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

In re GIANNA D., a Person Coming Under
the Juvenile Court Law.

SAN MATEO COUNTY HUMAN
SERVICES AGENCY,

Plaintiff and Respondent,

v.

ANTONIO D. et al.,

Defendants and Appellants

A133845

(San Mateo County
Super. Ct. No. 81672)

On November 17, 2011, at the conclusion of a combined jurisdictional and dispositional hearing, the juvenile court concluded that minor Gianna D. came within subdivision (b) of Welfare and Institutions Code section 300 (hereafter, subdivision (b)), and declared her a dependent child. Gianna's parents, Antonio D. and Kristine K., appeal from the dispositional order. Although expressed in differing language in their separate briefs, both parents argue that the conditions which *might* have warranted the initial assertion of jurisdiction had, by the time of the hearing, been so alleviated, mitigated, and superseded by subsequent events that they were wholly inadequate basis for a dependency. Although the parents' contention has some colorable merit, it is not sufficient to overturn the dependency.

BACKGROUND

Subdivision (b) provides in pertinent part: “Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court: [¶] . . . [¶] (b) 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 or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child’s parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent’s or guardian’s mental illness, developmental disability, or substance abuse. . . .”

In the petition filed by the San Mateo Human Services Agency (Agency) on August 9, 2011,¹ it was alleged that Gianna came within subdivision (b) for these reasons:

“There is substantial risk that the child, Gianna [D.], one year of age, will suffer serious physical harm or illness as a result of the failure or inability of the parents to adequately supervise and protect or willfully neglect the child or by the parents inability to provide regular care for the child due to the parents’ substance abuse in that:

“(a) The child, Gianna [D.] one year old, was left with a caregiver as the mother, Kristine [K.], who has a criminal history of drug related charges, was arrested on August 6, 2011, for possession of methamphetamine and drug related paraphernalia.

“(b) The child, Gianna [D.] one year old, was left with a caregiver as the father, Antonio [D.] was arrested on August 6, 2011, for possession of methamphetamine and drug related paraphernalia.

“(c) The family home was found to be unsafe for a small child due to the child having access to drug paraphernalia. Further, there was garbage strewn throughout the

¹ Dates mentioned are to the calendar year 2011 unless otherwise indicated.

home and caked on dried remains on the child's highchair as well as cigarette butts, foil with remnants of marijuana on it and Kerosene bottles within reach of the child."

On August 10, the day after the petition was filed, and without objection by either of the parents (Antonio was incarcerated and both he and Kristine were facing criminal charges following their arrests), Gianna was detained and her legal custody given to the Agency, which placed her with a relative.

The jurisdictional hearing was originally set for September 8, but it was continued until November 15. By the time the hearing was held, the court had received three reports from Agency social worker Laura Macrae. The court was advised that Kristine had a 2004 drunk driving conviction and several subsequent substance related charges that were dismissed after she successfully completed diversion. Both Kristine and Antonio "had child welfare history as a minor," but details could not be obtained from the "closed files." The reports further advised the court of the parents' uneven progress in attempting to deal with the causes for Gianna's entry into the dependency process.

In her initial report (dated September 6) Ms. Macrae told the court: "The child is unlikely to be returned until the parents have successfully participated in drug treatment programs and shown that they are able to live without the need to use illegal drugs. The mother has given various conflicting statements to Agency social workers on her drug use, admitting using methamphetamines on the day of the arrest and then later denying it and claiming to have smoked marijuana [¶] The mother has made some positive steps towards recovery by enrolling in Women's Recovery Association's outpatient program. In addition, she is on the waiting list for Hillside House, where she could reside with her child . . . if a place opened up for her in their inpatient program.

[¶] Unfortunately, the father has not appeared for two appointments set for Alcohol and Other Drug . . . assessments at the Sitike Counseling Center. The father is not staying at the [Daly City] address with the mother, and she informed the undersigned on 09/01/2011 that she was not sure where the father was living, and that he did not have a telephone."

