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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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In re Z. C., a Person Coming Under the  
Juvenile Court Law.

C068805

SACRAMENTO COUNTY DEPARTMENT OF HEALTH  
AND HUMAN SERVICES,

(Super. Ct. No.  
JD229869)

Plaintiff and Respondent,

v.

Z. S.,

Defendant and Appellant.

For two years, the parents of minor Z.C. have been pointing fingers, violating court orders, and making the minor an unfortunate pawn in a tug-of-war custody battle being played out in the juvenile court. Appellant Z.S., mother of the minor, now appeals from the juvenile court's modification order removing the minor from her joint custody and placing her in the father's sole physical custody. (Welf. & Inst. Code, §§ 388, 395; further undesignated statutory references are to this code.) She contends there was insufficient evidence for the juvenile

court to find the removal necessary and beneficial for the minor. We affirm.

#### **BACKGROUND**

The record and briefs in this case are replete with allegations of inappropriate conduct and violations of court orders as to both parents. We recount, however, only those facts relevant to the issue on appeal.

On June 19, 2009, the Sacramento County Department of Health and Human Services (Department) filed a section 300 petition on behalf of then almost five-year-old minor Z.C. because of ongoing domestic violence and failure to cooperate with voluntary services. The parents had lived together "off and on" since 2005, and the domestic violence had been ongoing at least from that time. The minor was detained.

The juvenile court sustained the petition on August 12, 2009, declared the minor a dependent child, and placed the minor with mother under a program of supervision and services. The juvenile court ordered services and visitation for the minor's father, but ordered the parents have no contact with each other.

Not long after the petition was sustained, mother gave birth to the minor's sibling. The newborn resided with mother and the minor. The minor's half sibling resided with the minor's father. Neither sibling is a subject of this appeal.

At an August 30, 2010, review hearing, father's counsel reported that father had not had a visit with the minor since December 2009. The juvenile court ordered the visits be made up and the hearing was continued. Mother continued to make the

minor unavailable for visits, and by November 18, 2010, father had still not had a visit since December 2009. The Department and the minor requested joint custody placement, with father as the primary caregiver.

At the December 9, 2010, contested hearing, the Department recommended the minor be placed with father because of mother's history of thwarting attempts to provide father with visitation. Father and the minor concurred. They also argued that placement with mother was now a risk because of mother's "emotional instability." The juvenile court ordered weekend visitation for father and continued the hearing to December 20, 2010.

On December 17, 2010, the Department filed a report changing its recommendation to joint physical custody. Although there were "significant concerns" about mother's ability to share joint custody, the social worker believed such an arrangement was in the minor's best interests. The Department was continuing to monitor the minor's safety in mother's care. The juvenile court ordered joint custody, alternating weeks, with exchanges taking place at school so the parents would not come in contact with each other. Mother was also ordered to submit to a psychological evaluation.<sup>1</sup>

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<sup>1</sup> Mother was ordered several times thereafter to submit to the psychological evaluation and finally did so on April 20, 2011. The psychologist concluded that she did not have any significant psychopathology, although she had narcissistic features to her personality that did not rise to the level of a mental disorder.

On March 8, 2011, father filed a section 388 petition for modification, requesting the minor be placed in his sole custody. Father subsequently withdrew the request after receiving assurances mother would abide by the visitation order.

During a progress report hearing held on April 18, 2011, father's counsel informed the court that father had shown her a picture of the minor with a mark on her face. Counsel indicated the minor had told father that mother had hit her, and father had tried to contact the Department to report the incident but no one followed up. The Department and the minor requested a continuance to investigate the matter.

Thereafter, the social worker reported that the minor had marks on her face near her eye. The minor had told father that her 19-month-old brother had hit her, but upon further questioning by father, the minor broke down and said mother had hit her because she was mad about her homework. On April 18, 2011, an emergency response worker talked to the minor at her school. The minor reported to that worker that she had "messed up on homework" and mother instructed her younger brother to hit her with a belt, which caused the bruising. The emergency response worker quoted the minor as stating: "'I didn't get the answer right so I got hit'"; "'Mom told [the brother] to do that'"; "'He actually did it with a belt'"; "'Mom told him to stop'"; and "'Yesterday she said sorry that she made [the brother] hit me.'" When asked why she told her father that mother had hit her, the minor said, "'Dad was going to tell the courts something about my face. That my mom did it but I wanted

to say [the brother] but I said mom. I was trying to say that but dad kept saying [the] same thing and took a picture.'" "

When the minor was questioned about discipline, the minor said she was scared mother would hit her with a belt. Asked when last mother had hit her with a belt, the minor answered, "'She (mom) never did anything except [the brother] did.'" The minor also asked the worker not to tell mother because she would get mad. The minor reported that father disciplined her by hitting her with an open hand.

