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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re A.K., a Person Coming Under the
Juvenile Court Law.

LOS ANGELES COUNTY DEPARTMENT
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

T.C.,

Defendant and Appellant.

B237719

(Los Angeles County
Super. Ct. No. CK70836)

APPEAL from orders of the Superior Court of Los Angeles County,
Marilyn Mackel, Juvenile Court Referee. Affirmed.

Merrill Lee Toole, under appointment by the Court of Appeal, for Defendant and
Appellant.

Office of the County Counsel, John F. Krattli, County Counsel, James M. Owens,
Assistant County Counsel, Tracey Dodds, Principal Deputy County Counsel.

T.C. (mother) appeals jurisdictional findings and dispositional orders made with respect to mother's 12-year-old daughter, A.K. Mother contends amendment of the dependency petition to conform to proof deprived mother of due process and the evidence did not support removal of A.K. from mother's care. These contentions lack merit. The instant amendment of the dependency petition did not deprive mother of due process and the juvenile court's custody order adequately complied with Welfare and Institutions Code section 361.2.¹ We therefore affirm the orders of the juvenile court.

FACTS AND PROCEDURAL BACKGROUND

A.K. came to the attention of the Department of Children and Family Services (the Department) on July 14, 2011, after Long Beach police officers investigated a report of domestic violence in the home where A.K. resided with father, stepmother and two half-siblings. The officers found methamphetamine and a handgun within reach of the children. Father and stepmother were arrested. A.K. was detained and placed in foster care. Father advised a social worker mother resides in Kansas and father does not know mother's whereabouts. Stepmother stated she has cared for A.K. since the child was two years of age and A.K. barely recalls mother.

On July 17, 2011, the social worker located mother and interviewed her by telephone. Mother stated she had been living in Kansas until a few months ago when she returned to Long Beach. In 1999, when A.K. was less than two years old, mother and father were sentenced to three years in prison for grand theft auto. Maternal grandmother cared for A.K. while mother was incarcerated. Mother claimed that, when father was released in 2002, maternal grandmother permitted father to take A.K. to Oregon for a visit but he failed to return her. Mother was not released until 2005 when her immigration case was settled. Mother did not hear from father until approximately one year ago when mother spoke to A.K. by telephone. Mother claimed father would not allow mother to have contact with A.K. but admitted her lack of communication with A.K. also was due to mother's unstable lifestyle.

¹ Unspecified statutory references are to the Welfare and Institutions Code.

Mother told the social worker she became addicted to methamphetamine and her two youngest children, L.C. and A.C., were removed from mother's care in 2007 and 2008, respectively. Both children were born with a positive toxicological screen and have been adopted by maternal aunt. Mother also has an eight-year-old child who is in the care of her biological father. Mother does not know the child's whereabouts or date of birth. Mother indicated she has not used drugs for several years, she was living with her boyfriend in a two-bedroom apartment and believed she was capable of caring for A.K. Mother indicated she regularly babysat L.C. and A.C. at maternal grandmother's home while maternal aunt worked.

The Department filed a dependency petition which alleged mother has a six-year history of methamphetamine abuse and is a current user of methamphetamine; A.K.'s siblings received permanent placement services due to mother's illicit drug use; and, mother's drug history places A.K. at risk of harm. The petition alleged father created a detrimental home environment in that narcotics and a loaded handgun were found within access of the child and father is a recent user of methamphetamine which renders father incapable of providing regular care.

On July 20, 2011, the juvenile court granted mother monitored visitation, ordered mother to submit to random drug tests and ordered individual counseling for A.K.

The jurisdiction report filed August 25, 2011, indicated mother told the social worker she "smoked speed" on an almost daily basis for approximately four years. Mother did not attend a drug abuse program when L.C. and A.C. were taken from her because she did not believe she would be able to overcome her addiction within a six-month period. Mother moved to Kansas to avoid bad influences and has not used drugs in the past three years.