The second report (dated October 17) told the court: "The mother and father . . . are young people, who have had difficulties in their families of origin. They have strong

support from extended family members and longstanding ties to the San Francisco Bay Area. Unfortunately, they have a history of drug abuse, which resulted in the removal of their daughter from their care. The mother initially was enrolled on a voluntary basis in an outpatient drug treatment program; however, she failed to complete it, and left the program on 09/27/2011, saying that she needed to focus her attention on other things. It is also very concerning to the undersigned that the mother tested positive for methamphetamines on 10/13/2011, and also revoked the Agency's consent to receive test results from Sitike Counseling Center. She stated that she is still on the waiting list to enroll in Hillside House, an Inpatient program, where she might be able to have Gianna placed with her, with the Court's approval of such a plan. This would be an excellent plan, as Mr. [D.] and she are still together as a couple and Mr. [D.] is unwilling to participate in a drug and alcohol assessment, let alone drug treatment. Mr. [D.] is stubbornly refusing to cooperate with participating in any voluntary services, even though his involvement in these services would make it much more likely that the Agency would recommend that the child be returned to his care."

In her third and final report (dated November 9) Ms. Macrae brought the court up to date with "additional information" and her final evaluation and recommendation:

"On 10/21/2011, the father showed up at a visit . . . without having tested first. The undersigned spoke to him on the phone and he stated that he 'revoked' the Agency and the Court. The undersigned informed him that the orders from Criminal Court prohibit him from visiting without having tested. He was uncooperative and the undersigned ended up instructing the grandfather [Mr. W., the step-paternal grandfather with whom Gianna had been placed] to call 911 if Mr. [D.] refused to leave. He left the home 'in a huff,' according to Mr. [W.]

"The undersigned was concerned about the effect of this kind of incident on both the child and the caregivers, who are elderly. As a result, the undersigned and her supervisor . . . determined that it would be necessary to have visits at Agency office henceforth, to protect the child and the caregivers from emotional harm. The

undersigned informed Ms. [K.] about this on 10/26/2011, and she stated that she feels that she is ‘being punished.’ . . . [¶] . . . [¶]

“On 10/27/2011, the undersigned received a telephone message from Ms. [K.], in which she stated that she had been offered a place in Hillside House, a residential treatment facility for Women’s Recovery Association, the date when she could enter the program was 11/02/2011. Ms. [K.] stated that the facility would also accept Gianna into the program at a later date

“On 11/04/2011, Mr. West informed the undersigned that Kristine . . . told their daughter Rachel that she is pregnant, and due to deliver on 01/13/2012 On 11/07/2011, the undersigned had a telephone conversation with counselor Bonnie Cardoza of the WRA program [which administered Hillside House], who stated that it would be alright for Ms. [K.] to have two children with her in the program, and that this has been done in the past. As the mother has made good on her promise to enter the WRA program, and clearly indicated that she would be thrilled to have her daughter placed there as well, the undersigned is respectfully recommending that Gianna . . . be released to her mother's care, while the mother is participating in a residential drug program.

“The undersigned is very concerned about this young couple’s ability to provide care to two young children under the age of two years old. The mother . . . has not been forthcoming with the truth with the undersigned; she chose not to disclose to the undersigned that she is over six months pregnant. However, she is actively pursuing a clean and sober lifestyle by being admitted to the residential program at the Women’s Recovery Administration; and it appears that the program has no problem admitting both children to Hillside House. This is a very positive outcome.

“Little is known [about] what the father intends to do, considering that he has chosen to pursue an idiosyncratic approach to his legal difficulties.^[2] It is hoped that he

² A probable reason for one of the continuances is that Antonio announced to the court at a hearing held on October 19 that he was relieving his appointed counsel because “I can represent and handle my own affairs . . . I can’t leave it to somebody else when

will consider a more practical approach toward the Court and Agency, and take responsibility for working towards reunifying with his family.” Ms. Macrae recommended that Gianna be declared a dependent child and that she be “returned to care, custody & control of the Mother under the supervision of Children & Family Services.”

