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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

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

B285812

DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. DK18885)

Plaintiff and Respondent,

v.

MELISSA A.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Philip L. Soto, Judge. Affirmed in part and reversed in part.

Suzanne Davidson, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, William D. Thetford, Principal Deputy County Counsel for Plaintiff and Respondent.

Melissa A. (mother) appeals a juvenile court jurisdictional and dispositional order declaring her daughter, Giselle A., a dependent child pursuant to Welfare and Institutions Code section 300¹, subdivisions (b) and (j). Specifically, mother contends the evidence was insufficient to support the juvenile court's findings that drug use by mother, and domestic violence between the parents, put the children at risk of harm. We conclude that there is no substantial evidence that mother is a current user of methamphetamines, and thus we modify the order to strike the allegation based on mother's drug use (count b-2). However, because there is substantial evidence that domestic violence between mother and Giselle's father placed the child at substantial risk of serious physical harm, we otherwise affirm the court's exercise of dependency jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

Mother has four children: Isabella A. (born in March 2012), D.S. (born in May 2016), S.S. (born in May 2016), and Giselle A. (born in May 2017). Ricardo S. (father) is the father of the three youngest children. This appeal pertains to Giselle only.

A. Prior Dependency Proceedings

In September 2016, the juvenile court sustained a petition alleging that Giselle's siblings were juvenile court dependents pursuant to section 300, subdivisions (a) and (b) due to mother's and father's history of domestic violence in the children's presence. The petition alleged that in June 2016, mother and father struck and pushed each other, breaking a window; in April 2016, father pushed and struck mother with closed fists while she

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

was pregnant; and on prior occasions, father restrained, spit on, and hit mother. Mother failed to protect the children in that she allowed father to live in the family home and have unlimited access to the children. The siblings were ordered detained in foster care, and the Los Angeles County Department of Children and Family Services (DCFS) was ordered to provide mother with family reunification services, including individual counseling, a domestic violence support group, and parenting classes.

In April 2017, DCFS reported that mother was unemployed, lacked a stable source of income, did not have permanent housing, and had not completed her court-ordered programs. Mother's family said they were willing to help mother if she stayed away from father, but they were unsure whether she continued to have contact with him. Although mother denied contact with father, the paternal aunt reported mother had been living with father at her home.

In May 2017, the juvenile court found mother in partial compliance with her case plan, and it ordered the children to remain in foster care.

B. Giselle's Birth and the Present Petition

Mother gave birth to Giselle in May 2017. The day of Giselle's birth, mother tested presumptively positive for methamphetamines. However, the laboratory that conducted the drug test reported that a positive test "is only a preliminary test result" and "[a] more specific test method must be used in order to obtain a confirmed analytical result." The laboratory was not able to confirm the positive drug test because it inadvertently discarded mother's urine sample.

Mother denied any drug use, and the children's social worker (CSW) who had been supervising the family said she had

never observed mother under the influence of drugs. Mother's prenatal records showed mother's urine tests had been negative for all substances, and Giselle tested negative for drug exposure.

The juvenile court denied DCFS's request for a removal order, and Giselle was discharged home to mother. Three days after giving birth, mother tested negative for all substances.

On June 5, 2017, DCFS filed a petition alleging: the parents have a history of domestic violence, as a result of which Giselle's siblings are juvenile court dependents (a-1, b-1, j-1); and mother is a current user of methamphetamine, which renders her incapable of providing regular care of Giselle (b-2). The juvenile court ordered that Giselle remain placed with mother, and that father "is not to live [in] or visit in the home."

C. Jurisdiction and Disposition

In July 2017, mother adamantly denied using substances of any kind during her pregnancy, but admitted father had been verbally and physically abusive to her. Mother reported that she had enrolled in domestic violence and parenting classes and was on a waiting list for individual therapy. She said she now understood that remaining in an abusive relationship with father placed her family at risk. Mother claimed not to have spoken with father since October 2016.

The maternal grandmother, with whom mother lived before giving birth, said mother did not have a history of substance abuse and had not used drugs during her pregnancy. Father also denied that mother used drugs.

DCFS opined that the domestic violence between mother and father was "chronic and not just isolated instances." Mother "has begun to accept responsibility for her actions and [develop] an understanding [of] how her actions have an effect on herself

and others. [She] has been talking about her chronic history of domestic violence [at] the hands of [father] and . . . how [that] relationship has cost her custody/care of her children, isolated her from her family and created a sense of dependency on [father].” Mother “understands basic concepts that are related to her case, such as boundaries with [father], understanding the cycle of domestic violence and child safety and development,” but tended to “shut down” when confronted with case issues. Thus, DCFS hoped to help mother develop “a better formal and informal support system, better understanding of domestic violence and other case related issues and realistic coping and life skills.”

