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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re FELICIA M. et al., Persons Coming
Under the Juvenile Court Law.

B247302
(Los Angeles County
Super. Ct. No. CK93506)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Appellant,

v.

D.M. et al.,

Defendants and Appellants.

APPEAL from a judgment of the Superior Court of Los Angeles County,
Veronica S. McBeth, Judge. Affirmed.

Cristina Gabrielidis, under appointment by the Court of Appeal, for Defendant and
Appellant, D.M.

John M. Kennedy, under appointment by the Court of Appeal, for Defendant and
Appellant, C.M

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel and
Tracey Dodds, Deputy County Counsel, for Plaintiff and Appellant. The dependency

court asserted jurisdiction over Felicia and Caleb M., finding that they were minors described by Welfare and Institutions Code section 300, subdivisions (b) and (j). The court also found that DCFS failed to prove the allegation that Felicia had been sexually abused as provided in section 300, subdivision (d); DCFS agreed to dismiss the physical abuse allegations under section 300, subdivision (a).

The court ordered the children placed in the home of their mother, Dawn M., under DCFS supervision; ordered monitored visits and telephone calls for their father, Clifford M., who lives in Wisconsin; and ordered family maintenance services. The court also ordered that Felicia not attend or participate in a particular New Age support group led by mother.

Mother, father and DCFS each appeal the juvenile court's orders. After review of their individual claims, we determine that the challenged orders are proper, and so affirm them.

FACTUAL AND PROCEDURAL SUMMARY

Mother and father are the parents of Felicia, born in February 2000, and Caleb, born in May 2004. The family resided together in Wisconsin until 2007, when father left for Afghanistan to accept employment as a civil engineer. Mother then moved with the children to southern California. The parents divorced in 2008.

This case came to the attention of the Department in May 2012, after father had returned from Afghanistan and was scheduled to come to California to visit the children.

During the pre-petition investigation, it was reported that when the family lived together in Wisconsin, father had viewed pornographic material and had engaged in inappropriate sexual behavior (masturbation) in the children's presence when he thought they were asleep; had once disciplined each child by grabbing them by the necks and pushing them against a wall; and had engaged in an act of domestic violence with mother.

In response to the allegations, father denied engaging in any sexual activity in front of the children or while they were present in the home. He believed that mother

was fabricating the allegations because he had lost his job and could no longer pay child support. Father concedes that in 2006, he had pulled mother's hair and grabbed a phone from her to stop her from calling the police. He also offered the information that when the children were young (i.e., before 2006), he had showered with them, but stressed that mother had full knowledge of this and expressed no concerns. Father also disclosed that mother and Felicia claimed that they had spirit angels who communicated with them; mother's was named "David," Felicia's was "Jonah." Felicia was upset that father revealed this information to the social worker.

On May 15, 2012, DCFS filed a petition containing allegations under sections 300, subdivisions (a), (b), (d) and (j). The conduct underlying these allegations occurred approximately five years or more before the filing of the petition when the family lived in Wisconsin, and consisted of the following: Under section 300, subdivision (a), DCFS alleged a history of domestic violence between the parents, and father's acts of pushing the children against the wall. Under subdivision (b), in addition to alleging that the foregoing conduct put the children at risk of serious physical harm, DCFS alleged that mother had a history of mental and emotional problems which rendered her unable to provide regular care for the children. Also listed under subdivision (b) was the allegation that father sexually abused Felicia by viewing pornography and masturbating in her presence, and mother's failure to protect Felicia. This conduct also formed the basis of an allegation of sexual abuse under subdivision (d), and sibling abuse under subdivision (j). Based on these allegations, the juvenile court detained the children, ordered them released to mother, and ordered monitored visitation for father.

