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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re MICHAEL M. et al., Persons Coming  
Under the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES  
AGENCY,

Plaintiff and Respondent,

v.

NAOMI T.,

Defendant and Appellant.

G050261

(Super. Ct. Nos. DP024668  
& DP024669)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, Andre Manssourian, Judge. Affirmed in part, reversed in part and remanded with directions.

William D. Caldwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Debbie Torrez, Deputies County Counsel, for Plaintiff and Respondent.

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Two older teenage boys, Michael, then 16 going on 17, and his half-brother Nicholas, aged 15, sneaked alcohol and got drunk on Valentine's Day last year. Their mother, Naomi, had two adults at her residence for drinks, had too much herself on an empty stomach, and fell asleep. Nicholas drank so much he threw up, passed out, and had to be taken to the hospital, where his blood alcohol level was tested at .167. A police officer was called to the house, Naomi was arrested, and, though she was soon released, the two teenage boys were taken into protective custody. Though the Orange County Social Services Agency makes no argument to the contrary, we have independently reviewed the record ourselves and ascertained the incident was an isolated one. Naomi has no DUIs and did not furnish any alcohol to her sons. The record is uncontroverted they "snuck" it. To be sure, both young men have been drinking (and experimenting with marijuana) since early adolescence. This, however, has been the product of their own stealth and not any encouragement on the part of their mother.

A little more than a month after the Valentine's Day incident, on March 20, 2014, Naomi pled no contest to a dependency petition. The two boys were returned to her custody, and she agreed, among other things, to random drug tests with no positive, missed or "diluted" tests. The record reveals no subsequent positive or missed tests. However, the result of one test previous to the hearing, on March 15, 2014, and a test on March 28, 2014, came back "diluted." These tests were conducted by a private concern and there is nothing in the record to indicate they were the product of, say, adding water to a urine sample.<sup>1</sup> The record is uncontroverted Naomi was tested 12 times after March 28 and each test was favorable to her. Moreover, in the time that followed the

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<sup>1</sup> The trial judge at a subsequent dispositional hearing did not credit Naomi's subsequent explanation she was drinking lots of water and cranberry juice in order to combat a bladder infection.

jurisdictional hearing, Naomi also completed a parenting class, a life skills class, and arranged therapy for the boys and her.

Despite her efforts, two interrelated sets of events subsequent to the jurisdictional hearing, prompted the trial court, at the dispositional hearing about three months later on June 4, to remove Michael – turning 17 the next day, and his brother Nicholas – from Naomi’s custody. One set we just mentioned – two “diluted” drug tests in March. The other event occurred in the early evening of April 2, 2014, when a social worker told Naomi to move out of the house or else the two boys would have to go to Orangewood Children’s Center. His reason was the two “diluted” drug tests. The result was some angry words from Naomi and Michael’s interposition of his own body between the social worker and his mother. The social worker backed out (literally), after which Michael slammed the door very hard.

To the trial judge at the detention hearing, this meant Naomi had “some perhaps unresolved alcohol issues” which she had not yet “conquered,” and she had “ignored the hostility, the aggression, the anger issues that they all have, and she has swept, to me, under the rug her older son’s alcohol issue.” The court pointed to Michael’s “substance abuse issues,” Naomi’s “heightened level of inability to parent,” and the “anger exhibited by mother to the social worker and law enforcement consistently throughout the course of this matter” and concluded: “[T]he court is not satisfied that [Naomi] even intends to care for the children and parent them the way they ought to be cared for and and parented.” And because Naomi was not “sufficiently committed to following the Agency’s and this court’s directives and orders,” he ordered custody of the children removed from her. This appeal challenges both the jurisdictional and dispositional orders.

We express no opinion on whether the isolated incident of February 14, 2014, combined perhaps with subsequent revelations that two teenage boys have sneaked and consumed alcohol as early teenagers,<sup>2</sup> are sufficient to establish juvenile court jurisdiction. By pleading no contest to the petition, Naomi not only admitted the *facts* underlying the petition, but, as a matter of statute, also agreed to the legal sufficiency of those facts to establish jurisdiction. California Rules of Court, rule 5.682(f)(8) provides that after a plea of no contest, the juvenile court “must” find the child is “described under one or more specific subdivisions of section 300.” Essentially, the rule does not allow for the dependency equivalent of demurrers when a parent pleads no contest. We thus agree with the social services agency’s argument that Naomi has waived her challenge to the *jurisdictional* finding. As our high court said in *In re Troy Z.* (1992) 3 Cal.4th 1170, 1181, “A plea of ‘no contest’ to allegations under section 300 at a jurisdiction hearing admits all matters essential to the court’s jurisdiction over the minor. Accordingly, by their knowing and voluntary acquiescence to the allegations of the petition, parents waived their right to challenge on appeal the legal applicability of section 300(e) to their conduct.”<sup>3</sup>

