Filed 3/8/18 In re D.W. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re D.W., a Person Coming Under the Juvenile Court Law.	B280371 (Los Angeles County Super. Ct. No. DK18333)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MICHAEL W. et al., Defendants and Appellants.	

APPEAL from orders of the Superior Court of Los Angeles County. Akemi Arakaki, Judge. Affirmed.

Jesse F. Rodriguez, under appointment by the Court of Appeal, for Defendant and Appellant Michael W.

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

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel and Jacklyn K. Louie, Principal Deputy County Counsel, for Plaintiff and Appellant Los Angeles County Department of Children and Family Services.

No appearance for Minor.

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J.W. (mother) and Michael W. (father) challenge the juvenile court's exertion of dependency jurisdiction over their daughter, D.W. Mother further challenges the court's refusal to continue the dispositional hearing and the ensuing dispositional order removing D.W. from her custody. We conclude that substantial evidence supports the court's orders and that the court did not abuse its discretion in denying a further continuance of the dispositional hearing.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *Underlying Facts*

In October 2015, mother (who was then 19) and father (who was then 43) had a daughter, D.W. Just six months earlier, father had a child with mother's sister.[1]

Both mother and her sister worked as prostitutes, and father was their pimp. Father would wait in the car with both children while their mothers turned tricks. Sometimes, father and mother would drop off the children with the paternal grandmother, although it was unclear whether they left sufficient formula and food.

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[1] Father's other child, M.W., is the subject of a separate petition and a separate pending appeal. (See *In re M.W.* (B280580, app. pending).)

Both mother and father are longtime users of marijuana. Mother started when she was 19 years old, and both she and D.W. tested positive for marijuana when D.W. was born. Mother and father have medical marijuana cards.

Both mother and father have criminal histories. Mother has been twice convicted of disorderly conduct (prostitution), convicted of disorderly conduct (lewd act), and convicted of loitering with intent to commit prostitution. Father has 1990, 1991, and 1993 convictions for possessing narcotics; a 2004 conviction for grand theft from a person; 1994 and 2008 convictions for failing to appear; a 2008 conviction for transporting narcotics; a 2010 conviction for being under the influence of narcotics; and a 2011 conviction for driving on a suspended license. In 2010, father engaged in multiple acts of violence against his then-girlfriend—grabbing her by the throat, pushing her off the bed, and strangling her. In July 2016, father either punched his uncle or pushed him with both hands in the chest, and then with mother's help (and while D.W. was in the car nearby), vandalized the uncle's car by pouring sugar into the gas tank and slashing its tires. The uncle reported that father is "dangerous and violent."

B. *Investigation and Operative Petition*

In July 2016, the Los Angeles County Department of Children and Family Services (Department) received a referral regarding D.W.

The Department had great difficulty locating mother, father, or D.W. The Department made more than 15 attempts to contact mother and father. Father eventually called the Department, declaring that he was "the best dad ever" and warning that he "will come and get [his] kids, and you won't see

us again." A few days later, the juvenile court issued a protective custody warrant for D.W. Nearly two months later, paternal grandmother surrendered D.W. to the Department.

In the operative second amended petition, the Department asked the juvenile court to exert dependency jurisdiction over D.W. on five grounds: (1) father engaged in a violent altercation with his uncle, and father vandalized his uncle's car in the presence of D.W., placing D.W. at risk of serious physical harm or danger (justifying dependency jurisdiction under Welfare and Institutions Code section 300, subdivisions (a) and (b));[2] (2) mother and father have history of substance abuse and are "current abuser[s] of marijuana" (justifying dependency jurisdiction under section 300, subdivision (b)); (3) mother and father leave D.W. with paternal grandmother "without making a plan for [her] ongoing care and supervision" (justifying dependency jurisdiction under section 300, subdivision (b)); (4) mother and father have a history of criminal arrests and convictions (justifying dependency jurisdiction under section 300, subdivision (b)); and (5) D.W. was born suffering from a positive toxicology screen for marijuana placing her at risk of serious physical harm (justifying dependency jurisdiction under section 300, subdivision (b)).

C. *Adjudication*

After nine hearings in the preceding six months, the juvenile court held a jurisdiction and disposition hearing on January 3, 2017.