At the contested adjudication hearing, Felicia testified in chambers about walking in on her father viewing pornography and masturbating when they lived in Wisconsin; showering with her father until she was seven; and her relationship with her father. Felicia also testified extensively about David, Jonah, and her "third eye." She explained that since mother had her spiritual guide, David, and Felicia had hers, Jonah, they had a special connection, and understood each. Felicia also spoke about her third eye, through

which she sees dead people. Although mother herself does not see dead people, she has friends who do, with whom Felicia can share her experiences. Felicia noted that father is not supportive of the special gifts that mother and Felicia share. This is upsetting to Felicia.

At the conclusion of the adjudication hearing, both parents requested dismissal of the petition. The court denied the motions and sustained counts b-1 (father used inappropriate discipline by pushing Felicia against a wall); b-3 (father's lacked appropriate boundaries, exhibited "by masturbating and viewing pornography without taking steps to protect the children from viewing such behaviors, . . . both of which were observed by the child, Felicia;") and j-1 (the b-3 finding placed Felicia's brother, Caleb, "at risk of harm, danger, sexual abuse and failure to protect"). The court found that father crossed boundaries and limits, but that he was not motivated by an unusual sexual interest in children. The court also found Felicia to be "imaginative" and that she could easily be manipulated, based in part on her desire to protect mother. While the court found father's conduct in unintentionally exposing Felicia to pornography negligent, it found no sexual abuse.¹ The court continued the children's placement with mother. In anticipation of a contested disposition hearing, the court ordered an Evidence Code section 730 examination of the family, to be conducted by Michael P. Ward, Ph.D., for purposes of disposition only.

Dr. Ward submitted his 44-page report to the court prior to the February 7, 2013 disposition hearing. Dr. Ward concluded that Felicia's testimony about seeing dead people "is simply not believable to any reasonable person. In fact, this is **utter nonsense**. The system and her naïve mother in this regard simply have to face the fact that she is

¹ The allegations of physical abuse (a-1 and a-2) and sexual abuse (d-1) against father, as well as the allegation that mother's mental and emotional problems endangered the children (b-2), were not sustained.

making this up and putting everyone on.”² As to visitation, after noting that he had only interviewed father telephonically and so could not make specific recommendations, Dr. Ward stated that “in light of all that I do know, I will say that I would be fairly hesitant to be overly restrictive in this case, especially in light of more recent developments, including the father’s report that in the last two visits at or after Court, the children hardly even acknowledged him.” Dr. Ward reported father’s sentiment that “he would just like to be able to see his children in a normal, natural setting and do normal, natural things – not just sit in a room and stare at each other with little or nothing to say.” Dr. Ward commented, “I would have to say there is a lot to be said for that”

At the disposition hearing, father requested joint custody of the children, with mother having primary custody or, short of that, unmonitored visits when he travels from Wisconsin to Los Angeles, plus telephone conversations at least once a week.

The court found, pursuant to section 361, subdivision (c), that there is a substantial danger if the children were returned to father, and that reasonable efforts were made to prevent and eliminate the need for removal from him. The court ordered the children to remain in the home of mother. It ordered individual counseling for mother, father, and each of the children, and a parenting class for father. Mother was ordered to find a child-oriented activity for Felicia to become involved in, and to not have Felicia attend the adult support group. Twice-a-week monitored visits were ordered for father when he is present in California, as were once-a-week monitored phone calls.

As noted above, father, mother and DCFS each appeal the juvenile court’s orders. We consider each of their contentions below.

² Dr. Ward also cautioned that “One would have to be very skeptical about much of this girl’s report – past, present and future. This does not mean that everything she says is wrong or inaccurate. But how can and does one discern fact from fiction, fabrication, misperception and misinterpretation in an obviously bright and somewhat precocious young girl capable of uttering such nonsense?”

DISCUSSION

“On appeal, the “substantial evidence” test is the appropriate standard of review for both the jurisdictional and dispositional findings. [Citation.] The term “substantial evidence” means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion; it is evidence which is reasonable in nature, credible, and of solid value. [Citation.]’ (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1433.) ‘In making this determination, all conflicts are to be resolved in favor of the prevailing party, and issues of fact and credibility are questions for the trier of fact. [Citation.] In dependency proceedings, a trial court’s determination will not be disturbed unless it exceeds the bounds of reason. [Citation.]’ (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 564.)” (*In re E.B.* (2010) 184 Cal.App.4th 568, 574-575.)

