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

In re J.M., a Person Coming Under the
Juvenile Court Law.

CONTRA COSTA COUNTY BUREAU
OF CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

M.A.,

Defendant and Appellant.

A132271

(Contra Costa County
Super. Ct. No. J10-01635)

M.A. (Mother) appeals from a dispositional order removing her son, J.M., from her custody under section 361, subdivision (c)(3) of the Welfare and Institutions Code.¹ Mother contends there is insufficient evidence to support the removal of J.M. from her home. We agree and shall reverse the order.

Factual and Procedural History

A juvenile dependency petition was filed on December 3, 2010, alleging that seven-year-old J.M. came within the jurisdiction of the juvenile court. The events leading to the filing of the dependency petition are as follows:

On November 9, 2010, N.H., with whom Mother had a sexual relationship, assaulted Mother in a movie theater parking lot. Mother filed a police report against N.H.

¹ All statutory references are to the Welfare and Institutions Code unless otherwise noted.

and requested that N.H. be prosecuted. Two days later, on November 11, Mother went to the hospital for leg pain related to the November 9 incident and reported that earlier in the day N.H. had entered her home, uninvited, and brutally raped her in the presence of J.M. The police were called and J.M. confirmed Mother's account with the officers. During their interviews of Mother and J.M. the officers also learned that prior to the November 9 assault, Mother and N.H. had been involved in two additional domestic violence incidents.

On November 14, Mother recanted her allegations of rape and told police that on November 12 she had consensual sex with N.H. After Mother recanted, social worker April Bolin from the Contra Costa County Bureau of Children and Family Services (CFS) interviewed both J.M. and Mother. During the interview, Mother's account of the November 9 and November 11 incidents were consistent with what she had originally reported to the police. Mother maintained that she did not want to press charges against N.H. for the November 11 incident and confirmed that the following day she had consensual sex with N.H. When asked whether J.M. had been exposed to domestic violence prior to witnessing the November 11 incident, Mother told Bolin that when J.M. was around one year old, J.M.'s father had been violent towards her in front of J.M..

After the juvenile dependency petition was filed Mother agreed to participate in mediation, as a result of which she entered a plea of no contest to the allegation that she "has been a victim of domestic violence that places the child at substantial risk for serious emotional and physical harm" and stipulated to the jurisdiction of the court.

J.M. was detained and placed in a foster home. After an altercation with his foster mother on December 16, J.M. was committed pursuant to section 5150 of the Health and Safety Code and treated for mood swings and post traumatic stress disorder. He was released six days later and placed in a "Level 14" placement.²

² A Level 14 placement is a group home for seriously emotionally disturbed children. (See Welf. & Inst. Code, § 11462.01.)

CFS prepared a disposition report in which it recommended that the court 1) adjudicate J.M. a dependent of the juvenile court; 2) find pursuant to section 361, subdivision (c)(3) that J.M. is suffering severe emotional damage and cannot remain safely in Mother's custody; 3) place the care, custody, and control of J.M. with CFS; and 4) require CFS to provide reunification services to Mother. Mother contested CFS's recommendations.

The dispositional hearing took place over four days between March 30 and May 17, 2011. CFS did not present any witnesses, relying primarily on the disposition report and a one-page letter from J.M.'s psychiatrist at the Level 14 placement. The letter stated that J.M. had been diagnosed with post-traumatic stress disorder and "appears to carry a great deal of guilt that he was unable to stop one particular traumatic event, reported to have occurred last November, to the extent that he blames himself for being unable to be an adequate 'protector,' who would have been able to stop the event from occurring and progressing."³ Mother testified on her own behalf and presented evidence that since J.M.'s detention she had taken numerous steps to address the issues that brought him to the attention of CFS. She had obtained a restraining order against N.H. She had also attended a domestic violence support group and created a domestic violence prevention plan, completed two parenting courses and created a parenting plan, completed a course in navigating the child welfare system, and consistently attended therapy appointments.

