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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re FAITH T., a Person Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

MARK A.,

Defendant and Appellant.

B269488
(Los Angeles County
Super. Ct. No. CK79387)

APPEAL from an order of the Superior Court of Los Angeles County, Annabelle G. Cortez, Judge. Affirmed.

Mitchell Keither, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel and David Michael Miller, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Mark A. (Father), presumed father of Faith T., appeals the juvenile court's dispositional order, contending substantial evidence does not support the court's decision to remove Faith from the custody of her parents after finding jurisdiction warranted by domestic violence perpetrated by appellant and substance abuse on the part of Faith's mother, Priscilla T. (Mother). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Detention

Fourteen-month old Faith came to the attention of the Department of Children and Family Services (DCFS) on June 30, 2015, when the agency received a referral stating Father had hit Mother on the head while she and Faith were in a parked car in front of Father's home, and that Mother had been taken to a hospital for treatment.

Sheriff's deputies had been called to the scene, but were told by Mother and Father that the caller must have been referring to a different couple. Later, the same deputies were called to the hospital, where Mother told them Father had grabbed her by the hair and punched her on the right side of her head multiple times. The deputies observed a hematoma on Mother's head and scratches on her neck. Mother refused the deputies' offer of assistance in obtaining a restraining order. Mother told hospital personnel that Father had hit her multiple times with his fists. Hospital reports indicated that Mother had been drinking, and that

she had tested positive for amphetamine and methamphetamine.

Interviewed by the caseworker, Mother confirmed that Father had hit her and that Faith was in the car at the time.¹ She further reported that she had been diagnosed as suffering from a concussion, and that her head still hurt. Mother said Father had gang affiliations, that he was “very violent” and that she was afraid of him. Father had told Mother, “You’ll be sorry if you try to get custody of Faith and file for child support. Do it and see, you’re not going to like what happens.” She denied currently being in a relationship with him.

Prior to the detention hearing, Father refused to be interviewed by the caseworker because criminal charges were pending.² Father filled out a Statement Regarding Parentage form indicating he was Faith’s presumed father, but that Faith was not living with him.³

¹ Mother later denied Faith was in the car with her, but the court expressly credited her first statement. On appeal, Father acknowledges that substantial evidence supports that finding.

² Father was arrested for the assault, but charges were not ultimately pursued.

³ It is clear from the record that at the time of the incident, Father was living with his relatives, and Mother and Faith were living with hers.

Both Mother and Father had previous involvement with dependency proceedings. In 2010, Faith's four half-siblings were the subject of proceedings in which the court found, among other things, that Mother had a history of substance abuse, including recent abuse of methamphetamine, and that Richard C., the father of two of the children, had physically abused Mother.⁴ Reunification services for Mother and the siblings' fathers were terminated in 2011. At the time of the underlying proceedings, all four children were in a long-term guardianship with Mother's aunt.

Father's older child, J.A., had been the subject of a proceeding in 2010, when Father was incarcerated.⁵ The court sustained allegations that Father failed to provide the necessities of life for his child. At the time of the underlying proceedings, J.A. was in the custody of his mother.

⁴ Beginning in 2008, DCFS had received multiple referrals based on Mother's alleged drug abuse, including an allegation that she was smoking methamphetamine and drinking prior to breastfeeding one of her children. Mother herself received DCFS services as a child as a result of her mother's substance abuse. Mother had a 2005 conviction for burglary, a 2011 conviction for issuing a threat with intent to terrorize, a 2011 arrest for possession of drug paraphernalia leading to a conviction in 2015, and a 2013 conviction for possession of a controlled substance.

⁵ Father's criminal record included convictions for assault, robbery and theft, and an arrest for sale of marijuana/hashish.

DCFS filed a petition seeking jurisdiction over Faith under Welfare and Institutions Code section 300, subdivisions (a) (serious physical harm), (b) (failure to protect) and (j) (sibling abuse). The allegations were based on the June 30 incident, Mother's long history of substance abuse, and Mother's failure to participate in reunification services offered in prior proceedings.⁶ DCFS initially recommended that Faith remain with Mother while she underwent drug testing and participated in domestic violence and substance abuse programs. Just prior to the detention hearing, DCFS changed its recommendation, based on its determination that Mother and Father remained in a relationship. At the July 31, 2015 detention hearing, the court ordered Faith detained from both Mother's and Father's custody. Faith was placed with her paternal grandparents.

