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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Plaintiff and Respondent,

v.

T.L.,

Defendant and Appellant.

A141053

(Alameda County
Super. Ct. No. OJ13021676)

INTRODUCTION

Defendant and appellant T.L. (mother) appeals from jurisdictional and dispositional findings entered by the juvenile court regarding her minor daughter, J.L. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 3, 2013, respondent Alameda County Social Services Agency (Agency) filed a juvenile dependency petition pursuant to Welfare and Institutions Code¹ section 300 alleging J.L., born in September 2013, was subject to the jurisdiction of the juvenile court due to mother's failure to protect (§ 300, subd. (b)), failure to provide support (§ 300, subd. (g)), and her prior abuse of the minor's siblings (§ 300, subd. (j)).

¹ Further statutory references are to the Welfare and Institutions Code unless otherwise specified.

According to the Agency's detention report, the minor was born at 37 weeks gestation with no evidence of drugs in her system and there are no developmental diagnoses or concerns. The minor was taken into protective custody by Oakland police on October 1, 2013, and placed in a county-licensed foster home.

Mother was initially interviewed at home by a social worker on September 25, 2013, regarding an allegation of neglect. Mother refused to disclose the identity of the minor's father. She appeared anxious, reported feeling very tired and overwhelmed, and thought she was suffering from post-partum depression. Mother told the social worker that because she was bedridden for a time during her pregnancy, she had been unable to attend counseling and drug-testing required under an existing case plan.² Mother asked to reschedule the interview.

On October 1, 2013, the Agency was informed mother was actively psychotic and assaultive towards staff at Highland Hospital and was being held for further assessment pursuant to section 5150 at John George Hospital; a social worker assisted Oakland police in taking the minor into care. The social worker received a phone call from Dr. Nikoleskaya, a psychiatrist at John George Hospital. The doctor stated she had completed mother's initial assessment and it was unclear whether mother was coming down from drugs or suffering from depression. Mother presented as unstable, having disorganized thoughts, and was unable to process information. After mother was admitted onto "Unit C" at John George, she presented as shut-down and did not engage with staff.

² Allegations in the dependency petition under section 300, subdivision (j) (Abuse of Sibling) state: "j-1 [Mother] has 5 other children, none of which [*sic*] are in her care at this time. Three of [mother's] children were removed from her care on 4/9/13 based on a substantiated general neglect allegation; [¶] j-2 In 2010 [mother] was offered IFM services but she failed to comply with her case plan, was not under the care of a psychiatrist, refusing medication and not been completing the required drug testing. . . ."

On October 3, 2013, the social worker spoke with mother's therapist, who began seeing mother for weekly sessions over a year ago. The therapist reported mother's attendance had been patchy and she had only seen mother three times recently. The therapist had previously diagnosed mother with post-traumatic stress disorder (PTSD); mother exhibits grandiose thinking, is manic at times, and not always rooted in reality. The therapist stated mother lacks insight into her mental problems and does not acknowledge any diagnosis or need for medication.

On October 7, 2013, the court ordered the minor detained and placed the minor in the Agency's care. The court ordered reunification services for mother and scheduled a hearing for October 17.

On October 16, 2013, the Agency filed a jurisdiction report requesting a continuance until after a jurisdictional and dispositional hearing on the dependency case involving minor's siblings was held. The report also noted that, as of October 7, mother was still admitted at John George Hospital where she had tested positive for methamphetamine, was diagnosed with psychotic disorder NOS, and placed on medications. The court continued the orders in effect and rescheduled the jurisdiction and disposition hearing for November 22, 2013. Subsequently, the court granted the Agency's unopposed request to continue the matter to December 19, 2013.

The Agency filed its jurisdiction and disposition report on December 16, 2013. The Agency reported the minor had been moved into the same foster home as her older siblings. During October and November of 2013, mother had three supervised visits with the minor; the visits went well, with mother holding, feeding, and changing the baby. Mother stated she was not taking medications and had not seen her therapist recently. Mother denied having been prescribed medications upon her discharge from John George Psychiatric Pavilion and denied she had been given a psychiatric diagnosis. The report related the Agency received mail returned from mother's address and her whereabouts were currently unknown, although mother was in contact with the Agency by phone. The

report concluded mother continues to struggle with ongoing substance abuse and intermittent mental health issues that she fails to recognize or accept.

