health, safety, protection, or physical or emotional well-being if he were returned home. The court stated that father was responsible

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[7] Counsel made this argument despite the fact that father obtained a restraining order against mother and contacted law enforcement when she violated it.

[8] The criminal court ordered father to take six months of parenting classes on September 26, just three weeks before the jurisdiction hearing.

for the marijuana plants, and it found that 36 plants was "above and beyond what one single individual needs." The court also found that father failed to protect W. from mother, and stated that "as far as I can tell, that hasn't changed." When father responded that he was the one who called the police, the court said, "What I'm looking for is for you to attend parenting that you were ordered to do, attend individual counseling, and test for the department. And I want to see that marijuana level going down, because if you are using every day, that is going to be a high level of marijuana in your system, sir."

The court declared W. a dependent child of the court under section 300, subdivision (b), and ordered that custody of W. be taken from his parents and that he be placed in the care of the Department for suitable placement. Father timely filed a notice of appeal from the October 18, 2016 order.

DISCUSSION

On appeal, father challenges the disposition order removing W. from his custody. Before we address the merits of father's appeal, we must address an apparent defect in father's notice of appeal. Father filed a form notice of appeal used for appeals from juvenile cases. In the section of the form used to indicate the order appealed from, father checked the box for "Section 360 (declaration of dependency)." In connection with that section, father also checked the box "with review of section 300 jurisdictional findings," but did not check the box "Removal of custody from parent or guardian." His challenge on appeal, however, is not to the jurisdictional findings, but rather to the disposition, i.e.,

removal of custody. Nevertheless, because both orders were made at the same hearing and are memorialized in the same minute order -- the date of which father properly identified in his notice of appeal -- and because the Department has not objected and has not suffered any prejudice from the defect, we construe the notice of appeal to have been taken from any or all of the orders issued at the October 18, 2016 hearing. (*Moyal v. Lanphear* (1989) 208 Cal.App.3d 491, 497 ["The strong public policy in favor of hearing appeals on the merits operates against depriving an aggrieved party . . . of a right to appeal because of noncompliance with technical requirements"].)

We now turn to the merits of father's appeal. Under section 361, physical custody of a child who has been declared a dependent child of the court cannot be taken from a custodial parent unless the juvenile court finds 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 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 . . . physical custody." (§ 361, subd. (c)(1).) In addition, where, as here, the custody proceeding involves an Indian child, physical custody cannot be taken from the parent unless there is a finding that continued custody of the child by the parent is likely to result in serious

emotional or physical damage to the child, and that finding is supported by testimony of a qualified expert witness. (§ 361, subd. (c)(6).)[9]

The clear and convincing evidence standard of proof required for removal of a child from a custodial parent is higher than the preponderance of evidence standard required for taking jurisdiction over a child. (§§ 361, subd. (c)(1), 355.) "The elevated burden of proof for removal from the home at the disposition stage reflects the Legislature's recognition of the rights of parents to the care, custody and management of their children, and further reflects an effort to keep children in their homes where it is safe to do so. [Citations.] By requiring clear and convincing evidence of the risk of substantial harm to the child if returned home and the lack of reasonable means short of removal to protect the child's safety, section 361, subdivision (c) demonstrates the 'bias of the controlling statute is on family preservation, *not* removal.' [Citation.] Removal 'is a last resort, to be considered only when the child would be in danger if allowed to reside with the parent.' [Citation.]" (*In re Hailey T.* (2012) 212 Cal.App.4th 139, 146.)

We review a dispositional order under the substantial evidence standard of review, "bearing in mind the heightened burden of proof."

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[9] The same standard applies under the federal statute governing custody proceedings involving an Indian child. (See 25 U.S.C. § 1912(e) ["No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child"].)

(*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) We consider the entire record to determine whether substantial evidence supports the juvenile court's findings. (*In re Hailey T.*, *supra*, 212 Cal.App.4th at p. 146.)

Here, in finding there would be a substantial danger to W.'s health, safety, protection, or physical or emotional well-being if he were returned to father's care, the juvenile court cited (1) father's cultivation of more marijuana plants than is necessary for a single person; (2) father's failure to protect W. from mother; (3) father's failure to attend the parenting classes he was ordered to take; and (4) father's perceived excessive marijuana use. We conclude these reasons are either not supported by the record or are inadequate to support the court's disposition.

