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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re R.A. et al., Persons Coming
Under the Juvenile Court Law.

B275719

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. DK15396)

Plaintiff and Respondent,

v.

E.A.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles
County, Julie Fox Blackshaw, Judge. Affirmed.

Karen B. Stalter, under appointment by the Court of
Appeal, for Appellant.

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

Appellant E.A., Sr. (Father), challenges jurisdictional findings rendered by the dependency court, and an ensuing disposition order removing his children from his custody. Father contends the evidence is insufficient to support the dependency court's rulings. We affirm.

FACTS

Father and L.A. (Mother) are the parents of three minors involved in the present dependency proceedings: E.A., Jr. (hereafter E.A.) born in April 2001; R.A., born in February 2001; and H.A., born in August 2008. Mother and Father are the parents of two other children not involved in the present case: C.A., an adult child, and A.A., who was a ward of the juvenile court under section 602 at all relevant times.¹ The parents and younger children most recently came to the attention of the Los Angeles County Department of Children and Family Services (DCFS) in October 2015 when it received a referral reporting that the older children had told a therapist that the parents “use meth,” and that, when under the influence, became neglectful toward the children in the home. A.A. stated that he did not want to visit with Mother because she “has not gotten her situation together.” During the remainder of 2015, a case social worker investigated the matter by interviewing relevant witnesses, reviewing prior referrals involving the family, as well as school and medical records for the children, and the parents’ criminal records. In January 2016, a removal order warrant was submitted and granted by the dependency court.

¹ All undesignated section references are to the Welfare and Institutions Code.

On February 1, 2016, DCFS filed a petition alleging that E.A., R.A. and H.A. were at risk of harm under section 300, subdivision (b), due to Mother's and Father's acts of allowing homeless adults to frequent and reside in the family home. (Count b-1.) The petition alleged that Mother had a "history of substance abuse" and was a "current abuser of methamphetamine," and, on prior occasions, "was under the influence of 'illicit drugs'" while the children were under her care and supervision, and that Father failed to protect the children from Mother's "substance abuse." (Count b-2.) Further, the petition alleged that Father had a "history of substance abuse" and was a "current abuser of methamphetamine," and that Mother failed to protect the children from Father's "substance abuse." (Count b-3.)

The dependency court detained the children from the parents, ordered that their visits be monitored, and issued a protective custody warrant for E.A., then 14 years old, whose whereabouts were unknown.

On February 29, 2016, the dependency court conducted a combined jurisdiction and disposition hearing. At that time, the court held the petition in abeyance as to E.A. because his whereabouts remained unknown. The court received DCFS's reports into evidence, heard argument, and then informed counsel that its tentative ruling was to sustain count b-3 alleging Father's "substance abuse" and Mother's failure to protect the children from the same. When Father's counsel argued that there was no evidence presented to show that the parents used methamphetamine, other than second-hand information in the initial referral, the court indicated that its concern was with the evidence in the reports showing Father's alcohol use. Father's

counsel argued the petition did not allege that Father abused alcohol and that there was no nexus between Father's alcohol use and harm to the children. Further, that Father's 2013 criminal conviction for possession and his completion of a drug diversion program was not substantial evidence that Father had a current alcohol or drug problem or that his alcohol use put the children at risk of harm. Father's counsel argued the court should dismiss the petition in its entirety, and return the children to the family home. Mother's counsel joined Father's counsel's argument. The dependency court dismissed the count alleging Mother's substance abuse and the count alleging that the parents permitted homeless adults to frequent and reside in the family home. The court sustained count b-3 as follows:

“[Father] has a history of substance abuse and is a current abuser [deleting the language ‘of methamphetamine’], which renders [him] incapable of providing regular care of the children. On prior occasions, [Father] was under the influence while the children were in [his] care and supervision. [Mother] failed to protect the children in that [she] knew of [Father]’s substance abuse. [Mother] allowed [Father] to reside in the children’s home and have unlimited access to the children. [Father]’s substance abuse and [Mother]’s failure to protect the children endangers the children’s physical health and safety and creates a detrimental home environment for the children, placing the children at risk of serious physical harm, damage and failure to protect.”