With respect to mother's assertion father "kidnapped" A.K. from maternal grandmother, the Department attached affidavits from maternal grandmother and father, both dated June 13, 2002, which indicated maternal grandmother voluntarily released A.K. to father's custody.

The Department reported A.K. was living with paternal relatives, was adjusting to visits with mother and indicated she would like to live with maternal aunt.

On August 25, 2011, the juvenile court continued the matter for a contested adjudication and directed the Department to assess the home of maternal aunt.

A Last Minute Information form filed October 7, 2011, indicated mother was receiving individual counseling services and parenting education classes through the Cambodian Association of America (CAA) and had been visiting A.K. on a consistent basis. On August 30, 2011, A.K. stated visits with mother had been going well.

On November 17, 2011, the Department reported father and stepmother had been convicted of drug offenses. Father had been sentenced to three years in state prison and stepmother had been granted probation. The report indicated A.K. now was in the care of maternal aunt. The Department recommended adoptive planning be postponed to explore the possibility A.K. could be returned to mother.

A letter from CAA dated November 16, 2011, indicated mother enrolled in individual counseling on August 11, 2011, and had attended 12 sessions. Mother also had attended 16 sessions of a parenting program.

At the contested adjudication on November 17, 2011, mother's counsel requested dismissal of the dependency allegation against mother, asserting there was no evidence mother was a current abuser of methamphetamine or that she was not able to provide regular care.

County counsel conceded mother's recent drug tests had been negative. However, mother's history of drug abuse had resulted in the termination of mother's parental rights with respect to A.K.'s siblings and had effectively removed mother from A.K.'s life. Counsel noted that, because mother had never participated in a drug program, A.K. would be at risk in mother's care and indicated the Department had no objection to amendment of the petition to conform to proof.

A.K.'s counsel agreed A.K. did not have a relationship with mother prior to the detention hearing, which was the first meeting with mother A.K. could recall. A.K.'s counsel suggested the petition be amended to conform to proof to allege A.K. has no

relationship with mother such that the child cannot be released to mother at this time. Counsel observed that an attachment to the court information form filed October 7, 2011, indicates mother has tested negative with the exception of August 4 and August 31.²

The juvenile court sustained the dependency petition under section 300, subdivision (b). The juvenile court struck the allegation mother is a current user of methamphetamine and amended the petition to allege mother has a six-year history of methamphetamine abuse and has never completed a substance abuse program which renders mother incapable of providing regular care for the child. The sustained petition further alleged A.K.'s siblings received permanent placement services due to mother's illicit drug use, and mother's failure to participate in a court-ordered substance abuse rehabilitation program with random testing, as well as her incarceration, has resulted in A.K. having no relationship with mother. Also, mother's drug history without treatment endangers the child's physical health and safety, creates a detrimental environment and places the child at risk of harm. The juvenile court overruled mother's objection to the amendment of the petition.

As to father, the juvenile court sustained the petition essentially as filed.

With respect to disposition, mother's counsel requested a continuance to allow counsel to cross-examine A.K. with respect to where she would like to live. After the juvenile court denied the request, mother's counsel requested placement of A.K. in mother's care.

A.K.'s counsel indicated she was not aware of A.K.'s current wishes with respect to mother as the child had only recently been placed with maternal aunt. Counsel indicated she would not object to a continuance for A.K.'s presence. Counsel pointed out A.K. was on a waiting list for a therapist.

The juvenile court denied the request for a continuance, noting the adjudication had been continued several times. The juvenile court found clear and convincing evidence of a substantial risk of detriment to return A.K. to either parent and ordered her

² The referenced attachment does not appear in the record on appeal.

to remain suitably placed with maternal aunt. The juvenile court granted mother and father family reunification services and monitored visitation. The juvenile court indicated A.K. and mother should be in conjoint counseling and asked the Department to work with the agency where mother was in counseling to expedite return of A.K. to mother. Mother was ordered to complete a drug rehabilitation program with random testing, individual counseling, conjoint counseling with A.K., parenting class and “Parents Beyond Conflict” with stepmother. The juvenile court continued the matter for a progress report addressing return of A.K. to mother’s care.