The court began the November 15 hearing by reciting that both parents were present, and that the court had received trial briefs from Kristine and the Agency on the issue whether the conditions for asserting dependency jurisdiction still existed.³ Without objection, all of Ms. Macrae’s reports were then received in evidence. Counsel for the Agency stated it was willing to submit the matter on those reports, “however, we are making Ms. Macrae available for any cross-examination.” Thereafter, Ms. Macrae was questioned at length and the hearing continued to November 17.

After hearing continued argument on November 17, the juvenile court stated its ruling:

“So in this case, the Court is . . . finding that the child is at substantial risk, that this child will suffer serious physical harm or abuse because of the evidence of ongoing substance abuse problems by both of these parents.

“The Court is very concerned about father’s attitude toward his substance abuse problem. He appears to be in denial and this also poses a great substantial risk of harm of Gianna.

I’m dealing with my kid.” When the court inquired if he wished to represent himself, Antonio told the court that there was another option to being represented by counsel and self-representation—henceforth “sui juris is how I’m going to approach this court.” According to what he knew about this concept, Antonio believed he would be “exercising sovereign rights” and thus was “not subject to the laws of the state.” The court held an in camera hearing and determined that Antonio’s appointed counsel would continue to represent him. Near the end of the hearing, the court noted that Antonio was “out of custody now.”

³ The record on appeal also includes a trial brief by Gianna’s attorney requesting that the court sustain the allegations of the petition.

“Mother, I want to commend you on your efforts to be in a substance abuse inpatient program at this time; but I am aware that this is new and you be struggling with this addiction for the rest of your life. One day at a time, one minute at a time, one hour at a time.

“So the record should reflect, then, that based on the evidence presented and the allegations in the petition filed with the Court on August 9 of 2011 shall be sustained, b1 subdivisions a, b and c. The child comes within the description of section 300

“The Court finds that the Department has proved their case for purposes of jurisdiction by a preponderance of the evidence.”

The court accepted the Agency’s recommendation and declared Gianna a dependent child and returned her custody to Kristine.

REVIEW

“Jurisdiction is appropriate under section 300, subdivision (b) where the court finds ‘[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 willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment. . . .’ . . . [T]hree elements must exist for a jurisdictional finding under section 300, subdivision (b): ‘(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) “serious physical harm or illness” to the minor, or a “substantial risk” of such harm or illness.’ (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) ‘The third element “effectively requires a showing that at the time of the jurisdiction 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). [Citations.]” ’ [Citation.]” (*In re J.O.* (2009) 178 Cal.App.4th 139, 152.)

Antonio argues that the second and third allegations against him “are not jurisdictional, as they fail to state a cause of action” under subdivision (b). He reasons that “a parent’s arrest, without any allegation of how that arrest harmed the child—or any child—is insufficient, standing alone, to support jurisdiction,” and there is no evidence that Gianna “was not well cared for. . . or in any way harmed by her father’s drug use.”

Kristine, who terms herself “a non-offending parent,” accepts “the fact that Gianna will remain a dependent,” desires to overturn the findings against her because they “might lead to prejudice at future review hearings in the current case or in future dependency cases regarding the child or her unborn sibling.” Both Antonio and Kristine assert the absence of substantial evidence. The common thread of the parents’ arguments is that whatever they did or failed to do because of their drug use did not cause any actual harm to Gianna, constituted only a single incident, and the evidence clearly showed that the deleterious condition of the apartment had been remediated.

At the outset, two points must be made.

First, any one of the three jurisdictional findings, if validly made by the juvenile court, will support the assertion of dependency jurisdiction. (*D.M. v. Superior Court* (2009) 173 Cal.App.4th 1117, 1127; *In re Jonathan B.* (1992) 5 Cal.App.4th 873, 875.)

