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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Placer)

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

PLACER COUNTY DEPARTMENT OF HEALTH &
HUMAN SERVICES,

Plaintiff and Respondent,

v.

S. H.,

Defendant and Appellant.

C066971

(Super. Ct. No. 53-
003100)

Mother, S. H., appeals from a judgment of the juvenile court sustaining a petition pursuant to Welfare and Institutions Code section 300, subdivision (c) declaring A. H. (minor) a

dependent of the court.¹ She contends there is insufficient evidence to support the finding that minor suffers or is at risk of suffering "serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others" as a result of mother's conduct. (§ 300, subd. (c).) We agree and reverse.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

Over the course of a number of years, mother and father, J. H., were engaged in a highly contentious divorce and custody dispute, detailed in over five volumes of family law files. Beginning in 2004 and continuing through 2008 there were numerous unfounded and inconclusive referrals to Child Protective Services (CPS). Each parent made claims against the other, with these unfounded allegations including claims of emotional abuse, sexual abuse, and general neglect. There was also a substantiated claim of general neglect made against mother in 2004. Ultimately, mutual restraining orders were issued.

In October 2006, mother sought counseling for minor, but father would not agree. The counselor noted it "could be detrimental to [minor's] health to continue counseling if her father is against the idea. This could create an unhealthy concept of counseling and confuse [minor] about it being a safe place." Based on the clinical history and observation of minor,

¹ Further undesignated statutory references are to the Welfare & Institutions Code.

the counselor believed minor could benefit from counseling. The counselor also noted that it was clear mother and father had "significant difficulty communicating with each other and this invariably affects [minor.] It would be beneficial for her to have a safe neutral location where she can express her thoughts and feelings about her family dynamics as well as learn important coping skills. It is vital that these services be ordered by Court and agreed upon by both parents so that [minor] does not incur future losses during this tumultuous time." The counselor also believed each parent needed individual counseling.

In December 2007, Dr. Dugan conducted a child custody evaluation. Mother reported father was "very cunning and quite manipulative." Specifically, she claimed he tried to manipulate her to "act out and be reactive" and that he told minor to make statements that would make mother overreact by creating conflict or calling CPS. Mother also reported father was preventing minor from being involved in therapy. Mother reported minor appeared "to like and enjoy time with both parents" but had "periods of crying, difficulties with transition, and difficulties with being exposed to high parental conflict" Father reported concerns about mother's emotional and behavioral instability, and that this behavior frequently occurs in front of minor and causes her to withdraw emotionally and behaviorally. He reported that minor was "doing pretty well" and had no significant problems. He was concerned, however, about her "emotional adjustment patterns with respect

to being caught in the middle of significant and chronic parental conflict." He claimed he was not opposed to minor being in counseling, but was opposed to mother "unilaterally and arbitrarily" selecting the therapist. Then, father wondered "given how well [minor] seems to be doing. . . whether or not she really needs any forms of child counseling."

Dr. Dugan also interviewed minor. There were no indications of cognitive, language or developmental delays. Minor presented as a "likeable, normally developing six-year old girl." There were no borderline or clinically significant spikes on any of her behavioral scores, supporting the parents' assertions that overall minor was developing well and not "exhibiting any developmental, emotional or behavioral problems." When the family was discussed, she appeared "shy, nervous and withdrawn." This affect was "notably different when compared to discussing her friends, school, activities or other areas of her life." The therapist concluded minor was "feeling fairly conflicted, confused, anxious and split with respect to her parents' separation and being exposed to ongoing parental conflict." Dr. Dugan was concerned about minor's emotional comfort and adjustment to the divorce, in part because of her "emotionally flat and withdrawn response upon discussing family issues" These concerns "more related to [minor's] divorce adjustment rather than any generalizable concerns."

Dr. Dugan interviewed minor's long-term daycare provider, Ms. Jackson, her kindergarten teacher, Becky Mills and a social worker, April Carew. Jackson and Mills both reported that

minor's development was normal or above average. Jackson noted minor had very social relationships and was well-liked. She appeared happy to see each parent and did not demonstrate any hesitation with either of them. Mills reported minor was a well-behaved, respectful, "great" child. Carew found father more reasonable, cooperative and rational than mother, but noted her primary concern with the various referrals to CPS was the "emotional abuse of [minor] as a result of being exposed to chronic, intense parental conflict."

