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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re ALEXANDRA B. et al., Persons  
Coming Under the Juvenile Court Law.

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Appellant,

v.

PAOLA B.,

Defendant and Appellant.

B260477

(Los Angeles County  
Super. Ct. No. DK06863)

APPEAL from orders of the Superior Court of Los Angeles County,  
Debra Losnick, Judge. Reversed and vacated.

Mary C. Wickham, Interim County Counsel, Dawyn R. Harrison, Assistant  
County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Appellant.

Anne E. Fragasso, under appointment by the Court of Appeal, for Defendant and  
Appellant.

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## INTRODUCTION

Paola B. challenges the orders of the juvenile court declaring her children dependents of the court under Welfare and Institutions Code section 300, subdivision (b)<sup>1</sup> and placing them with father. The Department of Children and Family Services (the Department) appeals from the order dismissing the count alleging that mother sexually abused one of her children (§ 300, subd. (d)). We hold the court did not err in dismissing the sex abuse count. We also conclude, however, that there was no evidence to support the finding under subdivision (b) of section 300. There being no basis for juvenile court jurisdiction, we reverse the jurisdiction order and vacate the disposition order.

### FACTUAL AND PROCEDURAL BACKGROUND

#### 1. *The investigation*

Mother, who was born in Sweden and raised abroad, and father, David B., are divorced and share legal custody of their children, Alexandra and Maxwell. Mother reported that father is an alcoholic and she and father have a history of domestic violence. Father claims mother is depressed. Father is remarried and lives with his wife, Briana B., and their two children. Mother lives with her boyfriend Simon B. and his 14-year-old daughter, N.

Father explained that the children were in his care when Alexandra, who was 10 years old at the time of the report, disclosed that seven-year-old Maxwell had been inappropriately touching mother's breasts, sometimes as much as five times a day. She said Maxwell squeezed and moved the breasts up and down and characterized the conduct as " 'creepy.' " She said that it began when they were all cuddling in mother's bed. Mother's breast was exposed and so Maxwell squeezed it. Mother said nothing. Maxwell confirmed the report to father and demonstrated what he would do. Maxwell explained that mother neither asked him to do this nor stopped him. Maxwell claimed mother's boyfriend Simon and his daughter N. have witnessed this activity. Father called his attorney who filed an ex parte motion in the family law court. Alexandra told father

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

she did not want to go home until the behavior stopped and she felt relieved that she had reported it.

Mother cried and declared to the investigating social worker that the allegations were false. She believed that father was coaching the children. She also claimed that Alexandra has a history of lying. In a follow-up interview, mother stated that the word “ ‘fondle’ ” was incorrect. She characterized the conduct as “innocent, childlike behavior” that occurred “on a number of occasions.” Once, Maxwell saw her topless in the closet, but she was never naked in front of him. Mother redirected Maxwell. Mother understood the conduct was uncomfortable for Alexandra and not good for Maxwell. She believed the events were exaggerated but stated she was “ ‘so sorry for having put the children through all of this and that they felt uncomfortable.’ ”

The allegations were confirmed by both children, father, police officers, and during a forensic examination. Father repeated the substance of his referral report to the Department and stated that the children were afraid of repercussions if they returned to mother’s house.

Briana related that mother showered with Maxwell when the child was five years old. Briana and father spoke to mother and the conduct stopped.

The children’s social worker concluded that Alexandra was able to distinguish between the truth and a lie. Alexandra disclosed that the conduct occurred five to seven times a day. Maxwell did it on his own initiative. Mother never said anything. Alexandra explained that mother and Maxwell were very close. She admitted that she felt jealous that Maxwell “got that attention.” In her follow up interview, Alexandra no longer wanted to talk about the conduct. She also “definitely want[ed] to see my mom again. I want to forget this ever happened. I just want what’s best for Maxwell. I want it [custody] to be half and half, like it used to be.”

Maxwell was also able to distinguish between the truth and a lie. He told the police that he touches his mother’s “ ‘boobies.’ ” He liked it the first time he tried it so he continued. Mother has never told him to stop or to keep the conduct a secret. Maxwell told the forensic examiner that *the first time* he touched his mother’s breasts,

“ ‘[s]he *kind of* smiled.’ ” (Italics added.) By the time of the Department’s interview, however, Maxwell claimed to be afraid that mother would be angry with him for telling. Both children were in counseling.

The forensic exam of Alexandra and Maxwell neither confirmed nor negated sexual abuse. Both children denied any physical or sexual abuse occurred in mother’s home.

The Department filed a petition alleging that on numerous occasions, since 2013, mother allowed Maxwell to fondle mother’s breasts. Mother allowed this to occur in Alexandra’s presence causing Alexandra to feel uncomfortable. (§ 300, subds. (b) & (d).)

