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

In re N.K. et al., Persons Coming Under the
Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

MELISSA P.,

Defendant and Appellant.

F069210

(Super. Ct. No. 13CEJ300247)

OPINION

APPEAL from an order of the Superior Court of Fresno County. Timothy A. Kams, Judge.

Caitlin U. Christian, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel C. Cederborg, County Counsel, and Amy K. Cobb, Deputy County Counsel, for Plaintiff and Respondent.

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When Melissa P. (mother) gave birth to her fourth child, T.P., both she and the child tested positive for illegal narcotics. Two of mother's three older children also had tested positive for illegal narcotics at birth. The Fresno County Department of Social Services (the Department) filed a petition pursuant to Welfare and Institutions Code section 300¹ alleging the four children, N.K., M.P., Mi.P., and T.P., fell within the jurisdiction of the juvenile court. The reports established each child had a different father. The jurisdiction hearing was not contested.

At the contested dispositional hearing, the juvenile court ordered custody of N.K., Mi.P., and T.P. be awarded to their fathers. M.P. was placed in foster care because her father was neither involved nor interested in her care.

Mother argues the juvenile court's dispositional order is erroneous because (1) there was insufficient evidence of a substantial risk of harm if the children were returned to her care, (2) there was insufficient evidence to support the juvenile court's findings that were required by section 361, subdivision (c)(6), (3) it awarded custody of N.K. and Mi.P. to their fathers, who were only biological fathers and not presumed fathers, and (4) it did not grant her reunification services as to N.K. and Mi.P. We reject each argument and affirm the dispositional order.

FACTUAL AND PROCEDURAL SUMMARY

The Department filed a dependency petition alleging the four children came within the jurisdiction of the juvenile court pursuant to the provisions of section 300, subdivision (b). At the time the petition was filed, the children had been detained.

The second amended petition alleged the children were at risk of suffering serious physical harm because of mother's substance abuse that affected her ability to care for the children. The petition alleged the newborn child was born while mother was under the

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

influence of methamphetamine and marijuana. Furthermore, this was the third child born to mother that had tested positive for controlled substances. Mother's past substance abuse had resulted in three prior referrals for services, the last being made in February 2013.

In addition, the petition alleged the children were at risk of suffering serious physical harm because mother had failed to provide a safe home as a result of exposing the children to past incidents of domestic violence wherein mother was the victim. All four children were alleged to fall within the provisions of the Indian Child Welfare Act of 1978 (ICWA; 25 U.S.C. § 1901 et seq.).

The detention report explained that a protective hold was placed on T.P. after her birth as she was the third child born to mother that had tested positive for methamphetamine and marijuana. This hold led to the other three children being detained. During an interview, mother admitted (1) using methamphetamine for the prior 16 years, (2) caring for her children while under the influence of controlled substances, although she believed the children did not know she was using drugs, (3) using methamphetamine and marijuana during the pregnancy, (4) she did not obtain prenatal care, and (5) she had received previous substance abuse treatment referrals. Mother also initially appeared reluctant to attend a substance abuse program.

Interviews with the three older children established they knew their mother used drugs. The detention report recommended the children be detained as there was a substantial danger to the physical health of the children. The juvenile court ordered the children detained temporarily.

In addition to providing the same information as in the detention report, the jurisdiction report summarized the services the Department was attempting to provide to mother. The jurisdiction report also summarized mother's addiction severity index, in which mother related she had been consuming alcohol to the point of intoxication for 18 years, methamphetamine for 13 years, and marijuana for 24 years. Mother was referred

for inpatient treatment. Mother's first drug tests were positive for methamphetamine and marijuana. The following two drug tests resulted in positive tests for marijuana.

Mother waived her right to a trial on the issue of jurisdiction and submitted on the reports. The juvenile court found the counts alleged in the petition true and concluded the children fell within the provisions of section 300, subdivision (b).

The Department's disposition report recommended (1) N.K. and Mi.P. be placed with their nonoffending fathers and the dependency action be dismissed as to them, (2) T.P. and M.P. remain in foster care, (3) reunification services be provided to mother for T.P. and M.P., and (4) no reunification services be provided to the fathers of T.P. and M.P.

The disposition report explained mother had a significant history of substance abuse. She wanted to reunify with her children, was visiting them on a regular basis, and was participating in the services recommended by the Department. However, mother had not completed any of the services as of the writing of the report and had not "fully ameliorated the conditions that brought her to the attention of the Department." Therefore, the Department did not recommend placing the children with mother.