Dr. Dugan concluded minor's relationship with each of her parents was quite important to her. He expressed significant concern about minor "experiencing ongoing emotional abuse as a result of regular, intense and inappropriate exposure to parental conflict and 'boundary violations' with respect to unpredictable, emotionally reactive behavior. . . . [Minor] is experiencing ongoing emotionally upsetting and abusive behavior patterns, and needs to be protected from this dynamic as much as possible by the parenting plan." While he noted mother demonstrated consistent problems exposing minor to "unpredictable emotionally explosive behavior", he also noted it was clear both parents had engaged in verbally and emotionally abusive behavior and exposed minor to it. Dr. Dugan concluded the parents were engaged in a "pattern of high parental conflict." He generalized that children exposed to high parental conflict "are at risk of developing significant emotional and behavioral concerns. . . [including] depression, anxiety, behavioral withdrawal, reduced communication and

emotional expression, lethargy, somatic symptoms and other like problems. . . [T]hese problems . . . are associated with emotional and behavioral withdrawal." Dr. Dugan concluded "both parents clearly have contributed to on-going co-parenting problems, and both parents clearly have contributed to the emotional adjustment difficulties of their child." Because of their ongoing difficulties, he concluded joint custody was not appropriate. Dr. Dugan's concerns about mother's emotional stability and father's more reasonable and stable presentation led him to recommend father be the primary physical custodian for minor.

In July 2008, father brought minor to counseling without mother's knowledge. Minor reported that mother made her say she did not love father and if she did not say she hated him, "Mom will beat the crap out of me." The counselor asked if mother beat her and minor answered, "No, but I'm afraid she will."

In July 2009, minor was seen by therapist Nina Nazimowitz. Nazimowitz reported minor was "an appropriate, playful, bright nervous 6, almost 7-year-old who is witnessing a large amount of conflict between her parents. [She] presented as nervous in therapy as she sought the approval of both parents" Nazimowitz concluded mother was invested in continuing the conflict between herself and father, her perceptions and interpretations were based on fear, and she was engaged in a power struggle that was taking precedence over her daughter. Nazimowitz concluded minor was "at this point, . . . coping well with her parent's discord but the damaging impact of [the]

situation will increase as [she] moves through her developmental stages and could cause a potential Axis II diagnosis."

On July 21, 2010, father was awarded full legal and physical custody of minor, "until such time as the parties are able to work more cooperatively with each other." On July 1, 2010, mother reported father to law enforcement for leaving minor in a hotel room while he was at work. After investigating, law enforcement determined "the biggest risk they [saw was] emotional abuse resulting from all the contention between the parents." Based on this risk, they referred the matter to CPS. Law enforcement and CPS assured father "this [was] really not a CPS issue." When father was asked for permission to interview minor, he refused, stating minor had "been interviewed so many times that she does not trust anyone."

As part of the family law proceedings, between May 18, 2010, and August 2010, the parents attended eight counseling sessions, many together. The sessions became "less effective and more conflictual" and the conflict was heightened as they "returned to court involvement." Because of their "established pattern of continued conflict and distrust, the inability to make sustainable gains and the increase in tension caused by co-parenting sessions," the sessions were terminated on August 10, 2010.

Also on August 10, 2010, father contacted CPS and reported that minor had just returned from a visit with mother. Mother had reportedly told minor that if she went to counseling she

would "be dead." Minor was crying intensely and violently shaking when she told the social worker the allegation was true.

A section 300 petition was filed alleging the child was "suffering, or is at substantial risk of suffering, serious emotional damage evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others," as a result of mother's statement that she would kill minor if she went to counseling and alleging "[a]s a result of ongoing acrimonious divorce proceedings, the minor suffers from ongoing emotional problems including depression and severe anxiety. The minor's mother has interfered with and sabotaged efforts to obtain counseling to treat these emotional problems." It was further alleged minor had been subjected to acts of cruelty by mother.

