Filed 12/3/14 In re Jacqueline S. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re JACQUELINE S., a Person Coming Under the Juvenile Court Law.	B253781 (Los Angeles County Super. Ct. No. CK98787)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. TIFFANY W., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Tony L. Richardson, Judge. Affirmed.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Jeanette Cauble, Senior Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Tiffany W. appeals from the dispositional order declaring her daughter Jacqueline S. a dependent of the court under Welfare and Institutions Code section 300, subdivisions (b) and (e).[1] Tiffany W. challenges the order removing Jacqueline from her custody, as well as the order requiring her to undergo a psychological assessment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Tiffany W. was 19 years old when Jacqueline was born. Kevin S. is Jacqueline's presumed father.[2] The parents, who never married, lived together after Jacqueline's birth in May 2012. They subsequently ended their relationship in March 2013.

On November 2, 2012, when Jacqueline was five months old, the Los Angeles County Department of Children and Family Services (Department) received an immediate response referral regarding the family. The reporting party stated that Jacqueline had bruises on her face and that she had suffered a broken arm requiring a cast when she was two months old. While the Department was investigating the matter, the family moved to Moreno Valley in Riverside County. The Department referred the matter to the Children's Services Division of the Riverside County Department of Public Social Services (Riverside DPSS), which conducted an investigation and on March 8, 2013 filed a petition on behalf of Jacqueline pursuant to section 300, subdivisions (a) (serious physical harm), (b) (failure to protect), and (e) (severe physical abuse). The Riverside DPSS filed a first amended petition on May 16, 2013.

A forensic evaluation of Jacqueline's injuries revealed that her fracture was highly unusual and inconsistent with the explanation given by the parents. According to the

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

[2] Kevin S. is not a party to this appeal. His participation in the dependency proceedings was minimal.

completed forensic medical assessment, Jacqueline's injuries were consistent with "Chronic and Repeated Physical Abuse." Additional bruises observed on Jacqueline's cheek in March 2013 appeared to be caused by pinching, not, as the parents claimed, by Jacqueline hitting her head on the tray of her highchair.

At the contested jurisdiction hearing on May 16, 2013, Tiffany W. waived her constitutional rights and submitted the matter on the first amended petition. Following a consideration of evidence from the Riverside DPSS, the juvenile court found true the allegations under section 300, subdivisions (b) and (e), that, while in the care of her parents, Jacqueline suffered a broken arm when she was two months, a large bruise to her face at five months, and had current bruising to her face. The court also found true that the parents' explanations for Jacqueline's injuries were inconsistent with medical findings that her injuries are consistent with chronic and repeated physical abuse, and that her parents left the Department's jurisdiction during an active investigation. In addition, the court found true the additional allegations under section 300, subdivision (b), that the parents neglected Jacqueline's health and safety by failing to seek medical attention for severe diaper rash; that the parents failed to benefit from pre-placement preventative services because Jacqueline was still subject to and neglected in their care; and that, because the parents led an unstable lifestyle and moved frequently, they failed to provide a safe and stable home for Jacqueline. The courted struck the remaining allegations under section 300, subdivisions (a) and (b).

Following the jurisdictional hearing, the Riverside Superior Court transferred Jacqueline's case to the juvenile dependency division of the Los Angeles County Superior Court for disposition. The court in Los Angeles County accepted jurisdiction of the case because Tiffany W. was living in Long Beach.

After the transfer, the Department prepared a jurisdiction/disposition report. In reliance on section 361.5, subdivision (b)(5), the Department recommended that the court not order family reunification services for either parent because Jacqueline had been the victim of severe physical abuse within the meaning of section 300, subdivision (e). In a Last Minute Information report prepared for the contested disposition hearing, the

Department reported that, although Tiffany W. consistently visited Jacqueline, Tiffany W. "appears disengaged during visits" and "appears very depressed and assumes she will not reunify with her child."

In December 2013, a social worker asked Dr. Thomas J. Grogan, an orthopaedic surgeon, to look at a picture of a swinging chair. Dr. Grogan opined that if the chair in the picture was a close representation of the chair Jacqueline had been sitting in when she fractured her right arm, it was conceivable that the hyperextension that caused her fracture could have occurred accidentally if Jacqueline had caught her arm between the edge of the chair and the frame as the chair moved forward. Dr. Grogan was unable to determine conclusively if Jacqueline's fracture was a result of intentionally inflicted abuse or an accident.

The court held the contested disposition hearing on December 10, 2013. Tiffany W. acknowledged in her testimony that Jacqueline sustained a broken arm when she was two months old. Tiffany W. testified that she was in the living room watching T.V. and did not see the injury occur. Tiffany first learned that Jacqueline had hurt her arm while in her swing when Kevin S. called her into the room. Jacqueline cried when Kevin S. moved her arm. They took her to the hospital immediately.

