Filed 6/24/15 In re K. B.

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re K. B., A Person Coming Under the Juvenile Court Law.	B260274 (Los Angeles County Super. Ct. No. DK06548)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. L. B., Defendant and Appellant.	

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

Kate M. Chandler, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Mark J. Saladino, County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Jeanette Cauble, Senior Deputy County Counsel, for Plaintiff and Respondent.

L. B. (mother) appeals from the juvenile court's orders asserting jurisdiction over her two-year-old son, K. B., and removing him from her care. Mother contends there was no substantial evidence supporting the court's findings that dangerous conditions in her home and her substance abuse placed K. at risk of harm. Mother also argues the Department failed to conduct an adequate investigation of her Native American heritage or provide notice as required under the Indian Child Welfare Act (ICWA). We disagree with mother's substantial evidence arguments and conclude that any failure to comply with ICWA was harmless error. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

K. was born in December 2011 to mother and Marquise C. (father). The parents agreed K. would live with mother and father would take him for overnight and weekend visits. Father began to be concerned about K. when he saw gang members and other people smoking marijuana at mother's house and observed that the house was infested by roaches and vermin and "so cluttered [it] was hard to walk through." Mother also ignored father's repeated requests to take K. to the doctor for his immunizations.

In late March 2014, father picked up K. for a visit and noticed K. had a swollen bump on his chin. Father took K. to the doctor who diagnosed and treated K. for a MRSA staph infection.[1] K. also had eczema, insect bites, and a yeast infection on his genitals and buttocks. Afterwards, father refused to return K. to mother's care.

However, on April 20, 2014, father allowed K. to visit mother for Easter. When father returned on April 22, 2014 to pick K. up, mother refused to release the child and father called the Department of Children and Family Services (Department). A social worker went to mother's home later that day and observed the living room was "very filthy," the carpet was "black from dirt," and the bedroom and bathroom areas were "horrendous." There were several broken items scattered around the house, and white powder was scattered on the floor in places. Mother acknowledged the powder was insecticide that had been put on the floor a few days earlier.

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[1] MRSA is an acronym for methicillin-resistant staphylococcus aureus, a bacterium that causes infections in different parts of the body.

The social worker called law enforcement to the home. The officers saw "a large amount of white powder all over the floor . . . throughout the entire house." They also found "a small zip-lock baggy containing a white powdery substance resembling [c]ocaine" on the living room floor. Mother was arrested for child endangerment and K. was released to father's custody.

In May 2014, a social worker visited mother at her home. The house was still cluttered and the carpet black with dirt, one bathroom was "filthy" and not in working condition, and a second bathroom was also dirty and trash-ridden. The social worker inquired about mother's use of marijuana. Mother said she had a license to use marijuana, smoked the drug two or three times a week, and used it when K. was in her care but not in his presence. However, father told the social worker that mother had used the drug in K.'s presence and that she smoked it on a daily basis.

As for K.'s medical issues, mother said she had noticed the swollen bump on K.'s chin and knew he had eczema, but had not sought medical treatment for these conditions. K.'s doctor confirmed the child was missing most of his immunizations and said mother had missed six scheduled appointments.

Mother also told the social worker that her maternal uncle "Lonzo" said their family had Native American heritage. She did not know the name of any tribe her family was affiliated with or the full name of her uncle. She said she would "have to call [her] uncle to get more information." She gave the social worker phone numbers for maternal grandmother and paternal grandmother but these relatives did not return the social worker's calls.

The Department filed a petition on July 25, 2014 alleging that K. was endangered by (1) a "filthy, unsanitary and hazardous home environment," (2) mother's marijuana abuse, and (3) mother's medical neglect of him. At the detention hearing, the court detained K. from mother.

In August 2014, mother refused to let the social worker visit her home. Although mother said she would call the social worker later to schedule a home visit, she did not do so. Mother also did not give the Department any additional information about her

family's Native American heritage, and the Department therefore concluded that no notice was required under ICWA.