1. *Father’s appeal*

Father appeals the juvenile court’s jurisdictional findings and dispositional order. Specifically, he contends there is no substantial evidence to support the juvenile court’s findings that his conduct of pushing Felicia against a wall and exposing her to pornography and masturbation in 2007 places the children at a current risk of physical harm. He also challenges the evidence to support the court’s order of monitored visitation.

Section 300, subdivision (b), authorizes the juvenile court to assume jurisdiction over a child where “[t]he 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 . . . to adequately supervise or protect the child . . . or by the inability of the parent . . . to provide regular care for the child due to the parent’s . . . mental illness, developmental disability, or substance abuse. . . . The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness.”

Jurisdiction is warranted under section 300, subdivision (j), when the child's sibling was abused or neglected and there is a substantial risk the child will be abused or neglected as well. Thus, subdivision (j) has two prongs: (1) "[t]he child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e) or (i);" and (2) "there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions." (*In re Rubisela E.* (2000) 85 Cal.App.4th 177, 197.) In contemplating jurisdiction under subdivision (j), a court is to consider "the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child." (§ 300, subd. (j).) The "broad language of subdivision (j) clearly indicates that the trial court is to consider the totality of the circumstances of the child and his or her sibling in determining whether the child is at substantial risk of harm, within the meaning of any of the subdivisions enumerated in subdivision (j)." (*In re Maria R.* (2010) 185 Cal.App.4th 48, 64.) The statute therefore gives the juvenile court greater latitude to exercise jurisdiction over a child whose sibling was abused than a court would have in the absence of the sibling abuse. (*Ibid.*)

Father argues that there are no allegations that he physically abused the children that were more recent than 2007. However, father left the family and traveled to Afghanistan in 2007, was absent from the country for four and a half years, and currently lives in Wisconsin. Thus, his contact with the children has been limited.

Felicia told the social worker father would pin her and her brother against the wall with one hand and then yell at them. She said that he did that to her about seven times, and to her brother twice. The discipline happened when mother was at work or running errands. Once father moved out of the home, he no longer shoved her against the wall. Felicia also denied father hit her or physically hurt her in any other way. Caleb also said that father shoved him against the wall.

Father admitted that when Felicia was young he would grab her by the shoulders and yell at her to go to bed. He denied hurting her and said he never did anything like that to Caleb, who was only two when father moved out of the family home.

Although father contends that his actions were remote in time, Felicia remembered them vividly. Father admits to only grabbing her shoulders, while Felicia said he grabbed her by the neck and pinned her against the wall. The juvenile court did not find that father intentionally inflicted physical abuse, but found that the harm inflicted was negligent. However, there is no indication that father understands the trauma he inflicted and the potential harm that could have occurred from holding a young child by the throat. Consequently, the juvenile court did not err when it found that the children were described by section 300, subdivision (b).

Father's sole challenge to the dispositional order is the proviso that his visits with the children be monitored. Father relies on Dr. Ward's Evidence Code 730 evaluation to assert that the visitation order "is not based upon substantial evidence, but is indeed contrary to the evidence," as the conclusion in that report is unmistakable that restrictive visitation is destructive to this family's healing process."

"The juvenile court has broad discretion to determine what would best serve and protect the child's interests and to fashion a dispositional order accordingly. On appeal, this determination cannot be reversed absent a clear abuse of discretion." (*In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 474; see also *In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1006.) A court abuses its discretion when it makes a determination that is "arbitrary, capricious, or patently absurd." (*In re Mark V.* (1986) 177 Cal.App.3d 754, 759, quoting *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 421.)

