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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

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

TULARE COUNTY HEALTH AND HUMAN
SERVICES AGENCY,

Plaintiff and Respondent,

v.

GLORIA F.,

Defendant and Appellant.

F063251

(Super. Ct. Nos. JJV065555A,
JJV065555B, JJV065555C)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Tulare County. Charlotte Wittig,
Commissioner.

Laloni A. Montgomery, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kathleen Bales-Lange, County Counsel, and John A. Rozum and Jason Chu,
Deputy County Counsel, for Plaintiff and Respondent.

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* Before Poochigian, Acting P.J., Detjen, J. and Franson, J.

Gloria F. appeals from the juvenile court's orders adjudging her three children, six-year-old Fabian, four-year-old Alexis and one-year-old Ava, dependents pursuant to Welfare and Institutions Code section 300, subdivision (b),¹ removing them from her custody (§ 361) and placing Fabian with his father, Adrian. We affirm.

PROCEDURAL AND FACTUAL SUMMARY

On July 2, 2011, Gloria called emergency services and reported that one-year-old Ava was nonresponsive. Officer Tanck responded and found Ava breathing and with a pulse. Gloria told Officer Tanck that she thought Ava ingested methamphetamine. She said she started using methamphetamine on June 27, 2011, to lose weight. She said that on July 1, she used the stove to light her pipe and that a lot of smoke came in contact with her plates and dishes. The next morning, she made Ava an egg. Ava took a bite and vomited. She noticed that Ava moved faster during the day but by that evening was not responding as usual. She acknowledged that using drugs was wrong and that it was wrong to use them in front of the children.

Officer Aguayo found the methamphetamine hidden in a box of diapers on the floor of a closet. The methamphetamine was in a metal tin container inside of a clear plastic pouch wrapped in a baby's bathrobe.

Gloria told a social worker from the Tulare County Health and Human Services Agency (agency) that she monitored Ava's temperature throughout the day. Ava played and was symptom free until around 5:30 p.m. that evening when Gloria observed her to be "out of it." Gloria checked Ava's heart by placing her hand on Ava's chest and concluded she was fine. Gloria gave her a bath and rechecked her temperature. She called 911 a little before 6:00 p.m. She denied any prior drug use.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Gloria identified Adrian P. as Fabian's father. She said she did not live with Adrian prior to Fabian's birth and did not know Adrian's whereabouts. She did not know the identity of Alexis's father but identified Ava's father by name.

Gloria told the social worker that she was depressed over her weight and had been feeling depressed since Ava's birth. She said she suffered a traumatic experience in 2006 for which she had not received mental health treatment.

The social worker took Alexis and Ava into protective custody and they were medically evaluated at the hospital. The examining physician cleared the children medically and told the social worker that their toxicology results were negative for drugs. Alexis and Ava were placed in foster care. Fabian was out of town with a maternal relative.

The agency filed a dependency petition alleging, in two counts under section 300, subdivision (b) (failure to protect), that Gloria had a history of methamphetamine abuse that endangered her children and that on July 2, 2011, Ava came into contact with Gloria's methamphetamine, causing Ava to become unresponsive and lapse into unconsciousness. The agency also alleged two section 300, subdivision (g) (no provision for support) counts, one as to Ava's father who was incarcerated with an unknown release date and the other as to Adrian alleging his whereabouts were unknown.

In July 2011, at the detention hearing as to Alexis and Ava, the juvenile court entered Gloria's denial of the allegations and inquired as to paternity. Gloria testified that she and Adrian were not married and were not living together at the time of Fabian's birth. She further testified that Adrian's name was not on Fabian's birth certificate and that Adrian never took Fabian into his home. However, she said there was a child support judgment and Adrian provided child support for only a few months. She said she was granted full custody of Fabian two years previously and subsequently had no further contact with Adrian. Following its inquiry, the juvenile court deemed Adrian to be Fabian's biological father.

The juvenile court ordered Alexis and Ava detained and ordered the agency to refer Gloria for a substance abuse evaluation, mental health assessment, parenting classes and drug testing. The juvenile court also ordered supervised visitation. A week later, the juvenile court ordered Fabian detained as well. He was placed with his sisters in the home of a non-relative extended family member in Tulare.

The agency located Adrian living in Fresno, and social worker Marie Hernandez met with Adrian and his wife to gather background information. Adrian said that he was a long haul truck driver and returned to Fresno every other day. He said he was convicted nine years previously for receiving stolen property and served one and a half years in prison. He said he was willing to assume physical custody of, and financial responsibility for, Fabian. He said he last saw Fabian a month and a half prior and that he contacted Gloria to visit Fabian but she would not respond to his requests. He said he first became aware that he had a child in 2006 when he was contacted by child support services. He took a paternity test that established his paternity and he paid child support. He said he started to build a relationship with Fabian and was willing to do whatever was necessary, including participate in services, to gain custody of him.

