Filed 10/25/12 In re A.M. CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re A.M. et al., Persons Coming Under the Juvenile Court Law.	B237622 (Los Angeles County Super. Ct. No. CK64476)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. GUILLERMO P., Defendant and Appellant.	ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on September 28, 2012, be modified as follows:

On page 9, the first sentence of the disposition shall read:

The October 14, 2011 jurisdictional findings with respect to count b-3, the count alleging appellant Guillermo P.'s prior substance abuse placed the children at risk of

harm, and the November 16, 2011 disposition order requiring appellant Guillermo P. to attend individual counseling are reversed.

This modification changes the judgment.

The petition for rehearing is denied.

MALLANO, P. J. ROTHSCHILD, J JOHNSON, J.

Filed 9/28/12 In re A.M. CA2/1

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LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. GUILLERMO P., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Rudolph A. Diaz, Judge. Dismissed in part and reversed in part.

Joseph D. Mackenzie, under appointment by the Court of Appeal, for Defendant and Appellant Guillermo P.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

Michael A. Salazar, under appointment by the Court of Appeal, for Minors.

A father appeals from jurisdictional and dispositional orders of the juvenile court adjudging his minor children dependents pursuant to Welfare and Institutions Code section 300, subdivision (b) (failure to protect or supervise).[1] The case arose after the children's mother was arrested for child endangerment. Father, who was not involved in the conduct which gave rise to this action, contends there is insufficient evidence to support the jurisdictional findings or the dispositional orders which gave him only monitored visitation, and required him to submit to drug testing and to participate in individual counseling. We agree that the court erred in asserting jurisdiction over father, and reverse the dispositional order requiring him to participate in individual counseling. We also grant the motion of respondent Department of Children and Family Services (DCFS) to dismiss the remainder of the appeal as moot.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Guillermo P. (father) and Krystal M. (mother, who is not a party to this appeal) are the parents of minors and A.M. (born April 2005) and Isaiah P. (born April 2006). The family came most recently to the attention of DCFS in early February 2011, after mother was involved in a car accident. DCFS filed a petition, pursuant to section 300, subdivisions (b) and (g), alleging that mother had endangered the children by driving her car, intoxicated, in the wrong direction on the freeway with both children (who were not harmed) in the car. The petition also alleged that mother had a history of drug abuse, and that father had a history of substance abuse and endangered the children by failing to provide for them due to the fact that he was incarcerated. Father was in prison at the time of the freeway incident. The children were placed in the care of their paternal grandparents.

An investigation revealed that the children had been the subjects of a dependency action in 2006. The children were removed from their parents' care based on sustained

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

allegations that Isaiah and mother tested positive for methamphetamine at Isaiah's birth, and a sustained allegation that father had a history of illicit drug and alcohol use. At that time the parents agreed to enter into a voluntary family maintenance contract and to participate in counseling and parenting programs. Father was also ordered to complete six consecutive random drug screens, and to attend Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) meetings. The 2006 case was terminated successfully with a family law order that granted mother legal and physical custody of the children and granted father unmonitored visitation upon his anticipated release from prison in June 2011. Further investigation of the 2006 dependency case indicated father had complied with the court-ordered program, i.e., successfully completed at least six random drug tests, completed the parenting program and was participating in individual counseling. However, his arrest and conviction for robbery, and his three-year prison sentence interrupted father's ability to fully complete his 2006 case plan.

Due to complications with transportation orders, waiver forms submitted by prison officials, and issues with his court-appointed representation, the jurisdictional hearing in the instant action as to father was continued several times. It took place in mid-October 2011.

The juvenile court rejected father's assertion that there were no new facts to support the allegations as to him, and denied his request to dismiss the petition as to him. The court sustained an amended section 300, subdivision (b) allegation as to father stating he had an "unresolved" history of substance abuse which rendered him incapable of providing regular care and supervision for the children, who had been declared juvenile court dependents in the past as a result of father's substance abuse, and that father's substance abuse endangered the children's physical and emotional health and safety and placed them at risk of physical and emotional harm. The remaining allegations as to father were dismissed.

Father was released from prison on October 30, 2011. He moved in with mother, and told DCFS he was going to support her so she could finish her court-ordered

programs and they could reunify with the children. He submitted voluntarily to a random drug screen which was negative.

Father also began to visit his children. The paternal grandmother confirmed that the parents visited daily. They did homework with the children, and played and talked with them. The grandmother had no concerns with the visits.