The Department recommended Mi.P. be placed with his father because he (the father) (1) requested custody, (2) lived with his girlfriend in an appropriate home and both he and his girlfriend were employed, (3) agreed to random drug testing, and (4) stated he would facilitate visitation with Mi.P.'s siblings.

The Department recommended N.K. be placed with her father because he (the father) (1) requested custody, (2) lived with his girlfriend in an appropriate home and both he and his girlfriend were employed, and (3) stated he would facilitate visits between N.K. and her siblings.

The disposition report further explained that mother had entered an inpatient treatment program through the Sierra Tribal Consortium on October 8, 2013, and was still participating in the program. Because she was still participating in the program, the

Department did not feel the conditions leading to mother's parenting problems had been ameliorated. A case plan was provided for mother's reunification with M.P. and T.P.

An addendum to the disposition report addressing T.P.'s father was filed by the Department before the hearing. The addendum indicated father had been visiting with T.P. The Department changed its recommendation to include family reunification services for T.P.'s father.

At the contested dispositional hearing, Loleta Garfield was called to testify by the Department as an ICWA expert. She authenticated the two declarations she had submitted to the juvenile court and confirmed her recommendations at the hearing were the same as her recommendations in the second declaration. These recommendations were (1) placement of N.K. with her father, (2) placement of Mi.P. with his father, (3) placement of T.P. with her paternal grandmother, and (4) placement of M.P. in a tribal foster home. Garfield recommended the placements be reassessed after mother completed her treatment.

Garfield confirmed that mother was participating fully in the services recommended by the Department. However, Garfield was of the opinion that mother's inpatient treatment program should have been longer than 90 days.

The Department's case worker, Junita Wibisono, confirmed the Department's recommendations remained as stated in the above outlined reports. She also confirmed mother successfully had completed a 90-day inpatient substance abuse treatment program and had completed or was participating in all other aspects of her case plan. Wibisono testified, however, that mother was living near her relatives, who had a history of drug use, and there was a danger mother would again abuse drugs.

In her testimony, mother admitted her past drug use and confirmed the steps she had taken since T.P.'s birth to obtain treatment for her addiction. She felt she was ready to have the children returned to her care because of the progress she had made and the support group she had to prevent a relapse. When asked if it was too soon in her

recovery to have the children returned to her custody, mother testified, “I don’t feel that it is because I’m taking my sobriety really serious. And when I was in the program, I learned a lot. And I don’t think that there’s anymore time that’s going to help me to stay clean and sober. It’s really up to me, and knowing my relapse signs, my triggers and my cravings, and to know what to do if I have one. And as long as I have my sober support group, I feel I will do fine. It’s really up to me, and I want to stay clean and sober, and that’s what I’m going to do in order to get my kids home.”

Mother also admitted that M.P. and Mi.P. had tested positive for drugs when they were born, and she was offered services for her addiction at that time. “The tribe did offer me services, and I attempted to do these services. I just was not ever able to stop using.”

After argument by the parties, the juvenile court ordered that N.K., Mi.P., and T.P. be placed with their fathers, concluding there was a substantial risk of harm if returned to mother’s care before she maintained her sobriety for a longer period of time and before she completed all of the programs addressing the issues that put the children at risk, including substance abuse and domestic violence. The juvenile court retained jurisdiction over all of the children and set a three-month review hearing for N.K. and Mi.P. pursuant to the provisions of section 361.2, subdivision (b)(2). The juvenile court ordered family maintenance services be provided to T.P.’s father. M.P. was ordered to remain in a foster home. The juvenile court ordered the Department to provide reunification services to mother for both M.P. and T.P.

DISCUSSION

I. Sufficiency of the Evidence

Mother argues there was insufficient evidence of a substantial risk of harm to the children if they were returned to her care. Our review of the sufficiency of the evidence is deferential. We “review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is

reasonable, credible, and of solid value” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496; *People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681.) We focus on the whole record, not isolated bits of evidence. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1203.) We presume the existence of every fact the trier of fact reasonably could deduce from the evidence that supports the judgment or order. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We will not substitute our evaluations of a witness’s credibility for that of the trier of fact. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.)

Mother’s argument is based on her sobriety and treatment after the children were taken from her custody, i.e., from the birth of T.P. until the dispositional hearing. She points out she complied with all court orders following removal of her children, she completed a 90-day inpatient drug treatment program, she was participating in all offered services, and she had not tested positive for drugs since the initial testing. In mother’s view, “No substantial evidence established that [she] needed to be sober longer for the children to be safely placed in her care, or that the children could not be safely placed in her care while she completed the services in her case plan.” Furthermore, mother argues there were reasonable means of ensuring the children’s physical safety in the home if they were returned to her care. In essence, mother is asserting her 20-year history of substance abuse should be ignored because she had been sober for five months.

