Filed 9/28/12 In re F.B. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re F.B. et al., Persons Coming Under the Juvenile Court Law.	B241021 (Los Angeles County Super. Ct. No. CK90527)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. G.M., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Marguerite D. Downing, Judge. Affirmed.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, Navid Nakhjavani, Deputy County Counsel, for Plaintiff and Respondent.

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G.M. appeals from jurisdictional and dispositional orders in the dependency proceeding concerning his son Jonathan.[1] We affirm.

Facts

This family came to the attention of DCFS on October 22, 2010. At that time, appellant was living with Mercedes E. ("Mother"), their son Jonathan, who was 20 months old, and Mother's two daughters, F., who was 13, and G., who was 8.

DCFS became involved after F. told her mother, then a teacher, then police, that appellant had gone into her room at midnight, while she was in bed sleeping, and touched her. She gave generally consistent accounts of the incident to Mother, the social worker, and police. She said that she woke up when appellant began rubbing her, and moved away, pretending to sleep. Appellant stopped touching her, but did not leave the room. About ten minutes later, appellant began touching her again. She told police that he put his hands under her blanket and touched her legs, then began rubbing her vagina over her clothes.[2] She told him to stop and get out of the room. He did.

F. and her sister G. shared a room with bunk beds. F. slept in the bottom bunk and G. in the top bunk. G. said that she had never seen appellant engage in any sexual abuse of F., and that he had never sexually abused her.

Mother saw appellant coming out of F.'s room that night, but did not believe that he had abused her. F. had been abused by a caretaker earlier in her life, and Mother thought that she had been so traumatized by the earlier abuse that she now believed that every man intended to abuse her. She also said that she had told appellant not to go into F.'s room, because she was afraid that F. would accuse him of something.

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[1] The record frequently refers to him as "Jonatan," but according to his lawyer, "Jonathan" is the correct spelling.

[2] In other accounts, she said that "I felt him wanting to get under my clothes and touch me down there," or that appellant "was going to touch her in her private part," but it is not clear whether these are inconsistent accounts, or merely accounts of different parts of the incident.

Appellant was arrested. A social worker spoke to him in jail. He denied any sexual contact, and said that he went into F.'s room and put his hand on her back in order to pray for her, in accord with the practices of his church. She woke up and asked him to leave, and he did. He said that F. was distrustful of men due to the earlier abuse, and believed that "every man that gets near her wants to touch her sexually."

Appellant also said that when he was let out of jail, he did not want to return home, because he believed that F. would again accuse him of abuse. He agreed that he would not be alone with F. or G.

In its investigation, DCFS also learned that Mother had used inappropriate physical discipline on F. and G.

DCFS recommended, and the family agreed to, a Voluntary Family Maintenance program, under which appellant would remain out of the home, complete a sexual abuse program for offenders, and have monitored visits with Jonathan. One of the goals of the plan was reunifying appellant and Jonathan.

In February 2011 a social worker made a home visit. F. told her that appellant was back in the home and that she was afraid of him. Mother said that that was not true. F. was placed in foster care.

Appellant had not enrolled in a sexual abuse program.

Another team decision meeting was held in August 2011 and after that F. was moved back into her home. Then, in October, F. called the social worker and said that she was afraid of appellant because he was in the home. She said that he gave her dirty looks and tried to get close to her and touch her when he passed her.

The social worker made an unannounced visit to the home. Mother said that appellant was not there and had not been coming to the house, but when the social worker insisted, appellant came out from under the bed.

F. and G. were removed from Mother's care. Jonathan was left with Mother. The social worker wrote that "there are no concerns about his safety at this time."

A Welfare and Institutions Code[3] section 300 petition was filed on October 28, 2010, as to F. and G. only. It alleged that Mother had physically abused F. and G. and that appellant had sexually abused F.

About this time, Mother told F. that she planned to marry appellant, and soon did so. In November, DCFS reported that appellant was having weekly visits with Jonathan, in the home.

Then, on November 21, 2011, DCFS held a team decision meeting with appellant and Mother. Everyone agreed that Jonathan would be detained and would remain with Mother, and that the parents would participate in services, including, for appellant, intensive sexual abuse classes, individual therapy, and a parenting class. He was to have monitored visits with Jonathan, and agreed not to live in the home.