Immediately following its jurisdictional findings, the court proceeded to disposition. The court announced that its tentative ruling was to return H.A. and R.A. to Mother's custody. Father's counsel argued against removing the children from Father, and Mother's counsel again joined in Father's counsel's argument. Minors' counsel and counsel for DCFS argued the court should order the children suitably placed and argued there was clear and convincing evidence to remove the children from both parents.

The dependency court removed the children from Father, and released them to Mother. The court ordered Father's visits to remain monitored and ordered DCFS to provide appropriate services. The court ordered Father to participate in a drug and alcohol treatment program, a 12-step program, a parenting course, and individual counseling to address case issues. The court ordered Mother to participate in individual counseling, a parenting program, and to submit to random drug tests and participate in a rehabilitation program if any of the tests were missed or dirty.

Father filed a timely appeal.

DISCUSSION

I. Father's Appeal is not Moot

As a preliminary matter, we deny DCFS's motion to dismiss Father's appeal as moot, and reject the same argument in the respondent's brief filed by DCFS. DCFS is correct that Father challenges jurisdiction findings and orders, and disposition findings and orders, issued by the dependency court in February 2016. Under those orders, the children were placed in Mother's custody and removed from Father's custody. DCFS is further correct that the dependency court issued orders in

November 2016 on a number of petitions pursuant to section 300, 342, 385, and 387, filed by DCFS between August to October 2016. Under the November 2016 orders, the children were removed from Mother due to her failure to comply with her case plan.² However, we depart from DCFS where it argues that the dependency court's findings and orders from November 2016 make Father's appeal from the court's February 2016 findings and orders moot.

This is not a situation where the court has terminated its jurisdiction, and no effective relief can be granted on appeal to a parent. (See, e.g., *In re N.S.* (2016) 245 Cal.App.4th 53.) Here, the findings and orders rendered by the dependency court in February 2016 appear to remain in effect as to Father, and serve as the basis for ongoing court supervision and orders as to Father. Under such circumstances, Father's appeal is not moot. Were we to reverse the jurisdiction and disposition findings and orders as to Father, the dependency proceedings could be on a markedly different footing than they are at the present time. The dependency court's more recent jurisdictional findings and orders as to Mother, which we agree with DCFS will allow the court to continue exercising authority over the children, is not a dispositive factor in determining the mootness of Father's appeal.

II. Amending the Section 300 Petition

Father contends the dependency court's jurisdictional findings must be reversed because the court violated his right to due process when it amended DCFS's section 300 petition at the adjudication hearing to conform to proof. Father argues he was

² We hereby grant DCFS's motion for judicial notice of the dependency court's rulings in August 2016.

not afforded adequate notice of the charges in the amendment, that he was a “substance abuser” of alcohol, as opposed to a “substance abuser and abuser of methamphetamine.” We are not persuaded that the court violated Father’s right to due process notice.

Dependency proceedings are conducted in accord with the Code of Civil Procedure’s provisions governing pleadings in civil actions (§ 348), and, thus, amendments to conform to proof to remedy variances between the petition and evidence are favored. (See, e.g., *In re Andrew L.* (2011) 192 Cal.App.4th 683, 688-689.) An amendment to conform to proof is improper only when the variance between the petition and the evidence offered at the adjudication is so disparate that the parent is denied constitutionally guaranteed notice of the allegations against him or her. (*In re David H.* (2008) 165 Cal.App.4th 1626, 1640.) The test for a proper amendment is whether the petition prior to the proposed amendment would have detrimentally misled a parent, or caused the parent to prepare his or her defense differently. (*In re Andrew L.*, *supra*, 192 Cal.App.4th at p. 689.)

