Filed 9/19/17 In re A.G. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re A.G. et al., Persons Coming Under the Juvenile Court Law.	B279580 (Los Angeles County Super. Ct. No. DK17339)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. LYDIA G., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Stephen Marpet, Judge. Reversed.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, John C. Savittieri, Deputy County Counsel, for Plaintiff and Respondent.

In 2015, Lydia G. (mother) was involuntarily hospitalized for a week in a mental health institution, where she experienced hallucinations and was diagnosed as suffering from depression. A year later she threw a hairbrush at her daughter, A.G., age six, who had failed to get ready for school, striking her on the nose and causing a bruise. Six months later, the juvenile court determined, on no other evidence—e.g., no prior or subsequent lapse, psychological evaluation, home study, or positive drug test—that mother's mental illness led to A.G.'s injury and presented an ongoing danger to both A.G. and her younger sister. The court declared the children to be wards of the court, removed them from mother's custody, and ordered reunification services.

We conclude no evidence suggests the hairbrush incident resulted from mother's mental illness or indicates she poses a risk of serious physical harm to her children. Accordingly, we reverse.

BACKGROUND

A. Detention

On May 6, 2016, mother threw a hairbrush at A.G. when the child failed to put on her shoes for school. The brush struck A.G. on the nose, causing a bruise. A.G. initially told a teacher she had fallen down, but later admitted mother threw the brush because she was angry.

Mother refused to allow a social worker or sheriff's deputy into the family home, but after a niece invited them in they met mother's other daughter, M.C., age two, and saw the condition of the house.

The home was dark and filthy, and smelled strongly of mildew, spoiled food, and feces. The walls, floors and kitchen were grimy, trash was strewn liberally throughout, and cockroaches roamed freely. The kitchen contained no refrigerator and little edible food, although a dirty, moldy refrigerator in the backyard held some moldy food. Jonathan C., M.C.'s father, reported that he had last been allowed into the home about a year and a half prior, and it was filthy then. Neither mother nor her sister, who resided in the home, could explain why it was in such condition. The deputy concluded the home had suffered years of neglect and was unsuitable to house small children.

A.G., who smelled of feces and urine, reported she was the only person who ever cleaned the house. She saw roaches every day, including on her bed, and stepped on them or hit them with a shoe when she could.

A.G. said mother became angry after she told A.G. twice to hurry up putting on her shoes for school, but she "was very tired, and . . . didn't want to go to school," so she "wasn't putting [her] shoes on." Mother threw the brush "from the door to the bed," striking her on the nose. When A.G. started to cry, mother began kissing her and told her she was sorry.

Several relatives reported A.G. was often filthy, and roaches infested her laundry. A.G.'s teacher reported that A.G. was doing poorly in school and would sometimes come to school smelling of urine and feces. The school would call mother to bring clean clothes for A.G., but only "an aunt" would come. The

teacher stated A.G. "is always very sad. She looks sad all the time. . . . She comes to school dirty; comes to school unkempt." The teacher stated, "Mom is strange. . . . I don't think she's all there."

A.G. said mother sometimes spanked her on the buttocks with a sandal, and the maternal aunt sometimes spanked her with a belt. She said mother also "yells and after she yells she says sorry." A.G. stated the brush incident was her fault because she was being lazy and not getting ready for school.

When asked about her favorite activity with mother, A.G. said she and mother sleep throughout the day.

Mother's sister stated mother was mentally ill, and a year prior had been involuntarily hospitalized in a psychiatric facility pursuant to Welfare and Institutions Code section 5150, which provides that a person suffering from a mental health disorder who presents a danger to herself or others may be detained for evaluation and intervention.[1] Several relatives reported that mother was unable to cope with stress, unsuccessfully managed her depression and anger, and was "unfit" to care for A.G. The social worker observed that mother rolled her eyes throughout the interviews and "did not appear to comprehend what was being discussed or the gravity of the situation."

Mother was arrested on a charge of child endangerment. (Pen. Code, § 273a, subd. (a).)

B. Petition

On May 11, 2016, DCFS filed a section 300 petition alleging mother physically abused A.G., which put both A.G. and M.C. at

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[1] All further statutory references will be to the Welfare and Institutions Code unless otherwise designated.

risk of serious physical harm, and the condition of the house endangered the children's physical health and safety. (§ 300, subds. (a), (b), (j).) The petition also alleged Jonathan C. failed to protect M.C. from a filthy home. The juvenile court detained the children, removed them from mother's custody, and ordered monitored visitation.

On June 14, 2016, A.G.'s father, Mark L., an admitted drug user, reported that he had had only a casual relationship with mother, they never lived together, and he had never been in her home or met any of her family. He saw A.G. only once, when she was about three or four years old, and although he wanted to have a relationship with the child he was not in a position to take custody of her.