CONTENTIONS

Mother contends there was insufficient evidence to sustain the original petition under section 300, subdivision (b) as to mother and the juvenile court amended the petition without notice, thereby violating mother’s right to due process. She also contends clear and convincing evidence did not support the juvenile court’s order removing A.K. from mother’s custody.

DISCUSSION

1. *Amendment of the petition to conform to proof did not amount to a denial of due process.*

Mother contends there was insufficient evidence to sustain the original dependency petition. However, we need not address this claim. The facial insufficiency of a petition is harmless if the evidence presented at the adjudication establishes jurisdiction and notice of the amended allegations is not prejudicially inadequate. (See *In re David H.* (2008) 165 Cal.App.4th 1626, 1640; *In re Athena P.* (2002) 103 Cal.App.4th 617, 626-628.) Thus, the issues presented are whether the juvenile court properly amended the petition to conform to proof and whether the evidence supports the assertion of dependency jurisdiction under the amended petition.

The relevant law is well settled. A juvenile court may permit amendment of a petition to “correct or make more specific” the factual allegations so long as “the very nature of the charge remains unchanged.” (*In re Man J.* (1983) 149 Cal.App.3d 475, 481; *In re Andrew L.* (2011) 192 Cal.App.4th 683, 689.) “If a variance between pleading and

proof . . . is so wide that it would, in effect, violate due process to allow the amendment, the court should, of course, refuse any such amendment. [¶] The basic rule from civil law, however, is that amendments to conform to proof are favored, and should not be denied unless the pleading as drafted prior to the proposed amendment would have misled the adversarial party to its prejudice.” (*In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1041-1042, fn. omitted.)

As explained in *Trafton v. Youngblood* (1968) 69 Cal.2d 17, amendments to conform to proof “have been allowed with great liberality ‘and no abuse of discretion is shown *unless by permitting the amendment new and substantially different issues are introduced in the case or the rights of the adverse party prejudiced* [citation].’ (Italics added.) [Citations.] [¶] ‘[A]mendments of pleadings to conform to the proofs should not be allowed when they raise new issues not included in the original pleadings and upon which the adverse party had no opportunity to defend. [Citations.]’ [Citations.]” (*Id.* at p. 31.)

Here, the juvenile court committed no violation of mother’s due process rights by amending the petition to delete the current abuse of methamphetamine and replace it with the failure to address the six-year history of abuse of methamphetamine through a drug rehabilitation program. The amendment conformed the allegations of the petition to the proof before the juvenile court and did not cause mother prejudice or mislead mother to her detriment. (*In re Jessica C., supra*, 93 Cal.App.4th at pp. 1042-1043.)

Mother claims she would have prepared her defense differently if the original petition had contained the language of the amendment. However, she does not point to any evidence she would have presented or argument she would have made had she been provided specific notice of the amendment. Although the amendment was not made after notice and a written motion as in *In re Andrew L., supra*, 192 Cal.App.4th at p. 689, the social reports provided notice of the issues being litigated and the variance between pleading and proof was not so wide that the amendment to conform to proof violated mother’s right of due process.

With respect to the sufficiency of the evidence to support the amended petition, it is clear mother's failure to address her longstanding drug abuse problem, which had resulted in the removal of A.K.'s siblings from mother's care in 2007 and 2008, placed A.K. at risk of harm in mother's care within the meaning of section 300, subdivision (b). (*In re J.O.* (2009) 178 Cal.App.4th 139, 152.) Although mother was participating in individual counseling, there was no indication she was in a drug program.