We find the dependency court’s amendment did not violate Father’s right to due process notice. The record does not support a conclusion that the amendment — which did no more than remove language referring to Father’s abuse of methamphetamine, while leaving language alleging his “substance abuse” — detrimentally impacted Father or caused him to prepare his defense differently. This is so because the petition in its original and amended form was consistently predicated on an allegation of Father’s “substance abuse.” We are satisfied, given the reports submitted by DCFS, that Father was on notice that the department’s concerns regarding

his “substance abuse” included his use of alcohol and its affect on his ability to parent his children. As the dependency court correctly observed at the adjudication hearing, DCFS’s reports were consistently based on concern about Father’s “unresolved substance abuse problem,” and DCFS’s collection of evidence indicating he was a “current abuser of alcohol and drugs.” DCFS’s reports recounted statements from the children about Father and Mother “drinking,” and the affects their drinking had on the parenting and care in the family home. The issue of whether the department’s evidence was sufficient to support dependency jurisdiction is an issue we address below. But for purposes of pleading, we are satisfied that Father was on notice that “substance abuse” involving “alcohol abuse” was an issue encompassed within the original petition, and that the juvenile court’s amendment to the petition to delete a specific allegation as to Father’s abuse of methamphetamine therefore did not violate Father’s right to due process notice.

III. Jurisdiction

Father contends the dependency court’s jurisdictional findings are not supported by substantial evidence. We disagree.

“We review the juvenile court’s jurisdictional findings for sufficiency of the evidence. [Citations.] We review the record to determine whether there is any substantial evidence to support the juvenile court’s conclusions, and we resolve all conflicts and make all reasonable inferences from the evidence to uphold the court’s orders, if possible. [Citation.]’ “‘The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.’ [Citations.]”’ (*In re V.M.* (2010) 191 Cal.App.4th 245, 252.)

Section 300, subdivision (b)(1), provides that the dependency court may assert jurisdiction over a child when the child “has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent . . . to adequately supervise or protect the child . . . or by the inability of the parent . . . to provide regular care for the child due to the parent’s or guardian’s . . . substance abuse. . . . The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness.” Under the statutory language, three elements are required for dependency court jurisdiction: (1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) serious physical harm or illness to the child, or a substantial risk of such harm or illness. (*In re B.T.* (2011) 193 Cal.App.4th 685, 691-692.)

We are satisfied that substantial evidence supports the dependency court’s finding that Father’s “substance abuse” in the form of “alcohol abuse” placed R.A. and H.A. at substantial risk of serious physical harm or illness. The evidence shows the maternal grandmother reported to DCFS that both Mother and Father “never stopped drinking,” and that Mother reported that Father had a problem with alcohol. The children reported that Father often drank outside the family apartment with his friends while failing to provide for the family and assist with the children, and that the parents argued over Father’s drinking. In June 2015, Mother had called the police to report Father’s drinking. The children reported that Mother made Father leave the home because he was failing to meet his familial obligations. Given all of this, the court could have reasonably concluded that

Father's drinking was becoming a large part of the family's daily life, and that it was adversely impacting the family which posed a risk to the children.

Further, the court could consider that H.A. was only seven years old and more vulnerable than an older child. Where young children are affected, a 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, 767; *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1219.) H.A. was not an infant, but a seven year old still requires more care and supervision than an older child. H.A.'s safety required more than a Father who stayed out of the family home, drinking — in the words of the children — "a lot of beer" with his friends.

The record also shows evidence of ongoing complaints from Mother that Father failed to support the family. Although economic difficulties alone are not a basis for dependency jurisdiction, the dependency court here could reasonably infer that Father's excess drinking was at least partially responsible for the failure to provide support. The evidence, taken as a whole, showed that Father was "drinking a lot," and failing to fulfill his parental duties in the family home. The record persuades us that this family's lifestyle was on a downward path, posing a risk of harm to the children for which intervention was appropriate. (See, e.g., *In re Christopher R.*, *supra*, 225 Cal.App.4th at p. 1220 [whether or not a father's unemployment and scrapes with the law were directly shown to be related to his marijuana use, the dependency court's finding that father's marijuana use was contributing to an inability to provide regular care for his infant was supported by the evidence].)