Tiffany W. also testified she and Kevin S. were still living together when, as alleged in the sustained first amended petition, Jacqueline was five months old and had a large bruise on her face. Tiffany W. testified that she was visiting her mother at the time while Kevin S. cared for Jacqueline. Kevin S. had told Tiffany W. that he had put Jacqueline "in the corner couch" and then heard a "boom." When Tiffany W. asked Kevin S. why he had not taken Jacqueline to the doctor, Kevin S. did not explain. Tiffany W. took Jacqueline to the doctor "[m]aybe a week" later to make sure she did not have headaches or a fever, by which time the bruise on Jacqueline's face was healing.

Jacqueline later sustained another injury to the left side of her face while with Kevin S. Tiffany W. had just finished feeding Jacqueline and had walked into the bathroom to wash her bowl. Kevin S. claimed Jacqueline hurt herself when she hit her face on the molding of a tray.

At one point after the parents had separated, Jacqueline developed diaper rash, which Tiffany W. treated with diaper rash cream. The rash, which was never severe while in her care, had almost healed when Tiffany W. took Jacqueline to visit Kevin S. who was living in Moreno Valley. Although Tiffany W. instructed Kevin S. to put cream on Jacqueline's diaper rash, he failed to do so, and Jacqueline's diaper rash worsened. Kevin S. did not explain to Tiffany W. why he had not used the cream, but Tiffany W. thought he was "just lazy." Although Tiffany W. testified that she believed all of Jacqueline's injuries were Kevin S.'s fault, she still believed that Jacqueline was not at risk in his care. She said she was not concerned "because she was very active when she was younger," which also explained her bruises.

Tiffany W. testified that she was about to start counseling again but was not sure what she wanted to work on in therapy. She further testified that for the past several months she was living with a family she met in a homeless shelter when she was 16 or 17 years old. Tiffany W. discussed the possibility that the court would return Jacqueline to her and that she and the family could care for Jacqueline in their home. Tiffany W. was not paying any rent and was unemployed although she was looking for a job.

The juvenile court declared Jacqueline a dependent of the court. The court found by clear and convincing evidence that there was a substantial risk of danger if Jacqueline were returned to her parents and that there was no reasonable means to protect Jacqueline without removing her from the physical custody of her parents. The court therefore removed Jacqueline from the custody of her parents. Over the Department's objection, the court ordered family reunification services for Tiffany W. Although the court noted that Tiffany W.'s judgment was questionable, the court agreed with counsel for Jacqueline that Tiffany W. was trying to be responsible and should have the opportunity to reunify with her daughter. The juvenile court concluded, however, that it was premature to release Jacqueline to Tiffany W. given the nature of her injuries and the "red flags [that] . . . should have indicated to mother that there was reason for concern." The court directed the Department to investigate whether Tiffany W.'s current housing was a safe place for Jacqueline if the court were to release Jacqueline to Tiffany W. in six

months. The court ordered family reunification services for Tiffany W. only and denied services for Kevin S. pursuant to section 361.5, subdivision (b)(5).

The proposed court-ordered case plan recommended parenting, individual counseling and a psychological assessment. Counsel for Tiffany W. objected to the proposed psychological evaluation, arguing that the evidence did not justify it. The juvenile court, "forecasting . . . that mother is going to reunify with this child," stated it "want[ed] to make sure she's armed with everything that's going to get her there." The court concluded that the services recommended by the Department were "appropriate under the circumstances and in the long run appropriate for what I would like to see happen in this case which is ultimately mother being reunified with her child who is one years old." The court signed the court-ordered case plan as presented, including the psychological assessment.[3] Tiffany W. timely appealed.

DISCUSSION

A. *Substantial Evidence Supports the Juvenile Court's Order Removing Jacqueline from Tiffany W.*

"Before the court may order a child physically removed from his or her parent's custody, it must find, by clear and convincing evidence, the child would be at substantial risk of harm if returned home and there are no reasonable means by which the child can be protected without removal. (§ 361, subd. (c)(1); . . . .) The jurisdictional findings are prima facie evidence the minor cannot safely remain in the home. (§ 361, subd. (c)(1);

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[3] We take judicial notice of the minute orders issued by the juvenile court during the pendency of this appeal. (Evid. Code, §§ 452, subd. (d), 459; *In re A.M.* (2013) 217 Cal.App.4th 1067, 1078; *In re Karen G.* (2004) 121 Cal.App.4th 1384, 1390.) On June 10, 2014 the court terminated Tiffany W.'s family reunification services and scheduled a selection and implementation hearing pursuant to section 366.26. On October 9, 2014 the court denied a petition filed by Tiffany W. pursuant to section 388, concluding that Tiffany W.'s proposed change of order would not promote Jacqueline's best interests. The section 366.26 hearing is currently set for December 9, 2014.