B. Jurisdiction

Prior to the jurisdictional hearing, Mother recanted her claim that Father hit her, saying he had only pushed and shoved her, and that she went to the hospital because she was dizzy from drinking. She said that Father also appeared to have been drinking. As no criminal case was being pursued, Father agreed to be interviewed by the caseworker. He told her "nothing happened" that night other than a

⁶ Undesignated statutory references are to the Welfare and Institutions Code.

verbal dispute, that Mother “probably did it [caused her injuries] herself,” and that he was “the real victim.” Both Mother and Father denied that Faith was in the car.

With respect to the substance abuse allegation, Mother told the caseworker she had been using drugs, including marijuana and methamphetamine “off and on” since she was 15 years old. She agreed to be referred to a substance abuse program, although she denied having “an addiction.” In November 2015, she reported enrolling in an outpatient substance abuse program, but told the caseworker she needed and was looking for an inpatient program. She also said she was enrolled in a parenting class, but did not provide any documentation. She had not undergone the drug testing proposed by the caseworker, claiming to have lost her identification card. Father denied seeing Mother use drugs. The caseworker provided referrals to programs, including a domestic violence program. Father said he had trouble participating due to his full time job as a truck driver.

At the December 9, 2015 jurisdictional/dispositional hearing, DCFS’s counsel and Faith’s counsel urged the court to sustain the allegations of domestic abuse by Father and drug abuse by Mother. Father’s and Mother’s counsel contested the domestic violence allegations. Counsel contended there was no current risk to Faith from domestic violence because the allegations involved a single incident, and Father and Mother were no longer involved in a relationship. In his argument to the court, Father’s counsel

did not dispute the allegation that Mother had a substance abuse problem, or the allegation that she had failed to participate in a court-ordered substance abuse program in the prior proceedings. Mother's counsel acknowledged that the allegations were "factually correct."

The court sustained all the allegations, finding true that (1) on or about June 30, 2015, Faith "was exposed to a violent confrontation between [Mother] and [Father] in which [Father] repeatedly struck [Mother's] head with [his] fists, causing [Mother] pain to the . . . head," and causing Mother "to sustain a concussion and [become] dizzy"; (2) Mother "has [a] seven[-]year history of substance abuse[,] including methamphetamine," was "a current user of amphetamine and methamphetamine," and on June 30, 2015, "was under the influence of illicit drugs while [Faith] was in [her] care and supervision"; and (3) Faith's four older half-siblings received permanent placement services as a result of Mother's ongoing substance abuse and failure to regularly participate in a court-ordered substance abuse program and random drug testing. Based on these sustained allegations, the court found jurisdiction warranted under section 300, subdivisions (a), (b) and subdivision (j).

At the hearing, the court explained that it had considered whether the violent behavior was likely to continue and whether it was "sufficiently serious to justify . . . the need for court jurisdiction," observing that even a "one-time incident [of domestic violence] . . . can be the basis for the court to assume jurisdiction to protect the child" if

that incident is “serious enough.” The court concluded that the behavior was likely to continue, as Mother had a prior history of domestic violence with her previous partner, Mother and Father had minimized Father’s behavior, and both had failed to take advantage of DCFS referrals to domestic violence programs. The court found support for its conclusion that the incident was sufficiently serious to warrant assumption of jurisdiction in the descriptions of Mother’s injuries and the medical treatment she received, and in the evidence that Father ““without provocation, reached into the vehicle, grabbed [Mother’s] hair, and punched her on the right side of her head.””

C. Disposition

Turning to disposition, DCFS agreed Father was entitled to reunification services but contended Mother was not, based on her failure to participate in a substance abuse program or drug testing in the prior proceedings. Mother testified that she was currently enrolled in programs and was learning to become a better parent. Faith’s attorney took the position that as Mother appeared to be making an effort and reunification services were to be offered to Father, it would be appropriate to provide at least six months of services to Mother. Father’s attorney contended Faith should not be removed from him or that he should be permitted unmonitored contact in her home with the paternal grandparents. Mother’s attorney argued in favor of

reunification services. Neither Father's counsel nor Mother's counsel contended Mother should have custody.