1. *Cultivation of Marijuana*

The fact that father cultivated more marijuana plants than necessary for a single person does not, by itself, establish that removal of W. from father's care was necessary to avoid a substantial danger to W.'s health or safety. It is undisputed that at the time of the disposition hearing, father had removed all of the plants, restored the room in which the plants were grown to a bedroom, and that father's elderly aunt was occupying the room. But even before father removed the plants, the undisputed evidence established that W. did not have access to the plants because the room where the plants were grown was kept locked (with two locked doors), and father had the only key. In fact, W. told the dependency investigator that he was not allowed in the

room, and he only knew there were plants in it because father showed him photographs he took when he was cleaning out the room. Thus, the Department's citation to *In re Rocco M.* (1991) 1 Cal.App.4th 814, in which the mother left drugs in locations where they were available to the child and left the child alone for long periods during which the child would have opportunities to ingest the drugs, is inapt.

Similarly inapt is the Department's argument that father's failure to appreciate the risk to W. of having marijuana plants in the home -- as purportedly evidenced by father's statement that marijuana is "a natural plant" -- supported an inference that father would return to cultivating marijuana plants in his home. In fact, when asked by the dependency investigator if he believed that growing marijuana plants in his home presented a risk to W., father responded, "That's why I got rid of it and stopped it because I didn't want it to be a problem in getting my son back." In light of father's statement -- and, more importantly, his actions in getting rid of the plants and moving his elderly aunt into the room where the plants had been cultivated -- any inference that father would return to growing marijuana plants is pure speculation, which cannot be the basis for a removal order. (*In re Steve W.* (1990) 217 Cal.App.3d 10, 22 ["speculation about [a parent's] possible future conduct is not even sufficient to support a finding of dependency much less removal of the physical custody of the child from the parent"].)

2. *Failure to Protect W.t From Mother*

The juvenile court's finding that father failed to protect W. from mother, and its statement that "as far as I can tell, that hasn't

changed," is contrary to the record. In fact, the undisputed evidence is that when the initial incident happened father attempted to calm mother down and, when that failed and she tried to hit him with a bat, he went downstairs and called law enforcement. He then immediately obtained a restraining order against mother and, when mother violated it, he called law enforcement. Thus, this finding cannot support the removal order.

3. *Failure to Attend Parenting Classes*

Although the record supports the juvenile court's observation that father had not yet attended any of the parenting classes that he had been ordered to attend, that fact is not substantial evidence that W. would be in substantial danger if he were returned to father's care. First, it is undisputed that at the time W. was detained, he was healthy, going to school, and developmentally on target. Second, father reasonably believed he was not required to participate in parenting classes until the criminal court ordered him do so on September 26, 2016, three weeks before the jurisdiction/disposition hearing.[10] There is no reason to believe that father will not comply with the criminal court's order, because his completion of the parenting classes is part of his plea

[10] It appears the juvenile court may have ordered father to participate in parenting classes at the detention hearing (the minute order for the hearing shows that the court made the order, but we do not have a reporter's transcript of the hearing to confirm this). However, father's attorney told father that he did not have to enroll in services because they were not court-ordered.

agreement, under which it appears the child endangerment charge may be dismissed.[11]

4. *Marijuana Use*

As noted, in making its dispositional order, the juvenile court told father that it "want[ed] to see [father's] marijuana level going down, because if you are using every day, that is going to be a high level of marijuana in your system." The court did not, however, make any finding that father was incapable of caring for W. with such a "high level" of marijuana in his system. In fact, the court *dismissed* the allegation that father's use of marijuana "interferes with providing regular care and supervision of the child [and] endanger[s] the child's physical health and safety and place[s] the child at risk of harm." In light of the dismissal of that allegation, and the absence of any evidence that father's use of marijuana (for which he had a physician's recommendation) detrimentally impacted his care of W., father's use of marijuana, even if the court believed it to be excessive, cannot be used as a ground for removing W. from father's care. (Cf. *In re Drake M.* (2012) 211 Cal.App.4th 754, 769 ["Prior case law is clear with respect to

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[11] The terms of the plea agreement are not in the record. However, we note that the minute order from the hearing at which the plea agreement was entered into shows that father did not enter a plea as to the child endangerment count. Instead, he was ordered to complete six months of parenting classes and to bring proof of completion of the classes to the next hearing date, which was described as a probation and sentence hearing. Because father was not required to plead to the child endangerment count, however, it seems likely that the plea agreement provided that the charge will be dismissed if he complies with the court's orders.

medical marijuana usage in the context of dependency. Although 'even legal use of marijuana can be abuse if it presents a risk of harm to minors' [citation], a jurisdictional finding under section 300, subdivision (b), based merely on such usage *alone* without *any* evidence that such usage has caused serious physical harm or illness or places a child at substantial risk of incurring serious physical harm or illness is unwarranted and will be reversed"].)

DISPOSITION

The order removing W. from father's custody is reversed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.