On July 18, 2017, the court sustained counts b-2 and j-1 of the petition. It ordered Giselle placed with mother under DCFS supervision, and ordered mother to attend a domestic violence program and individual counseling, among other things. The court further ordered that father was not to live in or visit mother’s home, mother was not to monitor father’s visits, and mother would be required to drug test if she appeared under the influence of drugs or alcohol.

Mother timely appealed from the July 18, 2017 order.

*D. Post-Appeal Proceedings*²

In November 2017, the three older siblings were returned to mother’s care. In early April 2018, Giselle fell from a couch

² On May 16, 2018, DCFS filed a request for judicial notice of a section 387 petition, a May 8, 2018 minute order, and a May 8, 2018 report. Mother has not opposed the request, which we now grant. (Evid. Code, §§ 452, subd. (d), 459; *In re Karen G.* (2004) 121 Cal.App.4th 1384, 1390 [“It is not uncommon for an appellate court to take judicial notice of subsequent proceedings in the juvenile court”].)

onto the floor, suffering a bruised face, during a violent incident between the parents in which father pulled mother's hair and punched mother in the face. As mother attempted to flee with the children, father threatened to kill her and her family.

Mother claimed that she had not spoken to father for about six months before the April incident, but that she met him on that occasion because he offered her and the children a place to sleep. The maternal grandfather, however, said he saw father with the family in December 2017; the paternal aunt said father, mother, and the children stayed at her home one night in December 2017 and again in early 2018; and the maternal uncle said the parents and children stayed with him "on the weekends and some weekdays." Six-year-old Isabella reported that father drove mother and the children to school on rainy days, and that mother and the children visited father at a friend's house when the maternal grandfather and aunt were away. Mother cautioned Isabella not to tell anyone about these incidents because "she [mother] would get in trouble and [the CSW] would take the kids from her."

On May 8, 2018, the juvenile court sustained a supplemental petition alleging that mother "has failed to comply with Juvenile Court orders in that [father's] visits are to be monitored, mother is not to monitor [father's] visits. On [April 4, 2018], the father hit the mother on the mother's face and pulled the mother's hair, causing the child [Giselle] to fall and sustain a bruise under the child's right eye. The children . . . are current dependents of the Juvenile Court due to domestic violence between [mother] and [father]. The mother's failure to comply with Juvenile Court orders endangers the children's physical

health and safety and places the children at risk of serious physical and emotional harm and damage.”

DISCUSSION³

Mother contends the juvenile court erred in exercising jurisdiction over Giselle because there was no substantial evidence that mother uses methamphetamines or that domestic violence between the parents put Giselle at risk of harm. Mother does not make an independent challenge to the disposition orders, but argues they must be reversed along with the jurisdictional findings.

I.

Standard of Review

A child may be adjudged a juvenile court dependent pursuant to section 300, subdivision (b) if he or she “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 or guardian to adequately supervise or protect the child . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent’s . . . substance abuse.”

³ In a supplemental letter brief, DCFS urges that mother’s appeal should be dismissed as moot because, regardless of our decision, “juvenile court jurisdiction will continue based upon” the sustained section 387 petition. Because the present petition is a basis for jurisdiction, albeit not the only basis, the appeal is not moot. Thus, we decline to dismiss it. (See *In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1547 [dependency appeal “‘is not moot *if* . . . the alleged defect undermines the juvenile court’s initial jurisdictional finding.’”].)

A child may be adjudged a juvenile court dependent pursuant to section 300, subdivision (j) if “[t]he child’s sibling has been abused or neglected . . . and there is a substantial risk that the child will be abused or neglected The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child.”

“In dependency proceedings, the social services agency has the burden to prove by a preponderance of the evidence that the minor who is the subject of the dependency petition comes under the juvenile court’s jurisdiction. [Citations.] We review the jurisdictional findings for substantial evidence. [Citation.] We consider the entire record, drawing all reasonable inferences in support of the juvenile court’s findings and affirming the order even if other evidence supports a different finding. [Citation.] We do not consider the credibility of witnesses or reweigh the evidence. [Citation.] Substantial evidence does not mean ‘any evidence,’ however, and we ultimately consider whether a reasonable trier of fact would make the challenged ruling in light of the entire record. [Citation.] The parent has the burden on appeal of showing there is insufficient evidence to support the juvenile court’s order. [Citation.]” (*In re Isabella F.* (2014) 226 Cal.App.4th 128, 137–138.)

