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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re KIMBERLY G., a Person Coming
Under the Juvenile Court Law

DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

ALEJANDRA E.,

Defendant and Appellant.

B288325

(Los Angeles County
Super. Ct. No. CK92054A)

APPEAL from an order of the Superior Court of Los Angeles County, Steff Padilla, Juvenile Court Referee. Affirmed.

John P. McCurley, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis,
Assistant County Counsel and Sarah Vesecky, Deputy County
Counsel for Plaintiff and Respondent.

At the conclusion of dependency proceedings in 2013, 10-year-old Kimberly G. was placed in a legal guardianship with her paternal grandmother, Alejandra E. Four years later, in 2017, the juvenile court terminated the legal guardianship and removed Kimberly from Alejandra's care after Kimberly reported that Alejandra was physically and emotionally abusive. Alejandra appeals the order terminating the guardianship and removing Kimberly from her physical custody, urging that the juvenile court applied the wrong legal standards and the court's findings were not supported by substantial evidence. We find no error, and thus we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Prior Proceedings

Kimberly (born in July 2003) is the child of D.G. (mother) and E.G. (father). In 2011, the Los Angeles County Department of Children and Family Services (DCFS) filed a juvenile dependency petition alleging that Kimberly had been sexually abused by mother's live-in boyfriend, David M., and that father had a history of substance abuse and drug sales. The juvenile court sustained the allegations of the petition and ordered Kimberly placed with her paternal grandmother, Alejandra.

In early 2013, mother reported that she and David had married. Mother continued to deny that David had abused Kimberly, reporting that David loved her children and had been

falsely accused. Kimberly told the children's social worker (CSW) that although she loved mother, she did not want to live with her because she did not feel safe with mother and David. Kimberly appeared bonded with Alejandra and happy in her home.

In June 2013, the juvenile court terminated mother's reunification services and set a Welfare and Institutions Code¹ section 366.26 hearing. At the October 1, 2013 hearing, the court appointed Alejandra as Kimberly's legal guardian, issued letters of guardianship, and terminated its supervision.

II.

Section 388 Petition

Four years later, in July 2017, mother filed a section 388 petition seeking to have Alejandra returned to her custody. Mother said Alejandra had hit Kimberly, and that Kimberly did not want to continue living with Alejandra "because she can't stand the way [Alejandra] is treating her." The juvenile court granted a hearing on the petition and ordered DCFS to investigate.

In November 2017, DCFS reported that between August and October, Kimberly had been living with an aunt and uncle while Alejandra recovered from knee surgery. Kimberly said she felt safe and less stressed with her aunt and uncle because she and Alejandra had not been getting along well. Alejandra "would say really mean things like you're not worth it or she would say that I wouldn't help her when she was sick. I would try to help her as much as possible but it never was enough. There were always arguments because I wasn't doing enough." Kimberly said she no longer felt safe with Alejandra because

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

Alejandra hit her. Kimberly explained that Alejandra had threatened to break Kimberly's cell phone, which mother had purchased, because Kimberly was using it excessively. Subsequently, Kimberly said, "I was using the computer and I picked up the phone to see if someone text[ed] me So when [Alejandra] walked into the room and saw me holding the phone she started yelling at me. We were arguing back and forth over the phone and she got mad because she wasn't getting things her way and she raised her hand and slapped me but I put my hands up to block her and she hit my hand as I was covering my cheek. I [asked] her if she realized that she just hit me and she said she didn't care. She was going to hit me again, but she didn't. So I immediately sent a text message to my mom and told her what happened.'" Kimberly said she was now fearful of what Alejandra would do if she were mad. She said Alejandra had "smacked [her] on the head" in the past, but had not left any marks or bruises. Kimberly also felt uncomfortable because Alejandra frequently brought up Kimberly's past sexual abuse and had recently put Kimberly in a program for victims of sexual abuse.

Although Kimberly did not want to continue living with Alejandra, she did not want to move back in with mother. She said mother had pressured her to talk to David about the sexual abuse allegations, and the conversation had confused and scared her. She explained: "I grew up knowing that he hurt me. I didn't know what to think. I felt weird, I just don't know." ²

² Mother disclosed that Kimberly had recently visited an amusement park with relatives, and the relatives had let mother take Kimberly for an overnight visit. Mother said that during the visit, Kimberly and David "talked about the previous history and

Alejandra denied hitting Kimberly, whom she described as a defiant and verbally aggressive teenager. However, Kimberly's aunt E. and uncle B., with whom she lived for several months, described Kimberly's behavior very differently, saying Kimberly was respectful and well-behaved.