DCFS wrote that the risk that Jonathan would be abused or neglected was high, in that appellant had sexually abused F., and because "[appellant] is in denial and he does not take any responsibility for the abuse. [Appellant] blames the child . . . for lying about the abuse and causing damage to his relationship with mother. [Appellant] did not comply with the Department since he has not completed his sexual abuse classes for offenders. In addition, [appellant] violated the safety plan as he was found inside the family home having contact with [F.]."

DCFS then filed an additional section 300 petition, this time as to Jonathan, with the same factual allegations as those in the earlier petition.

In December, DCFS reported that Jonathan was comfortable and happy with his mother (who no longer used inappropriate physical discipline), and that there were no concerns for his safety as long as appellant was out of the home. Mother monitored appellant's visits with Jonathan, and both Mother and appellant reported that the visits went well. Mother also said that Jonathan wanted to see his father more often, and asked why his father could not come home.

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

The jurisdictional and dispositional hearing for all three children was held on January 25, 2012. F. testified, essentially consistent with her earlier statements, that appellant had come into her room and rubbed her private parts over her clothing. She pulled the blankets up. Five minutes later, "he started rubbing again. He tried to go under." He put his hand under her clothes, and she told him to get out. She also testified that it was her mother, not appellant, who came into her room at night to pray over her. That would be at 10:00 or 11:00 p.m. F. had told her mother that she did not want appellant to join her, because she felt uncomfortable.

On the petition which concerned F. and G., the court sustained under subdivisions (b) and (d) on findings concerning the October 19, 2010 incident and on findings concerning Mother's inappropriate discipline. As to the October 19, 2010 incident, the court struck the allegation that appellant sexually abused F., and found instead that he had inappropriately touched her in a sexual manner.

As to Jonathan, the petition was sustained under subdivision (j), on findings parallel to the findings in the older children's case. The court found that "On 10-19-10, [appellant] inappropriately touched the child's sibling, [F.], in a sexual manner. On 10-21-10, [appellant] was arrested for Lewd Acts against a Child. Remedial services have failed to resolve the family problem due to the mother allowing [appellant] to frequent the sibling's home and have unlimited access to the sibling. The mother failed to protect the sibling when she knew of the inappropriate touching of the sibling by [appellant] and allowed [appellant] unlimited access to the sibling. Such inappropriate touching of the sibling by [appellant] and the failure to protect the sibling on the part of the mother endangers [Jonathan's] physical health and safety and places [Jonathan] at risk of physical harm, damage, sexual abuse and failure to protect."

The court then made dispositional findings. F. was to remain in foster care. G., who wanted to go home to her mother, was placed with Mother, as was Jonathan. Reunification services were ordered for both parents.

Discussion

1. The continuance

The case was first called for adjudication of the petitions on January 23, 2012. Appellant was present, but F. was not, despite the fact that her presence was necessary and had been requested, apparently by counsel for appellant. The case was continued until January 25, 2012, and both girls were ordered to be present. Appellant did not object to the continuance. However, appellant was not present when the case was called. His lawyer explained that, according to Mother, appellant was told by his employer that he would be fired if he was not at work, and that he needed at least a week's notice if he was to be in court. Counsel asked for a continuance, reminding the court that the case had been earlier continued through no fault of appellant's. The court denied the request as untimely.

Appellant contends that his due process rights were violated when the request for a continuance was denied.

Appellant is certainly correct that a parent whose child is, or may be, a dependent of the court has due process rights. (*In re Kelvin M.* (1978) 77 Cal.App.3d 396, 400.) "[P]arenting is a fundamental right the impairment of which requires strict adherence to procedural due process." (*In re Crystal J.* (1993) 12 Cal.App.4th 407, 412.) As part of that due process, a parent is entitled to adequate notice and an opportunity to be heard. (*In re B.G.* (1974) 11 Cal.3d 679, 688-689.) However, we see no due process violation here.

Due process does not mean that every request for a continuance must be granted. Appellant was present when the hearing date was set, and if the date did not allow him to inform his employer and make plans to attend, it was his obligation to say so, at that time. He did not say so, and the court was entitled to proceed in his absence.