At the hearing on December 19, 2013, the court conducted a *Marsden* hearing at mother's request. (*People v. Marsden* (1970) 2 Cal.3d 118.) After the court denied the mother's motion, it granted her counsel's request for a continuance and directed mother's counsel to file a joint contested hearing statement with the court. The court continued the jurisdiction and disposition hearing until January 16, 2014.

The Agency filed a memorandum on January 15, 2014, noting mother's whereabouts were uncertain but according to discharge information from John George Hospital, she was staying at a transitional shelter. Mother had been under a section 5150 hold at John George Hospital between December 6 and December 16, 2013, after she reported to transitional housing staff that auditory hallucinations were telling her to harm herself. Mother was diagnosed with psychotic disorder NOS and methamphetamine dependence. Mother was discharged with a 30-day prescription for an antipsychotic medication (Zyprexa) and was also provided with an outpatient referral to the Schman-Liles Clinic for mental health treatment.

The memorandum also related mother was again committed to John George Hospital under section 5150 (for one day only) on December 29, 2013. Mother was observed as assaultive with an elevated risk of suicide and presented with disorganized behavior. A toxicology screen performed on the date of admission showed mother tested positive for amphetamine, cocaine, and opiates. Mother was not formally admitted but was provided with a one-week supply of Lorazepam, an antianxiety psychotropic medication.

At the continued jurisdiction and disposition hearing on January 16, 2014, mother's counsel informed the court mother was not present. Counsel requested a continuance on the grounds he did not know why mother was not present; she usually attended hearings and had left telephone messages for him that week regarding the case.

Counsel for the Agency opposed a continuance for lack of good cause. Counsel for the minor also opposed a continuance because the December 19 hearing was continued at mother's request and "we are also outside the 60 days."³ The court denied the request for a continuance.

Thereafter, the court received into evidence without objection the Agency reports discussed above. The Agency requested the court make jurisdictional findings as to the minor and dispositional findings for out-of-home placement with reunification services to mother. Counsel for mother submitted on the Agency reports. The court stated, "I have read and considered the reports that are admitted into evidence. Based upon the information before me, I adopt each of the recommendations as outlined [in the Agency's January 14] memorandum." The court found the jurisdictional allegations to be true and declared the minor a dependent of the juvenile court. Also, the court found removal of the minor was supported by clear and convincing evidence and that reasonable efforts were made to prevent or eliminate the need for removal. Mother filed a timely notice of appeal on February 19, 2014.

DISCUSSION

A. *Request for Continuance*

Mother contends that the juvenile court's denial of her trial counsel's request for a continuance of the jurisdiction and disposition hearing was an abuse of discretion resulting in prejudicial and reversible error.⁴ We disagree.

³ See section 352, subdivision (b), quoted *post*, p. 5.

⁴ Preliminarily, we reject respondent's argument that mother's appeal must be dismissed for lack of a justiciable controversy because mother's trial counsel submitted issues of jurisdiction and disposition to the court based on the Agency's reports and did not request a trial. A parent "does not waive for appellate purposes his or her right to challenge the propriety of the court's orders" where the parent submits on a report, i.e., permits "the court to decide an issue on a limited and uncontested record" (*In re Richard K.* (1994) 25 Cal.App.4th 580, 589; see also *In re Tommy E.* (1992) 7 Cal.App.4th 1234, 1237 [father did not waive his right to contest jurisdictional findings on appeal in dependency proceeding by agreeing to submit jurisdictional determination on information

