Filed 9/20/12 In re G.R. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re G.R. et al., Persons Coming Under the Juvenile Court Law.	B236090
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JORGE R., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK69789)

APPEAL from orders of the Superior Court of Los Angeles County, Robert L. Stevenson, Juvenile Court Referee. Affirmed.

Patricia K. Saucier, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Navid Nakhjavani, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Jorge R., father of G.R. (three years old) and K.R. (toddler), appeals from the jurisdictional and disposition orders of the juvenile court. Father contends there was insufficient evidence for a jurisdictional finding under Welfare and Institutions Code section 300, subdivision (b),[1] and for a finding under section 361, subdivision (c) of a substantial risk of serious physical harm to the children if they remained in his custody. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The family consists of mother,[2] father, and the two children, G.R and K.R. Father and mother live separately. Mother and the children currently reside with a friend. Father is currently homeless.

1. *the petition's allegations*

The Department of Children and Family Services (DCFS) filed a petition naming the children. As sustained, the petition alleged in relevant part:

"b-1: The [children's mother and father] have a history of domestic violence and engaging in violent altercations in the children's presence. On or about 05/31/2011, and on prior occasions, the father slapped the mother and pushed the mother in the children's presence. The mother failed to protect the children. The mother allowed the father to reside in the children's home and have unlimited access to the children. . . ."

"b-2: The [children's father] is a current user of . . . methamphetamine . . . . On 06-10-2011, the father had a positive toxicology screen for amphetamines and methamphetamine."

2. *the evidence*

The evidence supporting the petition was as follows: the jurisdiction/disposition report states father demonstrated poor impulse control and coping skills. Father had a

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[1] All further references are to the Welfare and Institutions Code.

[2] Mother is not a party to this appeal.

history of domestic violence in at least two relationships (with mother and a former girlfriend). Mother was not the aggressor in these incidents. Father "resorted to abusing methamphetamine to deal with his stressful life circumstances." The children's social worker concluded father may not be safely reunified with the children until such time as he addresses his substance abuse and domestic violence issues, which, if not addressed, pose a risk to the physical health and safety of the children.

With respect to father's history of domestic violence, mother stated the police charged father with assaulting his girlfriend in 2006. In 2009, DCFS received a second allegation against father for domestic violence. A neighbor reported to DCFS that father and mother were involved in a domestic violence dispute, which dispute, the neighbor was told, was physical. DCFS stated the neighbor reported that police officers came to the house. The police did not arrest father. Although DCFS closed the referral as inconclusive, mother and father admitted they argued in the 2009 incident and father pushed mother. Father also denied hitting mother, stating I "shoved her away from me like 'get away from me' because I was mad."

In 2011, a social worker received a second referral of emotional abuse and general neglect of the children. The paternal aunt relayed an instance of domestic violence between father and mother and confirmed that father slaps and pushes mother around. The aunt's statements were contained in the investigating social worker's declaration, made under penalty of perjury, and included in the DCSF report. Mother and father claimed the paternal aunt fabricated the story due to a personal conflict within the family. Mother insisted she and father argued outside the paternal grandmother's house while the children were inside. Mother and father denied father struck mother. The parents stated they never argue in front of the children. They maintained father has never hit mother, and the only time father ever pushed her was in the 2009 incident.

By 2011, mother and father were homeless. The parents slept in their car, and their children slept in home of paternal grandmother.

Father has a history of substance abuse. In January 2009, according to the father's CLETS report, the police arrested and charged father with vehicular DUI involving

"alcohol/drugs." Father had two positive drug tests in June 2011. Father never appeared for one on-demand drug test. A missed drug test is considered a positive drug test. On June 10, 2011, father consented to another on-demand drug test, and tested positive for methamphetamine.

Father insisted to the children's social worker he had *never* used methamphetamines or any other type of drugs. Father stated he was "willing to pay for another drug test to prove he is not using drugs." Father subsequently admitted to a one-time use of methamphetamine and stated this was the only time he ever used methamphetamine. He explained a friend offered him some methamphetamine and he "tried" it.

Father agreed to stay away from the children and mother. Made aware of a court order to that effect, father responded, " 'because of my sister I have to go through this, fuck her and fuck you.' " Father lost control again and left the following message for the social worker on June 22, 2011: "I'm (father Jorge) trying to call this fucken [*sic*] bitch [children's social worker], so she can tell me what services to take but all she says is Jaime, Jaime, [the biological father of mother's other two children] fuck Jaime, fuck Florencia (a [*sic*] affiliated gang name) and fuck that bitch [the children's social worker]." The children's social worker indicated father's tone on the voicemail was "outraged." Nine minutes later, father left a "calm," second voice message for the same social worker explaining his desire to reunify with his family and asking for her help.