The court found clear and convincing evidence of a substantial risk of harm if Faith were returned to the home of her parents, and that there was no reasonable means to protect her without "removal from" her parents' physical custody, citing section 361, subdivision (c). The court ordered reunification services for both parents.⁷ Father appealed.

DISCUSSION

A. Removal of Faith from Father

After finding that a child is a person described in section 300 and therefore the proper subject of dependency jurisdiction, the court must determine "the proper disposition to be made of the child." (§ 358.) Section 361, subdivision (c)(1) permits the court to remove a child from the physical custody of parents or guardians "with whom the child resides at the time the petition was initiated" if the court finds by clear and convincing evidence that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the

⁷ Father was to participate in random drug testing and a domestic violence program for perpetrators. Mother was to participate in drug testing, a substance abuse program, a domestic violence program that included support for victims, a parenting program, and individual counseling to address case issues.

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."

As explained in *In re Julien H.* (Oct. 4, 2016, B267953) __ Cal.App.4th __ [2016 Cal.App. LEXIS 828], a juvenile court cannot remove a child from a parent's physical custody under section 361, subdivision (c)(1) unless the child was residing with that parent when the petition was initiated. (Accord, *In re Dakota J.* (2015) 242 Cal.App.4th 619, 628 ["[I]t is plain that the statute [section 361, subdivision (c)] does not contemplate that a child could be removed from a parent who is not living with that child at the relevant time"]; *In re Abram L.* (2013) 219 Cal.App.4th 452, 460 ["[The children] could not be removed from father's physical custody under section 361, subdivision (c)(1) because they were not residing with him when the petition was initiated" (italics omitted)]; *In re V.F.* (2007) 157 Cal.App.4th 962, 969 [section 361, subdivision (c) ""does not, by its terms, encompass the situation of the noncustodial parent""].) It follows that when the court "remov[ed]" Faith from Father's custody under section 361, subdivision (c)(1), it erred.⁸

⁸ The court in *In re Julien H.* concluded that the father had not forfeited the argument that the juvenile court erred: "Although in general, a party who does not raise an argument below forfeits the argument on appeal, where as here, an appellant poses a question of law, the appellate court can exercise its discretion to address the issue." (*In re* (Fn.continued on next page.)

However, as the court in *In re Julien H.* further explained, “reversal is unwarranted unless the error resulted in prejudice.” (*In re Julien, supra*, __ Cal.App.4th __ [2016 Cal.App. LEXIS 828 at p. *8].) Because the dependency court “has the power under section 361, subdivision (a) and section 362, subdivision (a) to limit the access of a parent with whom the child does not reside and thus effectively remove the child from the noncustodial parent,” and because the factual findings and standard of proof under these provisions are essentially the same as under section 361, subdivision (a) and section 362, subdivision (a), a court’s reliance on section 361, subdivision (c) to support removal from a noncustodial parent is not prejudicial error.⁹ (*In re Julien, supra*, [2016 Cal.App. LEXIS 828 at p. *9].)

The court in *In re D’Anthony D.* (2014) 230 Cal.App.4th 292 reached a similar conclusion, holding that the

Julien H., supra, __ Cal.App.4th __ [2016 Cal.App. LEXIS at p. *7].) Here, it is respondent who raises the issue that that matter was more appropriately resolved under a different statutory provision.

⁹ Section 361, subdivision (a)(1) grants the court authority to “limit the control to be exercised over the dependent child by any parent or guardian,” and applies to “any parent or guardian.” Section 362, subdivision (a) authorizes the court to “make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child” once he or she is “adjudged a dependent child of the court.”

noncustodial father's request for custody at the dispositional hearing should have been considered under section 361.2, subdivision (a), which requires the juvenile court to place a child with a noncustodial parent, "unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." The court nonetheless found the error in proceeding under section 361, subdivision (c) harmless: "[T]he [juvenile] court found 'by clear and convincing evidence' that the requested placement with father posed 'a substantial danger to the children's health.' In view of this evidence, and the court's express finding under section 361, we cannot say it is 'reasonably probable' that the court would have made a different finding had it considered whether the placement would be detrimental to the children's safety or physical well-being under section 361.2." (*In re D'Anthony D.*, *supra*, 230 Cal.App.4th at p. 304.)

