Filed 6/1/18 In re A.E. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re A.E., a Person Coming Under the Juvenile Court Law.	B285364
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. G.M., Defendant and Appellant.	Los Angeles County Super. Ct. No. DK22474

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Akemi Arakaki, Judge. Reversed.

Jacques Alexander Love, under appointment by the Court of Appeal, for Defendant and Appellant.

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

INTRODUCTION

The juvenile court adjudicated 10-year-old H.E. a dependent child under Welfare and Institutions Code[1] section 300, subdivisions (b) and (j), finding mother failed to make an appropriate plan for the child's safety when she left her daughter in the physical custody of the child's grandfather. The court reasoned that mother's failure to establish a formal arrangement with grandfather regarding H.E.'s support was sufficient to assume jurisdiction over the child, even though it was undisputed that for years H.E. had been physically safe and well provided for in grandfather's care. On appeal, mother contends the evidence was insufficient to show the arrangement placed H.E. at "substantial risk" of suffering "serious physical harm or illness" as required by section 300, subdivision (b)(1), or that H.E. was at risk of being "abused or neglected" as defined by section 300, subdivision (j). We agree with mother, and reverse.[2]

---

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

[2] In addition to adjudicating H.E. a dependent child, the court also assumed jurisdiction over H.E.'s then 17-year-old sister, A.E. While this appeal was pending, A.E. turned 18 years old and the juvenile court terminated dependency jurisdiction over her. Further, although mother's alleged neglect of A.E. was a predicate for the section 300, subdivision (j) finding with respect to H.E., there is no need to address the underlying allegations regarding A.E., because the evidence was insufficient to support the ultimate finding that H.E. would be abused or neglected in the manner specified by the statute. Accordingly, we conclude mother's appeal is moot to the extent it challenges the jurisdictional findings regarding A.E. (See *In re I.A.* (2011) 201 Cal.App.4th 1484, 1489.)

FACTS AND PROCEDURAL BACKGROUND

Consistent with our standard of review, we state the facts in the light most favorable to the juvenile court's ruling, drawing all reasonable inferences in support of the court's findings. (See *In re Isabella F.* (2014) 226 Cal.App.4th 128, 137 (*Isabella F.*).) In doing so, we are mindful of the elements required to sustain jurisdiction under section 300, subdivisions (b) and (j), and will not recount facts having no possible relevance to the court's finding that H.E. was in substantial risk of suffering serious physical harm or abuse.

In January 2017, the Los Angeles Department of Children and Family Services (the Department) received allegations that 10-year-old H.E. had been physically abused. The reporting party said mother, H.E., and mother's older daughter, 17-year-old A.E., had been residing in the home of the children's maternal grandfather (mother's father) for several years. Grandfather reportedly had kicked mother out of the house two years earlier due to a conflict between mother and A.E. Because mother did not have a stable residence at the time, she left the children in grandfather's custody. However, she visited H.E. at grandfather's home on a daily basis. The reporting party alleged that grandfather physically attacked mother by attempting to choke her and push her down in H.E.'s presence.

Grandfather, H.E., and A.E. all denied that mother had been assaulted. Grandfather confirmed that he had evicted mother from his home, and that H.E. and A.E. currently lived with him, along with mother's adult son, K.E. He said mother did not have a home where the children could stay, and that the girls' father was unwilling to care for them. Grandfather had not petitioned a court for legal custody of the girls. He did, however,

obtain an order requiring mother to pay him child support. Grandfather believed mother was upset over the support order, and that she made the false child abuse report to spite him.

Grandfather confirmed that mother visited H.E. a couple of days a week, but said she spent no time with her older daughter, A.E. He said mother was "very abusive" to A.E. when A.E. was younger. Three years earlier, mother called the police to accuse A.E. of physical assault, resulting in A.E.'s detention in a hospital for several days. Since then, mother and A.E. had not spoken to each other.