The emergency response worker also interviewed mother. Mother was adamant that she did not hit the minor with a belt or instruct the minor's younger brother to do so. Mother reported that the brother is "'very aggressive'" and hits his own head. Mother said the brother hit the minor while he was wildly swinging a belt, which he had taken off of the minor's pants. Mother had been "'wrestling with it to get it back from him'" when the child hit the minor with it. The minor was hit only once. Mother had apologized to the minor and reported the incident to the minor's teacher. Mother's friend then interjected that the minor's brother had hit her and her child as well.

The minor's teacher confirmed that mother had told her the minor's brother had hit the minor with a belt. The teacher and principal had questioned the minor, and the minor told them that her brother had hit her with a belt.

The social worker concluded the minor's reports varied as to who caused the injury. Accordingly, the result of the social

worker's investigation regarding allegations of physical abuse was "[i]nconclusive at this time" as to whether mother willfully harmed or injured the minor or inflicted unjustifiable punishment. The Department recommended the current joint custody arrangement remain in effect, with an order that neither parent employ corporal punishment.

The minor's teacher had reported that she saw the minor's injury on April 14, 2011. The injury was still visible to minor's counsel on April 18, 2011.<sup>2</sup> It consisted of three linear marks, each approximately 1.5 to 3 inches in length. The minor initially granted, but later revoked, permission for counsel to disclose to the court her statements to counsel.

Minor's counsel filed a section 388 petition for modification and a request for an order shortening time, seeking removal of the minor from mother's home and placement of the minor in father's sole custody with supervised visitation for mother. Minor's counsel asserted that, regardless of whether the injury was directly or indirectly caused by mother, the minor was at substantial risk of harm in mother's care.

A sheriff's deputy also interviewed the minor on April 18, 2011. The minor told the deputy that her brother had hit her with a belt because her mother had told him to. Specifically, the minor said she had been doing her math homework, and "I think I got one of the answers wrong. I think I said 6, and the

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<sup>2</sup> Counsel's declaration states she saw the injury on March 18, 2011, but this appears to be a clerical error.

answer was 8. My mom . . . got mad and she told my brother to hit me with a belt. [¶] My brother is one year old. He got my pink colored belt and he hit me with it. [¶] My mom didn't hit me. She doesn't do anything to me when I don't listen or follow the rules."

Both father and the minor's counsel filed pretrial statements requesting the juvenile court remove the minor from mother's care and place her in the sole physical custody of father. The contested hearing went forward on June 14, 2011. The Department did not file a pretrial statement, but during opening statements, counsel indicated the Department was "technically . . . opposed" to the requested change in orders "based on the current state of the evidence," but that could change in the future. There had also been a new report of physical abuse by mother (wherein the minor had told her teacher that mother had punched her in the stomach) that was being investigated.

The sheriff's report and photographs of the injury the minor received from the belt were received into evidence. The parties stipulated that Dr. James Crawford-Jakubiak was an expert in the area of recognizing child abuse and its causes. Crawford-Jakubiak testified that he had reviewed the photographs taken by father and that bruises to the face can be caused accidentally or intentionally, but that it is distinctly and relatively uncommon to see accidental bruises on the face. The bruising indicates traumatic injury, typically caused by an object coming into contact with the face, one or both of which

could be moving. The location of the minor's bruising indicates that the minor was likely to have been struck by someone who is left-handed.

Crawford-Jakubiak considered both claimed scenarios as to how the minor sustained the bruising to her face -- one scenario being that an adult caused the injury, the other scenario being that a one year old caused the injury. Crawford-Jakubiak opined that it was more probable the adult caused the injury. This opinion was based on the fact that a one year old typically engages in primitive actions such as pushing, biting, throwing things, and shoving. Crawford would need "a lot more detail about the specific actions that the one-year-old was allegedly engaged in" before he could reasonably conclude a one year old inflicted the injury with the belt.