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

At that hearing, the court exerted dependency jurisdiction over D.W. due to (1) father's violent altercation with his uncle, and (2) mother's and father's drug abuse. With respect to father's violence, the court found sufficient evidence that D.W. was at risk after "[l]ooking at all of th[e] information as to how that situation played [out], as to the statements of a number of the family members as to the relationship as to the violence that was occurring." With respect to mother's and father's drug use, the court found sufficient evidence of substance abuse based on mother's and father's long-standing and continued use of marijuana at "very high levels" (including during the pendency of the dependency case) as well as "the totality of the circumstances looking at some of the decisionmaking [and] . . . some of the activity occur[ring]." The court found sufficient evidence of risk to D.W. because she was "a child of tender years." The court dismissed the remaining allegations.

After the court made its jurisdictional ruling, mother requested a continuance of the dispositional hearing on the ground that the Department had yet to complete its assessment of mother's home. Father, D.W., and the Department opposed any further continuance. The court denied the continuance, explaining that it had already continued the hearing in November 2016 "for everyone to have the home assessed."

Proceeding to disposition, the court removed D.W. from mother and father and placed her with a paternal aunt. The court also ordered reunification services, including monitored visitation, housing and transportation assistance as well as individual counseling and weekly random drug testing, with the condition that if either parent's marijuana levels spike above

their current average usage the Department may require completion of a formal drug treatment program.

D. Appeals

Mother and father filed timely appeals.

DISCUSSION

I. Jurisdiction

Mother and father challenge the sufficiency of the evidence underlying the juvenile court's findings of dependency jurisdiction. We review such challenges for substantial evidence, and do so while viewing the record in the light most favorable to the court's rulings. (*In re R.T.* (2017) 3 Cal.5th 622, 633 (*R.T.*).)

Under section 300, subdivision (b)(1), a juvenile court may exert dependency jurisdiction if, as pertinent here, a "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness" due to (1) "the failure or inability of . . . her parent . . . to adequately supervise or protect" her, or (2) "the inability of the parent . . . to provide regular care for the child due to the parent's . . . substance abuse." (§ 300, subd. (b)(1).) *Risk* of harm means just that: The juvenile court "need not wait until a child is seriously abused or injured to assume jurisdiction." (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1383.) And when it comes to assessing that risk, the juvenile court may look to a parent's past behavior as a "good predictor" of whether the child is currently at risk. (*Id.* at pp. 1383-1384; *In re T.V.* (2013) 217 Cal.App.4th 126, 133.)

A. *Drug Abuse*

Substantial evidence supports the juvenile court's determination that D.W. faces "substantial risk . . . [of] serious physical harm" due to mother's and father's "inability" to care for her due to their substance abuse. (§ 300, subd. (b)(1).) Both

mother and father have been using drugs for years; father has several drug-related convictions; mother used marijuana while pregnant with D.W.; neither parent is gainfully (or at least lawfully) employed; and both parents' drug tests during the pendency of this petition continued to exhibit "very high levels" of marijuana. This constitutes "substance abuse." (See *In re Rebecca C.* (2014) 228 Cal.App.4th 720, 726-727 (*Rebecca C.*) [use of drugs over several years, resulting in criminal convictions or dependency proceedings constitutes "abuse"].) Risk to a child from substance abuse can be established either by (1) proof of "'an identified, specific hazard in the child's environment,'" or (2) proof that the child is of "tender years," in which case "the finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 766-767 (*Drake M.*), italics omitted.) In this case, D.W. is an infant of tender years, thereby establishing risk.

Mother and father offer several arguments against this conclusion.

First, both parents, drawing upon *Drake M.*, argue that a parent is engaged in "substance *abuse*" only if (1) a medical professional has diagnosed the parent as having a substance abuse problem, or (2) the parent's substance abuse meets the definition of a substance abuse problem as defined by the Diagnostic and Statistical Manual of Mental Disorders (DSM). (*Drake M.*, *supra*, 211 Cal.App.4th at p. 766.) As have several other courts, we decline to follow *Drake M.* to the extent it purports to require such a showing in all cases. (*Rebecca C.*, *supra*, 228 Cal.App.4th at p. 726; *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1218.) However, even if we applied *Drake*

M., the most recent version of the DSM defines "substance abuse" to include drug use resulting in interpersonal problems (such as physical fights) and failure to fulfill major obligations (such as unemployment and transient living). (*In re Natalie A.* (2015) 243 Cal.App.4th 178, 185-186; cf. *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1345-1346 [parent gainfully employed].) These conditions exist here.

Second, mother argues that the lawfulness of her marijuana use precludes it from constituting "substance abuse." She is wrong. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 452 ["even legal use of marijuana can be abuse if it presents a risk of harm to minors"].)