In connection with the November 2011 dispositional hearing, DCFS recommended that both parents receive reunification services for six months. DCFS confirmed that father had not been ordered into a drug treatment program in the 2006 case, but said he might benefit from counseling to assist his reintegration back into society, and to address child development and separation issues, and the earlier lifestyle choices that caused his incarceration. DCFS also requested that the court order father to participate in six more random drug screens. The children's counsel agreed with DCFS's recommendations and suggested the court order monitored visits until father was able to "prove himself."

At the disposition hearing, father argued there was no new evidence to justify ordering him to participate in individual counseling or to undergo further drug testing. He also requested that his visitation remain unmonitored, since the 2006 case had been closed with an order granting unmonitored visitation upon his release from prison.

The juvenile court found there was a substantial danger to the children if they were returned to their parents and ordered them suitably placed with the paternal grandparents. The court ordered father to submit to another six random drug tests and, if he tested positive, to complete a full substance abuse treatment program. Father also was ordered to participate in individual counseling. The court noted that father had to prove himself to be a safe caretaker for the children. It ordered monitored visitation and gave DCFS discretion to liberalize the visits.

Father appeals from the jurisdictional and dispositional findings and orders.

DISCUSSION

1. DCFS's request for judicial notice and motion to dismiss

DCFS requests that we take judicial notice of a postjudgment minute order dated June 1, 2012. According to that minute order, the juvenile court ordered the children returned to their parents' care and lifted the requirement that father submit to drug tests.

Ordinarily, an appellate court may not consider postjudgment evidence that was never before the juvenile court or rely on such evidence outside the record to reverse the judgment. (*In re Zeth S*. (2003) 31 Cal.4th 396, 399–400 (*Zeth S*.).) We will grant the request for judicial notice. (Evid. Code, §§ 452, subds. (c), (d), 459; *In re Sabrina H*. (2007) 149 Cal.App.4th 1403, 1417.) Our taking judicial notice of the June 1, 2012 minute order does not contravene *Zeth S*. The evidence is not offered to obtain a reversal (*In re Josiah Z*. (2005) 36 Cal.4th 664, 676), and taking judicial notice of the order will not overturn a judgment terminating parental rights, or impair "the juvenile law's purpose of 'expediting the proceedings and promoting the finality of the juvenile court's orders and judgment.'" (*In re Salvador M.* (2005) 133 Cal.App.4th 1415, 1421, quoting *Zeth S*., at p. 413.) The minute order relates solely to the issue of whether a portion of the appeal should be dismissed as moot, not to the merits of the appeal. (*In re Josiah Z.*, at p. 676, citing *Zeth S*., at p. 413.)

Based on the June 1, 2012 minute order, DCFS requests that father's appeal with respect to the dispositional orders requiring him to drug test and ordering that his visits be monitored be dismissed as moot. We conclude, and the parties concur, that as to the issues of father's drug testing and visitation, the contentions on appeal are moot, as there is no effective relief that can be given. (See *In re Jessica K*. (2000) 79 Cal.App.4th 1313, 1315–1316.) The motion for partial dismissal is granted.

2. There is no substantial evidence to support the jurisdictional allegations

Father contends that the jurisdictional findings based on the sustained allegation that he had an unresolved history of substance abuse are wholly unsupported by the record, particularly in light of the fact that the children were pulled back into the dependency system in 2011 solely because mother was arrested after driving with them in

the car while under the influence of alcohol, and it was her reckless behavior that placed the children at risk of harm. He maintains that, notwithstanding his history of substance abuse in 2006, the juvenile court's October 2011 order finding jurisdiction under section 300, subdivision (b) as to him should be reversed because there is no substantial evidence to support it. We agree.

DCFS maintains that we need not address jurisdictional argument because father does not challenge the jurisdictional allegations as to mother, and the juvenile court remains entitled to assert jurisdiction over the children based on those unchallenged allegations. Thus, it does not matter whether there is insufficient evidence to support the jurisdictional findings against father because a jurisdictional finding against one parent is """good against both."""" (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1492; see also *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.) We are not persuaded that we should refrain from addressing the merits of father's appeal.

"A jurisdictional finding under section 300, subdivision (b) requires: '"(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 such harm or illness." [Citation.]' [Citations.] The third element 'effectively requires a showing that at the time of the jurisdictional 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).' [Citation.]" (*In re James R.* (2009) 176 Cal.App.4th 129, 135.)