With respect to a scenario wherein mother instructed the one-year-old brother to hit the minor with a belt, Crawford-Jakubiak noted that "[t]ypically a six-year-old is going to . . . move away" from a one-year-old under those circumstances, so he would need to know more about how the younger child would be capable of engaging with the much older child and hitting her with something. This same explanation held true to a scenario where a one year old was wildly swinging a belt. He would also want to consider the relative heights of the children. In Crawford-Jakubiak's 15 or 16 years of working in this field, he had never seen that type of injury caused by a one or two year old.

Crawford-Jakubiak also noted that in what he read, there was no discussion about the minor being hit with a belt buckle. Crawford-Jakubiak explained that the three linear marks on the minor's face were typical of a pattern injury, which would be caused by being struck three times with a linear object or by a "complicated object" with more than one surface. As to whether a belt buckle could have caused the injury, Crawford-Jakubiak indicated he would need to know more about what the belt looked like and the relative heights of the children. Additionally, Crawford-Jakubiak indicated that marks being visible five days after the event is uncommon and would not be caused by most slaps.

Emergency response worker Shaunté Derrick testified that a second report of possible child abuse had been received on May 25, 2011. The minor complained of stomach pain and said mother had punched her in the stomach. When the worker interviewed the minor approximately a week later, the minor did not repeat the allegation and "didn't know" why she had made the statement, but did not deny having made it. There had also been a subsequent referral alleging father had driven drunk while the minor was in the car and had swerved when his girlfriend hit him. The Department was not taking action with respect to either of these referrals. Derrick opined that the minor was caught in "a lot of chaos" and would recount stories that had a "ring of truth" to them.

After hearing argument, the juvenile court found, by clear and convincing evidence, that mother had inflicted the injuries

to the minor's face and there was a substantial danger to the physical health and safety of the minor unless removed from mother's custody. The juvenile court granted the minor's section 388 petition for modification and placed the minor in father's sole custody with supervised visitation for mother. A review hearing was scheduled.

### **DISCUSSION**

Mother contends there was insufficient evidence for the juvenile court to find a substantial danger to the physical or emotional well-being of the minor if not removed from her home. The Department disagrees. So do we.

#### **A. Judicial Estoppel**

Initially, we address mother's argument in her reply brief that this court should disregard and strike the Department's brief on the ground of judicial estoppel. Mother argues that the Department is estopped on appeal from asserting the position that there was no juvenile court error because that position is contrary to the position it asserted in the juvenile court at the modification hearing.

It has been held that "[a]lthough equitable estoppel may apply to government actions where justice and right so require, 'estoppel will not be applied against the government if the result would be to nullify a strong rule of policy adopted for the benefit of the public [citations] or to contravene directly any statutory or constitutional limitations. [Citation.]' [Citations.]" [Citation.] The public policy here is the protection of abused and neglected children (§ 300.2) and the

children's need for stability and permanence [citation]."

(*In re Joshua G.* (2005) 129 Cal.App.4th 189, 197.) The juvenile court's order furthers these policies and we see no reason why the policy preventing the application of equitable estoppel to the Department under such circumstances would not apply equally to judicial estoppel.

Furthermore, setting aside the question of whether the doctrine of judicial estoppel may be applied against the Department in a dependency hearing, where the focus is on the protection and best interests of the child, one of the requirements for the application of judicial estoppel is clearly not met here. Judicial estoppel applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. [Citations.]" (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.) The third judicial estoppel factor of success is not satisfied here, as the juvenile court's order was contrary to the Department's recommendation of continued joint custody. (See *Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 170-171 ["[t]he factor of success—whether the court in the earlier litigation adopted or accepted the prior position as true—is of particular importance"].) Thus,

the Department is not estopped from asserting the position that there was no juvenile court error on appeal.

**B. Modification Petition**

At a hearing on a section 388 petition for modification, the party requesting the modification has the burden of proof. (Cal. Rules of Court, rule 5.570(h)(1); *In re Amber M.* (2002) 103 Cal.App.4th 681, 685.) If the request is for removal of the child from a parent's home, the hearing is to be conducted in the same manner as a dispositional hearing, and the petitioner "must show by clear and convincing evidence that the grounds for removal in section 361[, subdivision] (c) exist." (Cal. Rules of Court, rule 5.570(h)(1)(A), (2).)<sup>3</sup>

Section 361, subdivision (c) provides several grounds for removal of a minor from the custody of her parent or guardian, including when "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's

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<sup>3</sup> *In re Michael D.* holds that the heightened standard of proof does not apply when a parent petitions to modify a permanent placement plan. Under those circumstances, the parent's burden of proof remains preponderance of the evidence proving both changed circumstances and that the best interest of the child would be a change in placement to the parent's home. (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1083-1084, 1086.) Here, the minor petitioned to modify the placement order. The parties argued, and the juvenile court applied, the heightened standard of proof. We need not determine whether the minor was required to meet that heightened standard, as the minor has not appealed the requirement that she meet it and we find substantial evidence supports the juvenile court's ruling.

physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody." (§ 361, subd. (c)(1).)

