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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re TYLER F., et al., Persons Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

JOSEPH F.,

Defendant and Appellant.

B241659

(Los Angeles County
Super. Ct. No. CK90014)

APPEAL from an order of the Superior Court of Los Angeles County, Valerie Skeba, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Order modified and, as so modified, affirmed.

Nicole Williams, 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 Navid Nakhjavani, Deputy County Counsel, for Plaintiff and Respondent.

Joseph F. (father) appeals jurisdictional findings under Welfare and Institutions Code, section 300, subdivisions (b) and dispositional orders made with respect 16 year old Tyler and 15 year old Trinity.¹ Father contends that, because Tyler was the subject of a delinquency petition filed prior to the instant dependency petition, the court was required to obtain a joint assessment pursuant to section 241.1 before adjudicating the dependency petition. We agree with father's point but find the issue moot as Tyler's delinquency petition filed December 21, 2011, was dismissed with prejudice on September 5, 2012. With respect to Trinity, father contends there is insufficient evidence to support the jurisdictional findings. We agree with respect to one of the two counts sustained under section 300, subdivision (b), but affirm jurisdiction as to Trinity under the remaining count. We will modify the orders of the trial court and, as so modified, affirm them.

FACTS AND PROCEDURAL BACKGROUND

1. *Detention*

On February 1, 2012, the Department of Children and Family Services (the Department) received a referral indicating that on January 27, 2012, the Los Angeles Unified School District (LAUSD) placed a psychiatric hold on Tyler after he told school officials he had a dream in which he killed his father and a mental health assessment determined Tyler to be a danger to others. At the hospital, Tyler reported normal teenage conflict with father and did not report any abuse or neglect. Tyler was deemed

¹ Unless otherwise indicated, all statutory references are to the Welfare and Institutions Code.

ready for discharge on January 31, 2012. However, father refused to retrieve Tyler, claiming he feared Tyler might harm him.

A social worker learned Tyler was remorseful, had been diagnosed with mood swings, was prescribed medication and was ready for discharge. The social worker telephoned father who stated Tyler had assaulted him in the past, Tyler smoked marijuana and there had been occasions on which Tyler had been high when father picked him up at school. Father recently had searched Tyler's backpack and found a green pill bottle with a marijuana seed in it and a plastic bag containing a white substance. However, Tyler denied the contents of the backpack were his.

Father reported that, in June of 2011, he and Tyler got into a physical altercation which resulted in father sustaining a bloody nose. Thereafter, Tyler lived with maternal grandmother until he was caught smoking marijuana when he should have been at school. Tyler also had been "caught with marijuana and drinking alcohol" and was scheduled to appear in court on February 1, 2012, for "possession charges" but failed to appear because he was in the hospital.

When the social worker explained father was responsible for picking Tyler up or making an appropriate plan for him, father indicated he was attempting to place Tyler with a paternal uncle. However, that afternoon father reported no family members could be of assistance. When the social worker indicated father remained responsible for Tyler's care, father told the social worker to " 'go pick him up, make him a ward of the Court' " Later that day, after a conversation with a supervising social worker, father indicated he would go to the Sheriff's Station and press charges against Tyler.

On February 1, 2012, Tyler indicated he and father had been getting into altercations because Tyler was having difficulty coping with father's drinking, which recently had increased. Tyler attributed this to father's separation from father's ex-wife, Melissa F., three years earlier. Tyler had seen father drink four to five days per week and has seen him drunk but denied father was physically aggressive when drinking and stated he felt safe in the home.

Trinity told the social worker she had been living with maternal grandmother since the middle of 2011 and rarely saw father although they got along well at times. Trinity described father's relationship with her brothers as " 'bad' " and indicated there had been "physical altercations caused by father provoking arguments." (Boldface omitted.) 7Trinity stated father called her brothers demeaning names and they fought back when father used physical discipline. Trinity indicated father purchased a 12-pack of beer daily and Trinity believed father became more aggressive when he drank and at times arguments in the home were overwhelming.

Father's ex-wife, Melissa F., told the social worker she and father separated approximately three years ago. They have a daughter who is the subject of a family law order. Melissa F. indicated there had been physical and verbal abuse in the relationship and Melissa F. believed father and paternal grandfather had alcohol dependency and anger issues. Melissa F. indicated there had been marijuana and alcohol use during her relationship with father and an incident of domestic violence in which father set fire to Melissa F.'s vehicle and stated "she would be the next thing burning in her bed." (Boldface omitted.)

Maternal grandmother indicated the children have been in her care on numerous occasions. Trinity has resided with her since June of 2011. Father has not provided financial support for Trinity during that time. Maternal grandmother indicated the children had reported having seen father drunk. They also indicate father is moody and aggressive toward the boys.