At the section 388 hearing on November 1, 2017, the court found pursuant to sections 245.5 and 319, that it would be detrimental to Kimberly's physical and emotional health to remain in Alejandra's home. The court therefore ordered Kimberly to be removed from Alejandra and placed with an appropriate relative or extended family member. Alejandra was granted monitored visits with Kimberly, and mother was granted monitored visits in a therapeutic setting.

III.

Petition, Detention, and Termination of Guardianship

DCFS filed a supplemental juvenile dependency petition pursuant to section 387 on November 3, 2017. The petition alleged that the previous disposition had not been effective in protecting Kimberly, as follows: "On prior occasions, [Kimberly's] legal guardian, Alejandra [E.] physically abused the child. On a prior occasion, the legal guardian struck the child's hand[,] inflicting a mark. . . . On prior occasions, the legal guardian struck the child's head. Such physical abuse was excessive and caused the child unreasonable pain and suffering. Such physical

'cleared things up.' Mother reported that she wanted to give Kimberly the opportunity to speak with David and see if in fact she was afraid of him as the paternal relatives had previously indicated. Mother reported that things were cleared up and Kimberly saw that she was not in fact scared of David."

abuse of the child by the legal guardian endanger[s] the child's physical health and safety, and place[s] the child at risk of serious physical harm, damage, danger, and physical abuse."

The November 6 detention report stated that the CSW had attempted to address Alejandra's inappropriate discipline with her, but she "failed to take any responsibility, she attempted to justify her actions and minimized the incident. As a result, it is the assessment of the Department that any services offered to [Alejandra] such as individual counseling or parenting classes would be ineffective as [Alejandra] does not take responsibility for her actions and blames [Kimberly]."

DCFS filed a jurisdiction report in January 2018. It said Kimberly had been removed from the home of her aunt E. and uncle B. after she was caught with a marijuana-laced edible at school. Kimberly was now living with her aunt B., who was committed to caring for her. Aunt B. said she was willing to be Kimberly's legal guardian because "[s]he's been bounced around enough."

DCFS reported that Alejandra had said she wanted to have Kimberly returned to her care so she could " 'get the help (monetary) back and move into my own space with her.' " However, Kimberly did not want to return to Alejandra's home because " '[w]hen I was with her she would put me down.' " Kimberly said she liked living with her aunt B., explaining: " 'I am very happy and feel less stress now that I am not with [Alejandra]. I feel like I can express myself and open up. When I was with [Alejandra] I couldn't do anything and all she would do was remind[] me of why I couldn't be with my mom.' "

At the jurisdiction/disposition hearing, counsel for Kimberly and for DCFS urged that the petition should be

sustained and Kimberly should be removed from Alejandra's custody. Alejandra's counsel asked that the petition be dismissed, asserting that "this was an isolated, one-time incident . . . which would not create a continued risk to Kimberly."

The court sustained the allegation of the petition. It stated: "Even grandmother says [she] know[s] it was wrong what [she] did. [¶] As difficult as it is to deal with a teenager, this is a child that has already been abused and neglected. I don't think hitting her was the way to go. . . ." The court further found that terminating the guardianship was in Kimberly's best interest, explaining: "[Kimberly has] alleged and I have found partially true she was a victim of verbal and physical abuse. . . . There was an argument because she wasn't going to school, she wasn't doing her homework, she was failing her classes because she was on the phone like millions of teenagers across the country and across the world. [¶] The grandmother used inappropriate physical discipline and slapped her. Probably not the first time; probably not the last time. . . . [¶] . . . It is no longer appropriate and safe for Kimberly to be in that home." The court therefore terminated the guardianship, ordered conjoint counseling between Alejandra and Kimberly, and ordered monitored visits in a therapeutic setting between Kimberly and mother.

Alejandra timely appealed.

DISCUSSION

I.

Legal Principles

The juvenile court's power to appoint a guardian for a child who has been detained from his or her parents is governed by

sections 360 and 366.26.³ The court may order a legal guardianship under section 360 if a dependent child’s parent or parents waive reunification and agree to the guardianship, or under section 366.26 if the parents fail to reunify with a dependent child. (*In re Carlos E.* (2005) 129 Cal.App.4th 1408, 1417.) The guardianship in this case was created under section 366.26, after mother failed to reunify with Kimberly during the prior dependency proceedings.