“Section 352 is the primary statute governing continuances in dependency cases” (*Renee S. v. Superior Court* (1999) 76 Cal.App.4th 187, 194), and states in pertinent part: “Notwithstanding any other provision of law, if a minor has been removed from the parents’ or guardians’ custody, no continuance shall be granted that would result in the dispositional hearing, held pursuant to Section 361, being completed longer than 60 days after the hearing at which the minor was ordered removed or detained, unless the court finds that there are *exceptional circumstances* requiring such a continuance. The facts supporting such a continuance shall be entered upon the minutes of the court.” (§ 352, subd. (b), italics added.) Thus, subdivision (b) of section 352 specifically restricts the juvenile court’s “discretion . . . to grant continuances” by requiring a finding of “exceptional circumstances” justifying any continuance resulting “in the disposition hearing being completed longer than 60 days after the detention hearing.” (*Renee S. v. Superior Court, supra*, 76 Cal.App.4th at p. 196; § 352, subd. (b).)

In this case, the detention hearing was held on October 7, 2013. Thus, the jurisdiction and disposition hearing held on January 16, 2014, was already beyond the 60 days contemplated under section 352, subdivision (b). Yet mother’s counsel demonstrated no exceptional circumstances warranting a further continuance. Rather, the only grounds offered by counsel were mother’s unexplained absence from the hearing and the fact she “has usually been here at all of the hearings.” But even those grounds were undermined by counsel’s admissions he called mother “last night, and I did not reach her, and I called her again this afternoon and was only able to leave a message on her telephone.” Moreover, the case was most-recently continued at mother’s request from December 19, 2013, till January 16, 2014. In sum, this record cannot support a

provided to court in social services report[.]) Indeed, the Agency’s memorandum report of January 15, 2014, states: “The mother is not in agreement with the recommendations and requests [the minor] be returned to her care.”

finding the juvenile court abused its discretion by denying mother's request for a continuance. (See *In re Karla C.* (2003) 113 Cal.App.4th 166, 180 [juvenile court's "denial of a request for continuance will not be overturned on appeal absent an abuse of discretion" and discretion is abused "when a decision is arbitrary, capricious or patently absurd and results in a manifest miscarriage of justice"].)

B. Removal From Mother's Custody

"After the juvenile court finds a child to be within its jurisdiction, the court must conduct a dispositional hearing" to "decide where the child will live while under the court's supervision." (*In re N.M.* (2011) 197 Cal.App.4th 159, 169.) "Before the court may order a child physically removed from his or her parent's custody, it must find, by clear and convincing evidence, the child would be at substantial risk of harm if returned home and there are no reasonable means by which the child can be protected without removal." (*In re T.V.* (2013) 217 Cal.App.4th 126, 135; § 361, subd. (c)(1).) The social services agency's report must discuss "the reasonable efforts made to prevent or eliminate removal" (Cal. Rules of Court, rule 5.690(a)(1)(B)(i); *In re Ashly F.* (2014) 225 Cal.App.4th 803, 809), and the court "shall state the facts on which the decision to remove the minor is based." (§ 361, subd. (d); *In re Ashly F.*, *supra*, at p. 810.)

However, "[t]he 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." (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136 [disapproved on another ground in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6].) In deciding whether removal is appropriate, the court may consider "a parent's past conduct as well as present circumstances." (*In re N.M.*, *supra*, 197 Cal.App.4th at p. 170.)

We review the court's dispositional findings for substantial evidence. (*In re T.V.*, *supra*, 217 Cal.App.4th at p. 136.) Moreover, " 'on appeal from a judgment required to be based upon clear and convincing evidence, "the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the

respondent’s evidence, however slight, and disregarding the appellant’s evidence, however strong.” [Citation.]’ ” (*In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581.)