A.E. gave a similar account of her relationship with mother. She said she and H.E. had lived with grandfather for essentially their entire lives and that he would never abuse them.

H.E. denied the report of abuse in grandfather's home. At worst, grandfather had called her bad names, but that was a long time ago. She admitted fighting with her sister, but denied that A.E. had ever hit her. She said mother visited her regularly, but never stayed overnight at grandfather's house. She was never afraid or uncomfortable around mother, and she felt safe living with grandfather.

According to school personnel, A.E. was doing well at school, but H.E. was not. Her teacher reported that H.E. was falling behind and rarely completed homework. She said grandfather did his best to care for the children, but noted that he did not have legal authority to direct their education. Grandfather had attended individualized education program meetings for H.E. in the past, until mother objected to his presence. The teacher said H.E. had been referred for speech therapy, but mother refused to give consent. She said school staff

"always walks on eggshells around mother," because "they never know when mother is going to go off on them."

Mother told the Department that she had recently enrolled H.E. in reading and math tutoring classes, and that H.E.'s teacher said the girl's reading had improved. She said her current residence did not have adequate room for H.E., but she maintained that she did provide for her daughter by visiting her regularly and taking H.E. out to buy food, clothing and other items. Mother blamed grandfather for her present difficulties, arguing he had kicked her out of his home and then caused her wages to be garnished for child support, which prevented her from obtaining suitable housing. Mother maintained grandfather was "too old to care for the children" and that, instead of garnishing her wages, he should have helped her obtain a place to live with H.E. The Department social worker reported that mother was unable to explain how grandfather's home was unsafe.

In April 2017, the Department filed a dependency petition on behalf of H.E. and A.E. Under section 300, subdivision (b), the petition alleged the children were at substantial risk of serious physical harm because (1) mother and father "failed to make an appropriate plan for the children's safety and well being, in that the parents left the children in the care of the children's maternal grandfather, without providing the grandfather with written authorization for the care of the children"; (2) mother "refuses to have any contact with [A.E.] and [A.E.] refuses to have any contact with the mother"; and (3) the parents "failed to provide [H.E.] with educational and behavioral services" and "refuse[d] to work with the child's school[ ] regarding the child's educational,

behavioral problems and recommended mental health services."[3] The petition also alleged H.E. was a dependent child under section 300, subdivision (j) because mother was "unable and unwilling to provide [A.E.] with ongoing care and supervision" and this unwillingness to care for A.E. posed a "risk of serious physical harm, damage and danger" to H.E.

In recommending that the children be detained from the parents pending a determination on jurisdiction, the Department offered the following risk assessment: "Mother and father have demonstrated throughout the investigation that neither parent is willing or able to care for [H.E.] and [A.E.]. However, Maternal Grandfather . . . has demonstrated his ability and capability to provide [H.E.] and [A.E.] with their basic care and needs. Maternal Grandfather . . . is limited in his ability to provide or participate in any extended/specialized services for the children such as school and medical decisions."[4]

The juvenile court found a prima facie case for jurisdiction and detained the children with grandfather, granting him educational rights, and limiting the parents' contact with the children to monitored visits. The court ordered the Department

---

[3] Father is not a party to this appeal. Nevertheless, because jurisdiction is taken over the child, and the juvenile court was required to find a substantial risk of harm regardless of whose conduct the allegations implicated, our analysis regarding the court's section 300, subdivision (b) findings applies equally to those made against father.

[4] The Department also noted the family's prior child welfare history, which consisted of six unsubstantiated referrals. Mother's criminal history showed one conviction for burglary and assault in 1995.

to provide grandfather with emergency funding and to investigate whether the parents would agree to a legal guardianship.

Following the detention order, grandfather enrolled H.E. in speech therapy as her school had recommended. He wanted legal guardianship of H.E. and did not believe mother could take care of the girl. He acknowledged that the Department had previously provided him with directions on how to obtain a probate guardianship, but said he did not pursue it because "he did not feel it was urgent" as "things were going well" and he was receiving financial assistance for the children. Grandfather saw no need to pursue guardianship for A.E., who would soon turn 18 and graduate from high school.