Here, there is no evidence of serious physical harm or illness or a substantial risk of such harm to the children as a result of any potential substance abuse by father to bring them within the provisions of section 300, subdivision (b). Although the petition alleges that father's "unresolved history of substance abuse" rendered him presently unable to care for or supervise the children, the court made no such finding, and no nexus was shown between father's history of substance abuse and the parental conduct which gave rise to this dependency action. Rather, it appears that it is only father's failure or inability to complete his case plan in the 2006 action due to his incarceration that gave rise to any allegations against him here at all. But the fact of father's incarceration alone is

insufficient to justify the assertion of jurisdiction. "There is no 'Go to jail, lose your child' rule in California." (*In re S.D.* (2002) 99 Cal.App.4th 1068, 1077; *In re Brittany S.* (1993) 17 Cal.App.4th 1399, 1402.) There must be some causal link between a parent's incarceration and the risk of serious harm to a child. (See *In re Alexis H.* (2005) 132 Cal.App.4th 11, 13, 16 [noting, in dicta, that imprisonment alone may justify exercise of jurisdiction under § 300, subd. (b) if it renders parent unable to protect, care for or arrange supervision for his or her child].) No such nexus was shown here, where the children have been well cared for by their paternal grandparents.

The evidentiary record shows that, but for his incarceration, father was on track to complete his case plan in the 2006 action and that the juvenile court in that action was sufficiently confident that father had made enough progress that it terminated the dependency action with a family law order and gave father unmonitored visitation upon his released from prison. In an interview with DCFS while he was still incarcerated, father said he had been unable to participate in many programs because they were not available in prison, and NA/AA groups met only sporadically. But, he intended to participate in NA/AA once he was released.

"The basic question under section 300 is whether the circumstances at the time of the hearing subject the minor to the defined risk of harm." (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1134.) Here, the court's assertion of jurisdiction as to father relied solely on DCFS reports and the file from the 2006 dependency action. DCFS provided no new evidence that father had an ongoing substance abuse problem or that his prior history of substance abuse remained unresolved. Father maintains that this evidence was insufficient to support the count in the petition as to him, because it was "clear there was no evidence [he] had used drugs since at least 2006." Counsel for father and the children also point out that father's purportedly "unresolved history of substance abuse" had been considered—and presumably deemed a nonissue—by the juvenile court when it terminated the first dependency action in 2009, and issued a family law order giving father unmonitored visits upon his release from prison.

The record contains no evidence that father continued to use drugs. He completed the drug-related components of his court ordered case plan in the 2006 action: he submitted to random drug testing between March and July 2007, attended AA/NA meetings and was relieved of the testing requirement in July 2007. Father's ability fully to complete his case plan was interrupted by his prison term of several years. After he was released father submitted voluntarily to a drug test, which was negative. Once released, father also began visiting the children, who lived with their grandmother. Both the grandmother and DCFS social worker interacted with father during his visits, and neither expressed any concern that father was using drugs.

On this record, there is simply no evidence to support a finding that father's prior substance abuse placed the children at current risk of imminent harm. The mere language that father had a history of substance abuse, without more, is insufficient to warrant dependency jurisdiction. Previous acts of neglect, standing alone, do not establish a substantial risk of harm. There must be some reason beyond mere speculation to believe they will reoccur. (*In re J.N*. (2010) 181 Cal.App.4th 1010, 1025.) DCFS made an insufficient evidentiary showing that father's conduct which gave rise to the previous dependency case was relevant to the current action which was precipitated by mother's conduct and which occurred at a time when father was neither present nor able to protect the children. (See *In re Nicholas B.*, *supra*, 88 Cal.App.4th at p. 1134; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 824 [court cannot exercise jurisdiction if the evidence does not demonstrate any current risk].)[2]

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[2] Our conclusion that the court erred in asserting jurisdiction over father also requires reversal of the dispositional order as to father.

DISPOSITION

The October 14, 2011 jurisdictional findings and November 16, 2011 dispositional order requiring appellant Guillermo P. to attend individual counseling are reversed. Respondent's request for judicial notice and motion for partial dismissal of appeal are granted. The November 16, 2011 dispositional orders requiring appellant Guillermo P. to submit to drug testing and ordering monitored visitation are dismissed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.