Mother denied the allegations. She reported that in the past father had taken minor to counseling and told her what to say. She claimed she had tried to take minor to counseling in 2006 and father had stopped it. She also reported she had been told by a therapist that minor was not in need of counseling, she and father were. She explained she was concerned father was going to take minor "to counseling on her own and make it like it was her problem and not his." She did not want minor to think there was something wrong with her. She admitted she had told minor never to talk to social workers or police without her mother or an attorney present, because of her own extreme distrust of law enforcement and social services. Mother did not

want the child in counseling, because minor did "not need to be exposed to that stuff."

Father claimed he wanted minor in counseling with the Tahoe Women's Center. He talked to minor about attending counseling and told her she could share the idea with mother. When she came home from mother's, minor reported mother had said "If you talk to anyone at Tahoe Women's Services you are dead." Father reported minor believed mother was capable of anything. Father claimed counseling had failed because mother had sabotaged it and minor was intimidated because mother had told her not to speak with anyone.

Minor also reported she had a friend facing similar parental conflict problems. Minor told mother she and her friend were talking to a school counselor. Mother told her not to talk to the school counselor anymore "because she thought she was doing weird things." Minor reported her parents did not get along, mother said "bad things" about father and father kept things to himself. Minor reported mother needed "to learn to behave. I will feel better if she behaves. It makes me sad when she says bad things about my dad." Minor reflected about the divorce, stating she felt "bad and sad because I didn't want them to (get divorced). It's been four years; it should be over." Minor also stated she could talk to her friends and sometimes teachers when she had a problem and needed to talk.

After considering the social worker's reports, the court found prima facie evidence that minor was a child described by section 300. Accordingly, minor was detained from the home of

mother on August 16, 2010, and placed in father's home. Supervised visitation with mother at least twice a week was ordered.

Mother initiated therapeutic services for herself on August 19, 2010. Those services included conflict management and resolution with father and anger management. After nine hours of intensive psychotherapeutic sessions, mother had shown good progress and had an excellent prognosis.

Minor was also interviewed by the social worker relative to the juvenile court proceedings. Minor was described as a "lovely, quiet eight-year-old girl." During the interview, her "affect did not change from discussing her family dynamics or talking about her hobbies. She was flat and expressionless through the course of the interview." She said her favorite people were her parents. She described her mother as "nice, she really likes dogs. Sometimes she yells at me and sometimes she doesn't believe me when I tell her something." She described her father, saying "He takes me to the pool and bike rides. There are really no bad things."

Minor's elementary school teacher was interviewed on September 21, 2010. She had had limited interactions with minor over the past three years. She reported that minor "is a child that doesn't smile. . . she is expressionless. I have seen her smile a few times this year, but it's something I noticed."

Mother participated in three visits with minor. Further visits conflicted with mother's employment obligations and were cancelled. Although minor appeared somewhat nervous during the

visits, overall they were positive. During the last visit, mother got angry with the supervising social worker in front of minor. The social worker described the visit as "uncomfortable at best." The social worker was also concerned that minor "appeared to accept mother's angry behaviors as normal."

The social worker noted it was clear both parents loved minor, but that love had been "obscured by hatred of each other which is now completely out-of-control. Both parents have manipulated, exaggerated and deceived one another to the point that it has been nearly impossible for either party to trust that anything is truly being done in the best interest of the minor. . . . Both parents, in their own way, attempted to extend the family law matters into the current case." Both "inserted comments" to discredit the other. The social worker reported the primary concern was minor's emotional health. She concluded minor was not a "typical 'happy' child" and appeared "numb to stimulus of any kind, positive or negative."

On November 10, 2010, the Department of Health and Human Services (DHHS) dismissed the allegations that mother had threatened to kill minor if she went to counseling (§ 300, subd. (c)) and cruelty (§ 300, subd. (i)). The remaining allegation under section 300, subdivision (c) was amended to allege that "[a]s a result of ongoing acrimonious divorce proceedings, the minor suffers from ongoing emotional problems including depressive symptoms and anxiety. The minor's mother has made inappropriate comments to the minor which has [sic] affected the

minor's ability to trust others, thereby interfering with her ability to obtain appropriate treatment."