The Department assessed grandfather's home to be "clean and organized," with "ample food" and all utilities in "working order." It determined that H.E. was "doing well in the home of [grandfather]" and that her "basic needs [were] being met." H.E. also reported "feeling safe and well cared for in [grandfather's] home."

Mother maintained that she continued to provide support for her daughters, even though she did not live with them. She visited with H.E. several times a week, fed her, took her shopping and helped with her homework. She said she frequently attended school meetings for H.E., emphasized that she had enrolled her younger daughter in remedial math and reading classes, and explained that she refused speech therapy because she did not want H.E. pulled from class to attend therapy sessions that she did not believe the child needed. Although she admitted that she did not provide the same care for A.E., mother noted that both girls were insured through her Medi-Cal.

The Department continued to recommend that the court declare H.E. and A.E. dependent children on the grounds alleged in the petition. With respect to the failure to protect and abuse counts, the Department gave the following account in support of its recommendation:

> "[I]t is the Department's assessment that the mother and father have left the children in the care of [grandfather] without making an appropriate plan to continue to provide and care for their children. [Grandfather] has taken it upon himself to provide for the children and to seek county assistance to help provide for the children financially given the lack of financial support provided to him by the parents. The mother blames [grandfather] for her inability to provide for her children on her own and states that he has money and does not need financial assistance. The mother stated that due to the fact that [grandfather] is getting cash aid, the mother had to start paying child support about 3 to 5 months ago. Mother admitted that prior to that, she was not paying child support. . . .
>
> "The Court is respectfully informed that given that the children are currently stable in the care of [grandfather], the Department was willing to provide [grandfather] with the Legal Guardianship of the children via a [section] 360a.[5] However, the mother

---

5 Section 360, subdivision (a) provides in relevant part: "Notwithstanding any other provision of law, if the court finds that the child is a person described by Section 300 and the parent has advised the court that the parent is not interested in family

has not consented to this and has continued to report that she wants to reunify with [H.E.]."

On May 31, 2017, the court held a combined jurisdiction and disposition hearing. Minors' counsel joined with the Department's recommendation to sustain the petition, arguing the arrangement "wasn't an appropriate plan" and that grandfather "was able to do the best he could, but he didn't have the ability to advocate for these children in the educational setting until we came here at detention."

Mother opposed jurisdiction, arguing the Department had failed to demonstrate the children were at substantial risk of suffering physical harm or illness. Although she acknowledged her disagreement with grandfather about some of the educational programs that H.E. should participate in, mother maintained this was insufficient to establish a substantial risk of serious physical harm. And, while she recognized her relationship with A.E. was "strained," mother argued there was nothing to indicate this would result in abuse or harm to H.E.

The juvenile court sustained the allegations under section 300, subdivisions (b) and (j), finding the children at risk based on the parents' unwillingness or inability to provide for their basic needs and the parents' failure to make formal arrangements for

---

maintenance or family reunification services, it may, in addition to or in lieu of adjudicating the child a dependent child of the court, order a legal guardianship, appoint a legal guardian, and issue letters of guardianship, if the court determines that a guardianship is in the best interest of the child, provided the parent and the child agree to the guardianship, unless the child's age or physical, emotional, or mental condition prevents the child's meaningful response."

the children's care after leaving them with grandfather. However, the court struck the allegation that mother failed to provide for H.E.'s education or behavioral needs. The court explained:

> "I appreciate the argument that if you take your children to someone and you think they can take care of them, that is an appropriate plan. The problem is that's not the case.
>
> "If you leave your children on the doorstep of somebody, that is not making an appropriate plan. There are other steps that need to be taken and other safeguards put in place. There has to be a plan. . . . [¶] . . . There does need to be support set up. There does need to be an agreement how to proceed. There does need to be authorization to in fact appropriately and adequately care for the children.
>
> "If grandfather never opened the door and never was, in fact, going forward and advocating for himself fighting for the kids, fighting for their educational needs and for their support and for their care, I do believe that there is, in fact, serious physical harm and emotional harm . . . or the kids are at risk of that. So I think that's wherein lies the rub because although it works out, and luckily it worked out for [A.E.] and [H.E.], but for the active efforts of the grandfather that would not have been the case I don't believe. [¶] And so in that respect, I do believe the Department has met their burden."