Gloria completed a substance abuse assessment and told the assessor that she used methamphetamine for one week only. The assessor reported that Gloria's assessment indicated a high probability for and "clear evidence of substance dependence." Since Gloria had no prior drug treatment, the assessor recommended she participate in an outpatient program.

In its report for the jurisdictional hearing, the agency recommended against returning the children to Gloria's custody even though she was cooperating with services and regularly visiting the children. The agency was concerned that she had mental health issues she needed to address before the children could be safely returned. In addition, the agency believed that it was premature to place Fabian in Adrian's care. It stated it did not

have much information about Adrian other than what he reported and he and Gloria both stated that Fabian did not have a relationship with him.

Adrian subsequently provided the agency additional information, which suggested that he had an established relationship with Fabian. However the agency reported that the information was conflicting. Adrian said he had been trying to establish a relationship with Fabian since 2006 after discovering he was Fabian's father. He did not seek a custody order because Gloria told him she would allow him to see Fabian. He said he had custody of Fabian every weekend or monthly, depending on what Gloria allowed and that Fabian spent a month with him the previous summer. However, Adrian also told the social worker that Gloria stopped allowing him to see Fabian the previous year. He tried to get legal assistance but was unsuccessful.

The agency recommended that the juvenile court provide Adrian reunification services but not place Fabian with him. The agency informed the juvenile court that Fabian was placed with his siblings where he knew the caretakers and where he would be able to attend his school of origin.

In early August 2011, the juvenile court convened the jurisdictional hearing. Gloria and Adrian appeared and the court appointed counsel for Adrian. Adrian informed his new attorney that he worked out of town for 30 days at a time. The juvenile court ordered supervised visitation for Adrian and continued the hearing until mid-August. Meanwhile, the agency informed the juvenile court that Adrian did not have any criminal history in Tulare but that it was awaiting results from Fresno.

In mid-August 2011, the juvenile court convened the jurisdictional/dispositional hearing. Gloria and Adrian appeared represented by counsel who informed the court that Gloria and Adrian signed waiver of rights forms and wished to submit the matter on the basis of the social worker's report. The juvenile court obtained a waiver from both parents and no evidence was presented. County counsel asked the juvenile court to dismiss the section 300, subdivision (g) allegation as to Adrian and to amend the first

subdivision (b) allegation since there was no evidence that Ava had methamphetamine in her system. Gloria's attorney argued there was also no evidence that Gloria had a history of substance abuse prior to the July 2011 incident. The juvenile court proposed striking the first subdivision (b) allegation and certain portions of the second subdivision (b) allegation, resulting in a single subdivision (b) count. Counsel agreed with the proposed change and the juvenile court found the allegation true. The juvenile court also found the subdivision (g) allegation as to Ava's father true and dismissed the subdivision (g) allegation as to Adrian.

The juvenile court proceeded to the dispositional phase of the hearing. County counsel advised the juvenile court that the agency had not received the criminal background check on Adrian from Fresno. Adrian's attorney made an offer of proof that Adrian was convicted in 2001 of possession of stolen property and served time in jail. In 2003, he was convicted of possession of stolen property and served a prison sentence. He was released in 2005, successfully completed parole and was discharged from parole one year early. He had no subsequent arrests or convictions. Counsel for the parties stipulated to Adrian's offer of proof and the juvenile court accepted it. No further evidence was presented.

The juvenile court requested argument as to the detrimental effect of placing Fabian with Adrian. County counsel responded that he did not have an argument, stating he was under the impression that a presumed father was entitled to placement. Gloria's attorney argued Fabian did not have a relationship with Adrian and pointed out that Adrian had given varying accounts of how much contact he had with Fabian and that Gloria said it had been a year since he had seen Fabian. Gloria's attorney also argued that Adrian's estimate of how much time he was home varied and that it appeared he was away for long periods of time. She said Gloria wanted Adrian to have a relationship with Fabian but argued the juvenile court should begin with visitation.

Minors' counsel also argued against placing Fabian with Adrian, citing the lack of a relationship, Adrian's work schedule and Fabian's stable placement with his siblings. Minors' counsel agreed with Gloria that Adrian should develop a relationship with Fabian through visitation. He also pointed out that Fabian had either started or would be attending school in Tulare.

Adrian made an offer of proof, which the juvenile court accepted, that his work scheduled had changed and that he was on the road for two weeks and off for three days. He also said that his wife of seven years was home and that they had three grandchildren under the age of nine who visited them nearly every day.