Moreover, even assuming error or a violation of due process in the assertion of jurisdiction on this basis or on the assertedly improper ground that mother had abdicated her parental role (see *In re V.M.* (2010) 191 Cal.App.4th 245, 252-253), mother does not challenge the sufficiency of the evidence to support the jurisdictional allegations as to father. Because substantial evidence supported a finding of jurisdiction as to father, any impropriety in the amendment of the petition with respect to mother did not affect the juvenile court's assumption of jurisdiction, even if mother's conduct was not an independent basis for jurisdiction. (See, e.g., *In re Maria R.* (2010) 185 Cal.App.4th 48, 60; *In re Alexis H.* (2005) 132 Cal.App.4th 11, 16; *In re Alysha S.* (1996) 51 Cal.App.4th 393, 397 ["a jurisdictional finding good against one parent is good against both"].)

In sum, mother's attacks on the assertion of dependency jurisdiction fail.

2. *The juvenile court properly continued A.K. in the care of maternal aunt.*

Citing section 361, subdivision (c)(1), mother contends a juvenile court may not remove a dependent child from the physical custody of a parent unless there is substantial danger to the child's physical or emotional well-being and there is no reasonable alternative means to protect the child without removing the child from the home.

However, section 361, subdivision (c)(1) applies only with respect to the parent from whom the child was removed. Here, A.K. was removed from father's care after he left narcotics and a firearm within her reach. Mother was a noncustodial parent. Under these circumstances, section 361.2 applies. (*In re V.F.* (2007) 157 Cal.App.4th 962, 969-970; *In re Catherine H.* (2002) 102 Cal.App.4th 1284, 1289; *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1820-1821.)

Section 361.2 states: “(a) When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the 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.” (§ 361.2, subd. (a).)

A juvenile court’s ruling under section 361.2, subdivision (a) that a child should not be placed with a noncustodial, nonoffending parent requires a finding of detriment by clear and convincing evidence. (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 696; *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426; *In re Marquis D.*, *supra*, 38 Cal.App.4th at p. 1827.) Section 361.2, subdivision (c) requires findings, either in writing or orally on the record, as to the basis for the juvenile court’s determination under section 361.2, subdivision (a).

Here, the juvenile court found, by clear and convincing evidence, that placement with either parent would be detrimental to A.K. Although the juvenile court did not specifically reference section 361.2, this finding satisfied section 361.2, subdivision (c)’s requirement of express findings.

Mother asserts there was no reason A.K. could not have been released to mother as appropriate services were in place and mother had been visiting regularly. However, section 361.2 “conspicuously does *not* require that the court find the noncustodial parent might fail to protect the child or that there are no reasonable means to protect the child in the noncustodial parent’s home in order to deny the noncustodial parent’s request for placement. Instead, section 361.2 simply instructs the court to consider whether placement with the noncustodial parent would be ‘detrimental to the safety, protection, or physical or emotional well-being of the child. ’ ” (*In re Luke M.*, *supra*, 107 Cal.App.4th at p. 1425.) Thus, under section 361.2, subdivision (a), the juvenile court has broad discretion to evaluate not only the child’s physical safety but also his or her emotional well-being. “In an appropriate case, all that

might be required is a finding such a placement would impair the emotional security of the child. [Citations.]” (*In re C.C.* (2009) 172 Cal.App.4th 1481, 1490-1491.)

Here, mother had a longstanding substance abuse problem which had never been treated. Although mother had been testing negative, she had never participated in a drug treatment program. Additionally, mother saw A.K. for the first time in many years at the detention hearing, mother had no relationship with her eight-year-old child and mother admitted her unstable lifestyle had prevented mother from having a relationship with A.K. Given this background, the juvenile court reasonably could conclude it would be detrimental to A.K.’s emotional well being to place her in mother’s care before they had participated in conjoint counseling, which the juvenile court ordered.

In sum, the record indicates no abuse of discretion in the order directing that A.K. remained placed with maternal aunt.

DISPOSITION

The orders of the juvenile court are affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.