Third, both parents argue that the Department did not prove that D.W. had suffered any actual harm as a result of their substance abuse (e.g., no proof of malnutrition, father did not smoke marijuana in D.W.'s immediate presence). As noted above, however, because D.W. is of "tender years," the risk to her is presumed, and the Department was not required to show "'an identified, specific hazard'" resulting from the parents' substance abuse. (*Drake M.*, *supra*, 211 Cal.App.4th at pp. 766-767, italics omitted.)

Lastly, mother argues that the proof of risk as to her is lacking because her marijuana levels were dropping, and father argues that he has not had any drug-related convictions in the last 12 months. While commendable, their progress is insufficient to rebut the presumption of risk arising from their long-standing and unceasing marijuana use.

B. *Father's Violence*

Substantial evidence supports the juvenile court's finding that D.W. was at "substantial risk [of] . . . serious physical harm

or illness" due to father's "inability . . . to . . . protect" her from his violent tendencies. (§ 300, subd. (b)(1).) A child's exposure to domestic violence places a child at risk within the meaning of subdivision (b)(1) of section 300 (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194-195), at least where there is a likelihood of recurrence (*In re Daisy H.* (2011) 192 Cal.App.4th 713, 717; cf. *In re J.N.* (2010) 181 Cal.App.4th 1010, 1025-1027 [single incident insufficient]). In this case, father has a long history of responding to a variety of situations with violence, and had done so as recently as July 2016. Based on this history, father's uncle's statement that father is "dangerous and violent" is apt.

Father responds with four arguments. First, he says that his altercation with his uncle is an isolated incident. It is not. Second, father says that domestic violence only counts if it is between people in a romantic relationship, not just any old blood relative. Again, he is wrong. Third, father says his prior acts of violence against his ex-girlfriend should not count because they happened several years ago. What matters, however, is whether they are indicative of a continued resort to violence—which they are in light of father's attack on his uncle in 2016, and his proclamation that, despite his violent behavior, he is still "the best dad ever." Lastly, father asserts that his uncle's report is not credible because, just a few days before father pushed or punched him, his uncle told social workers that father was a fine parent. Father is inviting us to reweigh the juvenile court's credibility findings; this is something we cannot do. (*People v. Prunty* (2015) 62 Cal.4th 59, 89 [except in narrow circumstances, courts may not reweigh credibility findings].)

II. Disposition

A. *Denial of Continuance*

Mother challenges the juvenile court's denial of her request to continue the dispositional hearing. Where, as here, the continuance would result in moving the dispositional hearing more than 60 days beyond the date when the child was detained by the juvenile court, the moving party must show both (1) good cause, and (2) "exceptional circumstances." (§ 352, subds. (a) & (b).) We review a juvenile court's findings that this showing was not made for an abuse of discretion, bearing in mind that continuances are discouraged. (*In re F.A.* (2015) 241 Cal.App.4th 107, 117.)

The juvenile court did not abuse its discretion in denying the continuance because mother presented neither an exceptional circumstance nor good cause for a continuance. Mother sought a continuance so the Department could complete an assessment of her home, but *mother* was the sole reason it had not been completed. A Department employee went to her apartment to conduct an assessment prior to the jurisdictional and dispositional hearing, but mother's then-boyfriend told the employee to leave when the employee asked to see the two other bedrooms in the three-bedroom apartment and asked for the then-boyfriend's date of birth so the Department could check his criminal history. Given that nearly six months had passed since the Department filed its initial petition, and given the opposition of all other parties to any further continuance, the juvenile court's denial of a further continuance to give mother yet another chance for an assessment was not an abuse of discretion.

Mother raises four arguments in response. First, she asserts that no one explained to her why a home assessment

would require information about other people living in the home, and that the Department's desire to obtain information about her roommates and herself violates everyone's rights to privacy. Second, she contends that she had no reason to cooperate with the Department until the juvenile court exerted jurisdiction over D.W., which made the threat of D.W.'s removal more real. Third, she argues that she had insufficient notice of the "case plan." Lastly, she argues that the denial of a continuance deprived her of her constitutional right to present evidence and her right to challenge the "overly vague" final order that required drug treatment if mother's marijuana levels "spiked."

None of these arguments were advanced as a basis for a continuance, so the juvenile court certainly did not abuse its discretion in not considering them.

The arguments lack merit in any event.