Following argument, the juvenile court found that Adrian was a noncustodial parent who wanted custody of Fabian and that there was no showing that placing Fabian with him would be detrimental. Consequently, the juvenile court ordered Fabian placed with Adrian with family maintenance services and also ordered sibling visitation. The juvenile court also ordered all three children removed from Gloria's custody and ordered reunification services for her. The juvenile court set a hearing in February 2012 to review family reunification and family maintenance services. This appeal ensued.

DISCUSSION

I. Jurisdictional Finding

Gloria contends there was insufficient evidence to support the juvenile court's exercise of dependency jurisdiction under section 300, subdivision (b) (subdivision (b)). Therefore, she argues, the juvenile court's jurisdictional finding was error. We disagree.

Section 300, subdivision (b) provides, in relevant part, that a child may fall within the jurisdiction of the juvenile court if the "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" (§ 300, subd. (b).) Three elements are necessary for a jurisdictional finding under subdivision (b): "(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.” (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.)

Challenges to a juvenile court’s jurisdictional findings are reviewed for substantial evidence. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1649.) Substantial evidence is evidence that is “‘reasonable, credible and of solid value’” such that a reasonable trier of fact could make such findings. (*In re Christina A.* (1989) 213 Cal.App.3d 1073, 1080.) “We review the record to determine whether there is any substantial evidence, contradicted or not, which supports the court’s conclusions.” (*In re Kristin H., supra*, at p. 1649.) “‘All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the verdict, if possible.’” (*Ibid.*) Issues of fact and credibility are questions for the trial court and it is not our function to redetermine them. (*In re Rubisela E.* (2000) 85 Cal.App.4th 177, 194-195.)

Distilled to its essence, Gloria’s argument is twofold: there was no evidence she abused drugs and the children were not at a substantial risk of harm because Ava did not ingest methamphetamine. Gloria first challenges the juvenile court’s subdivision (b) finding which states:

“The mother’s substance abuse renders her unable to provide Fabian, Alexis and Ava with regular care, thereby placing the children at substantial risk of suffering serious physical harm or illness. The mother’s abuse of drugs endangers the children and places the children’s physical and emotional health and safety at risk of harm and damage and creates a detrimental home environment.”

Gloria contends that the juvenile court’s subdivision (b) finding merely recites the statutory language and lacks any facts that she abuses drugs. Her challenge to the specific language of the juvenile court’s finding, however, is of no consequence in this case for several reasons. First, Gloria is not challenging the sufficiency of the petition to state a cause of action for jurisdiction.² Further, she essentially negotiated the terms of

² Gloria clarifies this point in her reply brief.

the modified language by agreeing to them. Having done so, she cannot now challenge them for the first time on appeal. Additionally, the appellate record contains other evidence that Gloria struggles with drug use. We refer to the report of her substance abuse evaluation, which stated there was “clear evidence of substance dependence.” Gloria challenges the validity of this opinion, arguing there was no stated basis for it. However, Gloria waived her right to challenge this evidence by not raising an evidentiary objection.

We further conclude substantial evidence supports a finding under subdivision (b) that Gloria’s methamphetamine use placed the children at substantial risk of harm. Gloria used methamphetamine while caring for three small children and stored it in a place where it was accessible to them. It is not difficult to imagine any one of them discovering the drug and ingesting it. The fact that Ava did not actually ingest methamphetamine does not in any way diminish that risk and Gloria does not cite any authority that actual harm is required in order to adjudge a child a dependent under subdivision (b). Indeed, there is authority to the contrary. As one court stated, “The state, having substantial interests in preventing [harm to a child] is not helpless to act until that danger has matured into a certainty.” (*In re Eric B.* (1987) 189 Cal.App.3d 996, 1003.) “Substantial likelihood is sufficient.” (*Id.* at p. 1002.)

We find no error in the juvenile court’s finding that Fabian, Alexis and Ava are minor children described by section 300, subdivision (b).

II. Dispositional Order Removing the Children

Gloria contends there was insufficient evidence to support the juvenile court’s dispositional order removing the children from her custody pursuant to section 361, subdivision (c) which provides in relevant part:

“A dependent child may not be taken from the physical custody of his or her parents ... with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence of any of the following circumstances ...: [¶] (1) There 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 physical health can be protected without removing the minor from the minor's parent's ... physical custody.”

Thus, in order to remove a child under the statute, the juvenile court must find by clear and convincing evidence that the child would be placed at risk of substantial danger if returned to parental custody and that there are no reasonable means to protect the child without removing the child from the parent.

Gloria contends that her five-day use of methamphetamine and conduct on July 2, 2011, do not rise to clear and convincing evidence of danger to warrant removing the children under section 361. Further, she contends the juvenile court ordered the children’s removal without any information from the agency as to whether reasonable alternatives to removal existed.