The juvenile court found, by clear and convincing evidence, that there was a substantial danger to the minor's physical health and safety if not removed from mother's custody. On review, we determine whether the record contains substantial evidence for the juvenile court to make this finding by clear and convincing evidence, drawing all reasonable inferences to support the findings and noting that issues of credibility are matters for the juvenile court. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.)

Here, as the juvenile court noted, the minor initially reported to her father (a couple of days after the actual incident) that her brother had caused the injury, but upon further questioning she stated that mother had hit her because mother was mad about her homework. A few days later, the minor stated her brother had hit her with a belt but had done so at mother's direction, again because she had made a mistake in her homework. The minor later repeated to her teacher and principal that her brother had hit her with a belt, with no elaboration about why. The minor also stated, when asked about discipline, that she was scared mother would hit her with a belt. The import of these statements, as a whole, is that mother was using a belt as a form of discipline.

In addition, the juvenile court reasonably found implausible mother's explanation as to how the minor was

injured. First, as the juvenile court noted, mother's claim that she had been (apparently unsuccessfully) "wrestling" with a 19 month old to get a belt is inherently implausible. Additionally, mother claimed the minor had been struck only once with the belt. Crawford-Jakubiak testified that the injury appeared to be a pattern injury, consistent with being struck three times by a linear object (such as a belt). Furthermore, Crawford-Jakubiak testified that the type and severity of the injury suggested the minor was not injured by the kind of aggressive activities one year olds typically engage in, or even by a slap from an adult. And Crawford-Jakubiak also testified that he would expect a child the minor's age to move away from the younger sibling if the younger sibling was the one wielding the belt. In Crawford-Jakubiak's 15 years of experience in the field, he had never seen a one or two year old inflict the kind of injury inflicted upon the minor here.

This evidence is sufficient for the juvenile court to find, by clear and convincing evidence, that mother inflicted the injury upon the minor as punishment and did so by striking the minor in the face with a belt -- most probably, several times. Thus, substantial evidence supports the juvenile court's finding that the minor would be at risk of physical harm if she remained in mother's custody.

We reject mother's belated attacks on Crawford-Jakubiak's testimony as an expert witness. Mother stipulated that Crawford-Jakubiak was an expert witness and did not object to the nature of his testimony as an expert. Accordingly, she has

forfeited any objection to his testimony on that basis. (Evid. Code, § 353; *People v. Ward* (2005) 36 Cal.4th 186, 211.) With respect to mother's challenge to the foundation of Crawford-Jakubiak's opinion being based primarily on father's photographs "of moderate quality," mother's complaints go to the weight to be accorded to the expert's opinion and were therefore matters to be addressed in the juvenile court, not on appeal. (See *Francis v. Sauve* (1963) 222 Cal.App.2d 102, 119-120.) And we do note that mother did not cross-examine Crawford-Jakubiak on this, or any other, matter.

Finally, we note that mother does not explain how, even if the evidence could establish only that the minor's young brother inflicted the injury with the belt, there is not a substantial risk to the minor's physical health and safety if not removed from mother's custody. Certainly, if mother *instructed* the brother to strike the minor with the belt, the minor remains at risk. But even if mother's version of the events were believed, mother's failure to protect the minor from (while actively attempting to supervise) the young brother, whom mother claims to be "very aggressive" and who allegedly strikes himself, other adults, and children, would support a substantial risk finding.

In any event, as we have stated, there is substantial evidence to support the juvenile court's finding, by clear and convincing evidence, that mother inflicted the injuries upon the minor, thereby placing the minor's physical health and safety at risk if not removed from mother's custody.

**DISPOSITION**

The orders of the juvenile court are affirmed.

\_\_\_\_\_ RAYE \_\_\_\_\_, P. J.

We concur:

\_\_\_\_\_ MURRAY \_\_\_\_\_, J.

\_\_\_\_\_ HOCH \_\_\_\_\_, J.