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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re BROOKE H., A Person Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

MICHELLE W.,

Defendant and Appellant.

B240457

(Los Angeles County
Super. Ct. No. CK91368)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Donna Levin, Juvenile Court Referee. (Pursuant to Cal. Const., art. VI, § 21.)
Affirmed.

Thomas S. Szakall, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, John F. Krattli, County Counsel,
James M. Owens, Assistant County Counsel, and Melinda S. White-Svec, Deputy
County Counsel, for Plaintiff and Respondent.

Michelle W. (mother) appeals from (1) a judgment declaring her daughter, Brooke H., to be a dependent of the court pursuant to Welfare and Institutions Code¹ section 300, subdivision (b);² and (2) a dispositional order removing Brooke from mother's custody pursuant to section 361, subdivision (c)(1).³ She contends that the evidence was insufficient to support a finding of jurisdiction or to support the trial court's removal order. We disagree and will affirm both.

FACTUAL AND PROCEDURAL BACKGROUND⁴

Mother is married to Christopher Wilkins (stepfather). Prior to the day of the incident that lead to the Department of Children and Family Services' (DCFS) involvement, Brooke, who was born in 1996, lived with mother and stepfather. Mother and stepfather had been together for approximately eight years and Brooke reported

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

² Section 300, subdivision (b) states, in relevant 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: [¶] . . . 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"

³ Section 361, subdivision (c)(1) states, 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 [¶] (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody. . . ."

⁴ The factual and procedural background is drawn from the record, which includes a one-volume Clerk's Transcript and a one-volume Reporter's Transcript.

knowing stepfather since she was six years old. Brooke's biological father is Wayne⁵ H. (father).

DCFS filed a petition on January 10, 2012. The petition⁶ alleged, pursuant to section 300, subdivision (b), that on November 28, 2011, stepfather "sexually abused [Brooke] by fondling and digitally penetrating the child's vagina, inflicting abrasions in the child's vagina. The child's mother failed to protect the child in that the mother continues to maintain a relationship with [stepfather] and allows [him] to frequent the child's home. Such sexual abuse of the child by [stepfather] and the mother's failure to protect the child endangers the child's physical health and safety and creates a detrimental home environment and places the child at risk of physical harm, damage, danger, sexual abuse and failure to protect [sic]."

In its Detention Report, DCFS reported that it had received a referral on Tuesday, November 29, 2011 alleging that Brooke had been sexually abused by stepfather. The report described the incident as follows. "Brooke was asleep, heard the floor [creak], looked around her room, and looked at the mirrors on her closet. [Stepfather] was kneeling beside her bed on the side with a white t-shirt on. She looked at the clock which read, 1:07 AM. Brooke stated she was confused, and did not understand why he would be next to her bed. She stated he touched her leg over the

⁵ In at least one trial court filing, father's name appeared in the record as "DeWayne." His name is Wayne, however.

⁶ The petition also included an allegation pursuant to section 300, subdivision (d). However, DCFS later requested that that allegation be dismissed because mother had no part in the sexual abuse.

covers, at first, and then pulled his hand away, pausing for a minute. Brooke stated she tucked the covers around her so he could not get into the bed. [Stepfather] tried to pull the covers off of her, so she moved toward the wall. Brooke stated thoughts of screaming for her mother went through her head, but she couldn't make any noise. [Stepfather] put his hand under the covers first touching her leg. Brooke kept moving away. [Stepfather] touched her thigh and vagina, then went into her shorts and opened her vagina, inserting his fingers in and out of her vagina. He continued to do this motion for several seconds. Brooke could not see his other hand. [Stepfather] did not say anything during this incident. Brooke stated she was staring at the clock waiting for [him] to stop. She stated he walked out of the room at 1:36 AM, and went into the bathroom for a few minutes before going to his room."

The next day, Brooke waited until she was alone with mother to tell her about what happened. Afterwards, while Brooke went to her friend's house, mother confronted stepfather but he denied the allegations. Mother told him to leave. Mother called father who came over and then both parents called the police. Brooke was taken to a clinic where she was questioned and examined. The forensic nurse performing the exam found a tear on Brooke's vagina consistent with her story. Brooke denied being sexually active. Law enforcement, the forensic nurse and the DCFS social worker involved in the case all found Brooke's story credible.

Stepfather did not cooperate with law enforcement's investigation of the incident. Stepfather took a private polygraph, which, according to his private attorney Cohen, cleared his name. Cohen also stated that stepfather was ready to return home as

a result. DCFS informed stepfather that he was not to return home since Brooke continued to reside there and DCFS found that the allegations against him were substantiated.

