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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re KATIE W. et al., Persons
Coming Under the Juvenile Court
Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

MICHELLE W.,

Defendant and Appellant.

B276524

(Los Angeles County
Super. Ct. No. DK10571)

APPEAL from an order of the Superior Court of
Los Angeles County, Debra Losnick, Juvenile Court Referee.
Affirmed in part, reversed in part.

Donna Balderston Kaiser, under appointment by the Court
of Appeal, for Defendant and Appellant.

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

INTRODUCTION

In her appeal from the dispositional order of the juvenile court, mother Michelle W. contends that the jurisdictional finding that her children are defined by Welfare and Institutions Code section 300, subdivision (a)¹ is erroneous because the children were not physically injured by the domestic violence between her and the children's father, Glenn W.² We hold that the jurisdictional finding under section 300, subdivision (a) was legal error and reverse it. However, mother does not challenge the order declaring the children dependents under subdivision (b)(1) of section 300, and so we affirm the jurisdictional order on that basis.

FACTUAL AND PROCEDURAL BACKGROUND

1. *the family's history*

Mother's daughter Katie W. was born in 2006 and son Adam W. was born in 2010. The parents have an open family law case. Father has an extensive criminal history involving offenses such as assault with a deadly weapon, infliction of corporal injury on a spouse, burglary, and possession of controlled substances for sale.

In 2007, the Department of Children and Family Services (the Department) opened a case against father for choking

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

² Father Glenn W. is not a party to this appeal.

Devan, his son from an earlier marriage. Devan reported that father choked him and kicked him in the chest, knocking him to the floor and knocking the wind out of him. Father also threatened, in front of Devan, to kill mother if she tried to leave him.

In 2008, mother obtained a restraining order against father after he choked her. In 2010, the Department learned that father yelled and screamed profanities at mother and degraded her, about four times a week, when mother was eight months pregnant with Adam, and Katie was at home. Father was heard threatening to kill mother if she left with Katie. A caller watched as father dragged mother down the driveway by her hair. The Department substantiated these allegations and noted that mother was only marginally cooperative and was ambivalent about leaving father. Mother eventually agreed to move in with the maternal grandmother and to seek an injunction.

In January 2011, allegations that father neglected Adam were substantiated by the Department.

2. the original petition

In March 2015 the Department received a report that mother was neglecting and emotionally abusing the children by yelling and swearing at them. According to Katie and the maternal grandmother, mother announced that she was going to kill herself and the children. Concluding that the children were at high risk of harm, the Department detained them and recommended they be placed with father, where they felt safe.

The juvenile court sustained the ensuing petition in July 2015 after finding true the allegations that mother's behavioral and emotional issues, including suicidal and homicidal ideations, rendered her unable to supervise and care for the children.

(§ 300, subd. (b)(1).) The court placed the children with father. Mother was eventually allowed overnight visits in the maternal grandmother's house, although the family did not comply with that order.

3. the subsequent petition

Just as the juvenile court was deciding whether to terminate jurisdiction, the Department received a new domestic violence report. Father had kicked in the front door to mother's house in the early morning after mother refused to allow him in. The children were sleeping in the living room at the time and witnessed the incident. Adam was scared. He saw a piece of wood pass by Katie's head. Father repaired the door at an unspecified date. Katie got a splinter from a piece of the door's wood when she went to get her phone, but did not indicate on what day that occurred.

The Department learned during its investigation that both Adam and Katie have witnessed father punch mother in the stomach or ribs. Katie also saw father threaten to shoot mother and pull mother's hair until she cried. Adam offered that father hurt mother " 'some more times' " but declined to elaborate. Mother reported that father threatened "multiple times" to shoot her if she got custody of the children. Afraid the children would be removed from her custody, she concealed these threats from the Department. Mother minimized the domestic violence by continuing to allow father in her home, despite an earlier order for the parents to exchange the children in a public place. The Department created a safety plan under which the children would stay with the maternal grandmother while the social worker investigated the situation. Two days later, the Department requested a warrant for the children's removal.

The children wanted to be placed with the maternal grandmother. Katie did not want to live with her parents because “‘they are always fighting.’”

Father was arrested in April 2016 for illegal possession of an assault weapon with a large capacity magazine by a felon and received a three-year prison sentence.

The Department filed a subsequent petition (§ 342) in late March 2016 alleging in both counts a-1 and b-1, that mother and father “have a history of engaging in violent altercations in the presence of the children. On a prior occasion, in 2016, the father struck the mother’s stomach with the father’s fist. On prior occasions, the father threatened to shoot the mother. The mother failed to protect the children in that the mother allowed the father to visit the children in the mother’s home and have unlimited access to the children. The violent conduct by the father against the mother and the mother’s failure to protect the children endangers the children’s physical health and safety, creates a detrimental home environment, and places the children at risk of serious physical harm, damage, danger and failure to protect.” (§ 300, subds. (a) & (b).) On July 20, 2016, the juvenile court sustained the counts in the subsequent petition, finding the children were described by section 300, subdivisions (a) and (b). The court removed the children from both parents’ custody and ordered reunification services. Mother’s appeal followed.