II.

Substantial Evidence Supports the Finding That Domestic Violence Between the Parents Put Giselle at Risk of Harm

Mother contends that her past domestic violence with father was insufficient to support a finding that Giselle was at risk of harm. We disagree.

Domestic violence between a child's parents may support the exercise of jurisdiction if there is evidence that the violence harmed the children or placed them at risk of harm, and "the violence is ongoing or likely to continue. . . ." (*In re Daisy H.* (2011) 192 Cal.App.4th 713, 717.) Indeed, "ongoing domestic violence in the household where children are living, standing alone, 'is a failure to protect [the children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it.' [Citation.]" (*In re M.W.* (2015) 238 Cal.App.4th 1444, 1453–1454; see also *In re E.B.* (2010) 184 Cal.App.4th 568, 576 ["'Both common sense and expert opinion indicate spousal abuse is detrimental to children.'"].)

Here, it is undisputed that mother and father have a history of chronic domestic violence that continued until shortly before Giselle was born. Mother contends, however, that the past violence between her and father was not predictive of present risk because she had "gained insight into the past abuse, acknowledged her behavior put [Giselle's] older siblings at risk and mother no longer had contact with father outside the courtroom." We do not agree. As of the jurisdiction hearing in July 2017, mother had not yet completed domestic violence classes or individual therapy. Although mother had demonstrated some understanding of the nature of domestic

violence and its effect on the children, her CSW opined that she needed additional services to more fully address these issues. Further, notwithstanding mother's claim that she had not had any contact with father since October 2016, her family expressed concern in April 2017—seven months after her older children were removed from her care and just weeks before Giselle was born—that mother might still be having contact with him. And, mother had not obtained a job or permanent housing, and thus was vulnerable to offers from father of housing or financial assistance. The record before the juvenile court at the jurisdiction hearing, therefore, was more than sufficient to support the juvenile court's conclusion that the domestic violence between the parents placed mother at risk of future physical abuse and Giselle at risk of future physical harm.

Our conclusion is reinforced by post-judgment evidence that, contrary to mother's claim on appeal, mother continued a relationship with father well into 2018. That evidence was that mother and father continued to spend nights together at the homes of the paternal aunt and maternal uncle; that father regularly drove mother and the children to school; and that mother was with father in April 2018 because he offered her and the children a place to sleep. During the April visit, father punched mother in the face, causing Giselle to fall and suffer a bruised face. Plainly, therefore, mother has continued to have a relationship with father and to expose the children to violence between mother and father. The trial court did not err in so concluding.

III.

No Substantial Evidence That Mother Is a Current User of Methamphetamines

Because we have concluded that a sustained allegation of the petition is supported by substantial evidence, we need not consider mother's alternative contention—that there was insufficient evidence that she is a user of methamphetamines or that drug use rendered her unable to properly care for Giselle. We nonetheless retain discretion to consider the merits of this contention (*In re M.W.*, *supra*, 238 Cal.App.4th at p. 1452), and we elect to do so in this case.

Although mother tested positive for methamphetamines the day Giselle was born, the laboratory that conducted the test described its results as “preliminary,” and it specifically cautioned that “[a] more specific test method must be used in order to obtain a confirmed analytical result.” A confirmed result was never obtained because the laboratory inadvertently discarded mother's urine sample. Thus, the positive drug test conducted the day Giselle was born is not substantial evidence that mother uses methamphetamines.

There is, moreover, no other evidence that mother is a drug user. Urine tests administered during mother's pregnancy and three days after Giselle was born were all negative for any substance use; and although the family has been subject to DCFS supervision since September 2016, no one has reported observing mother under the influence of any substance. To the contrary, the CSW, the maternal grandmother (with whom mother lived before giving birth), and father all reported that mother did *not* use drugs, and mother has adamantly denied drug use of any

kind. On this record, therefore, we do not find substantial evidence that mother is a current user of methamphetamines.

DISPOSITION

We strike the juvenile court's finding sustaining count b-2 of the petition; in all other respects, the juvenile court's July 18, 2017 order is affirmed. DCFS's May 16, 2018 request for judicial notice is granted.

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EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.