Despite asking stepfather to leave the home, mother continued to see him and invite him over for visits when Brooke was not home. Brooke and mother would text each other so that stepfather could leave before Brooke came home. Brooke stated she feels betrayed that mother continues to see stepfather, but she also feels guilty because mother relies on stepfather for financial support.

As a result of the incident, a separate family law hearing was held with respect to the safety of stepfather's biological children.⁷ Mother attended the hearing with stepfather. Stepfather was allowed monitored visits with his children. When questioned why she would appear at the hearing in support of the man who molested her daughter, mother replied, "I'm put in a bad position as a wife and mother. I need to support both of them." She explained that she did not believe that stepfather was a risk to his own children. Stepfather stayed with mother over the weekend of January 6, 2012 to take care of her after having a surgery on her neck. Brooke was required to stay at a friend's house until that Saturday morning when father could pick her up for their regular weekend visit.

DCFS interviewed mother again during an unannounced visit on December 21, 2011 and noted that stepfather was not in the home. Mother was very upset and stated

⁷ Neither of stepfather's biological children is a party to the case below or to this appeal.

that “everything is very confusing right now.” She stated that she understood that stepfather was not allowed home right now but does not understand why. After DCFS explained the evidence substantiating Brooke’s accusations, mother stated that she was in a difficult position because stepfather was all she had. Mother agreed to protect Brooke but stated she would continue to see stepfather.

At the detention hearing on January 10, 2012, the trial court found father to be Brooke’s presumed father. It also determined that a prima facie case for detention was made and detained Brooke with father. Visitation with mother was granted and a no-contact order with respect to stepfather was issued.

On March 27, 2012, the trial court sustained count b-1 as to the mother and declared Brooke to be a dependent of the court. It also ordered Brooke placed with father who was non-offending. The trial court then continued the matter pending receipt of family law orders granting joint legal custody to the parents, sole physical custody to father, primary residence with father and unmonitored overnight visits with mother. The trial court terminated dependency jurisdiction and the custody order and judgment were filed on April 3, 2012. Mother filed her notice of appeal on April 5, 2012.

CONTENTIONS

Mother first contends that the evidence did not support the trial court’s finding of jurisdiction pursuant to section 300, subdivision (b) because DCFS failed to show that Brooke suffered or was at risk of suffering severe physical harm or illness as a result of mother’s failure to protect her from stepfather’s sexual abuse. Mother next contends that the trial court’s removal order was not supported by the evidence because

reasonable means were available to protect Brooke without removal from mother's custody. As a result, mother asserts that the judgment should be reversed and the petition dismissed. In the alternative, should we determine that the trial court's jurisdictional findings were supported by substantial evidence and affirm the judgment, she asserts that the dispositional order should be reversed and the case remanded with instructions to place Brooke with mother.

DISCUSSION

1. *Standard of Review*

“In a challenge to the sufficiency of the evidence to support a jurisdictional finding, the issue is whether there is evidence, contradicted or uncontradicted, to support the finding. In making that determination, the reviewing court reviews the record in the light most favorable to the challenged order, resolving conflicts in the evidence in favor of that order, and giving the evidence reasonable inferences. Weighing evidence, assessing credibility, and resolving conflicts in evidence and in the inferences to be drawn from evidence are the domain of the trial court, not the reviewing court. Evidence from a single witness, even a party, can be sufficient to support the trial court's findings. [Citations.]” (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 450-451.)

“ ‘[I]n dependency proceedings the burden of proof is substantially greater at the dispositional phase than it is at the jurisdictional phase if the minor is to be removed from his or her home. [Citation.] . . . [¶] 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. [Citations.] [Citations.] [¶] ‘Of course, on 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” [Citation.]’ [Citation.]” (*In re Henry V.* (2004) 119 Cal.App.4th 522, 528-529.)

2. *Substantial Evidence Supports the Trial Court’s Jurisdictional Findings*

Section 300, subdivision (b), states that the following will cause a child to fall under the jurisdiction of the court and be adjudged a dependent of such court: “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” Neither of the parties disputes that Brooke was sexually abused by stepfather. Instead, the question to be addressed is whether the evidence supports the inference that Brooke remained at risk of future sexual abuse by stepfather due to mother’s failure to protect the child. We find that it does.