Once a dependency guardianship has been created, the court may either continue dependency jurisdiction or, as it did in the present case, may terminate dependency jurisdiction and maintain jurisdiction over the child “as a ward of the guardianship.” (§§ 366.3, subd. (a), 366.4; Cal. Rules of Court, rule 5.740(a)(3); *B.B. v. Superior Court* (2016) 6 Cal.App.5th 563, 569 (*B.B.*); *In re Carlos E.*, *supra*, 129 Cal.App.4th at p. 1417.) In either case, a child for whom a guardianship has been established under section 366.26 remains “within the jurisdiction of the juvenile court. . . .” (§ 366.4; *In re Z.C.* (2009) 178 Cal.App.4th 1271, 1279.)

Sections 360, 366.3 and 388, and California Rules of Court,⁴ rule 5.740, set out the procedures for terminating or modifying a guardianship created pursuant to section 366.26. Under section 360, an application for termination of a guardianship “shall be

³ A guardianship may also be created by the probate court under the authority of the Probate Code. Probate guardianships and dependency guardianships exist under separate statutory schemes and are subject to different rules and procedures. (See *In re Z.F.* (2016) 248 Cal.App.4th 68, 72.)

⁴ All subsequent rule references are to the California Rules of Court.

filed in juvenile court in a form as may be developed by the Judicial Council,” and section 388 “shall apply.” (§ 360, subd. (a).) The Judicial Council has not developed a form for the specific purpose of terminating a dependency guardianship, but instead has directed in rule 5.740(c) that a petition to terminate a dependency guardianship must follow the procedures and use the Judicial Council form (form JV-180) promulgated under section 388. (See *B.B.*, *supra*, 6 Cal.App.5th 563 [if legal guardian can no longer safely care for child, section 388 petition should be filed to terminate the guardianship].)

If an application to terminate a guardianship states a change of circumstances and it appears that the best interest of the child may be promoted by the proposed termination, the juvenile court is required to order a hearing. (Rule 5.570(e)(1), (f).) Prior to the hearing, the court will direct the social services department to prepare a report that evaluates whether the child could safely remain in the guardian’s care if maintenance services were provided. If applicable, the report will also identify appropriate family maintenance or reunification services and set forth a plan for providing those services. (§ 366.3, subd. (b)(2); *B.B.*, *supra*, 6 Cal.App.5th at pp. 569–570.)

Proceedings to terminate a dependency guardianship are held in the juvenile court and shall be determined “based on the best interests of the child.” (§ 366.3, subd. (b)(2); see also rule 5.570(e)(1) [court may grant petition to terminate dependency guardianship if it “states a change of circumstance or new evidence and it appears that the best interest of the child . . . may be promoted by the proposed change of order”]; *In re Carlos E.*, *supra*, 129 Cal.App.4th at p. 1418.) If the court terminates the guardianship and continues or resumes dependency jurisdiction,

it “must order that a new plan be developed to provide stability and permanency to the child.” (Rule 5.740(c)(1), (3), (4).)

II.

The Juvenile Court Did Not Err in Removing Kimberly from Alejandra’s Physical Custody

A. The Juvenile Court Was Not Required to Make Removal Findings Under Section 361, Subdivision (c)

Alejandra contends that before removing Kimberly from her physical custody, the juvenile court was required to find by clear and convincing evidence that there was a substantial risk of injury to Kimberly’s physical health, safety, protection, or emotional well-being, and no alternative reasonable means to protect her existed. Alejandra contends the juvenile court neglected to make these findings, and any implied findings are not supported by substantial evidence.

Alejandra’s contention derives from section 361, subdivision (c), which says that a child “shall not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence [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 or guardian’s physical custody.”

Alejandra assumes that because she was Kimberly’s legal guardian, this section applied to her. Not so. As several courts have explained, references to “parents or guardians” (such as

those found in section 361, subdivision (c)) “refer to guardianships established *in probate court*, rather than guardianships created by the juvenile court after a child has become a dependent of the court.” (*In re Carlos E.*, *supra*, 129 Cal.App.4th at p. 1420, italics added.) “Throughout the Welfare and Institutions Code, reference is made to ‘parents or legal guardians.’ Although we have not found any specific section determining the significance of this particular phrasing, the ‘guardians’ portion of ‘parents or guardians’ appears to refer to situations where a child enters the jurisdiction of the dependency court with a guardianship previously established in probate court. This phrasing is meant to include the appropriate legal caretaker of a child within the code sections *at the time dependency proceedings are initiated*.” (*In re Carrie W.* (2003) 110 Cal.App.4th 746, 758, italics added.)