Here, mother contends no substantial evidence supports the juvenile court’s determination that the Agency made reasonable efforts to prevent or eliminate removal, relying on *Ashly F.*, *supra*.⁵ In *Ashly F.*, the mother physically abused her children and, after the detention hearing, moved out of the family home where the husband remained. (*Id.* at pp. 806-807.) The disposition report by the Department of Children and Family Services (DCFS) perfunctorily stated there were no reasonable means by which the children could be protected without removal and that reasonable efforts were made to avoid removal. (*Id.* at p. 808.) The report did not elaborate other than to say the family was provided with reunification services. (*Ibid.*) Further, the report “did not state that DCFS had conducted the prerelease investigation report on Father as it was directed to do at the detention hearing.” (*Ibid.*) The court made no inquiry, and in its order merely parroted DCFS’s assertion it made reasonable efforts to avoid removal. (*Ibid.*)

On these facts, the appellate court in *Ashly F.* concluded “DCFS and the court committed prejudicial errors in failing to follow the procedures . . . for determining whether the children needed to be removed from their home. Ample evidence existed of ‘reasonable means’ to protect Ashly . . . in their home. Mother had expressed remorse . . . and was enrolled in a parenting class ‘to learn other ways to discipline [her] children.’ By the time of the hearing Father had already completed a parenting class. Furthermore,

⁵ Preliminarily, mother asserts the trial court failed to state the facts on which its decision to remove the minor was based as required under section 361, subdivision (d), and this failure constitutes prejudicial error. However, even assuming the trial court’s statement of reasons was inadequate, any error was harmless because, as explained *post*, the court’s determination was amply supported by substantial evidence. (See *In re J.S.* (2011) 196 Cal.App.4th 1069, 1078 [harmless error rule applies to appellate review of juvenile court rulings and reversal “ ‘only when the court, “after an examination of the entire cause, including the evidence,” is of the “opinion” that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.’ [Citation.]”].)

‘reasonable means’ of protecting the children that should at least have been considered include unannounced visits by DCFS, public health nursing services, in-home counseling services and removing Mother from the home.” (*Ashly F.*, *supra*, 225 Cal.App.4th at p. 810.)

Our circumstances are polar opposite to those in *Ashly F.* In this case, mother refused to acknowledge her mental health issues, denied receiving a psychiatric diagnosis, denied she was prescribed medications for her condition, and was not engaged in ongoing treatment. Moreover, the “reasonable means” identified by the *Ashly F.* court—unannounced visits by DCFS, public health nursing services, in-home counseling services, and removing Mother from the home—are unworkable where, as here, mother was living at an unidentified transitional shelter, was the minor’s sole caretaker, refused to identify the father, and the minor is an infant.

Furthermore, evidence before the court showed that between October and December 2013, mother was hospitalized and kept under observation three times after suffering acute psychotic episodes. During her hospitalization on December 29, 2013, mother was observed as assaultive with an elevated risk of suicide and presented with disorganized behavior. Additionally, she tested positive for amphetamine, cocaine, and opiates during her hospitalization, and then subsequently failed to appear for drug-testing scheduled for January 9, 2014. Moreover, she refused to acknowledge her mental health issues, denied receiving a psychiatric diagnosis, denied she was prescribed medications for her condition, and was not engaged in ongoing treatment. Mother’s therapist described her as “manic at times and not always rooted in reality.” The Agency’s mail was returned from mother’s last known street address and the Agency was informed she was living at a transitional shelter. Mother’s counsel tried unsuccessfully to contact mother prior to the dispositional hearing and then she failed to appear at the hearing.

Last, but not least, in regard to her six children,⁶ mother has a long history with the Agency involving issues of drug use, homelessness, and mental health problems. This evidence amply supports a finding that “[t]here is or would be a substantial danger to the physical health, safety, protection, or physical . . . well-being” of four-month-old J.L. if she had been returned to mother at the disposition stage. (§ 361, subd. (c)(1); see also *In re Diamond H.*, *supra*, 82 Cal.App.4th at p. 1136 [child need not suffer “actual[] harm[] before removal is appropriate” because the focus at disposition “is on *averting harm* to the child” (italics added)]; *In re N.M.*, *supra*, 197 Cal.App.4th at p. 170 [court may consider “a parent’s past conduct as well as present circumstances” in deciding whether removal is appropriate].)

DISPOSITION

The juvenile court’s jurisdictional and dispositional orders are affirmed.

⁶ Two of mother’s children are placed with parental relatives and the other four, including minor J.L., are placed in the same foster home during pending dependency proceedings.

Dondero, J.

We concur:

Margulies, Acting P.J.

Banke, J.