As for disposition, the court removed the children from parental custody, ordered the Department to provide

reunification services, and granted mother weekly unmonitored visits and bi-weekly monitored visits.

DISCUSSION

Mother contends the evidence was insufficient to support the jurisdictional findings because there was no evidence that H.E. was ever at risk of serious physical harm or abuse as required by section 300, subdivisions (b) and (j). She emphasizes that each of the Department's reports admitted H.E. was safe and well provided for in grandfather's care, and she argues the juvenile court's speculation that H.E. might have suffered harm if grandfather had not taken it upon himself to care for the child cannot serve as a substitute for actual evidence of substantial risk. We agree the evidence was insufficient to sustain jurisdiction.

"In dependency proceedings, the social services agency has the burden to prove by a preponderance of the evidence that the minor who is the subject of the dependency petition comes under the juvenile court's jurisdiction. [Citations.] We review the jurisdictional findings for substantial evidence. [Citation.] We consider the entire record, drawing all reasonable inferences in support of the juvenile court's findings and affirming the order even if other evidence supports a different finding. [Citation.] We do not consider the credibility of witnesses or reweigh the evidence. [Citation.] Substantial evidence does not mean 'any evidence,' however, and we ultimately consider whether a reasonable trier of fact would make the challenged ruling in light of the entire record. [Citation.] The parent has the burden on appeal of showing there is insufficient evidence to support the juvenile court's order. [Citation.]" (*Isabella F., supra,* 226 Cal.App.4th at pp. 137–138.)

Section 300, subdivision (b)(1) authorizes dependency jurisdiction where "[t]he child has suffered, or there is a substantial risk that the child will suffer, *serious physical harm or illness*, as a result of . . . the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment." (Italics added.) Because the statute permits jurisdiction "*only so long as is necessary* to protect the child from risk of suffering serious physical harm or illness" (*ibid.*, italics added), the evidence must show that the child faces a *current risk* of serious physical harm. (See *In re J.N.* (2010) 181 Cal.App.4th 1010, 1023.)

Thus, section 300, subdivision (b) requires a showing of "*concrete* harm or risk of physical harm to the child." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820–821, italics added.) "As appellate courts have repeatedly stressed, ' "[s]ubdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness." ' " (*In re Jesus M.* (2015) 235 Cal.App.4th 104, 111.)

Similarly, section 300 subdivision (j) requires evidence of "abuse" that, in most cases, results in physical harm to the child. The statute authorizes dependency jurisdiction where "[t]he child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions." (§ 300, subd. (j).) Section 300, subdivisions (a), (b), (d), and (e) all contemplate some form of physical harm. Only subdivision (i), which requires a showing that the child "has been subjected to an act or acts of *cruelty* by the parent" (§ 300,

subd. (i), italics added), can be the basis for jurisdiction without evidence of *physical* harm to the child. (See *In re D.C.* (2011) 195 Cal.App.4th 1010, 1012–1013 [evidence that mother knew child was terrified of water, and that she held child underwater for 10 seconds, was sufficient to find an act of cruelty under section 300, subdivision (i)].) Here, there was no evidence to indicate mother would subject H.E. to an act of cruelty as that phrase is commonly understood within the dependency context, and the Department has never contended otherwise. (See *id.* at pp. 1016–1017.)