CONTENTIONS

Mother does not challenge the juvenile court’s dispositional order or its jurisdictional finding under section 300, subdivision (b)(1). Rather, she contends that the court erred in finding the children are described by subdivision (a) of section 300.

DISCUSSION

1. *justiciability*

The Department contends that we may not address mother's appeal because it raises a nonjusticiable issue. The justiciability doctrine generally counsels against deciding an appeal unless it involves "a present, concrete, and genuine dispute as to which the court can grant effective relief." (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1489.) The Department argues, because mother does not challenge the orders sustaining the counts under section 300, subdivision (b)(1) in either petition, that the juvenile court has jurisdiction over these children irrespective of the outcome of this appeal, with the result that we are unable to give mother any effective relief.

Mother responds that the juvenile court's order sustaining the count under section 300, subdivision (a) could prejudice her in the family law proceeding and because a finding under section 300, subdivision (a) subjects her to registration on the Child Abuse Central Index (CACI) under the Child Abuse and Neglect Reporting Act, Penal Code sections 11164 through 11174.3. CACI lists may be made available to county licensing agencies and others conducting background investigations of people seeking employment or volunteer work, and to out-of-state agencies investigating prospective foster or adoptive parents. (Pen. Code, § 11170, subds. (b)(4) & (8), (e)(1); see generally *Gonzalez v. Santa Clara County Dept. of Social Services* (2014) 223 Cal.App.4th 72, 84-85.) Because of the ramifications of the finding that the allegations under count a-1 are true, we shall exercise our discretion and consider the merits of mother's appeal. (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1015, citing *In re C.C.* (2009) 172 Cal.App.4th 1481; see also *In re Drake M.*

(2012) 211 Cal.App.4th 754, 762-763 [prejudice to appellant by failing to address merits of nonjusticiable appeal].)

2. *The jurisdictional finding under section 300, subdivision (a) was error.*

Mother argues that because her children did not suffer nonaccidental, physical harm, the finding they were described by section 300, subdivision (a) is erroneous.

“We review the jurisdictional findings for substantial evidence and will affirm if ‘there is reasonable, credible evidence of solid value to support them. [Citations.]’ [Citation.]” (*In re Jonathan B.* (2015) 235 Cal.App.4th 115, 119.) Insofar as mother argues that section 300, subdivision (a), by its terms, does not support jurisdiction when a child is exposed to domestic violence without being physically abused, she raises a question of law that we independently review. (*In re Giovanni F.* (2010) 184 Cal.App.4th 594, 598.) We ascertain the Legislature’s intent from the language of the statute, and when that language is clear and unambiguous, we are not permitted to engage in statutory construction. (*In re Daniel M.* (1996) 47 Cal.App.4th 1151, 1154.)

A child will come within the jurisdiction of the juvenile court under subdivision (a) of section 300, if “[t]he child *has suffered*, or there is a *substantial risk that the child will suffer, serious physical harm* inflicted nonaccidentally upon the child by the child’s parent or guardian.” (Italics added.)

Mother argues that section 300, subdivision (a) does not apply because there is no evidence that her children suffered serious, nonaccidental, physical harm. We recognize that these parents have a decade-long pattern of engaging in extreme domestic violence in front of the children. The children saw father repeatedly punch, kick, and drag mother, pull mother’s

hair, scream at her, and threaten to shoot her. Mother failed to protect Katie and Adam. Although she sought a restraining order, she let it lapse, and has continually allowed father to have access to her and the children in violation of court orders and despite the Department's safety plan. The parents' behavior more than adequately supports jurisdiction under section 300, subdivision (b). (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194 ["domestic violence in the same household where children are living *is* neglect; it is a failure to protect [the children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it."].)

However, the record is devoid of evidence that Katie or Adam has suffered any *physical* injury from their parents' violence. While section 300, subdivision (a) may apply when a child suffers less serious injuries, the sole physical abuse the Department could point to here -- the splinter Katie got on an unspecified date -- is simply not a serious, nonaccidental, physical injury as contemplated by the statute, the Department's insistence to the contrary notwithstanding. (See *In re Isabella F.* (2014) 226 Cal.App.4th 128, 139 [one incident of scratching the child insufficient to support finding of substantial risk of future serious physical harm].) In the absence of any substantial evidence that the children have suffered serious, nonaccidental physical injury, the Department had to show that they were at "substantial risk" of "suffer[ing] serious physical harm inflicted nonaccidentally" by the parents. (§ 300, subd. (a).)