On June 15, 2016, mother told a social worker that Mark L. had seen A.G. three times but played no part in her life, and she refused to allow him to visit A.G. absent a court order because, she stated, "he's not a good guy. . . . [I]n the past, he did drugs and I didn't trust him." Mother also required that Jonathan C. obtain a court order before he could visit M.C. because, she stated, "we had an altercation with his mother . . . and I wanted to make sure everything was in writing. She wanted [M.C.] to stay overnight. I said, 'No.' My baby was only 3 months."

Mother stated she used marijuana and methamphetamines in the past, but had been "sober for like 10 years." When asked why she had thrown the brush at A.G., mother said, "I was tired and frustrated."

Mother denied she had ever been hospitalized, but stated that a counselor at "Cerritos Hospital" had once prescribed Zoloft for stress. She was not currently taking any medication.

M.C.'s paternal aunt described mother as "unfit," showing few "motherly instincts." She reported that the paternal grandmother always took care of M.C., even when mother was present. The paternal aunt never saw mother hit the children, but she was always yelling at them.

On June 18, 2016, mother enrolled in 10-week parenting and 12-week anger management classes.

On July 20, 2016, in criminal proceedings on mother's child endangerment charge, the superior court issued a temporary protective order directing her to have only peaceful contact with her daughters as provided by any current or future juvenile court order.

On June 21, 2016, DCFS amended the petition to allege under section 300, subdivisions (b) and (g), that Mark L. was unable to care for A.G. due to his history of substance abuse.

On September 6, 2016, DCFS reported that mother had undergone psychiatric hospitalizations in January 2005 and in June 2015, for six days, during which she was reported to cry uncontrollably and suffer from active visual and auditory hallucinations, "seeing shadows" and hearing voices "telling her 'negative things.' " Mother was diagnosed with major depression with psychotic features, was prescribed Zoloft for depression and Zydis for the hallucinations, and was placed on suicide watch. She took the Zoloft for a couple of months after discharge, but then stopped.

On September 6, 2016, DCFS amended the petition to allege mother's history of substance abuse and mental and emotional problems endangered the children and rendered her unable to care for them.

Mother completed the 10-week parenting class and was reported to have "demonstrated an **excellent** understanding of this very comprehensive parenting program." Mother completed the 12-week anger management program, and was reported to have "demonstrated an **excellent** understanding of the material." Mother had also newly enrolled in individual counseling, completing two sessions by the time of the jurisdiction hearing. Her therapist reported her prognosis was good but recommended continued therapy. Mother tested negative for drugs on multiple occasions, visited the children regularly without incident, and reported that the family home had been "cleaned," although a bedroom where her disabled brother resided was still "really bad." As of October 23, 2016, mother was attending a second parenting class.

Mark L. had no contact with DCFS after June 2016, when he stated he did not want custody of A.G.

C. Hearing

The combined jurisdiction and disposition hearing was continued several times to synchronize reunification services with requirements levied upon mother in criminal proceedings involving her child endangerment charge.

On November 11, 2016, six months after the precipitating hairbrush incident, the juvenile court conducted a combined jurisdiction and disposition hearing upon documentary evidence and oral argument. There was some confusion about the effect of the protective order issuing from mother's criminal proceedings, and mother's attorney did not ask for immediate return of the children.

Mother's attorney represented that mother had not seen a psychiatrist in more than six months, but argued no nexus

existed between her prior mental illness and her ability to care for A.G. or M.C. She had completed a parenting class and anger management program, was enrolled in individual counseling, and presented no risk to the children.

DCFS presented no current home study or recent psychological evaluation of mother.

The juvenile court struck allegations pertaining to the condition of the family home and mother's prior drug use. The court found that mother's physical abuse of A.G. and her history of mental and emotional problems endangered the children and rendered her unable to care for them. It stated, "This is a serious problem. [She did not throw the brush] for punishment[,] so there's something going on, another dynamic that needs to be addressed if mother took a hairbrush, threw it at the kid, not because she was punishing [her], because she was angry at something. That's a big, big problem. When a parent punishes a child and over punishes that's one thing but this isn't what happened here. [¶] . . . This is something she needs to deal with in addition to [anger management]. That's why there's a mental health component that needs to be complied with."

The juvenile court found DCFS had complied with the Indian Child Welfare Act as to mother, but made no similar finding as to Mark L., who had failed to return the department's ancestry questionnaire. The court reaffirmed its order removing the children from mother's custody, with monitored visitation that DCFS could liberalize as appropriate, and ordered that mother undergo a psychiatric evaluation, continue individual counseling, participate in a 26-week parenting class, and take all prescribed medications. The court ordered that A.G. also participate in individual counseling.

The court also found jurisdiction as to Mark L. due to his past and current substance abuse.