Accordingly, because Alejandra was not Kimberly’s guardian at the time the dependency proceedings were initiated in 2011, but instead was appointed Kimberly’s guardian *as a result of* those proceedings, the juvenile court was not required to make findings under section 361, subdivision (c), before removing Kimberly from Alejandra’s physical custody. (See *In re Joel H.* (1993) 19 Cal.App.4th 1185, 1201 & fn. 14 [section 361 did not apply to removal of dependent children from their great-aunt, with whom they had been placed during prior dependency proceeding]; c.f. *In re Alicia O.* (1995) 33 Cal.App.4th 176, 183.) The court’s failure to make such findings, therefore, is not reversible error.

B. Substantial Evidence Supported the Juvenile Court's Finding That the Placement with Alejandra Had Been Ineffective in Protecting Kimberly

Although the juvenile court was not required to make removal findings under section 361, subdivision (c), it arguably *was* required to make findings under section 387, subdivision (b). That section provides that a court may change or modify a previous disposition by removing a child from a guardian's physical custody if "the previous disposition has not been effective in the rehabilitation or protection of the child." (§ 387, subd. (b).)

There is no dispute that the juvenile court found that the placement with Alejandra had not been effective in protecting Kimberly. Alejandra contends, however, that there is no support for these findings because there was no evidence that she "posed a risk of actual physical harm or danger to [Kimberly] or [acted] outside the range of legally acceptable discipline."

The contention is without merit. Removal under section 387 does not require a finding of past or future likely *physical* harm—instead, "if the evidence established that the relative was no longer able to provide the dependent child a secure and stable environment, then such evidence would presumably be sufficient to support a finding that a prior disposition was not effective in protecting the minor." (*In re Joel H.*, *supra*, 19 Cal.App.4th at pp. 1200–1201; see also *In re T.W.* (2013) 214 Cal.App.4th 1154, 1161 ["[t]he only fact necessary to modify a previous placement is that the previous disposition has not been effective in protecting the child."].)

In the present case, the evidence was sufficient to support the juvenile court's finding that the placement with Alejandra

was not effective in protecting Kimberly. Kimberly told the CSW that Alejandra hit her, told her she wasn't " 'worth it,' " and frequently brought up her past sexual abuse. As a result, Kimberly felt anxious and unhappy in Alejandra's home. In her new placement with her aunt, Kimberly was happier, less anxious, and felt more able to " 'express [her]self and open up.' " On the basis of this evidence, the juvenile court was well within its discretion in concluding that Alejandra was no longer able to provide Kimberly with a secure and stable environment, and that the placement in Alejandra's home therefore was not effective in protecting Kimberly.

III.

The Juvenile Court Did Not Err in Terminating the Guardianship

Alejandra contends the juvenile court erred in terminating the guardianship because the court applied the wrong legal standards and its findings were not supported by substantial evidence. As we now discuss, her claims are without merit.

A. DCFS Arguably Erred in Filing a Section 387 Petition, But Any Error Was Harmless

Alejandra contends the juvenile court erred in terminating the guardianship because DCFS did not file a petition to terminate the guardianship under section 366.3. We do not agree. As we have said, the Judicial Council has not developed a form under sections 360 or 366.3 for the specific purpose of terminating a guardianship; instead, it has stated in rule 5.740(c) that an application to terminate a dependency guardianship must be submitted on a form JV-180, and must follow the procedures promulgated under section 388. (Rules 5.740(c),

5.570; see also section 360, subd. (a).) Accordingly, DCFS did not err by failing to file a petition under section 366.3.

DCFS arguably *did* err by filing a petition under section 387, rather than under section 388, but the error was harmless. The Court of Appeal recently considered a similar issue in *B.B.*, *supra*, 6 Cal.App.5th at p. 571. There, at a section 366.26 hearing, the juvenile court appointed H.B.’s aunt his legal guardian and issued letters of guardianship. Three years later, the San Diego County Health and Human Services Agency (Agency) filed a section 300 petition alleging that the aunt had left H.B. inadequately supervised; and in a subsequent jurisdiction/disposition report, it recommended that the guardianship be terminated. The juvenile court sustained the allegations of the petition and terminated the guardianship. (*B.B.*, at pp. 566–568.) H.B.’s father filed a writ petition, arguing that the juvenile court erred by terminating the guardianship on a section 300 petition, rather than a section 388 petition, and that the error was prejudicial because father would have been entitled to reunification services had the guardianship been terminated under section 388. (*B.B.*, at p. 569.)