More to the point, there was no evidence to support the juvenile court's finding that H.E. was ever at substantial risk of suffering serious physical harm. As mother rightly emphasizes, each of the reports the Department submitted in advance of the jurisdiction hearing acknowledged that H.E. was physically safe in grandfather's home under the arrangement that had persisted for at least two years since mother's eviction. In each of its reports the Department recommended that H.E. *remain* in grandfather's home, under substantially the same plan, with only a change to the legal custody arrangement pertaining to educational rights. Indeed, after the Department determined the initial report of abuse could not be substantiated, its focus shifted almost entirely to assisting grandfather with pursuing a guardianship and persuading mother to consent to one. While the Department and juvenile court reasonably expected a guardianship would improve the existing arrangement for H.E., that expectation had absolutely no bearing on the critical question of whether the plan for H.E.'s care was so inadequate as to subject the child to a substantial risk of *physical* harm. By the

Department's own consistent admissions, no such risk existed so long as H.E. resided in grandfather's home.

Normally, when the adequacy of a parent's plan for a child's safety and well being is in doubt, dependency jurisdiction is asserted under section 300, subdivision (g). The requirements for establishing jurisdiction under that subdivision highlight the shortcomings of the dependency petition in this case. In relevant part, section 300, subdivision (g) authorizes jurisdiction when "[t]he child has been left without *any provision for support*; . . . or a relative or other adult custodian with whom the child resides or has been left is *unwilling or unable* to provide care or support for the child, the whereabouts of the parent are unknown, and reasonable efforts to locate the parent have been unsuccessful."[6] (Italics added.)

Although the Department challenged the existing plan for H.E.'s care, it did not petition for jurisdiction under section 300, subdivision (g), and it could not have met the requirements for establishing jurisdiction under that subdivision on this record. First, while subdivision (g) requires evidence that the child was left "without any provision for support," here, the existing arrangement undisputedly provided support for H.E.—both from grandfather who cared for H.E. in his home and from mother who regularly visited H.E. and provided some financial support (albeit under a wage garnishment order). (See *In re Anthony G.* (2011)

---

[6] Jurisdiction is also authorized when "physical custody of the child has been voluntarily surrendered pursuant to Section 1255.7 of the Health and Safety Code and the child has not been reclaimed within the 14-day period specified in subdivision (g) of that section; [or] the child's parent has been incarcerated or institutionalized and cannot arrange for the care of the child." (§ 300, subd. (g).)

194 Cal.App.4th 1060, 1065 [jurisdiction finding under section 300, subdivision (g) requires proof the child was left without provision for support, not simply that the absent parent had not provided support for the child].) Second, and most significantly, although subdivision (g) contemplates supervision when a child has been left with a *relative*, jurisdiction is authorized *only* if the relative is "unwilling or unable to provide care or support for the child." (§ 300, subd. (g).) In leaving H.E. with her grandfather, who by all accounts was willing and able to provide care and support for the child, mother made a sufficient plan for her daughter's care under subdivision (g).

Tacitly acknowledging it could not meet its evidentiary burden under section 300, subdivision (g), the Department instead alleged mother neglected H.E. by failing to make an appropriate plan for her care under section 300, subdivision (b). The apparent attempt to evade subdivision (g)'s requirements is unavailing, as the undisputed evidence showed H.E. was never at risk of suffering serious physical harm or illness due to mother's "willful or negligent failure . . . to provide the child with adequate food, clothing, shelter, or medical treatment." (§ 300, subd. (b).)

In re Andrew S. (2016) 2 Cal.App.5th 536 (*Andrew S.*) is instructive. There, the presumed father of two young children challenged the juvenile court's jurisdiction finding under section 300, subdivision (b) that "he failed to provide the children with the necessities of life, placing them at substantial risk of serious physical harm or illness" during the father's incarceration in a Texas prison. (*Id.* at p. 539.) The evidence showed the children's mother had " 'adequate income and housing' and 'extended family support' " and "there was no evidence that [the children] at any time lacked adequate food, clothing, shelter or medical treatment

or that [the mother]—or the children's maternal grandmother in [the mother's] absence—had otherwise failed to meet their needs." (*Id.* at pp. 542–543.) While the juvenile court acknowledged this evidence precluded a jurisdiction finding under section 300, subdivision (g), it nonetheless concluded the father had "failed to protect the children" under subdivision (b) because he failed to make "arrangements for the children with maternal relatives" in anticipation of the mother, who was charged with abusing the children, losing custody. (*Id.* at pp. 541, 543–544.) The *Andrew S.* court disagreed, and reversed.