2. The jurisdictional order

Father challenges the substantial evidence for the assertion of jurisdiction over Jonathan. "In reviewing the jurisdictional findings . . . we look to see if substantial

evidence, contradicted or uncontradicted, supports them. [Citation.] In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court." (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.)

Father's contention is that a finding that he molested his stepdaughter is not enough. He argues that "the issue is whether [appellant's] sexual abuse of an unrelated female amounted to substantial evidence he would turn to homosexual incest."

As both parties acknowledge, many courts have considered this issue, under section 300, subdivision (j), with differing results. (See *In re Ana C.* (2012) 204 Cal.App.4th 1317; *In re Maria R.* (2010) 185 Cal.App.4th 48; *In re Andy G.* (2010) 183 Cal.App.4th 1405; *In re P.A.* (2006) 144 Cal.App.4th 1339; *In re Karen R.* (2001) 95 Cal.App.4th 84; *In re Rubisela E.* (2000) 85 Cal.App.4th 177.)

We need not discuss these cases in detail, but say only that we are satisfied that in at least some instances, sexual abuse[4] of a girl can establish that a brother is at risk of sexual abuse.

This is such a case. F. was only 13 years old when the incident took place, and to appellant's knowledge, was very vulnerable, because she had been molested before. He claimed that he and Mother feared that he would be wrongly accused by her, but nonetheless went into her room, without Mother, in the middle of the night, and by his own account, touched her. According to F., whom the juvenile court believed, he continued to do so for some minutes, and left only when she told him to. He did all of this while another child, G., was asleep in the upper bunk.

Further, even after DCFS became involved, he did nothing to improve the situation for F. or for his family. He agreed to move out of the home, claiming that he feared another false accusation, but did not do so. He did not attend a sexual abuse

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[4] The juvenile court found "inappropriate touching of a sexual nature," rather than "sexual abuse," but the distinction, if there is one, is unclear, and for our purposes, does not matter.

program, although he had promised to do so. When in the home with F., he indicated -- at the very least -- a lack of boundaries and respect for her by giving her "dirty looks," and by trying to touch her.

The danger to Jonathan is increased by Mother's attitude toward the abuse. She disbelieved F., and allowed appellant back into the house, to F.'s detriment and in violation of her agreement with DCFS.

We note, too, that "This conclusion is consistent with section 355.1, subdivision (d), which provides in pertinent part that: '(d) Where the court finds that either a parent, a guardian, or any other person who resides with . . . a minor who is currently the subject of the petition filed under Section 300 . . . (3) has been found in a prior dependency hearing . . . to have committed an act of sexual abuse, . . . that finding shall be prima facie evidence in any proceeding that the subject minor is a person described by subdivision (a), (b), (c), or (d) of Section 300 and is at substantial risk of abuse or neglect. The prima facie evidence constitutes a presumption affecting the burden of producing evidence.' [¶] Although section 355.1, subdivision (d), was not triggered here because the [two section 300 petitions were adjudicated at the same time,] it nonetheless evinces a legislative determination that siblings of sexually abused children are at substantial risk of harm and are entitled to protection by the juvenile courts." (*In re P.A., supra*, 144 Cal.App.4th at p. 1347.)

3. The dispositional order

First, we agree with appellant that the dispositional order was a removal order under section 361. Appellant was not living in the home (or at least was not supposed to be living in the home) when Jonathan was detained, but that was only pursuant to a voluntary agreement.

We further agree that the standard in the juvenile court is clear and convincing evidence. "A dependent child may not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence . . . . [¶] (1) There

is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody." (§ 361, subd. (c)(1).)

"A removal order is proper if it is based on proof of parental inability to provide proper care for the minor and proof of a potential detriment to the minor 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. [Citations.]" (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, overruled on other grounds, *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.)

"We review an order removing a child from parental custody for substantial evidence in a light most favorable to the juvenile court findings." (*In re Miguel C.* (2011) 198 Cal.App.4th 965, 969.) We find such evidence, in the evidence set out above, including the evidence concerning the molestation of F. and the evidence that appellant, after agreeing to take a sexual abuse program and to move out of the home, did not do so.

Disposition

The jurisdictional and dispositional orders are affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J. KRIEGLER, J.