Mother timely appealed. Neither Mark L., who did not appear at the hearing, nor Jonathan C. have appealed.

After the jurisdiction hearing, mother's criminal proceedings resolved with a restraining order enjoining her to maintain only "peaceful contact" with her children as permitted by the juvenile court.

DISCUSSION

I. No Substantial Evidence Supported Jurisdiction

Mother contends the juvenile court's jurisdictional findings were unsupported by substantial evidence because A.G. suffered no serious physical harm from the hairbrush incident, and mother's mental illness did not put the children at risk. We agree.

We review a jurisdictional order for substantial evidence. (*In re I.J.* (2013) 56 Cal.4th 766, 773.) " 'In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings and disposition, we determine if substantial evidence, contradicted or uncontradicted, supports them. "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." [Citation.] "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.] ' "[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial

evidence . . . such that a reasonable trier of fact could find [that the order is appropriate]." ' " ' " (*Ibid*.)

A. *The Record Does Not Show A.G. Suffered "Serious Physical Harm," as Defined by Section 300, Subdivision (a).*

Subdivision (a) of section 300 authorizes jurisdiction if the "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian." (*Ibid*.) "Although there may be an 'I know it when I see it' component to th[e] factual determination [of what constitutes 'serious physical harm'], . . . parents of common intelligence can discern what injuries fall within its reach." (*In re Mariah T.* (2008) 159 Cal.App.4th 428, 438.)

Nothing in the record supports a finding that the bruising on A.G.'s face amounted to serious physical harm. DCFS's social worker described A.G.'s bruising as a "redish/purple" bruise on her nose and a "slight" bruise on one cheek. A sheriff's deputy observed "minor purplish bruising across the bridge of [the] nose and also under [the] eyes." Minor bruising falls outside the reach of section 300. (See *In re Isabella F.* (2014) 226 Cal.App.4th 128, 132 [fingernail scratches on one side of a child's face, a fingernail gouge mark on an earlobe, and a small cut and discoloration on a cheekbone held to be nonserious]; cf. *In re Mariah T.*, *supra*, 159 Cal.App.4th at p. 438 [deep, purple bruises on a three-year-old child]; *In re J.K.* (2009) 174 Cal.App.4th 1426, 1433 [dislocated shoulder]; *In re David H.* (2008) 165 Cal.App.4th 1626, 1645 [bruises, linear red marks, welts, and broken skin].)

Mother admits she failed to interact appropriately with A.G. on the morning of May 6, 2016. She immediately apologized, and soon after detention completed anger

management and parenting programs and enrolled in individual counseling.

A minor injury may nevertheless be serious when there is a history of repeated abuse. (*In re N.M.* (2011) 197 Cal.App.4th 159, 169.) But the hairbrush incident was an isolated event, and nothing in the record suggests mother had a history of abusing either of her daughters.

A juvenile court may find a substantial risk of *future* injury "based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child or the child's siblings, or a combination of these and other actions by the parent or guardian that indicate the child is at risk of serious physical harm." (§ 300, subd. (a).) "A juvenile court need not wait until a child is seriously abused or injured before it takes jurisdiction under section 300, subdivision (a)." (*In re Isabella F.*, *supra*, 226 Cal.App.4th at p. 138.) But the record here offers no indication that A.G. faced a substantial risk of future serious harm.

B. *Insufficient Evidence Supports the Finding that A.G. or M.C. Faced a Substantial Risk of Harm Under Section 300, Subdivisions (b) or (j).*

A child may be adjudged a dependent of the court under subdivision (b) of section 300 if 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." (§ 300, subd. (b)(1).) A child may also be adjudged a dependent if there is a substantial risk the child will suffer serious physical harm inflicted nonaccidentially upon the child by the child's parent. The juvenile court need not find "that a parent is at fault or

blameworthy for her failure or inability to supervise or protect her child." (*In re R.T.* (2017) 3 Cal.5th 622, 624.) "The three elements for jurisdiction under section 300, subdivision (b) are: ' "(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." ' [Citations.] 'The third element, however, effectively requires a showing that *at the time of the jurisdictional hearing* the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur).' " (*In re B.T.* (2011) 193 Cal.App.4th 685, 692.)

Jurisdiction is proper under subdivision (j) of section 300 if the child's sibling has been abused or neglected as defined in section 300 and there is a substantial risk that the child will also be abused or neglected. (§ 300, subd. (j).) "Subdivision (j) thus allows the court to take into consideration factors that might not be determinative if the court were adjudicating a petition filed directly under one of those subdivisions." (*In re I.J.*, *supra*, 56 Cal.4th at p. 774.) The subdivision's "broad language . . . clearly indicates that the trial court is to consider the totality of the circumstances" to assess the risk of harm to the child. (*Ibid.*) "The provision thus accords the trial court greater latitude to exercise jurisdiction as to a child whose sibling has been found to have been abused than the court would have in the absence of that circumstance." (*Ibid.*)

Here, mother's psychiatric records indicated she recently suffered from substantial mental health problems, including auditory hallucinations, and was diagnosed with severe depression. Upon her discharge from psychiatric care she was referred for mental health treatment that she did not seek or

receive. Mother's relatives reported she suffered ongoing mental health problems, and A.G. reported that mother slept all day.