The jurisdiction/disposition hearing was held on October 28, 2014. The court sustained the petition's allegations under Welfare and Institutions Code[2] section 300, subdivision (b), removed K. from mother's custody, and ordered him placed with father. Mother was ordered to participate in a drug program, random drug testing, parenting classes, and individual counseling. Mother timely appealed.

CONTENTIONS

Mother contends there was no substantial evidence to support the juvenile court's findings that unsanitary home conditions and her substance abuse placed K. at risk of harm. Mother also challenges the court's removal of K. from her custody. Finally, mother contends the Department failed properly to investigate her Native American heritage and provide the notice required by ICWA.

DISCUSSION

1. *Substantial Evidence Supported the Jurisdictional Findings*

Mother challenges only two of the three jurisdictional findings made by the juvenile court. Therefore, her appeal will not result in a reversal of the court's order asserting jurisdiction. "As long as there is one unassailable jurisdictional finding," the juvenile court may still assert jurisdiction over a dependent child. (*In re Ashley B.* (2011) 202 Cal.App.4th 968, 979.) However, the court retains discretion to consider alternative bases for taking jurisdiction. (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1015.) Here, the two challenged jurisdictional findings provide support for the removal order, from which mother also has appealed. Therefore, we shall consider the merits of mother's challenge to the jurisdictional findings.

Mother first contends there was no substantial evidence supporting the sustained allegation under section 300, subdivision (b) that the "filthy, unsanitary and hazardous home environment" mother created placed K. at risk of harm. Subdivision (b) provides

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

for jurisdiction when "[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 or guardian to adequately supervise or protect the child . . . . The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from the risk of suffering serious physical harm or illness." (§ 300, subd. (b)(1).)

Mother argues that, at the time of the jurisdictional hearing in October 2014, there was no current risk of harm to K. because the last inspection of mother's home had taken place almost six months earlier. However, there was substantial evidence that mother had not taken sufficient measures to clean up her home since the social worker's initial inspection. When the social worker returned to inspect mother's home in May 2014, the social worker saw the house was still cluttered, the carpet was still black with dirt, and certain rooms were still filthy. Mother then refused to allow the social worker to return to the home for another inspection in August 2014 and, although mother said she would contact the social worker later on to schedule a home visit, mother never did so. The juvenile court could reasonably infer from these actions by mother that the home remained in the same unsanitary condition. Accordingly, the court did not err in finding the unsanitary conditions in mother's home presented a current risk of harm to K. at the time of the jurisdictional hearing.[3]

Mother also argues there was no substantial evidence to support the court's finding that she abused marijuana and that that abuse rendered her "incapable of

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[3] Mother also argues it was "impossible" for the Department to show a current risk at the time of the jurisdictional hearing arising from the home's unsanitary conditions because K. had not lived with mother for months. Mother misconstrues section 300's requirement that a child must be at "current risk of serious physical harm" at the time of the jurisdictional hearing. (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1025; but see *In re J.K.* (2009) 174 Cal.App.4th 1426 [distinguishing cases where the petition alleges the minor has suffered prior serious physical harm under section 300].) That a minor is detained from a parent at the outset of a case does not mean the juvenile court can no longer find a current risk of harm to that child at the jurisdiction hearing. Such an interpretation of the statute is contrary to well-established case law and would lead to "absurd consequences." (*In re J.N., supra,* 181 Cal.App.4th at p. 1024.)

providing regular care and supervision of [K.]." "[J]urisdiction based on 'the inability of the parent [] to provide regular care for the child due to the parent's . . . substance abuse' must necessarily include a finding that the parent at issue is a substance *abuser*. (§ 300, subd. (b).) . . . [W]ithout more, the mere usage of drugs by a parent is not a sufficient basis on which dependency jurisdiction can be found. . . . " (*In re Drake M.* (2012) 211 Cal.App.4th 754, 764.)

According to mother, there was no evidence she was a substance abuser because she had a medical license to use marijuana, she used it only twice a week, she did not use marijuana in K.'s presence, and there was no evidence her drug use caused harm to K. Mother has selectively cited to the evidence in support of her argument; she relies on her own statements and ignores all conflicting evidence. However, when we review for substantial evidence, "all conflicts [in the evidence and in reasonable inferences from the evidence] are to be resolved in favor of the prevailing party . . . ." (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393.)