. . . .) The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child. [Citation.]" (*In re T.V.* (2013) 217 Cal.App.4th 126, 135-136; accord, *In re J.S.* (2014) 228 Cal.App.4th 1483, 1492.)[4]

"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.)

"On appeal from a dispositional order removing a child from a parent we apply the substantial evidence standard of review, keeping in mind that the trial court was required to make its order based on the higher standard of clear and convincing evidence." (*In re Ashly F.* (2014) 225 Cal.App.4th 803, 809.) "In reviewing the sufficiency of the evidence on appeal, we consider the entire record to determine whether substantial evidence supports the juvenile court's findings. Evidence is '"[s]ubstantial"' if it is reasonable, credible and of solid value. [Citation.] We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or weigh the evidence. Instead, 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. [Citations.] The appellant has the burden of showing there is no evidence of a

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4 Tiffany W. does not challenge the Riverside juvenile court's jurisdictional findings.

sufficiently substantial nature to support the findings or order. [Citation.]" (*In re T.V., supra*, 217 Cal.App.4th at p. 133; see *In re A.E.* (2014) 228 Cal.App.4th 820, 826.)

Substantial evidence supports the juvenile court's decision to remove Jacqueline from Tiffany W.'s custody. It is true, as Tiffany W. points out, that she did not inflict Jacqueline's injuries and she no longer had a relationship with Kevin S. As noted, however, the focus of the removal statute is on averting harm to the child. (*In re T.V., supra*, 217 Cal.App.4th at p. 133.) The record reveals that Tiffany W. was an immature mother who lacked the insight and abilities to protect Jacqueline. In a very short period of time Jacqueline suffered a broken arm and bruising to her face. Given the severity of the injuries Jacqueline sustained in such a short time while in the presence of her father, Tiffany W. should have recognized the warning signs and questioned whether Kevin S. posed a danger to their daughter. And even after the medical evidence strongly suggested that Jacqueline's broken arm and bruises were the result of physical abuse, Tiffany W. continued to deny that Kevin S. had been abusive towards Jacqueline. Because "[a] parent's past conduct is a good predictor of future behavior" (*ibid*.), Tiffany W.'s inability to recognize the potential danger to her child justified the child's removal.

There was also substantial evidence to support the juvenile court's finding that there were no reasonable means to protect Jacqueline without removing her from Tiffany W.'s custody. At the time of the hearing, Tiffany W. had been living with a family she met at a homeless shelter years earlier, and she was unemployed. Although Tiffany W. testified that the family members had no criminal record and were willing to accept Jacqueline into their home, the Department had yet to conduct an investigation of the family or its home. Under these circumstances there were no reasonable means to protect Jacqueline without removing her from Tiffany W.'s custody. (See § 361, subd. (c)(1); *In re T.V., supra*, 217 Cal.App.4th at p. 133; accord, *In re J.S., supra*, 228 Cal.App.4th at p. 1492.)

B. *The Juvenile Court Did Not Abuse Its Discretion in Ordering Tiffany W. to Submit to a Psychological Assessment*

Tiffany W. challenges that portion of the dispositional order requiring her to submit to a psychological assessment. She contends there was no evidence that she suffered from mental illness and that the required assessment was not reasonably designed to eliminate the conditions that led to dependency jurisdiction.

Subdivision (d) of section 362 provides that "[t]he juvenile court may direct any reasonable orders to the parents . . . of the child who is the subject of any proceedings under this chapter as the court deems necessary and proper to carry out this section, including . . . a direction to participate in a counseling or education program . . . . The program in which a parent . . . is required to participate shall be designed to eliminate those conditions that led to the court's finding that the child is a person described by Section 300." Under this statute, "'"[t]he juvenile court has broad discretion to determine what would best serve and protect the child's interests and to fashion a dispositional order accordingly."' [Citation.] On appeal, '"this determination cannot be reversed absent a clear abuse of discretion."' [Citation.]" (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1221.)

The Supreme Court has observed that "the juvenile court's discretion in fashioning reunification orders is not unfettered. Its orders must be 'reasonable' and 'designed to eliminate those conditions that led to the court's finding that the child is a person described by Section 300.' (§ 362, subd. ([d]).) 'The reunification plan "'must be appropriate for each family and be based on the unique facts relating to that family.'" [Citation.]' [Citation.]" (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1229.)