While we applaud mother’s efforts and encourage her to continue on the path of sobriety, the juvenile court properly considered her substance abuse history when ordering N.K., Mi.P., and T.P. placed with their fathers and M.P. placed in foster care. Not only did mother test positive for drugs when T.P. was born, but she also tested positive for drugs when M.P. and Mi.P. were born. She previously had received referrals to drug and alcohol treatment programs but claimed she was not able to stop abusing drugs. Mother also was living very close to a parent who had a history of drug abuse. While mother cannot be denied custody because of her parent’s drug abuse, such close proximity to drugs increases the chance of a relapse. Each of these factors properly could

inform the juvenile court's decision. Indeed, past behavior must always inform the juvenile court's decision because past behavior, whether before or after the juvenile court obtains jurisdiction over a child, must form the basis for the juvenile court's disposition orders.

None of the cases cited by mother supports her argument. We begin by rejecting any reliance on the cases describing the standard the juvenile court was required to utilize when making its order. The record demonstrates the juvenile court was aware of the standard of proof it was required to apply in this matter. Our review is limited to a review of the entire record for substantial evidence to support the order.

In re Henry V. (2004) 119 Cal.App.4th 522 (*Henry V.*) involved a single instance of injury inflicted on a child. The child suffered minor burns on his buttocks, which he attributed to falling on the lamp in his room. The mother denied any knowledge of how the injury occurred. Examining physicians concluded the mother's curling iron was the most likely cause of the injuries. (*Id.* at p. 526.) The juvenile court ordered the child placed in foster care while the mother received reunification services.

The appellate court reversed, noting this was a single instance of abuse, all of the recommended services could have been provided while the child remained with his mother, and the juvenile court failed to consider any alternative to out-of-home placement, even though there was ample evidence appropriate services could have been provided while the child remained with his mother. (*Henry V., supra*, 119 Cal.App.4th at p. 529.) The appellate court also noted the record did not establish whether the trial court applied the clear and convincing standard when ordering the child into out-of-home placement. (*Id.* at p. 530.)

Here, mother has a 20-year history of drug abuse, numerous referrals for treatment, which were ignored, and the record demonstrates the juvenile court understood the burden of proof the Department was required to meet when the court ordered out-of-home placement.

Mother also cites *In re Lana S.* (2012) 207 Cal.App.4th 94 (*Lana S.*) as support for her argument. The parent in *Lana S.* appealed from the jurisdictional and dispositional orders that resulted in her parental rights being terminated. Mother is correct the facts in *Lana S.* were more egregious than in this case.

The mother in *Lana S.* had a history of drug abuse. She was accused by her boyfriend of using methamphetamine; drug paraphernalia was found in the house; she previously had lost custody of other children because of drug abuse; she denied any drug problem; she refused to submit to a drug test; and she referred to her boyfriend as a heroin addict. (*Lana S.*, 207 Cal.App.4th at pp. 104-106.)

Mother distinguishes *Lana S.* because she (mother) admitted her drug use, sought treatment, had not tested positive for illegal drugs since the petition was filed, and had participated fully in the services offered by the Department. The parent in *Lana S.*, however, was an extreme example. While mother certainly is not so extreme, she did ingest drugs while she was pregnant with three different children, resulting in each child testing positive for drugs at birth.

Lana S. is relevant because the appellate court found sufficient evidence to support the juvenile court's order, which was based on the facts that existed when the children were removed from the mother's care. The juvenile court here also properly considered the circumstances that existed when the children were removed from mother's care.

The other cases cited by mother are similarly distinguishable and not helpful. (*In re Ashly F.* (2014) 225 Cal.App.4th 803 [no evidence to support finding that there were no reasonable means of protecting the children except for removal from the home]; *In re Jasmine G.* (2000) 82 Cal.App.4th 282 [social worker's belief child could not be returned safely to the home is not substantial evidence]; *In re Heather A.* (1996) 52 Cal.App.4th 183 [repeated acts of domestic violence created substantial risk of harm to the children]; *In re Paul E.* (1995) 39 Cal.App.4th 996 [chronic messiness in the home not clear and convincing evidence of a substantial risk of harm to the child].)