After considering the social worker's report, the court found the petition as amended had been proven by a preponderance of the evidence and declared minor a child as described by section 300, subdivision (c). Minor was removed from mother's care and custody, and placed with father, subject to the continuing supervision of DHHS. Reunification services were ordered for mother and a family maintenance plan was ordered for father. Mother's visitation schedule was changed to comport with her work schedule and the supervision was changed to a therapeutic setting.

DISCUSSION

Mother contends the jurisdictional finding should be reversed because there was neither an allegation or proof that minor "suffered, or was at substantial risk of suffering, serious emotional harm because of her mother's conduct, and that the harm was evidenced by severe anxiety, severe depression, withdrawal or aggressive behavior."

"In reviewing the sufficiency of the evidence on appeal, we look to the entire record for substantial evidence to support the findings of the juvenile court. We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence, or determine where the weight of the evidence lies. Instead, we draw all reasonable inferences in support of the findings, view the record in the light most favorable to the juvenile court's order and affirm the order even if there is

other evidence supporting a contrary finding. [Citations.]” Mother, the appellant here, has the burden of showing there is no evidence of a sufficiently substantial nature to support the order. (*In re A.M.* (2010) 187 Cal.App.4th 1380, 1387–1388; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 820, quoting *In re Katrina C.* (1988) 201 Cal.App.3d 540, 547.)

To establish minor comes within juvenile court jurisdiction under section 300, subdivision (c), the DHHS had to establish “the following three elements: (1) serious emotional damage as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior or a substantial risk of severe emotional harm if jurisdiction is not assumed; (2) offending parental conduct; and (3) causation.” (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1379.) To meet this burden, the department alleged as supporting facts, that minor was suffering from “ongoing emotional problems including depressive symptoms and anxiety” caused by the “ongoing acrimonious divorce proceedings” and mother’s inappropriate comments to minor which affected her ability to trust and interfered with her obtaining appropriate treatment. The juvenile court did not make any additional specific findings on the petition, just that the allegations of the petition were true. We agree with mother that on this record, there is not substantial evidence that minor is seriously emotionally damaged or that she is in danger of becoming so unless jurisdiction was assumed.

Here, there was no allegation, and no finding, of “serious emotional damage” as required by section 300, subdivision (c).

In accordance with the amended allegation, the court found only that there were "emotional problems including depressive symptoms and anxiety." This finding does not support jurisdiction. To the extent the court intended to equate "emotional problems" to "serious emotional damage," the record lacks evidence of behavior that meets the statutory definition - "severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others." "[D]epressive symptoms" and "anxiety," as alleged in the petition, do not rise to the level of serious emotional harm required by the statute. (See *In re Brison C.*, *supra*, 81 Cal.App.4th at pp. 1379-1380.) Over the numerous years of these "ongoing acrimonious divorce proceedings," at most minor has exhibited some emotional withdrawal. She has not exhibited any developmental, emotional or behavioral problems. She is well-liked, social, appropriate, playful and bright. The most recent therapist to opine on the matter concluded minor was coping well with the parental conflict. This evidence does not rise to the level of serious emotional damage.

Nor is there evidence that mother's comments actually affected minor's ability to trust or obtain treatment. Mother has sought counseling for minor, and father opposed it. The counselor was concerned father's attitude about counseling would inhibit minor's ability to benefit from it. Later, father claimed he was not opposed to minor receiving counseling, but questioned the need for it. In 2008 and 2009, the record indicates minor was in counseling. Although concerns were

raised about mother and some of her comments, there was no indication she was interfering in any way with minor's therapy. In 2010, minor reported mother told her not to speak with the school counselor "because she thought she was doing weird things" and mother told minor if she went to counseling she would "be dead." But, minor also stated when she had a problem and needed to talk, she could talk to friends and teachers. This record certainly supports the conclusion that recently mother has made inappropriate comments to minor about therapeutic settings. However, there is no indication in the record that minor does not trust therapists. The only indication that minor has a lack of trust came from father in 2010, when he refused to let minor be interviewed by a social worker, claiming she had been interviewed so much that she did not trust anyone. Nor is there any indication in the record that mother's inappropriate comments have in any way impacted minor's ability to benefit from the provision of counseling services.