Second, “a jurisdictional finding good against one parent is good against both. More accurately, the minor is a dependent if the actions of either parent bring [the minors] within one of the statutory definitions of a dependent. [Citations.] This accords with the purpose of a dependency proceeding, which is to protect the child, rather than prosecute the parent.” (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 397; accord, *In re Alexis H.* (2005) 132 Cal.App.4th 11, 16; *In re Joshua G.* (2005) 129 Cal.App.4th 189, 202.) Thus, in order to quash the dependency, the parents must persuade us to overturn not only the finding against Kristine, but also the finding against Antonio.⁴

As a matter of pleading, the parents adopt an overly narrow view of the petition’s allegations. Contrary to Antonio’s view, the petition is not solely about the arrests of himself and Kristine. Kristine erroneously construes the petition as “limit[ed] . . . to one day in [her] life.” Nor does the petition hinge on the condition of the apartment on August 6. The subject of the petition is “the parents’ substance abuse” putting Gianna at risk, as evidenced by the events of August 6, when both Antonio and Kristine were arrested “for possession of methamphetamine,” Kristine having a “history of drug-related

⁴ We commend Kristine for acknowledging these principles in her opening brief.

charges.” As for the assertions in Antonio’s brief that “Merely leaving a child with a caregiver is not jurisdictional . . . unless there is also an allegation that the parent knowingly left the child with a dangerous or potentially dangerous caregiver,” and that “there was no indication that the caregiver with whom the parents left the child was deficient in any way,” these are a distortion of the petition and the record.

This was not a situation where parents decided to get high after depositing their child with someone else. The Agency was reacting to both parents consuming drugs and both being arrested, in the child’s presence, and it was those arrests that necessitated taking Gianna into care. In this situation, the “caregiver” was the Agency, not someone selected by the parents. Antonio’s argument that the petition “fail[ed] to state a cause of action” is without merit.

The parents’ claim that the juvenile court’s decision is not supported by substantial evidence is to be evaluated according to well-established principles. “The issue of sufficiency of the evidence in dependency cases is governed by the same rules that apply to all appeals. If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. [Citation.] We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or evaluate the weight of the evidence. Rather, we draw all reasonable inferences in support of the findings, view the record most favorably to the juvenile court’s order, and affirm the order even if other evidence supports a contrary conclusion. [Citation.] The appellant has the burden of showing the finding or order is not supported by substantial evidence. [Citation.]” (*In re Megan S.* (2002) 104 Cal.App.4th 247, 251; accord, *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.) “[A]n appellate court does not reassess the credibility of witnesses or reweigh the evidence. [Citation.] Conflicts in the evidence must be resolved in favor of the juvenile court’s findings, and the evidence must be viewed in the light most favorable to the judgment, accepting every reasonable inference that the court could have drawn from the evidence. [Citations.] Thus, we must uphold the juvenile court’s factual findings if there is any substantial evidence, whether controverted or not, that supports the court’s conclusion.” (*In re S.C.* (2006) 138 Cal.App.4th 396, 415.)

Those findings can be express or implied on appeal. (*In re Arturo D.* (2002) 27 Cal.4th 60, 77; *In re S.G.* (2003) 112 Cal.App.4th 1254, 1260; *In re Rebekah R.* (1994) 27 Cal.App.4th 1638, 1652.)

Solely for purposes of this appeal, it will be assumed that the third of the allegations was overtaken by events. There was evidence produced at the November hearing that, when subsequently inspected—once, three months before the hearing—conditions in the apartment had improved and no longer presented the situation as alleged. Still, the impact of this improvement was lessened by the effect that Kristine was no longer residing there, and had little prospect of an immediate return. Gianna, of course, was living elsewhere in care. With respect to Antonio, the condition of the apartment loses relevance because there is nothing in the record demonstrating that he desired sole custody of Gianna at that address.

It is true that “ ‘[w]hile evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm’ ” (*In re Levi H.* (2011) 197 Cal.App.4th 1279, 1291, quoting *In re Rocco M., supra*, 1 Cal.App.4th 814, 824), the parents take too narrow a view of dependency jurisdiction. Their focus on the absence of any “actual harm” is artificial.