What about conditions that did not lead to the court's finding that the child is a dependent under section 300 but unquestionably may impede a parent's ability to reunify with his or her child? Section 362 is silent on this issue, but *In re Christopher H.* (1996) 50 Cal.App.4th 1001 provides an answer.

Christopher H.'s mother died two weeks after he was born prematurely. When Christopher was six months old and still hospitalized, the Fresno Department of Social

Services filed an amended petition on his behalf under section 300, subdivisions (b) and (g). Count b-1 alleged Christopher was a high risk child who had been hospitalized since birth and who would need extensive medical care upon his release from the hospital. Christopher's father, Gary H., failed to visit Christopher, cooperate with medical staff, obtain the training needed to care for Christopher, and to prepare his home for Christopher's basic needs. (*In re Christopher H.*, *supra*, 50 Cal.App.4th at p. 1005.)

At the jurisdiction/disposition hearing Gary H. argued that the evidence was insufficient to support a finding that Gary H.'s alcohol problems constituted a risk to Christopher because Christopher was in the hospital when his father was arrested for driving under the influence. (*In re Christopher H.*, *supra*, 50 Cal.App.4th at p. 1005.) Among the reunification services the court ordered for Gary H. were a substance abuse evaluation, participation in any recommended treatment, and submission to random drug or alcohol testing. (*Ibid*.) On appeal, Gary H. argued that the juvenile court lacked jurisdiction to impose a drug or alcohol testing condition because the court had not found that his alcohol abuse had negatively affected his ability to care for Christopher. (*Id.* at p. 1006.) The Court of Appeal rejected this argument, noting that Gary H. had a record of substance abuse and driving under the influence arrests that "pose[d] a potential risk of interfering with his ability to make a home for and care for Christopher." (*Id.* at p. 1007). The Court of Appeal held that the juvenile court "reasonably concluded appellant's substance abuse was an obstacle to reunification that had to be addressed in the reunification plan" and that the juvenile court did not abuse its discretion by ordering Gary H. to submit to random drug or alcohol testing as part of the reunification plan. (*Id*. at p. 1008; see *Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1018 ["requiring [the mother] to be drug and alcohol free before she could visit with her children was reasonable to protect their well-being"]).[5]

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[5] *In re Basilio T.* (1992) 4 Cal.App.4th 155, cited by Tiffany W., is distinguishable. In that case the juvenile court, as part of the reunification plan, ordered the parents to submit to drug testing and to receive substance abuse therapy. The Court of Appeal reversed this order because the record did not contain any evidence that the parents had a

A similar conclusion is warranted here. Between the time of the jurisdiction hearing and the disposition hearing, the Department observed a change in Tiffany W.'s behavior. Although she visited Jacqueline regularly, Tiffany W. had become disengaged and appeared to be "very depressed" because of her concern that she might not reunify with Jacqueline. Because depression, if it existed, posed a potential risk of interfering with Tiffany W.'s ability to reunify with Jacqueline and to benefit from the services offered, the juvenile court acted within its discretion in ordering Tiffany W. to undergo a psychological evaluation. (See *Laurie S. v. Superior Court* (1994) 26 Cal.App.4th 195, 199, 202 ["psychological evaluations of parents are frequently used in dependency cases" and "psychological evaluation is an 'information-gathering tool'"].)

"The fundamental premise of dependency law is to serve the best interests of the dependent child." (*In re Samuel G.* (2009) 174 Cal.App.4th 502, 510.) "The law provides the juvenile courts with the necessary tools and guidelines, as well as broad discretion, to make appropriate orders regarding dependent children consistent with this foundational principle. '"The juvenile court has broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order in accordance with this discretion." [Citation.]' [Citations.]" (*In re A.J.* (2013) 214 Cal.App.4th 525, 536.) The purpose of reunification services "is 'to facilitate the return of a dependent child to parental custody.' [Citations.]" (*In re Jaden E.* (2014) 229 Cal.App.4th 1277, 1281.) "[W]hen the court is aware of other deficiencies that impede the parent's ability to reunify with his child, the court may address them in the reunification plan." (*In re Christopher H.*, *supra*, 50 Cal.App.4th at p. 1008.) The juvenile court did not abuse its discretion by selecting the tool of a psychological

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substance abuse problem. (*Id*. at pp. 172-173.) The court noted, however, that "[i]f, during the pendency of the case, evidence of a substance abuse problem arises justifying the inclusion of such a component in the reunification plan, the trial court can modify the reunification plan accordingly and order additional services. [Citation.]" (*Id*. at p. 173, fn. 9.)

assessment to serve the best interests of Jacqueline and facilitate her return to her mother's custody.

DISPOSITION

The order is affirmed.

SEGAL, J.*

We concur:

WOODS, Acting P. J.

ZELON, J.

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