The juvenile court made clear at the November 21, 2016 hearing that the Department was to assess mother's and father's homes by the January 3, 2017 hearing. Assessing whether a home is safe for a child necessarily encompasses an inquiry into the risks, if any, posed by the people living in that home; it was not necessary for anyone to tell mother this. And while such an inquiry undoubtedly requires mother and her cohabitants to surrender some of their privacy, it is a surrender made voluntarily and in order to obtain a benefit mother is seeking—namely, consideration of her home as a place where D.W. may safely live.

Mother had ample reason to cooperate all along. She knew the jurisdictional and dispositional hearing would be held on January 3, 2017, and had an incentive to provide the Department with the information it needed to assess her home. Mother's

argument that she should be able to ignore the Department's requests for information until the juvenile court actually exerts dependency jurisdiction would encourage noncooperation and all but require that dispositional hearings be held at some point several weeks after jurisdictional hearings, a result inimical to the basic policy goal of resolving juvenile dependency cases expeditiously.

Mother had plenty of advance notice of the case plan for disposition because its substance was set forth in the Department's filings as far back as July 2016.

Lastly, mother was not denied her constitutional right to present evidence. Mother cites *In re Angela C.* (2002) 99 Cal.App.4th 389, 395 and *In re Dolly D.* (1995) 41 Cal.App.4th 440, 444, as support, but those cases dealt, respectively, with failure to provide notice of the continued hearing date for termination of parental rights and with the denial of the right to cross-examine a witness; they do not hold that the unavailability of evidence due to a litigant's refusal to cooperate with a public agency violates that litigant's constitutional rights. The denial of a home assessment also has nothing to do with the allegedly vague drug testing condition, to which mother could have objected irrespective of the home assessment. Her failure to do so constitutes a forfeiture (*Marlene M. v. Superior Court* (2000) 80 Cal.App.4th 1139, 1149), and the condition is not in any event vague or unreasonable.

B. *Removal*

Mother and father challenge the juvenile court's order removing D.W. from their custody. A juvenile court may remove a child from her parents only after finding, by clear and convincing evidence, that (1) "[t]here is or would be a substantial

danger to the physical health, safety, protection, or physical or emotional well-being of the [child] if [she was] returned home," and (2) "there are no reasonable means" short of removal "by which the [child's] physical health can be protected." (§ 361, subd. (c)(1).) We review a removal order for substantial evidence (*R.T.*, *supra*, 3 Cal.5th at p. 633), although courts remain divided over whether we do so through the lens of clear and convincing evidence. (Compare *In re Ashly F.* (2014) 225 Cal.App.4th 803, 809 (*Ashly F.*) [applying clear and convincing standard to substantial evidence review on appeal] with *In re J.S.* (2014) 228 Cal.App.4th 1483, 1492-1493 [disregarding clear and convincing standard on appeal].) We will sidestep this conflict by using the more parent-friendly lens of clear and convincing evidence.

Substantial evidence supports the juvenile court's removal order in this case. Substantial evidence supports a finding, by clear and convincing evidence, that D.W. would face a substantial danger to her health and safety if she were returned home. The juvenile court's jurisdictional finding already constitutes a finding, by a preponderance of the evidence, that D.W. is at substantial risk of serious physical harm. Both parents' drug use, their involvement in the sex trade, and father's history of violence provided ample basis to conclude, by clear and convincing evidence, that returning D.W., an infant, to their home(s) would be dangerous. Substantial evidence also supports the finding, by clear and convincing evidence, that no reasonable means short of removal would protect D.W. Both father and mother had a history of not cooperating with the Department, and any plan short of removal would require their cooperation.

(Cf. *Ashly F.*, *supra*, 225 Cal.App.4th at pp. 808-811 [parents were cooperating with case plan and with Department].)

Mother responds that D.W. is no longer in substantial danger because mother is making progress by lowering her drug levels and moving in with a different man, and because the juvenile court could have considered unannounced visits, random drug tests, and parenting classes as an alternative to removal. Neither possibility negates the substantiality of the evidence supporting the court's removal order. Mother's progress thus far, while commendable, was recent and not sufficient to eliminate her long-standing drug use and parenting issues. And the juvenile court's dispositional order already implements two of the three options mother now suggests; the court could reasonably conclude that leaving D.W. in mother's care subject to unannounced visits would be insufficient given mother's history of noncooperation.

DISPOSITION

The juvenile court's jurisdictional and dispositional orders are affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