“The idea that state authority can be mobilized only after the fact is untenable. Power is not disabled from dealing with latent risk. The state, having substantial interests in preventing the consequences caused by a perceived danger is not helpless to act until that danger has matured into certainty. Reasonable apprehension stands as an accepted basis for the exercise of state power. This is evident from decisions licensing state action to forestall potential or contingent harm. [Citations.]” (*In re Eric B.* (1987) 189 Cal.App.3d 996, 1003.) This pro-active, preventive approach reflects that “dependency law in general does not require a child be actually harmed before the Agency and the courts may intervene.” (*In re Leticia S.* (2001) 92 Cal.App.4th 378, 383, fn. 3.) Still, whatever the nature of the parental acts or omissions that pose actual or

potential harm, “ ‘[t]here must be some reason to believe [they] may continue in the future.’ ” (*In re Rocco M.*, *supra*, at p. 824.)

Notwithstanding whatever doubts the juvenile court may have expressed before reaching its decision,⁵ our review of the record shows that, at the time of the hearing, there was substantial evidence that the parents’ problems might recur. (*In re A.J.* (2011) 197 Cal.App.4th 1095, 1104; *In re Rocco M.*, *supra*, 1 Cal.App.4th 814, 824.)

Kristine’s difficulty in conquering substance abuse, extending from 2004 to 2011, is well-documented. There was evidence—her own statement in fact—that on August 6, she had been smoking marijuana, in the baby’s presence, prior to being arrested, this after consuming methamphetamine outside of Gianna’s presence. There was also evidence that Antonio had a practice, whenever Kristine was away, to entertain friends and “get high.” And Antonio told Ms. Macrae that he likes to “party a lot.” Antonio further admitted to the arresting officer that he has been a user of methamphetamine for a year, and that he had smoked methamphetamine while Gianna was in the house on August 6. Whatever their practices, it is undisputed that both parents were arrested, at the house with Gianna, while under the influence, and after both admitting smoking marijuana while Gianna was present.

Commendably, Kristine has acknowledged her problem and moved to deal with it. But even completion of a drug program is not conclusive proof that a parent has overcome addiction. (See *In re Anthony W.* (2001) 87 Cal.App.4th 246, 251.) By contrast, Antonio has never admitted that he either has a problem or that it requires a change in his behavior. Since the dependency was commenced, clean drug tests were required for his visits with Gianna; Antonio did not participate in all scheduled drug tests.

⁵ In her opening brief, Kristine focuses on comments made by the juvenile court at the hearing questioning whether dependency jurisdiction was sufficient, and then reproaches the court for having “apparently dismissed the allegations . . . (a) and (b)” and then “reversed itself” and sustained those allegations. It is, of course, the final ruling that counts, and it cannot be impeached or undermined by comments or questions the court may have previously expressed. (*In re Ernesto H.* (2004) 125 Cal.App.4th 298, 314-315; *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1451.)

Any progress Kristine might achieve could be negated by reuniting with Antonio, a prospect feared by Ms. Macrae because Kristine “is a co-dependent with the father” and a renewal of their relationship “as he refuses to obtain treatment for his drug addiction would cause a potential hazard to the child.” Thus, there is a considerable basis for the juvenile court concluding that “this child is at substantial risk . . . because both parents have an ongoing substance abuse problem specifically as it relates to father.” Moreover, at the time of the hearing, both parents still faced criminal charges based on their August 6 arrests.

The juvenile court may have been correct in its assessment that “This is a thin case.” But it is not, as Kristine and Antonio argue, a deficient case. Gianna’s counsel argued in her trial brief (see fn. 3, *ante*) that “current risk of harm to Gianna exists because of the parents’ unaddressed substance abuse which caused them to neglect Gianna’s basic need[] . . . to be supervised by persons not under the influence of illegal drugs which put her at substantial risk of harm.” If Antonio sees no need to change his regular use of methamphetamine, and if Kristine (and Gianna) reunite with him, there would be an obvious risk of a recurrence of the events of August 6.

As previously mentioned, the question in dependency cases is whether, at the time of the hearing, there is “ ‘some reason to believe’ ” that the acts subjecting the minor to actual or potential harm “ ‘may continue in the future.’ ” (*In re Rocco M., supra*, 1 Cal.App.4th 814, 824.) In light of the foregoing, and whether treated as a matter of pleading or one of proof, this standard was satisfied.

DISPOSITION

The dispositional order is affirmed.

Richman, J.

We concur:

Kline, P.J.

Haerle, J.