On February 3, 2012, the social worker telephoned father to obtain Tyler's clothing. Father refused to accommodate the social worker and stated Melissa F. "can purchase new clothing for him." The detention report requested continued detention of Tyler and continued court supervision of Trinity, who was in the care of maternal grandmother but in the custody of father.²

At the detention hearing on February 7, 2012, the trial court ordered Tyler and Trinity to remain in their current placements. The court ordered the Department to provide father referrals for conjoint counseling, parenting education and substance

² Father's criminal history, set forth in the detention report, consisted of a conviction of misdemeanor infliction of corporal injury to a spouse or cohabitant on May 13, 2004. In 1994, father was arrested for possession of a controlled substance and was convicted of driving on a suspended license and reckless driving, both misdemeanors.

The family's prior child welfare history, as relevant here, included a referral dated November 1, 2010, which resulted in a sustained allegation of physical abuse by father upon father's now adult son, Travis, following a physical altercation. Father's alcohol consumption, issues with anger and a domestic violence incident involving Melissa F. were noted.

A referral dated August 17, 2009, alleging possible sexual abuse was closed as unfounded but the file indicated the children had been exposed to domestic violence and were left alone with paternal grandfather who "passes out from being drunk."

A referral dated May 14, 2004, alleged Travis was out of control and his behavior was affecting father's work and marriage and father wanted the child placed with mother, who had been "abusive/neglectful" in the past.

abuse rehabilitation. The court also ordered the Department to assist Tyler obtain his belongings from father's residence.

2. *Jurisdiction/Disposition Report*

In interviews conducted for the jurisdiction report, Trinity reported father was easily angered when he drank and got into physical conflicts with her brothers three to five times per year. Tyler stated father was under the influence of alcohol “ ‘[a] couple of times a week’ ” when Tyler and Trinity were in his care.

Father acknowledged he smoked marijuana several years ago but claimed he had not consumed alcohol in the past 30 days. Father denied the children had ever been “put in harm's way because [he] had a beer or two.” Father stated he did not want to bring Tyler home from the hospital because he had no assurances Tyler would not harm him. Father was concerned because Tyler had only seen a doctor one time while he was hospitalized and father felt powerless because Tyler would not listen to him.

On March 6, 2012, father requested a contested adjudication and the court continued the matter to April 17, 2012. A supplemental report filed April 17, 2012, indicated Tyler had been referred for counseling and will participate in Alateen to understand how generational substance abuse can affect his life.

3. *Contested Adjudication*

On April 17, 2012, the trial court called the case in the afternoon session for the contested adjudication. When the court asked if there were any objections to receipt into evidence of the social reports, father's counsel indicated father objected to the reports because they were “advocate driven as opposed to the kind of report that

M[a]linda S.” approved, “[which] we believe would be . . . more objective.”³ Father’s counsel also requested a joint assessment of Tyler pursuant to section 241.1 and noted California Rules of Court, Rule 5.512, required receipt of a joint assessment before the jurisdiction hearing. Father’s counsel asserted prejudice because the information in the social reports was “slanted” and a joint assessment report would “give a fuller more complete balanced picture of the case.”

The trial court refused to continue the adjudication to obtain a joint assessment report. Tyler’s counsel then indicated father’s counsel previously had been advised a section 241.1 report was “already being taken care of in delinquency court.” Thus, father would not be prejudiced by having to proceed with the adjudication.

The court noted all parties and witnesses were present. Also, the matter had been continued at father’s request for a contested hearing. Thus, father should have raised the section 241.1 issue earlier “rather than springing it on everybody at 2:15 [p.m.]” Further, the court had no control over when the report would be finished, the report was not relevant to the current hearing and the court would address the section 241.1 issue when the report had been received.

At the contested adjudication, the social worker, Tyler, Trinity and father testified. Trinity testified she would not feel safe living with father because he became “aggressive” when he drank. Trinity was afraid father “would get angry and

³ *In re Malinda S.* (1990) 51 Cal.3d 368, held an exception to the hearsay rule permits reliance on social reports at a jurisdiction hearing in a dependency matter.

then . . . take it to another level.” Trinity denied being afraid of father hitting her, but testified she was afraid he would hit her brother.

Tyler testified father typically drank six to nine beers per night. By the time father consumed the fourth beer, he would become aggressive for “no apparent reason.” Father “[s]ometimes” would engage Tyler and his brother in physical conflicts in which father would “push and shove” and “might hit,” which caused Tyler to “fight[] back.” Father’s aggression made Tyler angry and he sometimes worried about it.

At the conclusion of the hearing, the trial court found father had “absolutely no insight into how his drinking . . . affect[ed] his children” and “interfere[d] with his ability to be a good parent.” The court observed both father and Tyler had anger issues and father’s alcohol use fueled the conflict. The court expressed “absolute[] shock” that father saw no correlation between his behavior and Tyler’s hospitalization.