Mother’s statements reflected a deeper concern over her own situation with her husband rather than over her daughter’s safety. For example, mother stated that she would keep stepfather away from her home *until Brooke felt comfortable around him*. Mother also stated that she needed to continue her relationship with stepfather for his financial support because she “can’t just lose \$4,000” despite father’s offer to financially assist mother in relocating. And mother appeared at the family law hearing in support of stepfather’s visitation with his own children after she became aware that

he had molested her daughter. At the team decision-making meeting on January 4, 2012 when mother was presented with the evidence against stepfather, she walked out of the meeting as DCFS explained that a petition would be filed to ensure Brooke's protection.

Even in the face of mounting evidence, mother appeared to doubt her daughter's statements. Brooke stated that when she first told mother about what happened, mother responded, " " "Are you f'ing kidding me? Are you sure? Why the f would he do that? . . . Are you sure this happened?" ' ' " When DCFS explained that stepfather must not be allowed to return home, mother agreed but stated she did not understand why. Later, mother reported that she felt it would be inappropriate for stepfather to live in the same home with Brooke, but when asked why she felt that way, she replied, "I don't know." When DCFS asked if she believed Brooke was sexually abused mother replied, "I want to say yes. You know, here's the thing. Here's where I struggle. I guess I'm still in disbelief." She also stated, "In a million years, I would not think this man [stepfather] would ever do this."

Mother also appeared to attempt to shift some blame onto Brooke. She questioned why Brooke had not screamed while the sexual abuse was occurring. She also questioned why the tear on Brooke's vagina had healed within a few days of the incident as noted during Brooke's follow-up exam, stating that her internet research showed that such tears took weeks to heal. Mother also commented that Brooke walked around the home naked in front of stepfather on a regular basis, although Brooke maintained that stepfather had only seen her naked accidentally upon her exiting the shower or getting dressed. Mother stated Brooke would say things like, "My butt looks

good,” while naked. Mother originally stated that Brooke was a virgin and had not been sexually involved with any boys. She later recanted stating that Brooke had engaged in some “touching” with boys, then accused Brooke of lying to the forensic nurse.

Mother’s prioritizing her own concerns over Brooke’s, her vacillating belief in Brooke’s story in the face of mounting evidence supporting it, and her shifting blame to Brooke for stepfather’s sexual abuse support the inference that mother has yet to fully address and acknowledge the abuse and its effect on Brooke. As a result, the trial court did not err in finding that mother’s failure to grasp the danger to Brooke that stepfather presented and continues to present would make her unable or unwilling to protect Brooke from future abuse.

3. *Substantial Evidence Supports the Trial Court’s Removal Order*

“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 . . . [¶] [that] [t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be protected without removing the minor from the minor’s parent’s or guardian’s physical custody.” (§ 361, subd. (c)(1).) This provision has been construed to allow removal for substantial risk of either physical or emotional harm. (*In re H.E.* (2008) 169 Cal.App.4th 710, 721.)

Mother challenges the trial court's removal order on the basis that a no-contact order with respect to stepfather was a reasonable means to protect Brooke without her removal from mother's custody. She supports this argument by asserting that the trial court gave mother unmonitored overnight visits subject only to the no-contact order issued against stepfather. This argument is without merit.

Although mother was allowed unmonitored overnight visits with Brooke, subject to the no-contact order, such an arrangement is vastly different than having Brooke live with mother on a full-time basis. By residing permanently with father, Brooke has a safe, secure home in which to live free from the potential danger of stepfather's visits. Although there is a risk that Brooke may encounter stepfather at mother's home, such risk is greatly reduced by the fact that her visits can be arranged far in advance. Instead of having to constantly worry whether she can come home, Brooke could remain in her home with father until stepfather leaves mother's home or could cancel the visit if needed without fear about where she will sleep that night. Having a safe, secure home away from stepfather and not with mother is important as the evidence discussed above supports the inference that mother has yet to fully address and acknowledge the sexual abuse and its effect on Brooke. We find that the trial court did not err in finding that there were no reasonable means by which Brooke's physical and emotional health could be protected without removing her from mother's custody.

Further, section 361.2, subdivision (a), required the trial court to place Brooke with her non-custodial, non-offending father, who requested such placement, unless it found that placement with father would be detrimental to Brooke's safety, protection, or

physical or emotional well-being. Mother raised no arguments and pointed to no evidence, and we have found none, showing that Brooke's placement with father would be detrimental to her in any way.

DISPOSITION

The judgment and dispositional order are affirmed.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.