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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

In re HEATHER M. et al., a Person
Coming Under the Juvenile Court Law.

B231445

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. CK84769)

Plaintiff and Respondent,

v.

MATTHEW M.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County,
Timothy Saito, Judge. Affirmed.

Suzanne Davidson, under appointment by the Court of Appeal, for Defendant
and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County
Counsel, and Kim Nemoy, Principal Deputy County Counsel for Plaintiff and
Respondent.

Father, Matthew M., appeals from juvenile court orders declaring his four children dependents under Welfare and Institutions Code section 300, subdivision (b).¹ He challenges the sufficiency of the evidence supporting the jurisdictional findings, arguing there was no evidence that the children suffered any physical harm or that they were at substantial risk of current physical harm. Father also contends the Department of Children and Family Services (the Department) failed to give appropriate notice under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.).

We find substantial evidence to support jurisdiction under section 300, subdivision (b). ICWA does not apply because the children were never removed from the care of their mother.

FACTUAL AND PROCEDURAL SUMMARY

Father and Evelyn M. married in 1999 and divorced in 2005. They reconciled in 2006 and separated again in 2008. They share custody of four children, the subjects of this dependency proceeding: Heather (born June 2000), Edward (born May 2002), William (born April 2003), and Valerie² (born August 2007). The children live with mother, maternal grandmother and mother's sister. Father lives with various family members and friends. The children visit him every other weekend and one day out of the week.

The Department received a referral about the family in August 2010 when it was reported that mother hit William on the head with a shoe. The ensuing investigation indicated a history of domestic violence between father and mother. In an initial interview, with father in the home, mother appeared nervous and uncomfortable and indicated she was having problems with father. She agreed to an Up Front Assessment

¹ Statutory references are to the Welfare and Institutions Code.

² It appears uncontested that the Matthew M. is not the biological father of Valerie, but mother did not oppose his recognition as presumed father. Valerie's birth father played no role in her life.

(apparently the Department's term) to discuss the situation. Father admitted he and mother argued but denied domestic violence. Heather said that her parents argued a lot when they were married but the arguments were less frequent since father visited infrequently.

The Up Front Assessment assessor reported to the social worker. The assessor expressed concern about on-going domestic violence between father and mother. Mother told the assessor she had been physically, emotionally and sexually abused by father. Although the physical and sexual abuse had ended, there was continuing emotional abuse. Father had threatened mother that he would kill himself and called her constantly, demanding to know her whereabouts. Father also called other people to find out mother's whereabouts. Mother tried to keep this situation away from her children, but the assessor believed the children would still be affected. In a subsequent interview, mother told the social worker that there was only one incident of physical domestic violence, shortly after the couple married, in which father punched and kicked her. Just after Heather was born in 2000, father sexually assaulted mother on more than one occasion. Mother said her refusal to have sex with father was the usual trigger for their arguments. Mother cried as she recounted this history, holding her head in her hands.

Mother also reported two incidents in which father held a knife to his throat. In the first incident, father threatened to kill himself if she left him. In the second, he again threatened to kill himself and also threatened to kill her. Mother thought father's behavior was escalating and that things were getting worse. She realized at the time that she and the children could not share housing with father. Father was screaming loudly during one of these incidents which made mother believe the children heard what was going on although they were not in the same room. Although they were currently living apart, mother continued to fear that father would hurt her or the children. Father continued to call her constantly, questioning her whereabouts and accusing her of sleeping with other men. He also called the oldest child, Heather, and maternal grandmother, to ask where mother was and what she was doing. Father questioned Valerie and Heather about their mother. Mother felt like a prisoner and was afraid of

doing anything that might upset father because she did not know what he might do. The children got upset when they saw her upset or crying as a result of her fear of father. Twice mother called law enforcement during past incidents, although nothing was done because father had left by the time police arrived. Father threatened to cancel visitations with the children if mother did not agree to participate.

During the Up Front Assessment, mother admitted that in 2010 she had felt overwhelmed by father's harassment, had disappeared for five days, and was reported missing. She lied to police when found saying she had been kidnapped and drugged. She eventually confessed that she had lied and was ordered to complete community service for filing a false report.

Heather confirmed that father called her to ask about mother, but was unable to say how often this occurred. She had seen mother cry on several occasions after speaking with father. Mother's current boyfriend reported that father makes excuses so his visits with the children are in mother's home. He said when he is out with mother, she gets at least 30 calls from father in 20 minutes.

The social worker's assessment was that there was a high risk level, with the children's safety and well-being at risk. This was based on the children's involvement in an emotional abuse incident; Edward's developmental disability; mother's diagnosis of depression; and two or more incidents of domestic violence in the household within the year. The social worker cited father's continued threats and harassment of mother, his use of the children to monitor mother's whereabouts and his use of visits with the children to see mother.

A petition under section 300, subdivisions (a) and (b) was filed as to all four children alleging domestic violence, father's threats to kill himself and harassment of mother. The children were detained and released to mother. A temporary restraining order was issued against father which was to remain in effect until November 2013. Services and visitation were ordered.