The trial court declared the children dependents within the meaning of section 300, subdivision (b). The court sustained count (b)(1), which alleged father’s alcohol abuse rendered him incapable of providing regular care and placed the children at risk of harm, and count (b)(2), which alleged father refused to retrieve Tyler from the hospital and such unwillingness on the part of father endangered the child’s safety and well being. As to the (b)(2) count, the trial court found father’s behavior in failing to pick Tyler up from the hospital was unreasonable under the circumstances. The court struck a section 300, subdivision (j) count which alleged Trinity was at risk of harm based on father’s failure to pick Tyler up from the hospital. The court found father’s

conduct in this regard did not necessarily endanger Trinity as she and Tyler were “differently situated.”

The trial court ordered the children removed from father’s custody, and ordered father to participate in family reunification services, a 12-step program, random drug testing, individual counseling, anger management and monitored visitation.

CONTENTIONS

Father contends the jurisdictional finding with respect to Tyler must be set aside because the trial court proceeded without first obtaining and considering a joint assessment pursuant to section 241.1. With respect to Trinity, father contends there is insufficient evidence to support the jurisdictional findings.

DISCUSSION

1. *On the Facts Presented, the Failure to Obtain A Section 241.1 Report Is Now Moot*

Father contends the trial court erred in failing to obtain and consider, before the adjudication, a joint assessment report prepared pursuant to section 241.1 to determine whether Tyler’s interests would best be served by the status of ward or dependent. (Cal. Rules of Court, rule 5.512(e).) Father contends that, where the possibility of dual jurisdiction arises, the trial court must determine which jurisdiction best suits the minor’s needs. Father argues the failure to do so requires reversal of the jurisdictional findings and dispositional orders with respect to Tyler.

A child may not simultaneously be declared a dependent child and a delinquent ward. (*D.M. v. Superior Court* (2009) 173 Cal.App.4th 1117, 1123.) Section 241.1 sets

forth the specific procedure for handling cases in which it appears the minor comes within section 300 and either section 601 or section 602. (§ 241.1; Cal. Rules of Court, rule 5.512(a).) In those instances, the county probation department and child welfare agency must consult and jointly determine which status will best serve the minor's interests and that of society. (*Los Angeles County Dept. of Children & Fam. Services v. Superior Court* (2001) 87 Cal.App.4th 320, 325.) Once the report is completed, it is presented to the court in order to determine the appropriate status for the minor.⁴ (*In re Marcus G.* (1999) 73 Cal.App.4th 1008, 1012-1013.)

In this case, the potential for dual jurisdiction was raised when the dependency petition was filed because Tyler was the subject of a delinquency proceedings filed December 21, 2011. Accordingly, it was the responsibility of the second court seeking to assert jurisdiction, here, the dependency court, to order a section 241.1 report and to conduct a hearing on the joint assessment before conducting the jurisdiction hearing. (*In re Joey G.* (2012) 206 Cal.App.4th 343, 349; *In re Marcus G., supra*, 73 Cal.App.4th at p. 1013; Cal. Rules of Court, rule 5.512(e).)

⁴ The section 241.1 report must contain the joint recommendation of the probation and child welfare department and include “ ‘(1) [a] description of the nature of the referral; [¶] (2) [t]he age of the child; [¶] (3) [t]he history of any physical, sexual, or emotional abuse of the child; [¶] (4) [t]he prior record of the child's parents for abuse of this or any other child; [¶] (5) [t]he prior record of the child for out-of-control or delinquent behavior; [¶] (6) [t]he parents' cooperation with the child's school; [¶] (7) [t]he child's functioning at school; [¶] (8) [t]he nature of the child's home environment; [¶] (9) [t]he history of involvement of any agencies or professionals with the child and his or her family; [¶] (10) [a]ny services or community agencies that are available to assist the child and his or her family; [¶] (11) [a] statement by any counsel currently representing the child; and [¶] (12) [a] statement by any [court appointed special advocate] CASA volunteer currently appointed for the child.’ ” (*D.M. v. Superior Court, supra*, 173 Cal.App.4th at p. 1124.)

Because Tyler was at risk of dual jurisdiction at the time of the adjudication, the trial court should have ordered a report pursuant to section 241.1 before it conducted the jurisdiction hearing. However, at the request of the Department, we have taken judicial notice of a post-judgment minute order of the delinquency court which indicates that the section 602 petition filed December 21, 2011, was dismissed with prejudice on September 5, 2012, and there were no outstanding warrants in the file. The minute order further indicates that Tyler appeared with a delinquency attorney and the same attorney who represented Tyler in dependency court. The minute order indicates the matter was set for “T/S” (presumably, trial setting) and indicates that Tyler had completed 21 AA meetings, suggesting the delinquency petition was never adjudicated.