According to the police report, the first time Maxwell touched mother’s breasts, she was wearing a bra. Maxwell claimed to also have touched mother when she was not dressed, but could not provide a specific number of times that occurred. Maxwell never touched nipples or any other part of mother’s body. Mother never touched him inappropriately, and never asked or coerced him to touch her breasts. Maxwell did it on his own. The investigating officer “formed the opinion that the interaction between him [Maxwell] and [mother] was no[t] committed in a lewd or lascivious manner.” Another investigating police officer indicated to the Department that, after speaking only to father, Briana, Maxwell, and Alexandra, “he believes that this could be a custody issue and it just seems like there is something else missing and Father and Stepmother may be coaching the children.”

The Department viewed as family strengths that mother and father love the children; both want their children to thrive; and mother was remorseful about causing Alexandra to be uncomfortable.

## 2. *The adjudication hearing and rulings*

Mother testified that she never allowed Maxwell to fondle her breasts for any extended period of time. She explained that he would poke her “as any child would in a kind of joking, pestering attention-seeking manner.” Maxwell did this about five times in the past year. Usually, she would brush him aside, and sometimes she would say

“ ‘No,’ ” or “ ‘Stop it.’ ” Maxwell has never *fondled* her breasts while she was undressed. Once, he ran in while she was dressing and said, “squeeze, squeeze,” squeezed her breast and “ran out, laughing.” Otherwise, he would “poke[]” her in the breast. Mother understood the word “fondling” to have a sexual connotation; but Maxwell poked. The police never filed charges concerning the allegations.

The juvenile court found that mother was not trying to avoid detection. The court found that Alexandra and Maxwell were telling the truth but did not believe N.’s or Simon’s testimony. The court believed that Maxwell was touching mother’s breasts, but found that the conduct did not rise to the level of abuse as defined in subdivision (d) of section 300 as there was no “real proof of any kind of sexual gratification on anyone’s part.” The court dismissed the sex abuse allegation under subdivision (d). Next, the court changed the language of the b-1 count to read that mother allowed Maxwell “ ‘to touch’ ” mother’s breasts, rather than “ ‘to fondle’ ” mother’s breasts, and sustained that count as amended. The court reasoned that “this is just a case where it should have been handled differently, that there are boundaries that have been completely crossed and that counseling will assist the family on getting back on track.”

As for the disposition, the juvenile court declined father’s request to terminate its jurisdiction with a family law order. Instead, the court wanted mother and the children in counseling to learn “appropriate boundaries.” The court placed the children with father under the Department’s supervision with family maintenance for father. The court ordered individual counseling for the children and conjoint counseling with mother when the children’s therapist determined they were ready. The reunification plan for mother included parent education, individual counseling for mother to address appropriate sexual boundaries and case issues. The court ordered monitored visits for mother and no visits for Simon and the children. The case was continued for a hearing to determine whether to terminate jurisdiction under section 364. Mother and the Department filed their separate appeals.

## CONTENTIONS

Mother contends there is no evidence to support the jurisdiction or removal order. The Department contends the juvenile court erred in dismissing the sex abuse count.

## DISCUSSION

1. *The Department's appeal: there is no evidence to support a finding of sex abuse (§ 300, subd. (d)).*

A child comes within the jurisdiction of the juvenile court under section 300, subdivision (d) if the 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, by his or her parent . . . .”

Penal Code section 11165.1 defines sexual abuse as, inter alia, “sexual assault,” which includes “The intentional touching of the genitals or intimate parts . . . or the clothing covering them . . . of the perpetrator by a child, for *purposes of sexual arousal or gratification*, except that it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose.” (Pen. Code, § 11165.1, subds. (a), (b)(4), italics added.)

Penal Code section 11165.1 also defines sexual assault as conducted in violation of Penal Code section 288 (lewd or lascivious acts upon a child). Penal Code section 288 “ ‘prohibits all forms of *sexually motivated* contact with an underage child.’ ” (*In re R.C.* (2011) 196 Cal.App.4th 741, 749, italics omitted, italics added.) “[A]ny touching of a child under the age of 14 is a felony offense ‘even if the touching is outwardly innocuous and inoffensive, if it is accompanied by the *intent to arouse or gratify the sexual desires* of either the perpetrator or the victim.’ [Citations.]” (*Ibid.*, italics added.)

The juvenile court here found no evidence that the acts were “for purposes of sexual arousal or gratification.” We agree. Although the Department presented exhaustive evidence showing that Maxwell repeatedly touched mother’s breasts, there is no evidence that either the child or mother was sexually aroused or gratified. Mother explained that the child poked rather than fondled her. As she understood the word,

“fondle” had sexual connotations, but Maxwell’s behavior was not sexual in nature. The forensic exam did not confirm sexual abuse. “[T]he only way to determine whether a particular touching is permitted or prohibited is by reference to the actor’s intent as inferred from all the circumstances.” (*People v. Martinez* (1995) 11 Cal.4th 434, 450.) But the actor here was Maxwell, a seven-year-old child who was never prompted. Although Maxwell’s behavior is inappropriate, there is simply no evidence whatsoever that he was motivated by sexual desire, arousal, or gratification.