Mother's mental health issues probably resulted in her inability to meet some basic parental responsibilities. Her children slept with cockroaches in a filthy, uninhabitable home with little edible food. Mother was unable to explain why the home was in such a state, and the only person ever to "clean" it was her six-year-old daughter, who removed roaches by stepping on them or hitting them with a shoe. Mother's daughters were little better kempt than the home, as A.G. sometimes went to school smelling of urine and feces, and her laundry teemed with roaches.

Although this record might have supported a finding that in May 2016, mother's lassitude put her children at substantial risk of illness, the juvenile court struck allegations pertaining to the condition of the house, and the record contains no indication that at the time of the jurisdiction hearing, six months after the last reported DCFS home visit, the house remained in disorder. Nor was there evidence that mother learned nothing from her parenting and anger management programs.

In short, no substantial evidence indicated that mother's mental health issues from 2015 carried over into 2016 in any respect relevant to the sustained petition. Mother experienced hallucinations and suffered from severe depression in 2015, but there is no record she suffered hallucinations in 2016. A parent's outdated psychological evaluation cannot be deemed credible and of solid value so as to support the conclusion that a minor's physical or emotional well-being would be threatened by the parent's mental illness. (*In re Heather P.* (1988) 203 Cal.App.3d

1214, 1229-1230, disapproved on another ground by *In re Richard S.* (1991) 54 Cal.3d 857, 866, fn. 5.)

Although mother's relatives described her as depressed, angry, "unfit," and unable to cope with stress, these vague, lay anecdotes failed to rise to the level of substantial evidence of serious mental illness. The proper basis for a juvenile court's ruling predicated on a parent's mental illness "is expert testimony giving specific examples of the manner in which the [parent's] behavior has and will adversely affect the child or jeopardize the child's safety." (*In re Jamie M.* (1982) 134 Cal.App.3d 530, 540.) Even if mother actually suffered from clinical depression, that bare diagnosis would tell us little about her behavior and its effect on her daughters. A diagnosis of mental illness "should be the court's starting point, not its conclusion. Rather than mandating a specific disposition because the mother is [mentally ill], the diagnosis should lead to an in-depth examination of her psychiatric history, her present condition, her previous response to drug therapy, and the potential for future therapy with a focus on what affect her behavior has had, and will have, on her children. [¶] Harm to the child cannot be presumed from the mere fact of mental illness of the parent . . . ." (*Ibid.*)

Here, no expert testimony or other evidence suggested that mother's depression endangered the children in some way other than by causing them to live in a filthy home, a finding the juvenile court expressly declined to make. "The primary motivating factor in declaring jurisdiction appears to have been to offer mother services. We have no doubt that providing services to assist a family that has acknowledged the need for support certainly was meant to promote the best interests of [the

child] and her entire family, but these good intentions are an insufficient basis upon which to find jurisdiction under section 300 . . . ." (*In re Isabella F.*, *supra*, 226 Cal.App.4th at p. 139.)

II. Jurisdiction Was Improper as to Mark L. and Jonathan C.

The juvenile court found jurisdiction because Mark L.'s drug use posed a danger to A.G., and Jonathan C. failed to protect M.C. from mother's filthy household. But Mark L. played no part in A.G.'s life. He saw her only a few times, when she was approximately four years old, and did not currently want custody. He therefore presented no independent danger to the child, and given our conclusions above regarding mother, failed to protect her from no danger. Neither did Jonathan C. fail to protect M.C. from any danger, as the court struck allegations pertaining to the condition of mother's home. Jurisdiction cannot be based solely on a finding that an absentee parent failed to protect a child from a nonexistent danger. (*In re Andrew S.* (2016) 2 Cal.App.5th 536, 542.) Therefore, jurisdictional findings as to Mark L. and Jonathan C. must be reversed.

DCFS argues Mark L. was not an absent parent because he has "expressed his desire to visit and bond with [the child], and ultimately obtain custody of her." But a parent's desire to be present in a child's life does not by itself create an actual presence. Speculation that Mark L. might at some time in the future gain access to A.G., continue to abuse drugs, and possibly pose a danger because of the drug abuse, does not support current jurisdiction.

III. Indian Child Welfare Act

Given the above conclusion, we need not determine whether proceedings below satisfied the Indian Child Welfare Act.

DISPOSITION

The juvenile court's orders are reversed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.