Dr. Ward's evaluation reflected a concern that the situation this family found itself in, including long periods of separation of the children from father as a result of his work in Afghanistan, as well as the fact that the parties live a great distance apart, presented special challenges to the reunification process. Dr. Ward approached the question of visitation in terms of the healing process, as one would expect of a psychologist. The

juvenile court, however, was guided by other considerations, most notably the safety of the children. Under these circumstances, we cannot say that the juvenile court abused its discretion in ordering monitored visits for father.

2. *Mother's appeal*

Mother contends the juvenile court's order prohibiting Felicia from participating in the support group which she leads at the Crystal Haven Wellness Center violates mother's right to exercise reasonable control over her child's religious practices. We see no violation.

As the United States Supreme Court has observed, "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task. . . ." (*Thomas v. Review Bd., Ind. Empl. Sec. Div.* (1981) 450 U.S. 707, 714.) California courts have long found guidance in our pursuit of this difficult and delicate task in the opinion of *Fellowship of Humanity v. Alameda County* (1957) 153 Cal.App.2d 673, where the court stated: "Religion simply includes: (1) a belief, not necessarily referring to supernatural powers; (2) a cult, involving a gregarious association openly expressing the belief; (3) a system of moral practice directly resulting from an adherence to the belief; and (4) an organization within the cult designed to observe the tenets of the belief." (*Id.* at p. 693.)

Mother explained that she subscribes to certain spiritual beliefs which are unconventional in Western culture. One of these beliefs concerns "a system of energy flowing through the human body, and energy centers known as 'chakras.' She believe[s] that crystals [have] the power to heal blockages in energy flow, and to open up the chakras." Mother learned the practice of crystal healing from Jennifer, who became her business partner. The two woman opened a healing center called the Crystal Haven Wellness Center, where mother leads a support group known as the Awakening Group. Felicia was the only child who attended the Awakening Group. Mother testified to her belief that "the group could support Felicia as they shared her abilities and could provide

counsel.” Mother also stated that she takes the children to church, which is presumably something separate and apart from the Wellness Center.

Mother made no attempt to explain how the spiritual beliefs which she shares with the participants in the Awakening Group form a system of moral practice directly resulting from adherence to those beliefs, the tenets of which are monitored by an organization within the group of believers. (*Fellowship of Humanity v. Co. Alameda, supra*, 153 Cal.App.2d at p. 693.) Nor does mother explain the relationship between the church to which she takes the children and the Awakening Group, which she facilitates as part of a commercial enterprise. In short, mother failed to establish that her participation in the Awakening Group constitutes a religious practice.

Moreover, section 361, subdivision (a) permits the juvenile court to limit the rights of a parent over her child if necessary to protect the child. Here, Dr. Ward opined that Felicia’s claim that she saw spirits all the time was “utter nonsense,” and she was making up all of her claims of communing with the dead. Dr. Ward also opined that it was not in Felicia’s best interest to have mother and other adults reinforce and validate Felicia’s claims of supernatural powers. Given the facts of this case, the juvenile court did not abuse its discretion in limiting mother’s right to have Felicia attend or participate in the Awakening Group.

3. The Department’s appeal

DCFS maintains that the trial court erred in finding that the minors were not described by section 300, subdivision (d). We conclude the finding is supported by substantial evidence.

Section 300, subdivision (d) states, in relevant part, that jurisdiction over a child arises when “[t]he child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code.” Included in the statutory definition of “sexual abuse” is any act that violates certain criminal statutes, including Penal Code section 647.6, annoying or molesting a child

under 18 years of age. (Pen. Code, § 647.6, subd. (a).) The Department contends that the evidence before the juvenile court established that father violated this section of the Penal Code.