The dependency court was not required to have seen an actual incident of physical harm to the children to properly find facts justifying jurisdiction. Because risk of physical harm justifies intervention, it is well-settled that dependency law generally “does not require a child be actually harmed before [DCFS] and the courts may intervene.” (*In re Leticia S.* (2001) 92 Cal.App.4th 378, 383, fn. 3.) The purpose of dependency proceedings is “to prevent risk, not ignore it.” [Citation.]” (*Jonathon L. v. Superior Court* (2008) 165 Cal.App.4th 1074, 1104, quoting *In re Eric B.* (1987) 189 Cal.App.3d 996, 1004.)

We are amply satisfied that the evidence in this case supports the dependency court’s decision to exercise jurisdiction over R.A. and H.A.

IV. Disposition — Removal

Father contends the dependency court’s disposition findings and orders calling for the removal of his children from his custody are not supported by substantial evidence. We disagree.

A dependent child may properly be removed from a parent’s custody when there is clear and convincing evidence of a substantial danger to the child’s health, safety, and emotional well-being that cannot be eliminated by reasonable means short of removal. (§ 361, subd. (c)(1).) A removal order is proper when there is “proof of a 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. [Citation.] “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 A.S.* (2011) 202 Cal.App.4th 237, 247.)

"On appeal from a dispositional order removing a child from a parent we apply the substantial evidence standard of review, keeping in mind that the trial court was required to make its order based on the higher standard of clear and convincing evidence. [Citation.]" (*In re Ashly F.* (2014) 225 Cal.App.4th 803, 809; *In re Hailey T.* (2012) 212 Cal.App.4th 139, 146-147.)

The dependency court's findings and order removing his children from his custody is supported by the same evidence supporting its jurisdictional findings. As discussed above, substantial evidence supports the conclusion that Father has an alcohol abuse problem. Further, the evidence supports the conclusion that Father had no interest in addressing his substance abuse problem. Father did not make himself available to DCFS after the detention hearing.

Father's arguments about the dependency court's treatment of the case as to Mother do not persuade us that, as to Father, the removal decision cannot be sustained. First, the issue is whether the children would be at risk of harm if Father stayed in the family home. It is unclear how findings as to Mother undermine the courts' finding of risk posed by Father. In any event, the record shows that Mother maintained some contact with DCFS and the children after the children were detained. As we noted above, the same is not true with respect to Father.

Father's argument that there were reasonable means to protect the children absent removal from him does not persuade us that reversal is required. By not cooperating with DCFS and not visiting his children after detention, it is difficult to find how

it is that DCFS and or the dependency court could have arranged means to protect the children. (*In re Maria R.* (2010) 185 Cal.App.4th 48, 71 [a parent's refusal to cooperate with agency was evidence that removal was necessary].)

V. Disposition — Substance Abuse Programs

Father contends the dependency court's disposition findings and orders calling for him to participate in substance abuse and alcohol programs and to have monitored visits with his children are not supported by substantial evidence. We disagree.

Father is correct, of course, that orders and services in the dependency setting must be tailored to the circumstances that justified the court's intervention with an eye toward eliminating that conditions that led to the court's decision to exercise jurisdiction over a dependent child. (§ 362, subds. (a) & (d).) However, the dependency court has broad discretion to determine what dispositional orders would best serve and protect a child's interests.

On appeal, its determination may not be reversed absent a clear abuse of discretion. (*In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 474.) The same standards apply to visitation orders. (*In re Briana V.* (2015) 236 Cal.App.4th 297, 311.) An abuse of discretion means the dependency court exceeded the limits of judicial discretion by making an arbitrary, capricious or patently absurd decision. (*In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1456.)

Given our review of the evidence showing Father's substance abuse problems in connection with jurisdiction and removal, we cannot say that the dependency court's disposition as to programs and visitation are absurd.

DISPOSITION

The dependency court's jurisdiction and disposition findings and orders are affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.