There was no evidence that the minor was at risk of serious emotional damage if the juvenile court did not assume jurisdiction. The case has been proceeding in family law court. There is no reason why it cannot continue there. Nor is there any reason why the family law court cannot address and resolve the issues in this case. The family law court can enter orders addressing custody, visitation, and counseling for parents and minor. "This is part and parcel of the family law court's role." (*In re Sarah M.* (1991) 233 Cal.App.3d 1486, 1500,

disapproved on other grounds by *In re Chantal S.* (1996) 13 Cal.4th 196.) "The family court, rather than the juvenile court, is the proper forum for adjudicating child custody disputes. (*In re John W.* (1996) 41 Cal.App.4th 961, 975 [].) The family court provides a means to decide domestic and family controversies and has available to it counselors and evaluators with the education and training needed to assist the court in settling family controversies. (Fam. Code, §§ 1801, 1814-1816, 3110-3116.) When custody and/or visitation are contested, the family court may refer the contested issues for mediation. (Fam. Code, § 3170.) 'The juvenile courts must not become a battleground by which family law war is waged by other means.' (*In re John W.*, *supra*, 41 Cal.App.4th at p. 975.) 'If indeed there is ever a place for it, the place for a custody battle is in the family law courts. There the battle will not consume public resources which are better directed to children who typically do not have the luxury of two functional parents fighting for custody. . . .' (*Id.* at p. 976.)" (*In re Alexandria M.* (2007) 156 Cal.App.4th 1088, 1096.)

Unfortunately, it is no secret there is a significant emotional cost to all children whose parents divorce. That cost is heightened when the parents cannot, or will not, put aside their own differences for the benefit of their child. However, section 300, subdivision (c) is not intended to protect all children suffering the emotional consequences of their parents' divorce related misbehavior. (*In re Alexander K.* (1993) 14

Cal.App.4th 549, 559; *In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 823.)

The statute specifically delineates "the type of impairment to the child's emotional functioning which will support intervention." (*In re Alexander K.*, *supra*, 14 Cal.App.4th at p. 559.) The impairment must be evidenced by severe anxiety, severe depression, withdrawal or aggressive behavior. That evidence does not exist here. There is no evidence that minor's "emotional problems" are any greater than those which any young child coping with self-centered, divorcing parents is likely to experience. Accordingly, there is not substantial evidence supporting the allegations in the petition or the jurisdictional findings.

In reaching this result, we note there is certainly in this record much evidence of emotional turmoil and occasional withdrawal by minor. It is clear to us that this was caused by her parents' dysfunctional conduct in their ongoing custody dispute. They have both been manipulative and deceitful to the point where neither is acting in the minor's best interests. Every professional involved with this family has noted the parents appear incapable of resolving their conflicts. Multiple psychiatrists, mediators and therapists, law enforcement officers and social workers have all concluded that both parents' conduct in the custody power struggle was emotionally abusive of minor. There is no question the parents' conduct through the course of their divorce and custody battle has been emotionally damaging to their daughter.

However, that is not the allegation in this petition. The allegation here is that the minor is at substantial risk of emotional damage because her mother's inappropriate comments have affected her ability to trust and thereby obtain appropriate treatment for the emotional problems she suffers as a result of their acrimonious divorce. There is not substantial evidence supporting this allegation.

We do not see this as a "win" for mother nor for father. We suggest that instead, A.H. is the winner here, as we have decided she is not currently at "substantial risk of emotional damage" despite her parents' sustained dysfunction. This is a testament to the minor's strength, loyalty and love. We trust that the family court will continue to make appropriate orders to protect A.H. and that she will continue to do well. We expect her parents, each of whom she obviously loves very much, finally, will begin behaving with humility and civility toward one another and become the exemplars, the role models, that their child, this child, needs and deserves. If they do not, they will continue to hinder and harm their child, this child, who deserves better. Unless both parents grow up and behave as grown-ups -- as parents -- and put their child first, A.H. may indeed end up at substantial risk of emotional damage such that the DHHS's intervention may be necessary.

DISPOSITION

The juvenile court's November 10, 2010, jurisdictional order is reversed. The dispositional judgment and all

subsequent orders predicated on the November 10, 2010,
jurisdictional order are vacated.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

DUARTE, J.