The same is true here. The court found by clear and convincing evidence that Faith would be at a substantial risk of harm if returned to the custody of either of her parents, pointing to the seriousness of the proven act of domestic violence and the likelihood that it would recur.¹⁰ It is not

¹⁰ Although the juvenile court's findings must be made on clear and convincing evidence, "[o]n review, we employ the substantial evidence test, however bearing in mind the heightened burden of proof." (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.)

reasonably probable the court would have reached a different result had it considered Father's request for custody under a different statutory provision.

Father contends the court's conclusion that removal was necessary to protect Faith in the future "rested on speculation and conjecture" in view of the fact there had been only a single instance of domestic violence. "A removal order is proper if based on proof of parental inability to provide proper care for the child and proof of a potential detriment to the child if he or she remains with the parent." (*In re N.M.* (2011) 197 Cal.App.4th 159, 169.) ""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.] The court may consider a parent's past conduct as well as present circumstances. [Citation.]" (*In re John M.* (2012) 212 Cal.App.4th 1117, 1126.)

As numerous courts have held, exposing children to domestic violence can support a finding of detriment to the children sufficient to support a jurisdictional finding. (See, e.g., *In re T.V.* (2013) 217 Cal.App.4th 126, 134; *In re R.C.* (2012) 210 Cal.App.4th 930, 941; *In re E.B.* (2010) 184 Cal.App.4th 568, 576; *In re S.O.* (2002) 103 Cal.App.4th 453, 460-461; *In re Heather A.* (1996) 52 Cal.App.4th 183, 194.) Domestic violence in the household represents a failure to protect the children from the substantial risk of encountering the violence and suffering serious physical harm while it is occurring. (*In re Heather A.*, *supra*, 52

Cal.App.4th at p. 194.) Moreover, “children of these relationships appear more likely to experience physical harm from both parents than children of relationships without . . . abuse. . . . [E]ven if they are not physically harmed, children suffer enormously from simply witnessing the violence between their parents . . . [¶] [And] children of abusive fathers are likely to be physically abused themselves.” (*In re E.B.*, *supra*, 184 Cal.App.4th at p. 576; accord, *In re Sylvia R.* (1997) 55 Cal.App.4th 559, 562.)

Father’s assault on Mother was unprovoked, vicious and criminal. Mother suffered serious injury -- a concussion -- and required medical intervention. Although there was no evidence of specific instances of prior domestic violence, Mother described Father as “very violent” and said he had threatened her in the past. The fact that Father would engage in such behavior -- reaching into the car, grabbing Mother by the hair, and repeatedly punching her -- with no provocation supported the court’s determination that Father’s inability to control his temper would endanger his infant daughter. Moreover, Father’s insistence that nothing happened” and that he was “the real victim” of the June 30 assault further supported the court’s determination.

B. Removal from Mother’s Custody

Appellant contends substantial evidence did not support removing Faith from either parent. Father forfeited any challenge to the removal from Mother’s custody by failing to contest that order below. (See *In re Abram L.*,

supra, 219 Cal.App.4th at p. 462; *In re T.G.* (2013) 215 Cal.App.4th 1, 13-14.) At the dispositional hearing, neither Father nor Mother sought to have custody returned to Mother. Moreover, the removal order was supported by substantial evidence. Mother had a long-standing drug problem that she had failed to address in prior proceedings, leading to the loss of custody of Faith's older siblings; she was only beginning to address these issues by the time of the underlying dispositional hearing. In addition, she had shown poor judgment by twice becoming involved with abusive men and by attempting to protect Father after he physically attacked her. We find no basis to reverse the order.

DISPOSITION

The court's dispositional order is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.