Here, the record contained evidence that mother used marijuana on a daily basis and that she smoked the drug in K.'s presence and while he was in her care. In addition, that mother may have had a license to use marijuana is unavailing to her if that use "present[ed] a risk of harm" to K. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 452.) In fact, there was evidence mother regularly neglected K. and that her marijuana use was connected to this neglect, thereby placing him at risk of harm.

Mother failed to take K. to his medical appointments or to obtain medical treatment for his various ailments, and she exposed him to a filthy home environment where poison and cocaine were within his reach. Because K. was only two years old at the time of the jurisdiction hearing, "the absence of adequate supervision and care pose[d] an inherent risk to [his] physical health and safety." (*In re Drake M., supra,* 211 Cal.App.4th at p. 767.) As K. needed constant care and supervision, it was reasonable for the court to infer that mother's recurrent use of marijuana while caring for K. contributed to her neglect of him (including the failure to protect him from

marijuana smoke) and, therefore, qualified as substance abuse. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1218-1219.)

In cases where a child is of " 'tender years,' " " 'the finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of [physical] harm.' " (*In re Christopher R., supra,* 225 Cal.App.4th at p. 1219.) Here, that prima facie evidence was buttressed by mother's admissions that she failed to take care of K.'s medical needs and knowingly exposed him to an environment where poison was within his reach. Furthermore, mother's smoking of marijuana in K.'s presence directly placed him at risk of physical harm. (*In re Alexis E., supra,* 171 Cal.App.4th at p. 451.) On these grounds, there was substantial evidence that mother's marijuana abuse placed K. at risk of harm.[4]

2. *Substantial Evidence Supported the Removal Order*

Mother contends there was no substantial evidence supporting the court's removal order because the record did not show that K. was in mother's care when he developed a staph infection. Mother has misread the record; the undisputed evidence established that K. had a swollen bump on his chin when father picked him up from mother's care in March, that the bump was diagnosed as a symptom of a staph infection, and that mother had failed to obtain medical treatment for the infection despite having seen symptoms of the infection. Mother therefore has not met her burden of showing the court erred in ordering K. removed from her care.[5] (See *Paterno v. State of*

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[4] Mother also argues that, because there was no substantial evidence she abused marijuana, the court's order that she participate in a substance abuse program was error. As we find there was substantial evidence supporting this jurisdictional finding, mother's challenge to the case plan fails as well.

[5] Mother also briefly argues the court erred in placing K. with father under section 361.2 because father shared custody with mother. Although the court's placement of K. with father is not properly before us on appeal, we note that section 361.2 expressly allows a social worker to place a child in "[t]he home of a noncustodial parent" and defines a "noncustodial" parent as one "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." (Section 361.2, subds. (a) & (e) (emphasis added).)

California (1999) 74 Cal.App.4th 68, 84 [the appellant bears the burden of affirmatively establishing error].)

3. *The Department Complied With Its Obligations Under ICWA*

Mother contends the Department failed to comply with its obligations under ICWA because it did not adequately investigate her claim of Indian ancestry and did not comply with ICWA's notice requirements. However, any failure by the Department to comply with ICWA was harmless error.

The notice provision of ICWA provides that "[i]n any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking *the foster care placement of, or termination of parental rights to,* an Indian child shall notify the parent or Indian custodian and the Indian child's tribe . . . . " (25 U.S.C. § 1912, subd. (a), (emphasis added).) Accordingly, the ICWA "requires notice only when child welfare authorities seek permanent foster care or termination of parental rights; it does not require notice *anytime* a child of possible or actual Native American descent is involved in a dependency proceeding." (*In re Alexis H.* (2005) 132 Cal.App.4th 11, 14.) Here, K. was placed with father, not in foster care, and the Department did not seek termination of parental rights. Accordingly, ICWA did not apply.

DISPOSITION

The orders are affirmed.

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EGERTON, J.*

WE CONCUR:

EDMON, P. J.

ALDRICH, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.