3. *the court's findings*

The juvenile court sustained the b-1 count finding it provided historical and current information. The court stated when "one person pushes or shoves the other person, the children are around, they are yelling and screaming—this doesn't occur in silence, so the children are affected. And there has been a history there, so I think based upon the history and the currency of this particular event—and I can find that to be true without relying on the aunt's statement." The paternal aunt did not appear at the hearing despite the alleged subpoena for her to testify.

In sustaining and amending the b-2 count, the court did not give "a lot of weight" to father's claim he does not use methamphetamine.

As for the disposition, the juvenile court found by clear and convincing evidence there would be a substantial risk of detriment to return the children to father's custody and released the children to mother. The court ordered reunification services for father to include a 26-week domestic violence program, a drug/alcohol program with weekly random or on demand testing, parenting classes, and monitored visitation. The court ordered monitored visits for father, and continued its previous order of no contact between the parents.

CONTENTIONS

Father contends (1) there was insufficient evidence that the children were at substantial risk of harm, and (2) the dispositional order under section 361, subdivision (c) removing custody from father lacked clear and convincing evidence that the children were at substantial risk.

DISCUSSION

1. *The evidence supports the jurisdictional findings.*

At a jurisdictional hearing, the juvenile court must first determine if the children are persons described by section 300. (§ 355, subd. (a).) If the allegations in the petition are proven true by a preponderance of the evidence, the children are ruled dependents of the court. (*Ibid*.) A social study prepared by the petitioning agency, and any hearsay evidence contained in it, is admissible and constitutes competent evidence upon which a finding of jurisdiction pursuant to section 300 may be based. (§ 355, subd. (b).) A child will fall under section 300, subdivision (b) if, "[t]he 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." (§ 300, subd. (b)). The purpose of section 300, subdivision (b) is to provide maximum safety and protection to children who are at risk of such harm. (§ 300.2) A home environment "free from the negative effects of

substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child." (§ 300.2)

" ' "The petitioner in a dependency proceeding must prove by a preponderance of the evidence that the child . . . comes under the juvenile court's jurisdiction." ' [Citation.] On appeal from an order making jurisdictional findings, we must uphold the court's findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings. [Citation.] Substantial evidence is evidence that is reasonable, credible, and of solid value. [Citation.]" (*In re Veronica G*. (2007) 157 Cal.App.4th 179, 185.) The burden is on the appellant to show there was insufficient evidence for the court's ruling.

One parent's conduct causing the juvenile court to assert jurisdiction over the minor " ' "is good against both [parents.]" ' " (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1492.) If jurisdiction over the child under section 300, subdivision (b) is taken as a result of one parent's actions, the child comes under the jurisdiction of the juvenile court regardless of the other parent's actions. (*Id.* at pp. 1491-1492) Here, mother accepted the court's jurisdiction over the children based on her own conduct with respect to the domestic violence and father's drug use allegations. Mother's submission to the petition provided a basis for jurisdiction over the children. Once jurisdiction was taken, DCFS did not have to prove separate section 300, subdivision (b) allegations regarding father's conduct for the children to be declared dependents of the court.

However, father was not non-offending. Thus, we turn to the evidence adduced to analyze whether the juvenile court erred in sustaining allegations naming him.

The evidence against father was more than sufficient for a finding of substantial evidence that father's substance abuse created a risk for the children under section 300, subdivision (b). Father's two positive drug tests, i.e., his missed test and positive test, support the order. Additionally, the police arrested father in 2009 for a DUI involving "alcohol/drugs."

Father argued he only used methamphetamine once and only did so because of the stressful situation of being homeless, unemployed, and his family situation. Father cites *In re J.N.*, (2010) 181 Cal.App.4th 1010 (*J.N.*) to bolster his argument that one time usage is not enough to satisfy section 300, subdivision (b). However, his reliance on *J.N.* is misplaced. The court held in *J.N.* that one time usage is not sufficient evidence of a substance abuse problem. (*Id*. at p. 1026.) Jurisdiction here is not based on a one-time use as father claims. The juvenile court here did not believe father only used methamphetamines once. Not only do we defer to the trial court's credibility determinations (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53), but the record supports the court's finding: Father has *two* positive drug tests in June 2011 alone, had a DUI drug/alcohol arrest in 2009.