Section 300, subdivision (a) clearly and unambiguously specifies three circumstances under which the juvenile court could find a substantial risk of serious future injury. The statute reads, "For purposes of this subdivision," a court may find a

substantial risk of the requisite harm “based on [(1)] the manner in which a less serious *injury was inflicted*, [(2)] a *history of repeated inflictions of injuries* on the child or the child’s siblings, or [(3)] *a combination of these and* other actions by the parent or guardian that indicate the child is at risk of serious physical harm.” (§ 300, subd. (a), italics added.) In each of the three circumstances listed in the statute, the child has been physically injured.

The Department cites *In re Marquis H.* (2013) 212 Cal.App.4th 718 and *In re Giovanni F.*, *supra*, 184 Cal.App.4th 594, to argue that children need not have actually been harmed, or even have been the target of abuse, for a court to find them at risk of physical harm under section 300, subdivision (a). *Giovanni F.* and *Marquis H.* do not alter our conclusion.

In re Marquis H., is distinguished because, although the parents of Marquis did not abuse him, they subjected their grandchildren -- who were living in the same house with Marquis -- to serious and repeated physical abuse that included burning them, and hitting them repeatedly with bats, electrical cords, belts, and crutches. (*In re Marquis H.*, *supra*, 212 Cal.App.4th at pp 721-723.) The appellate court held that section 300, subdivision (a) applied because the “history of repeated inflictions of injuries” occurred, although on *grandchildren* in the house rather than on *siblings*. (*In re Marquis H.*, at pp. 725, 727.) The court determined that “ ‘the permissive language of the second sentence [of section 300, subdivision (a)] merely sets forth scenarios in which the statute may apply. . . . ‘[T]he Legislature could not be expected to foresee and codify *every mode of physical abuse* which may place a child at substantive risk of physical harm by an abusive parent.’ ”

(*In re Marquis H.*, at p. 725, italics added.) The *Marquis H.* court recognized that “physical abuse” in some “mode” was a prerequisite to section 300, subdivision (a) jurisdiction.

Unlike *Marquis H.*, there is no evidence here of extreme physical abuse of Katie and Adam, or of children in the position of siblings of, and in the same household as, them. Although father inflicted serious abuse on Devan, those events occurred before Adam was born and the record does not indicate that Katie was exposed to it. Thus there is no evidence that such abuse was inflicted on a sibling *in the house*.

The Department’s reliance on *Giovanni F.* is likewise unavailing. There, while driving the mother and their infant son, the father punched the mother in the face and strangled her until she lost consciousness. (*In re Giovanni F.*, *supra*, 184 Cal.App.4th at p. 600.) At their destination, when the mother regained consciousness, she struggled with the father and the two broke a window with the car seat while the infant was still in it. (*Ibid.*) Concluding that “[t]he child need not have been actually harmed in order for the court to assume jurisdiction. (See *In re James R.* (2009) 176 Cal.App.4th 129, 135),” (*id.* at p. 598), the *Giovanni F.* court found sufficient evidence to support a finding under section 300, subdivision (a). (*In re Giovanni F.*, at pp. 600-601.) The court asserted that “[d]omestic violence is nonaccidental” and observed, when domestic violence “occurs in a moving vehicle, that the potential for injury inherent in the violence is dramatically increased by the likelihood of a collision that could prove fatal.” (*Ibid.*)

We disagree with *Giovanni F.*’s reading of section 300, subdivision (a) that jurisdiction could be found in the absence of actual injury to the child. *Giovanni F.* relied for that proposition

on *In re James R.*, *supra*, 176 Cal.App.4th 129, which did not address the showing under section 300, subdivision (a); that case involved a jurisdictional finding under subdivision (b) where actual injury is not an element. (*In re James R.*, at p. 131; *In re Giovanni F.*, *supra*, 184 Cal.App.4th at p. 598.) Additionally, *Giovanni F.* overlooked the clear words of the statute in which physical abuse to a child is a prerequisite for section 300, subdivision (a) jurisdiction. Without evidence of physical abuse, jurisdiction falls under subdivision (b) of section 300, which is frequently applied in domestic violence cases. (*In re T.V. (2013)* 217 Cal.App.4th 126, 134 “[e]xposing children to recurring domestic violence may be sufficient to establish jurisdiction under section 300, subdivision (b).”]; *In re Heather A.*, *supra*, 52 Cal.App.4th at pp. 193-194.)

The physical violence between mother and father here is extremely serious and places the children at substantial risk of encountering the violence and suffering serious harm from it. (*In re Heather A.*, *supra*, 52 Cal.App.4th at pp. 193-194.) Absent evidence that any child in the household suffered serious physical injury as the result of the parents’ domestic violence, however, the jurisdictional finding under subdivision (a) of section 300 was erroneous.

DISPOSITION

The order of July 20, 2016, taking jurisdiction over Katie W. and Adam W. under Welfare and Institutions Code section 300, subdivision (a) (count a-1) is reversed. In all other respects, the order is affirmed.

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ALDRICH, J.

We concur:

EDMON, P. J.

JOHNSON (MICHAEL), J.*

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