³ The letter states that J.M. "is a very sweet individual, who obviously cares about others, and would be willing to put their perceived wellbeing above his own. He is, however, tormented by extraordinary events which he has witnessed in his life, and due to his young age, been unable to prevent." The letter states that J.M. had indicated that the November incident "was not the only occasion in which he was significantly traumatized by witnessing significant interpersonal violence." The letter concludes that J.M.'s "level of PTSD was best characterized as severe a few months ago, but appears to have shown some improvement in a structured, predictable environment, where [J.M.] has been increasingly reporting feeling safe."

CFS also introduced copies of the restraining order that Mother obtained against J.M.'s father, a letter from Mother requesting a school district assessment of J.M., a referral from one of J.M.'s teachers, and a letter from the school principal directing Mother to make an appointment before appearing on the school campus.

In therapy she had addressed “her psychological issues around self-esteem, responsibility as a parent, setting limits and requirements of the men she chooses to associate with in the future.”

The court, stating that “it doesn’t require much” for the court to remove the minor from the home, and that it was not convinced the minor would not be at risk if returned to the home, adopted CFS’s recommendations, declaring J.M. a dependant of the court and removing him from Mother’s custody. Mother timely appeals.

Discussion

A. Sufficiency of the Evidence

Section 361, subdivision (c) provides in relevant part: “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 of any of the following: . . . [¶] . . . [¶] (3) The minor is suffering severe emotional damage, as indicated by extreme anxiety, depression, withdrawal, or untoward aggressive behavior toward himself or herself or others, and there are no reasonable means by which the minor's emotional health may be protected without removing the minor from the physical custody of his or her parent or guardian.”

“ ‘Parenting is a fundamental right, and accordingly, is disturbed only in extreme cases of persons acting in a fashion incompatible with parenthood. . . . [The] involuntary termination of that relationship by state action must be viewed as a drastic remedy which should be resorted to only in extreme cases of neglect or abandonment’ [citations] . . . ‘[Severing] the parental relationship [must be] the least detrimental alternative for the child.’ ” (*In re Jeannette S.* (1979) 94 Cal.App.3d 52, 59.) “Removal on any grounds not involving parental rejection, abandonment, or institutionalization requires a finding that there are no reasonable means of protecting the child without depriving the parent of custody. [Citations.] [¶] . . . [Out-of-home placement] is a last resort, to be considered only when the child would be in danger if allowed to reside with the parent.” (*In re Henry V.* (2004) 119 Cal.App.4th 522, 525.)

“The governing statute, section 361, subdivision (c), is clear and specific: Even though children may be dependents of the juvenile court, they shall not be removed from the home in which they are residing at the time of the petition unless there is clear and convincing evidence of a substantial danger to the child’s physical health, safety, protection, or physical or emotional well-being and there are “no reasonable means” by which the child can be protected without removal. [Citation.] The statute embodies “an effort to shift the emphasis of the child dependency laws to maintaining children in their natural parent’s homes where it was safe to do so.” [Citations]’ [¶] . . . This heightened burden of proof is appropriate in light of the constitutionally protected rights of parents to the care, custody and management of the children.” (*In re Henry V.*, *supra*, 119 Cal.App.4th at pp. 528-529, fn. omitted; see also *In re Angelia P.* (1981) 28 Cal.3d 908, 919 [holding that all findings in a removal proceeding “must be made on the basis of clear and convincing evidence” (italics omitted)].)

Here, the court appears to have misunderstood the standard of proof. “‘Clear and convincing’ evidence requires a finding of high probability. . . . [S]uch a test . . . requir[es] that the evidence be ‘ “so clear as to leave no substantial doubt”; “sufficiently strong to command the unhesitating assent of every reasonable mind.” ’ ” (*In re Angelia P.*, *supra*, 28 Cal.3d at p. 919.) However, in ruling the court stated, “And, of course, as the mother may [or] may not be familiar with the law, it doesn’t require much for the court to remove the child to protect that child and make that child safe.” The court also indicated that it was, “not convinced, certainly, that this child would not be at risk. [¶] . . . [¶] . . . At some point in time the court has to trust the people that are – who have that obligation and are entrusted with that responsibility. . . .” Contrary to these statements, “[t]his was . . . a hearing in which [the agency] had the express burden of proving to the court that the conclusions it had reached were correct. . . . [The agency]’s conclusions are merely the starting point, not the ending point, of the analysis. [¶] We do not deprive parents of their children’s custody merely because [the agency] asks us to. . . . We do not presume that [the agency]’s judgments about the propriety of returning children to their parents’ custody are correct, even if we have previously found them to be correct in other

cases. The final, and actual, judgment on the issue belongs to the court, not to [the agency]. And that judgment must be exercised independently, and in accordance with the proper standards of proof.” (*David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 796-797).