Father filled out a form parental notification of Indian status, indicating that he might have Cherokee ancestry through his paternal great-grandmother. At the initial

detention hearing, the court ordered the Department to give the appropriate ICWA notice. There is no indication in the record that this was done. The Jurisdiction/Disposition report of December 13, 2010 noted that ICWA did not apply.

The juvenile court dismissed counts A-1 and B-2 of the petition and sustained count B-1 as amended to conform to proof, finding mother and father had a history of violent physical altercations while the children were in the home, that father had struck mother with his fists and had kicked her, and that father repeatedly forced mother to engage in nonconsensual sexual intercourse. The court found true the allegation that father threatened to kill himself and mother in the home while the children were in close proximity, and that father continued to call and harass mother. Mother failed to take action to protect the children from father's conduct. It found that "[s]uch domestic violence on the part of the father against the mother and in the children's presence and the mother's failure to take action to protect the children endangers the children's physical and emotional health and safety and places the children at risk of harm."

The court relied on *In re Mariah T.* (2008) 159 Cal.App.4th 428, *In re E.B.* (2010) 184 Cal.App.4th 568 and *In re J.K.* (2009) 174 Cal.App.4th 1426. It cited the pattern of sexual assault between mother and father which had lasted for years before their separation and at times when the children were present in the same household. It also relied on mother's statement that father wanted to have sex in front of the children, but that he pulled mother into another room. The court noted that in one sexual assault on mother, father had used a large "Indian knife" while screaming loudly and that the children were home at the time. It found ample evidence that father was trying to maintain a relationship with mother, citing evidence of his multiple telephone calls and insistence that mother be present when he visited before the restraining order issued. The court found: "His apparent obsession with the mother places children [at] present and future risk as well, as the parents have not taken action to eliminate the risk."

Father filed a timely appeal from the jurisdictional order.

DISCUSSION

I

Father challenges the sufficiency of evidence to support the court's jurisdictional finding that the children come within section 300, subdivision (b). The Department must establish by a preponderance of the evidence that the allegations under section 300 are true. (*In re S.O.* (2002) 103 Cal.App.4th 453, 461.) We apply the substantial evidence test, viewing the evidence in the light most favorable to the juvenile court's order. (*Ibid*; *In re Y.G.* (2009) 175 Cal.App.4th 109, 112.) "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 serious physical harm in the future (e.g. evidence showing a substantial risk that past physical harm will reoccur)." [Citations.]" (*In re B.T.* (2011) 193 Cal.App.4th 685, 692.)³

Father argues there is no evidence that any of the children suffered physical harm as a result of his conduct, and that the history of domestic violence and suicide threats are not enough to support an inference of a substantial risk of future serious physical harm or illness. He points out that the physical and sexual incidents with mother had ended in 2008 and that the only recent evidence was of arguments with mother and harassing telephone calls.

³ Some courts disagree whether dependency jurisdiction under section 300, subdivision (b) may be based on a single prior incident resulting in physical harm without evidence of current risk. (Compare *In re J.N.* (2010) 181 Cal.App.4th 1010, 1023 [dependency court cannot exercise jurisdiction absent evidence of current risk] with *In re J.K.*, *supra*, 174 Cal.App.4th 1426 [evidence of prior serious physical harm sufficient alone to support jurisdiction under section 300, subdivision (b) without evidence of current or future risk].) We observe that past conduct is relevant as it bears on present or future risk of harm. In any case, we need not determine which line of authority to apply since in this case we have no evidence of prior physical harm but do have evidence of a continuing pattern of volatile behavior by father consistent with his prior acts of domestic violence. This evidence supports jurisdiction under section 300, subdivision (b) because it demonstrates a substantial risk of physical harm to the children.

While the incidents of sexual assault occurred during the marriage and the physical violence occurred in 2004, five to six years before the jurisdictional hearing, there was substantial evidence that father remained obsessed with mother and extremely volatile. Mother testified that when the dependency proceeding was initiated, she and father were constantly engaged in verbal fights, and that he was present in her home nearly every day. These verbal fights continued “almost all the time” from their final separation in February 2008 to the issuance of a restraining order in November 2010. Father would get very upset if he was present when mother talked with someone else on the telephone. As a result when he was in her home, mother hid or turned off her cell phone so he did not get upset and angry. Mother said that before the restraining order was issued, father would snap for no reason and would call her names every time they fought, at least once a week since 2008. He called her names in front of the children. The fights were about what she was doing and whether she was in a relationship with someone else. Father would sometimes drink four or five beers while at mother’s house.

Many times father made multiple calls to mother in a single day and, on one occasion, more than 30. Although she changed her cell number three times, father always obtained the new number. Eventually she got rid of her cell phone because she could not deal with father’s constant calls. Heather told mother she was tired of father asking her questions about who she was seeing, who was visiting the house, and whether any other man was around. In 2008 father had threatened to kill the person mother was with and then put a bullet in mother’s head. He also threatened that he would kill himself in front of her.