The Court of Appeal affirmed, concluding that the Agency erred by filing a petition under section 300, but that any error was harmless. (*B.B.*, *supra*, 6 Cal.App.5th at pp. 569–573.) It explained that once a legal guardianship is established, it may be modified or terminated pursuant to section 388, *not* section 300. (*B.B.*, at p. 569.) However, the Agency’s error in proceeding under section 300 did not automatically require reversal. Instead, reversal was mandated only where “ ‘the court ‘after an examination of the entire case, including the evidence,’ is of the ‘opinion’ that it is reasonably probable that a

result more favorable to the [petitioning] party would have been reached in the absence of the error.” ’ ’ (B.B., at p. 572.) In the case before it, father would have been entitled to reunification services under section 388 only if he demonstrated that such services were in the child’s best interests. (B.B., at p. 571.) Nothing in the record supported a best interests finding, and thus the “Agency’s failure to follow the section 388 procedures to terminate the guardianship and set a new section 366.26 hearing was harmless error.” (*Id.* at pp. 572–573.)

The same analysis applies here. Had DCFS filed a section 388 petition, the juvenile court would have been required to maintain the guardianship only if it concluded that doing so was in Kimberly’s best interests. It is not reasonably probable the court would have so concluded. To the contrary, the court expressly found that Alejandra subjected Kimberly to “verbal and physical abuse” and that it was “no longer appropriate and safe for Kimberly to be in [Alejandra’s] home.” In light of these express findings, it is not reasonably probable the juvenile court would have continued the guardianship had a petition been filed under section 388, rather than section 387.

B. The Juvenile Court Did Not Abuse Its Discretion by Terminating the Guardianship

Alejandra contends that terminating the guardianship exceeded the juvenile court’s discretion because her conduct did not amount to “physical abuse.” In support, she cites *In re D.M.* (2015) 242 Cal.App.4th 634, 639–643, in which the court held that spanking a child on the buttocks does not cause “serious physical harm” within the meaning of section 300, subdivisions (a) and (b), and thus that the juvenile court had erred in finding two siblings within the court’s jurisdiction.

In re D.M. has no application in present circumstances. Here, unlike *In re D.M.*, dependency jurisdiction is undisputed, and the question before the juvenile court was not whether Kimberly had suffered or was likely to suffer serious physical harm, but rather whether remaining in Alejandra's physical custody was in Kimberly's best interests. (See *A.H. v. Superior Court* (2013) 219 Cal.App.4th 1379, 1392 [when a minor is in the custody of a person who is not the minor's parent or predependency probate guardian, the juvenile court may grant a section 388 petition based solely on the best interest of the minor, and need not find that the current placement is detrimental].) Accordingly, neither "physical abuse" nor "serious physical harm" was required to terminate the guardianship.

Alejandra also contends that the juvenile court abused its discretion in terminating the guardianship because DCFS did not adequately analyze whether Kimberly could safely have remained in Alejandra's care if appropriate services had been provided. Again, the claim is without merit. Section 366.3, subdivision (b)(2) requires a court considering a petition to terminate legal guardianship to "order the county department of social services or welfare department having jurisdiction or jointly with the county department where the guardian and child currently reside to prepare a report, for the court's consideration, that shall include an evaluation of whether the child could safely remain in, or be returned to, the legal guardian's home, without terminating the legal guardianship, if services were provided to the child or legal guardian." The court ordered DCFS to prepare such a report, and DCFS did so. The report stated that 14-year-old Kimberly had repeatedly said she did not wish to live with Alejandra because Alejandra was emotionally and verbally

abusive. DCFS described Kimberly as withdrawn and depressed, and recommended that she not be released to Alejandra because Alejandra “did not show any remorse and attempted to justify and minimize her actions.” Further, DCFS said, it did not believe the family would benefit from services because Alejandra “does not appear to have insight as to how she was hurting [Kimberly] . . . not only physically but emotional[ly] and psychologically.” Under the circumstances of this case, section 366.3, subdivision (b)(2) did not require anything more.

DISPOSITION

The order removing Kimberly from Alejandra’s physical custody and terminating the guardianship is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.