Upon review of the record, we find no substantial evidence, much less evidence that is clear and convincing, to establish that removing J.M. from Mother’s custody is the only reasonable way to protect J.M.’s emotional health. “[O]n appeal, the substantial evidence test is the appropriate standard of review. Thus, in assessing this assignment of error, ‘the substantial evidence test applies to determine the existence of the clear and convincing standard of proof’ (*In re Amos L.* (1981) 124 Cal.App.3d 1031, 1038.)” (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 170, superseded on another ground as stated in *In re Lucero L.* (2000) 22 Cal.4th 1227, 1239-1249.) “Of course, we are mindful of the basic requirement that we indulge all inferences in favor of the factual conclusions reached by the trial court. [Citation.] But those conclusions must be based upon substantial *evidence* which appears in the record, not upon the court’s own unarticulated assumptions.” (*David B. v. Superior Court, supra*, 123 Cal.App.4th at pp. 794-795).

The court’s finding that “there are no reasonable means by which the minor’s emotional health may be protected without removing the minor from the physical custody of his or her parent or guardian” rests on the court’s belief that Mother will again choose an abusive partner that will result in harm to J.M.’s emotional health.⁴ While Mother unquestionably has a history of abusive relationships, by the time of the disposition

⁴ In explaining its decision, the court stated: “You look at the facts of the case going back to the beginning, and why I suspect and concluded in my detention order that [J.M.] should be detained is that there was this history of a boyfriend who had an assaultive background and may or may not have assaulted mother previously. I seriously doubt and I don’t think it’s reasonable to perceive this was the only assault. It may have been the only rape where she didn’t cooperate sexually with him, but I’m sure there were other aggressive behaviors, especially this kind of person. And mother’s history with the father shows that she somehow associates herself with this kind of dangerous person. [¶] But then to invite him back in the home for whatever reason a day or two later and then lie to the first report and then recant. . . .”

hearing she had discontinued her relationships with both men who had abused her in the past, obtaining restraining orders against both. There is no evidence that Mother intends to have any further contact with either of her two prior abusers or with her husband upon his release from prison. Mother testified that she is in the process of obtaining a divorce from her husband (who was not one of the abusers) because she did not “want to be involved with anyone in that setting and it’s just not good for me or my son.”

Furthermore, Mother has taken a number of steps to address her own trauma and tendency to choose violent partners, including regular therapy sessions, joining a domestic violence support group and creating a domestic violence prevention plan. She has spoken with her landlord about her need to relocate, and the landlord has agreed to permit Mother to move into another rental property or to activate a security system in her current residence. There is no evidence to suggest that Mother will choose another partner that would be harmful to J.M.

The court in *In re Steve W.* (1990) 217 Cal.App.3d 10 addressed a very similar situation. The juvenile court there removed a child based on its concern “that [Steve’s mother] would enter a new relationship with yet another abusive type of person” based on her past relationships with abusive men. (*Id.* at p. 22.) The Court of Appeal found “[t]his reasoning . . . troubling” as it was based on “pure speculation.” (*Ibid.*) While “[t]here was evidence that [Steve’s mother]’s selection of partners was not conducive to the raising of children as evinced by her two previous relationships[, a]ll other factors . . . support[ed] a finding that she would not enter a relationship detrimental to Steve. At the time of the hearing [Steve’s mother] had begun counseling, she was living in an adequate apartment and was self-supporting. There was no evidence that she was then involved in a relationship with anyone.” (*Ibid.*) “[S]peculation about the mother’s possible future conduct is not even sufficient to support a finding of dependency much less removal of the physical custody of the child from the parent. The court’s conclusion here is supported by little more than speculation, and such does not suffice as substantial evidence to support removal.” (*Ibid.*; see also *In re Jasmine G.* (2000) 82 Cal.App.4th 282.)