The *Andrew S.* court explained that, while section 300, subdivision (b) establishes a basis for jurisdiction where the willful or negligent failure to provide for a child creates substantial risk of physical harm or illness, neither it, nor section 300, subdivision (g), "justifies the juvenile court's assumption of jurisdiction over an otherwise well-cared-for child simply because an absent parent has not provided support." (*Andrew S., supra,* 2 Cal.App.5th at p. 542.) Further, the court rejected the suggestion that pleading the allegation under subdivision (b) somehow rescued a finding that otherwise could not have been made under subdivision (g). As the court explained, although the mother's improper discipline constituted abuse, there was no evidence that father's neglect placed the children at risk of suffering physical harm from a lack of "food, clothing, shelter or medical treatment" as required by subdivision (b). (*Andrew S.,* at pp. 542–543.) Because the undisputed evidence showed the children's needs were met during the father's incarceration, the *Andrew S.* court concluded "the Department did not satisfy its burden of proof under . . . subdivisions (b) or (g)." (*Andrew S.,* at p. 544.)

The same conclusion is compelled here, where, regardless of mother's alleged neglect, it was undisputed that grandfather met H.E.'s needs and that H.E. was never at risk of suffering serious physical harm from lack of "food, clothing, shelter or medical treatment" while in grandfather's care. (*Andrew S., supra,* 2 Cal.App.5th at pp. 542–543.) Contrary to the Department's assertion and the juvenile court's reasoning, no formal plan for support was required, and no legal guardianship was mandated, so long as H.E. continued to receive adequate care and support from grandfather in mother's absence. (See *id.* at pp. 542–544; see also *In re X.S.* (2010) 190 Cal.App.4th 1154, 1160 [reversing section 300, subdivision (b) jurisdiction finding that father had failed to provide for child where child was well cared for by the maternal grandmother and father's failure to provide did not cause the child to suffer harm or create risk of future harm].)

Finally, the juvenile court analogized this case to a hypothetical where mother left her children "on the doorstep of somebody," reasoning that "[i]f grandfather never opened the door and never was, in fact, going forward and advocating for himself fighting for the kids," H.E. would have been at risk of "serious physical harm and emotional harm." The analogy cannot be reconciled with the undisputed evidence. Whatever mother's shortcomings, she did not just leave H.E. on someone's doorstep. Mother arranged for H.E. to remain in the home of her father—H.E.'s grandfather—with whom H.E. had lived for essentially her entire life. And mother continued to provide support for H.E., as the juvenile court found in dismissing the allegation that she failed to provide for the child's educational and behavioral needs.

Further, there was no basis for the court's speculation that grandfather might stop "advocating" for H.E. When mother moved out, she and grandfather agreed to work together to ensure H.E. was properly cared for, and when mother was not providing the financial support that grandfather thought she should, he successfully pursued a support order without the Department's assistance. The dependency system's purpose is to protect children who are being abused or neglected and to ensure the safety, protection, and well-being of children who are at risk of that harm. (§ 300.2.) Here, the evidence indisputably showed that H.E. was not in need of that protection, and that grandfather was willing and able to care for the child when mother could not. The juvenile court erred in assuming jurisdiction over H.E.[7]

---

[7] Because we conclude the evidence was insufficient to support the assumption of jurisdiction, the disposition order must necessarily be vacated. (See *In re Janet T.* (2001) 93 Cal.App.4th 377, 392.)

DISPOSITION

The jurisdictional order is reversed and the disposition order is vacated.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.