Father claims the dismissal of the petition filed December 21, 2011, does not demonstrate the potential for dual jurisdiction has been eliminated. He claims dismissal of the petition did not render determination of which status would be more appropriate for Tyler moot. However, given that Tyler no longer is at risk of being subjected to dual jurisdiction, there is no determination to be made.

Father argues it is unknown whether Tyler may have other delinquency petitions pending and suggests he may be on informal probation. He claims this court cannot act as an arbiter of facts the trial court should have determined. Also, father suggests dismissal of the petition filed December 21, 2011 might have been part of a plea agreement that encompassed numerous cases. Additionally, this court is unaware of any subsequent developments in the delinquency court. Based on these concerns, father concludes it would be inappropriate to find the section 241.1 argument is moot.

Father claims remand with directions to order a section 241.1 report would not be an exercise in futility and would provide the court with information that it excluded at the jurisdictional hearing. Father notes that, at the adjudication, the court permitted father to inquire only with respect to the petition filed December 21, 2011, and only if the alleged offense was “a crime of violence[.]” Additionally, on cross-examination of Tyler, father’s counsel implied that Tyler had a prior delinquency case but the juvenile court refused to permit counsel to question Tyler in this area. Father also testified the police were called to the home after the June 2011 incident. However, the record is silent as to whether anyone was arrested or whether charges were filed.

Review of the record indicates father’s counsel asked Tyler if he recalled “having a 602 case terminated” in June of 2011. The court sustained a relevancy objection. When counsel inquired whether Tyler had spoken to a social worker about delinquency issues, the trial court again sustained an objection and directed counsel to question only with respect to the current case. Tyler then indicated he did not recall speaking to the social worker about his current delinquency matter, filed December 21, 2011. The dependency court sustained a relevance objection, indicating it might change its ruling if the underlying offense were a crime of violence, as only such crimes might explain father’s failure to pick Tyler up from the hospital.

During father’s testimony, father described the June 2011 incident in which Tyler punched father and bloodied his nose after father broke Tyler’s chain. Father indicated the police were called on that occasion and on one previous occasion when Trinity and Tyler were screaming and a neighbor called the police.

However, nothing in these truncated lines of questioning indicates Tyler was subject to dual jurisdiction.

Finally, father notes Tyler had to attend and complete 21 AA meetings in order to obtain a dismissal. Thus, he already has been subjected to dual jurisdiction.

However, the minute order does not support this assertion. It indicates a delinquency petition was filed and dismissed with prejudice after Tyler attended AA meetings.

There is no indication jurisdiction was ever asserted. Given the termination with prejudice of those proceedings, there is no current risk of dual jurisdiction and thus no need to remand with directions.

2. *Sufficiency of the Evidence with Respect to Trinity*

Father contends there was insufficient evidence to show that Trinity was at substantial risk of harm or illness based on father's alcohol abuse alleged in (b)(1) or father's failure to retrieve Tyler from the hospital alleged in (b)(2). As to the (b)(2) count, it appears father's claim is well taken. The dependency court struck a count under section 300, subdivision (j) which alleged Trinity was at risk of harm based on father's failure to retrieve Tyler from the hospital, finding Tyler and Trinity were not similarly situated. However, the court failed to delete reference to Trinity from the identically worded (b)(2) count. We shall therefore order count (b)(2) modified to omit reference to Trinity.

However, the count alleging father's alcohol abuse placed Trinity at risk of harm is supported by the record. Father concedes his excessive consumption of alcohol may have exposed Trinity to emotional friction but claims there was no nexus between

father's alcohol consumption and any defined risk to Trinity's safety. Father notes Trinity testified she was afraid father would hit her brother but said she was not afraid of father. Also, Trinity had not witnessed any altercations after she moved to the home of her grandmother in June of 2011, she rarely saw father, there was no evidence of altercations between Trinity and father, and there was no showing Trinity would be " 'exposed to a *substantial* risk of *serious physical* harm or illness.' [Citation.]" (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1137.)

Father concedes his alcohol abuse had an emotional impact on Trinity. Also, Trinity testified father became aggressive when he drank and she had witnessed father and Tyler engage in physical altercations. The fact father thus far had engaged only her male siblings in physical altercations does not mean Trinity was not at risk of harm engendered by father's alcohol consumption. Although Trinity was in maternal grandmother's care, father had custody of the child. Dependency jurisdiction over Trinity was necessary to ensure her safety.

Thus, jurisdiction was proper as to Trinity under count (b)(1).

DISPOSITION

The orders of the juvenile court are modified to delete reference to Trinity in count (b)(2). In all other respects, the orders of the juvenile court are affirmed.

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CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.