In February 2010 mother disappeared for five days, leaving the children in the care of her mother. Mother testified that she wanted to end her life because of father’s harassment. Father had found out mother was out on a date with her current boyfriend, started calling her, and would not stop. Father filed a missing person report. Mother returned after five days and told police officers she had been kidnapped and drugged. She served community service for filing a false report. Mother had had no contact with father since the restraining order issued.

This evidence distinguishes this case from the cases on which father relies. In *In re James R.* (2009) 176 Cal.App.4th 129, the mother had a history of mental illness, but did not pose a risk to her children. The parents communicated well with each other, were very attentive to their children's needs, had religious support and help from extended family. The family came to the attention of the social services agency when mother had a negative reaction to taking ibuprofen and drinking beer. There was no evidence of actual harm to the children from the conduct of either parent and no showing that the parents' conduct created a substantial risk of serious harm. The court concluded that any causal link between mother's mental state and future harm to the minors was speculative. (*Id.* at pp. 136–137.) Significantly, there was no history of domestic violence between the parents. Uncontradicted evidence established father would protect the children. (*Ibid.*) The court reversed jurisdictional findings under section 300, subdivision (b) for lack of evidence. (*Id.* at p. 137.)

In *In re Janet T.* (2001) 93 Cal.App.4th 377, mother was homeless and was living in various shelters with her minor children. Mother had a history of mental illness and multiple referrals to children's services agencies in San Diego and Los Angeles counties. Mother was uncooperative, made no plan for the care of the children, and had failed to arrange for their medical care and attendance at school. (*Id.* at pp. 380–384.) Mother brought a facial challenge to the allegations of the petition under section 300, subdivision (b), a procedure akin to a demurrer. (*Id.* at p. 386.) The court concluded that neither the petition nor the Department's reports alleged necessary facts to support the conclusion that the children were currently at substantial risk of serious physical injury or illness because of mother's mental or emotional problems. (*Id.* at p. 390.) The court relied on *In re Alysha S.* (1996) 51 Cal.App.4th 393, in which the court found an allegation under section 300, subdivision (b) inadequate because it alleged only a single incident of domestic violence between the parents but no allegation that the violence was ongoing. (*Id.* at p. 398.)

Father also cites *In re Rocco M.* (1991) 1 Cal.App.4th 814 which discussed the showing necessary to establish a substantial risk of future serious physical harm or illness

as of the time of the hearing.⁴ (*Id.* at pp. 823–824.) The case did not involve an established pattern of domestic violence between the parents. Instead it concerned mother’s neglect of her child because of drug and alcohol addictions.

In re Heather A. (1996) 52 Cal.App.4th 183 is more on point. In that case, there was a pattern of numerous incidents of domestic violence between the father and stepmother. At times the children were present, at others they were in another part of the house. The father had threatened to kill stepmother and himself. (*Id.* at p. 188.) The father challenged the sufficiency of the evidence to support jurisdiction under section 300, subdivision (b). The Court of Appeal reasoned that the continuing violence between father and stepmother put the children in a position of physical danger because they could wander into the room where the violence was occurring and accidentally be injured. (*Id.* at p. 194.) It concluded that “domestic violence in the same household where children are living *is* neglect; it is a failure to protect [the children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it. Such neglect *causes* the risk.” (*Ibid.*)

Similarly, in *In re E.B.* (2010) 184 Cal.App.4th 568, the mother admitted that father abused her emotionally and physically, within the hearing of the children. Despite such abuse, mother returned to father repeatedly. Father had threatened to kill mother or the children. The court concluded that this conduct endangered the children and supported jurisdiction under section 300, subdivision (b) and that the father’s past violent behavior toward mother was an ongoing concern, citing studies stating that violence will reoccur in 63 percent of relationships where it has occurred once. (*Id.* at p. 576.)

We are satisfied that the evidence in this case supports jurisdiction under section 300, subdivision (b). Although the actual incidents of sexual and physical violence against mother had occurred in the past, father continued to behave explosively in the household when the children were present. He argued with mother constantly and

⁴ The *Rocco M.* court addressed a version of section 300, subdivision (b) that has been superseded. (*In re J.K., supra*, 174 Cal.App.4th at p. 1436.)

obsessively harassed her until a restraining order issued. Despite this pattern, mother continued to allow father to be a constant presence in the home. Under these circumstances, the risk of current or future harm to the children from domestic violence is not impermissibly speculative.

II

Father claims the Department failed to provide the notice required under ICWA after he indicated he might have Indian heritage. ICWA's notice requirements do not apply because it requires notice only when the child welfare authorities seek permanent foster care or termination of parental rights. (*In re Alexis H.* (2005) 132 Cal.App.4th 11, 14.) Here the Department never sought, and the juvenile court did not order, the removal of the children from mother.

DISPOSITION

The jurisdictional order is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.