In an effort to raise an inference of sexual arousal or gratification, the Department argues that the nature of the conduct -- squeezing mother’s breasts, an intimate part of her body, in an up and down motion, seven times a day every day -- coupled with the evidence that mother smiled when Maxwell touched her, mother’s failure to provide a credible, innocent explanation, and her failure to appropriately stop Maxwell, or tell him he could not touch her, is all evidence that mother “received sexual gratification from the touching.”<sup>2</sup> The Department exaggerates. There is no evidence that mother’s smile was one of approval, arousal, or was a grimace. Otherwise the record shows that mother brushed Maxwell aside, attempted to redirect him, and sometimes said “ ‘No,’ ” or “ ‘Stop it.’ ” It is undisputed that mother never touched Maxwell inappropriately, and never asked or coerced him to touch her. Maxwell innocently poked mother on his own initiative because he liked to. The investigating police concluded that the conduct was not committed in a lewd or lascivious manner and suspected that the allegations were all motivated by a custody dispute because “it just seems like there is something else missing and Father and Stepmother may be coaching the children.” Although the behavior was not appropriate, there is no evidence in the record that it was for sexual gratification. There being no evidence that gives rise to the inference of sexual arousal or gratification,

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<sup>2</sup> *In re R.C.*, *supra*, 196 Cal.App.4th 741, relied on by the Department is distinguished on its facts. There, a 32-year-old man claimed to be in love with a 12-year-old child and engaged in tongue-to-tongue French kissing. The appellate court held that “French kissing between an adult and a 12-year-old child who describe themselves as ‘in love’ is inherently sexual.” (*Id.* at p. 744.) Unlike *R.C.*, a child may poke his mother in the breast for reasons that may be inappropriate, but are not necessarily inherently sexual.

the juvenile court did not err in dismissing the count alleged under section 300, subdivision (d).

2. *Mother's appeal: there is no evidence that the children are at risk of harm (§ 300, subd. (b)).*

Section 300, subdivision (b), allows a child to be adjudged a dependent of the juvenile court when “[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 or guardian to adequately supervise or protect the child . . . .” (§ 300, subd. (b)(1).)

“ “The statutory definition consists of three elements: (1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) ‘serious physical harm or illness’ to the minor, or a ‘substantial risk’ of such harm or illness.” [Citation.] The third element “effectively requires a showing that at the time of the jurisdiction 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). [Citations.]” [Citation.]” [Citation.]” (*In re Christian P.* (2012) 208 Cal.App.4th 437, 449, italics added.) The Department had the burden to present evidence of a specific, non-speculative and substantial risk to Maxwell and Alexandra of *serious physical harm*. (*In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003.)

Here the record is devoid of evidence of a specific, defined risk of *serious* harm or illness, or substantial risk of such harm resulting from Maxwell touching mother’s breasts. The only evidence of harm was that the conduct caused Alexandra “to feel *uncomfortable*” and, as the Department suggests, caused sibling rivalry. (Italics added.) Research has revealed no case holding that feelings of discomfort constitute *serious* physical harm or illness as that is defined under section 300, subdivision (b). Even assuming the discomfort were sufficient, and although “ ‘past conduct is probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the children to the defined risk of harm.’ ” (*In re David M.* (2005) 134 Cal.App.4th 822, 831.) The Department adduced no evidence that the children were

at a current risk of any harm at the time of the jurisdiction hearing. It is undisputed that Alexandra wanted to be with mother and have custody returned to the 50/50 arrangement it had been before the Department's involvement. Maxwell missed mother. Mother was remorseful and declared she was " 'so sorry' " that Alexandra felt discomfort and that the events were not good for Maxwell. Mother loved and wanted her children to thrive. The record contains no testimony linking mother's conduct to her ability to parent or provide a clean, safe` home. (*Id.* at p. 830.) The children are in counseling further reducing the likelihood of recurrence. Although it is possible to dream up many potential harms that could occur, "without more evidence than was presented in this case, such harms are merely speculative." (*Ibid.*) "[P]revious 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. [Citations.]" (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 565.) The Department failed to meet its burden to adduce evidence beyond mere speculation.

Accordingly, we conclude the juvenile court did not err in dismissing the allegations under section 300, subdivision (d). We reverse the jurisdiction order declaring the children dependents under subdivision (b) of section 300. As the consequence of our holding, we need not address mother's additional contention challenging the order placing the children with father.

DISPOSITION

The jurisdiction order of October 23, 2014 is reversed. The disposition order is vacated.

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ALDRICH, J.

We concur:

EDMON, P. J.

JONES, J.\*

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