Mother also attacks the juvenile court's finding that there were no reasonable means of protecting the children other than removal from her care. Mother asserts the juvenile court could have conditioned return of the children to her care on continued participation in services and strict monitoring, including random drug testing. While this is a possible outcome the juvenile court could have considered, there was substantial evidence to support the order actually made. Mother's lengthy history of substance abuse, her past refusals to seek treatment, and the three children born with drugs in their systems as a result of mother's drug abuse greatly outweighed mother's five-month period of abstinence.

Stated another way, 20 years of substance abuse cannot be ignored simply because mother remained sober for five months. Contrary to mother's testimony, mother's ability to remain sober for a greater length of time would provide additional evidence that she has overcome her demons. The comparatively short period of time mother remained sober did not eliminate the risk of a relapse. Thus, there was substantial evidence to support the juvenile court's orders.

II. Section 361, subdivision (c)(6)

Section 361, subdivision (c) provides the grounds on which the juvenile court may rely to remove a dependent child from the custody of the parent with whom the child resided at the time the petition was filed. Subdivision (c)(6) of section 361 is applicable in an Indian child custody proceeding and provides that a child shall not be taken from the physical custody of his or her parents unless the juvenile court finds by clear and convincing evidence that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and that finding is supported by testimony of a 'qualified expert witness' as described in Section 224.6." Section 224.6 provides that a *qualified expert witness* "may include, but is not limited to, a social worker, sociologist, physician, psychologist, traditional tribal therapist and healer, tribal spiritual leader, tribal historian, or tribal elder, provided the individual

is not an employee of the person or agency recommending foster care placement or termination of parental rights.” (*Id.*, subd. (a).) Mother argues there was not substantial evidence to support the juvenile court’s finding under this section.

Mother recognizes that Garfield testified at the hearing as the qualified expert witness. In addition, Garfield submitted a declaration to the juvenile court, as well as an addendum to the declaration. Garfield testified that those documents contained her recommendations regarding the children. Garfield also confirmed that she recommended placement of the N.K. and Mi.P. with their fathers, placement of T.P. with her paternal grandmother until T.P.’s father was able to support the child, and placement of M.P. in a tribal home. Garfield recommended the placements be reassessed after mother completed treatment. When asked about whether continued custody by mother likely would cause the children to suffer serious emotional or physical damage, Garfield confirmed her opinion that the children should be removed from mother’s care. Garfield testified mother needed more time in her aftercare program to assist her in remaining sober, and the additional time would make the home safer for the children. She also believed the children would be at risk while mother continued her services. Garfield expressed surprise that mother participated in only a 90-day treatment program, considering the number of years she abused drugs, and opined mother should have been in a longer inpatient treatment program.

In the relevant portions of her declaration, Garfield recommended mother’s inpatient treatment extend for at least six months to one year to allow her to gain treatment not only for her substance abuse but also for her severe depression. Garfield also concluded it would be detrimental to the mental and physical health of the children if they were returned to mother’s custody until all components of the case plan were completed.

In the addendum to her declaration, Garfield reiterated her recommendation that the children not be placed with mother until she had completed the treatment ordered by the juvenile court.

Mother's argument, once again, focuses on her short period of sobriety while ignoring her lengthy history of substance abuse. Garfield testified, both as a witness and in her declarations, that she had reviewed the records in the case and that the children would be at risk if returned to mother's care until she had remained sober for a longer period of time. Considering the extensive evidence of mother's substance abuse outlined in the preceding section, Garfield's opinion was based on well-documented facts and constituted substantial evidence to support her conclusions and the juvenile court's orders.

III. Indian Child Custody Proceedings

Mother contends in this section that this is not an Indian child custody proceeding despite arguing in the preceding section that the juvenile court erred because there was not substantial evidence to support the section 361, subdivision (c)(6) finding, which is required only because this proceeding is an Indian child custody proceeding. Whether this is an Indian child custody proceeding is significant because it affects the ability of the juvenile court to award custody to the fathers of the children.

The juvenile court found that neither N.P.'s father nor Mi.P.'s father met the statutory definition of a presumed father, but were biological fathers only. This distinction is critical in this case. The juvenile court ordered that N.P. and Mi.P. be placed with their fathers pursuant to section 361.2, subdivision (a), which provides that when a child is removed from the custody of a parent pursuant to section 361, the court must "first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that

placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child.” The Supreme Court has held this section refers only to presumed fathers, not biological fathers. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 454.)