Father's history of domestic violence is also supported by substantial evidence. Father argued there was insufficient evidence for the juvenile court to find a history of domestic abuse or violent altercations. First, father contends there was only one incident of pushing: the 2009 argument. Second, father argues the court relied erroneously on the statements of the paternal aunt who fabricated and exaggerated the 2011 incident, including the statements father punched mother during the argument, and frequently pushes and slaps mother in front of the children. However, mother admitted father pushed her during the 2009 altercation. Mother also reported that police charged father in an incident of domestic violence with his former girlfriend in 2006, and father did not challenge the truth of that allegation. Moreover, the aunt's statement is contained in a social worker's declaration that was signed under penalty of perjury and included in the Department's report, with the result that account is competent evidence on which to base the jurisdictional findings. (§ 355, subd. (b).) In any event, the juvenile court ruled the section 300, subdivision (b) domestic violence allegation could be sustained without "relying on the [paternal] aunt's statements," by basing the decision on father's and mother's history. Leaving the aunt's allegations aside, the various reports and statements taken by the social worker are ample evidence to support the finding under section 300, subdivision (b). Violent altercations involving father are a risk to the children under

section 300, subdivision (b). (See *In re Sylvia R.*, (1997) 55 Cal.App.4th 559, 562.) The allegations of domestic violence are supported by substantial evidence.

Father relies on *In re Daisy H.* (2011) 192 Cal.App.4th 713 (*Daisy H.*) to support his assertions that there was insufficient evidence to find the domestic violence was ongoing between the parents and that the children were at risk of harm. Father claims, like *Daisy H.*, the domestic violence occurred when the children were not present. However, the facts in *Daisy H*. are distinguishable for several reasons. In *Daisy H*., an unidentified caller reported the father was emotionally abusing his three children. (*Id.* at p. 717.) The mother in *Daisy H.* then informed a social worker about an incident *seven years prior* when father choked her and pulled her hair. (*Id.* at p. 717.) The findings in *Daisy H*. were based on a single incident. By contrast, in the present case father had *three* reported incidents of domestic violence in 2011, 2009, and 2006. Father's admission that he got mad and pushed mother in 2009, combined with his "outrage" and swearing at the children's social worker and mother, demonstrates father's poor impulse control. There is sufficient evidence for a finding of on-going domestic violence.

Father contends the children did not witness either argument or the pushing, which alleviates the harm to the children and shows lack of sufficient evidence. That claim is meritless. " 'Studies show that violence by one parent against another harms children *even if they do not witness it.*' " (*In re Sylvia R., supra*, 55 Cal.App.4th at p. 562, italics added, quoting Fields, *The Impact of Spouse Abuse on Children and Its Relevance In Custody and Visitation Decisions in New York State* (1994) 3 Cornell J.L. & Pub. Policy 221, 228.) "Secondary abuse" is abuse suffered by children as a result of domestic violence in the home. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 195.) " '[C]hildren are affected by what goes on around them as well as what is directly done to them.' " (*Ibid.*) The record supports the juvenile court's jurisdictional findings.

2. *The evidence supports the disposition order.*

Removing a child from his or her home in the disposition phase requires a substantially higher burden of proof than declaring a child a dependent in the jurisdiction phase. (*In re Henry V.* (2004) 119 Cal.App.4th 522, 528.) The juvenile court's

jurisdictional findings must be based on a preponderance of the evidence, whereas removal must be supported by clear and convincing evidence. (*Id.* at pp. 528-529.) The court must find "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.]" (*In re Miguel C.* (2011) 198 Cal.App.4th 965, 969.) " '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.]' [Citations.]" (*Ibid.*) In this regard, the court may look to a parent's past conduct in addition to present circumstances. (*In re Cole C.* (2009) 174 Cal.App.4th 900, 917.)

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 J.K., supra,* 174 Cal.App.4th at p. 1433.)

The evidence overwhelmingly supports the juvenile court's decision to remove the children from father's custody. Father's methamphetamine use and history of domestic violence are serious. Father has outbursts of uncontrollable anger, as evidenced by his yelling and swearing at mother and at the children's social worker. Father's issues are compounded by his refusal to acknowledge he has an issue with substance abuse or domestic violence or that his behavior is a serious risk to his children. Finally, father is homeless and unable to care for his children.

Father cites the District Attorney's failure to charge him in the 2009 domestic violence as other proof that the court lacked sufficient evidence for the disposition order. However, a failure to convict in a criminal case where the standard of proof is beyond a reasonable doubt does not prove the parent did not commit domestic violence for

dependency hearings, which is the much lower standard of proof of a preponderance of the evidence. (*In re Sylvia R.*, *supra*, 55 Cal.App.4th at p. 563.)[3]

In summary, the record contains sufficient evidence to support the juvenile court's finding there was clear and convincing evidence of a substantial danger to the children's health and safety if they remained in the custody of father. The court's disposition order was not error.

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[3] Father argues because the children did not witness the arguments or father pushing mother, there was not clear and convincing proof that the children were at risk. His claim fails. As previously discussed, children do not have to witness the violence to be put at risk. (*In re Heather A., supra,* 52 Cal.App.4th at p. 195.)

DISPOSITION

The orders are affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.