Here, as in *Steve W.*, the juvenile court has impermissibly removed Mother's son from her custody because of its speculative concern that she will begin another abusive relationship. Not only does the record fail to provide support for such speculation but, like the situation in *Steve W.*, "[a]ll other factors . . . support a finding that she would not enter a relationship detrimental to [J.M.]" (*In re Steve W.*, *supra*, 217 Cal.App.3d at p. 22.)

The juvenile court also justified its decision with the assertion that Mother minimized her role in causing J.M.'s mental health issues.⁵ However, in our review of the record we find no evidence that Mother minimized her role in causing J.M.'s emotional problems or tried to place all of the blame on another. When asked if she believed her own conduct contributed to J.M.'s acting out, she responded in the affirmative. The fact that she has utilized a number of services to improve her parenting skills and address her past victimization indicates that she does recognize her role in causing her son emotional harm. CFS argues, "It should be axiomatic that if [Mother] denied the extent of [J.M.'s] emotional problems as well as how her actions had impacted him emotionally, his emotional health was at substantial risk if left in her care." While Mother may have been overly defensive concerning the extent of her son's emotional problems, the evidence is uncontradicted that she frequently and consistently addressed his emotional needs by seeking professional assistance.

A further deficiency in the record to support removal of J.M. from Mother's custody is the court's failure to consider reasonable alternatives to placing J.M. in the custody of CFS. The court in *In re Jeannette S.*, *supra*, 94 Cal.App.3d at page 60, found that "[t]he clear and convincing standard was not met [because] the juvenile court had . . . reasonable alternatives available to it short of awarding custody to the Department." As

⁵ According to the court: "And then the full nature and scope of his behavior problems that we can't necessarily, mother would have us conclude, somehow she even suggested that it's because of the time he spent with [his] father, that those behavior problems don't to some extent rest on mother's doorstep I think is unbelievable. That's where the minimalization and exaggeration first caught my attention by mother's testimony. I mean, 'It's not my fault.' "

Mother urges, there are a variety of less drastic alternatives that may be available so as to obviate removal. So far as the record here reflects, the juvenile court gave no consideration to whether its concerns for the minor's well-being if returned to Mother's home could be averted by imposing conditions on the return, such as requiring Mother to enforce the restraining order against N.H., continue with mental health treatment for J.M. or herself, or accept supervision and unannounced visits by CFS. Such alternatives must be explored before concluding that removal of a minor from the home is necessary. (*In re Henry V.*, *supra*, 119 Cal.App.4th at p. 529.)

In sum, there is insufficient evidence that J.M.'s emotional health would be endangered if he were returned to Mother's custody. The order removing him from Mother's custody therefore must be set aside.

B. Indian Child Welfare Act

Mother also contends the juvenile court did not comply with the notice provisions of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). ICWA requires 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 If the identity or location of . . . the tribe cannot be determined, such notice shall be given to the Secretary.” (25 U.S.C. § 1912; see also § 290.2, subd. (e), § 291.) Notice must be given when a dependency petition is filed (§ 290.2) and prior to all subsequent hearings (§ 291). Here, the court was on notice that J.M. may be an Indian child, but there is no indication that proper notification was given at any time prior to the entry of the disposition order. CFS has requested that we take judicial notice of a minute order entered by the juvenile court on August 15, 2011, several months after Mother filed her notice of appeal. While it is apparent there was not timely compliance with ICWA, we are in no position on the present record to determine whether steps that may have been taken belatedly constitute adequate compliance with the statute. We leave that determination to the juvenile court on remand.

Disposition

The dispositional order is reversed. The matter is remanded for further proceedings consistent with this opinion.

Pollak, J.

We concur:

McGuinness, P. J.

Jenkins, J.