The words “annoy” and “molest” are synonymous and “refer to conduct designed ‘to disturb or irritate, esp[ecially] by continued or repeated act’ or ‘to offend’ [citation]; and as used in this statute, they ordinarily relate to ‘offenses against children, [with] a connotation of abnormal sexual motivation on the part of the offender.’ [Citation.] Ordinarily, the annoyance or molestation which is forbidden is ‘not concerned with the state of mind of the child’ but it is ‘the objectionable acts of defendant which constitute the offense,’ and if his conduct is ‘so lewd or obscene that the normal person would unhesitatingly be irritated by it, such conduct would “annoy or molest” within the purview of’ the statute. [Citation.]” (*People v. Carskaddon* (1957) 49 Cal.2d 423, 426.)

Quoting *People v. Kongs* (1994) 30 Cal.App.4th 1741, DCFS posits that “[t]he deciding factor for purposes of a Penal Code 647.6 charge is that the defendant has engaged in offensive or annoying sexually motivated conduct which invades a child’s privacy and security, conduct which the government has a substantial interest in preventing.” (*Id.* at p. 1752.) DCFS argues that, “[u]sing that objective standard, having a naked man masturbate only feet from a person is conduct so lewd or obscene that the normal person would unhesitatingly be irritated by it. Felicia would have had no choice but to stand there, naked and wet, while Father pleased himself.³ That is sexual abuse, and the juvenile court erred by not finding that Felicia was a child described by section 300, subdivision (d).” Thus, as DCFS reads the statute, father’s subjective intent is irrelevant to the analysis. We do not agree.

“It is generally true that motive is not an element of a criminal offense. (See *People v. Daly* (1992) 8 Cal.App.4th 47, 59; see also 1 Witkin & Epstein, Cal. Criminal

³ We note that DCFS relies on Felicia’s testimony concerning shared showers with father, as to which the juvenile court made no finding, rather than the finding actually made by the court, that father masturbated while viewing pornography on a computer without taking steps to protect the children from observing this behavior.

Law, *supra*, § 100, pp. 118–119.) But the offense of section 647.6 is a strange beast. As noted in *People v. Pallares* [(1952)] 112 Cal.App.2d Supp. [895] at p. 901: ‘Although no specific intent is prescribed as an element of this particular offense, a reading of the section as a whole [then section 647a] in the light of the evident purpose of this and similar legislation enacted in this state indicates that the acts forbidden are those *motivated by an unnatural or abnormal sexual interest or intent with respect to children.*’ (Italics added.) This construction was affirmed by our high court in *In re Gladys R.* [(1970)] 1 Cal.3d [855] at pp. 867–869. The court in *Gladys R.* noted ‘the comparatively narrow province of section 647a [now section 647.6]; it applies only to offenders who are *motivated by an unnatural or abnormal sexual interest or intent.*’ (1 Cal.3d at p. 867, italics added.) In making these observations, the court in *Gladys R.* distinguished another decision on section 647a, *People v. Carskaddon*[, *supra*,] 49 Cal.2d [at p.] 423, by noting that the *Carskaddon* court ‘found no evidence that the defendant had committed an act coming within the purview of section 647a, and therefore held it unnecessary . . . to consider *the matter of motivation.*’ (*Id.*, 1 Cal.3d at p. 868, fn. 24, italics added.)” (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126-1127.) Consequently, “[t]here is no doubt that in proving the mental state element of the section 647.6 offense, the prosecution must show that the acts or conduct ‘were motivated by an unnatural or abnormal sexual interest.’ [Citations.]” (*Id.*, at p. 1127.)

Here, the juvenile court found that father’s conduct, by means of which DCFS contends he annoyed and molested Felicia within the meaning of Penal Code section 647.6, was not motivated by an unnatural or abnormal sexual interest, but by a failure to respect personal boundaries. As the court explained, “I believe [Felicia] had been [a]sleep and walks in and seeing the computer, which he turns around. He is masturbating while this occurs.” The court concluded father unintentionally exposed Felicia to pornography. As the case law makes clear, this behavior does not amount to annoying or molesting a child under Penal Code section 647.6.

DISPOSITION

The judgment is affirmed.

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MINK, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.