In an Indian child custody proceeding, however, the term “parent” is defined by statute to include biological parents. Section 224.1, subdivision (c) states that in an Indian child custody proceeding, the term “parent” is defined as provided in 25 United States Code section 1903 of the ICWA. Title 25 United States Code section 1903(9) defines the term “parent” for the purposes of the ICWA as “any biological parent or parents of an Indian child”

Therefore, if this is an Indian child custody proceeding, the juvenile court was permitted to place N.K. and Mi.P. with their fathers, even though they did not attain presumed father status. If this is not an Indian child custody proceeding, the juvenile court erred by placing N.K. and Mi.P. with their fathers since they were not presumed fathers.

The term “Indian child custody proceeding” is defined in section 224.1, subdivision (d) as “a ‘child custody proceeding’ within the meaning of [25 United States Code] Section 1903 of the Indian Child Welfare Act, including a proceeding for temporary or long-term foster care or guardianship placement, termination of parental rights, preadoptive placement after termination of parental rights, or adoptive placement.”²

In this case there is little doubt that this is an Indian child custody proceeding. The juvenile court and all of the parties treated the matter as such, and the children were

²Title 25 United States Code section 1903(1) defines a child custody proceeding in almost identical terms.

placed in temporary foster care. Indeed, the juvenile court placed M.P. in foster care in its dispositional order.

Nonetheless, mother argues this is not an Indian child custody proceeding, citing *In re J.B.* (2009) 178 Cal.App.4th 751. We are not persuaded. In *J.B.* the issue was limited—are the findings required by section 361.2, subdivision (c)(6) required when an Indian child is removed from the mother’s custody and placed in the father’s custody? We held such findings were not required because none of the categories identified in section 224.1 (temporary or long-term foster care or guardianship, termination of parental rights, preadoptive placement after termination of parental rights, or adoptive placement) was implicated. (*J.B.*, at pp. 757-760.) While this was undoubtedly the correct result, the expansion of the holding sought by mother is unwarranted. *J.B.* stands only for the proposition that section 361.2, subdivision (c)(6) findings are not required when an Indian child is removed from the custody of one parent and placed with another parent. Since this code section is not at issue, however, *J.B.* is not relevant.

Moreover, this case is factually distinguishable from *J.B.* We were clear in *J.B.* that foster care placement, either temporary or long term, was not implicated. Here, the children were placed in temporary foster care, resulting in this case falling within section 224.1’s definition of an Indian child custody proceeding. Accordingly, the juvenile court did not err in placing N.K. and Mi.P. with their biological fathers.

IV. Reunification Services

Once the juvenile court determines it will remove a child from the custody of one parent and award custody to the previously noncustodial parent, section 361.2, subdivision (b) provides three options for how the juvenile court may proceed. Subdivision (b)(1) of section 361.2 allows the juvenile court to award legal and physical custody to the previously noncustodial parent and terminate jurisdiction over the child. Subdivision (b)(3) of section 361.2 allows the juvenile court to award custody to the previously noncustodial parent, subject to the supervision of the juvenile court, and

provides the juvenile court with discretion to order reunification services to either or both parents.

The juvenile court placed N.K. and Mi.P. with their biological fathers pursuant to section 361.2, subdivision (b)(2). This section permits the juvenile court to award custody to the previously noncustodial parent while retaining jurisdiction over the child and requires a home visit be conducted within three months to address any concerns that have been raised about the ability of the previously noncustodial parent to care for the child. After the report is filed addressing the home visit, the juvenile court must take further action pursuant to section 361.2, subdivisions (b)(1), (2), or (3).

Mother argues the juvenile court abused its discretion when it failed to order reunification services for N.K. and Mi.P. Because the juvenile court acted pursuant to section 361.2, subdivision (b)(2), it did not have discretion to order reunification services. That discretion exists pursuant to section 361.2, subdivision (b)(3), which may or may not be implicated after the three-month review required by section 361.2, subdivision (b)(2). In any event, the juvenile court did not err when it did not order reunification services for mother at the dispositional hearing.

We have reviewed the cases cited by mother. None of these cases addresses section 361.2, subdivision (b)(2). While some of the cases address undisputed general propositions of law, these propositions are not relevant at this time.³

³We also reject mother's assertion that because the Department failed to address this argument in its brief, we must grant her the relief she seeks. Regardless of the Department's position, mother is entitled to relief only if the law supports her argument. In this case, the law does not entitle mother to any relief.

DISPOSITION

The disposition order from which mother appeals is affirmed.

CORNELL, Acting P.J.

WE CONCUR:

GOMES, J.

PEÑA, J.