On a challenge to the juvenile court’s findings resulting in the removal of a child, we apply the substantial evidence test. (*In re Henry V.* (2004) 119 Cal.App.4th 522, 529 (*Henry V.*)) In doing so, we bear in mind the higher standard of proof yet view the record in the light most favorable to the challenged order, drawing all reasonable inferences in support of that order. (*In re Javier G.* (2006) 137 Cal.App.4th 453, 462-463.) Further, appellant bears the burden of showing there is no evidence of a sufficiently substantial nature to support the removal order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.) In light of the evidence, as summarized above, we conclude substantial evidence supports the juvenile court’s removal order.

In this case, the juvenile court made a jurisdictional finding that Gloria’s drug use placed the children at substantial risk of harm and ordered them removed from her custody. Though the juvenile court did not articulate a factual basis to support its removal order, we can infer from Gloria’s mental state on July 2, 2011, and her substance abuse assessment that her methamphetamine use was more extensive than she claimed. In addition, a reasonable inference can be made that Gloria’s methamphetamine use endangered the children to the level required to remove them given their ready access to

it and her delayed response to what she believed was a potentially life-threatening situation.

Further, we are not persuaded, given the facts of this case, by Gloria's contention that a reprimand and monitoring would have been a reasonable means to prevent the children's removal. Gloria's children are young and unable to protect themselves and she was their sole caretaker. Additionally, the true extent of her methamphetamine use was unknown. Short of monitoring Gloria 24 hours a day, there was no way to ensure her children's safety except by removing them from her care.

Nor are we persuaded by the case authority Gloria cites, *Henry V.*, *supra*, 119 Cal.App.4th 522 and *In re Yvonne W.* (2008) 165 Cal.App.4th 1394 (*Yvonne W.*), to advance her argument. In *Henry V.*, a four-year-old child was removed from his mother's custody after the child was found to have three linear first and second degree burn marks on his buttocks. (*Henry V.*, *supra*, 119 Cal.App.4th at pp. 525-526.) The examining doctors opined that the child's burns were most likely inflicted by the mother's curling iron. (*Id.* at p. 526.) The appellate court reversed the dispositional findings after concluding the juvenile court did not understand that its removal order had to be supported by clear and convincing evidence and that there was insufficient evidence to support the order. (*Id.* at pp. 529-530.) Here, by contrast, the appellate record reflects that the juvenile court made its dispositional findings by clear and convincing evidence and, as we discussed above, substantial evidence supports the juvenile court's decision to remove the children. Further, we find *Yvonne W.* is entirely unavailing. It arose from a different stage of the proceedings, an 18-month review hearing, and challenged the juvenile court's finding of detriment to return the child rather than its decision to remove. (*Yvonne W.*, *supra*, 165 Cal.App.4th at p. 1397.)

We find no error in the juvenile court's order removing Fabian, Alexis and Ava from Gloria's custody.

III. Fabian's Placement with Adrian

Gloria contends the juvenile court erred in placing Fabian with Adrian on two grounds: 1) Adrian was not Fabian's presumed father; and 2) the court did not consider the sibling relationships. We conclude that Gloria waived her right to raise the first issue and that the evidence does not support the second.

A. Adrian's Paternity Status

When the juvenile court removes a child from parental custody, it must determine whether there is a noncustodial parent requesting placement. (§ 361.2, subd. (a).) If there is, section 361.2, subdivision (a) requires the juvenile court to place the child with that parent unless doing so would be detrimental to the child. (*Ibid.*) Only a presumed father is entitled to custody of his child under the statute. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451.)

In this case, the juvenile court and the parties operated under the assumption that Adrian was Fabian's presumed father even though the court never expressly made that finding. Gloria's attorney had the opportunity to argue that section 361.2 was not applicable or request further investigation into the matter. She did not do so. Consequently, Gloria waived her right to challenge the juvenile court's order placing Fabian with Adrian. (*In re Wilford J.* (2005) 131 Cal.App.4th 742, 754.)

B. Sibling Relationships

Section 361.2, subdivision (i) requires the juvenile court to consider the nature of sibling bonds and the appropriateness of maintaining those bonds in making its placement decision. To that end, the agency is required to provide the juvenile court such information in its social study of the child. (§ 358.1, subd. (d)(1).)

Gloria correctly asserts that the agency did not assess the detrimental effect of separating Fabian from his siblings. There was, however, no reason for the agency to conduct such an assessment since it was not recommending Fabian's placement with Adrian. Gloria's further assertion that the juvenile court did not consider the effect of

such a separation, however, is not supported by the record. The juvenile court expressly stated that it believed that terminating the sibling relationships would be detrimental but that separating the children did not rise to the level of detriment as long as they had ongoing contact. For that reason, the juvenile court ordered weekly sibling visitation and asked for a commitment from Adrian that he would comply with the visitation order.

We find no error on this record.

DISPOSITION

The judgment is affirmed.