We note in this regard that Naomi makes no claim of ineffective assistance based on some purported failure of her appointed trial counsel to advise her a plea of no contest admits the legal conclusions of a juvenile dependency petition. The idea that Naomi derived no benefit from her plea is belied by the fact her plea spared her a time-consuming legal fight, exploration into her personal drinking history, and at least

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<sup>2</sup> The most egregious allegations in that regard came from Nicholas, who admitted in a conversation with a social worker that he would drink “every couple of months” and obtain alcohol by the device of youths outside a liquor store asking a stranger to buy them beer. According to a social workers’ report “The child reported that he has consumed as much as ‘a 24 pack’ of beer” – an obvious exaggeration, but concerning, nonetheless.

<sup>3</sup> All statutory references in this opinion are to the Welfare and Institutions Code.

afforded some concededly valuable services directed at curbing her sons' nascent drug and alcohol habits.<sup>4</sup>

The dispositional order is another matter. Even assuming grounds for juvenile court jurisdiction, there is a statutory presumption at the dispositional hearing that the child will be returned to parental custody. That presumption was discarded by our Supreme Court in *In re Marilyn H.* (1993) 5 Cal.4th 295, 308: “At the dispositional hearing, and at each review hearing prior to permanency planning, there is a statutory presumption that the child will be returned to parental custody. At the dispositional hearing, the burden is on the state to prove, by clear and convincing evidence, that removal of the child from the parent’s custody is necessary.” (Accord, *In re Michael D.* (1996) 51 Cal.App.4th 1074, 1083; § 361, subd. (c)(1) [showing required for removal of child from parent’s home, of “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 or guardian’s physical custody”].)

Recently in *In re Ashly F.* (2014) 225 Cal.App.4th 803, our colleagues in the Second District reiterated that removal at a dispositional hearing must meet *two* statutory tests: Not only must there be clear and convincing evidence of “substantial danger” to the child but there must “no reasonable means” to protect the minor *without* removal. (*Id.* at p. 809.) The second test – the requirement removal be the last resort – is

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<sup>4</sup> *In re Isabella F.* (2014) 226 Cal.App.4th 128, cited by Naomi, is inapposite on the waiver point. There a mother requested jurisdictional findings based on “allegations related *solely to father.*” (*Id.* at p. 136.) That request was not, in substance, an admission as to the allegations as they related to her. (*Ibid.*) And though *Isabella* can be read for the proposition that an appellate court may consider on appeal the (otherwise waived) issue of jurisdiction when “insufficient evidence supports the jurisdictional order” (*id.* at p. 136), this case does not present a good candidate for the exercise of such discretion. Naomi states on page 3 of her opening brief she and her sons “want the services the agency offers,” they just don’t admit to the idea of jurisdiction. Under such circumstances, and particularly in light of our reversal of the dispositional order, we do not see this case as an *Isabella* situation.

just as important as the first. The *Ashly F.* court thus reversed a dispositional order because the social services agency there had failed to show there were no means to protect the children other than the drastic step of removal. Such means, said the court, included unannounced visits and in-home counseling. (*Id.* at p. 810.)

The underlying facts in *Ashly F.* were more egregious, and typical of the dependency system, than the facts here: In *Ashly F.*, the mother had used an extension cord to strike one daughter leaving bruises, had “cut” another daughter with a belt, and had used a plastic hanger to discipline a third. (See *id.* at p. 806.) The children were at least in some danger if she got carried away with her regime of corporal punishment again. Nevertheless, the fact there were less intrusive means of protecting the three young daughters *in* the home required reversal.

In the present case, the social services agency makes no effort to argue on appeal that there were no other means by which these two older teenagers could be “protected” from their own drinking short of removal. In fact, the agency doesn’t even mention *Ashly F.* in its brief. Obviously there are plenty of reasonable means to protect these two teenagers from drinking alcohol, including random testing and unannounced visits. We further note that, while we do not condone Naomi’s counterproductive anger shown to the social worker, anger management was not the basis for juvenile court jurisdiction.

The jurisdictional order is affirmed although we express no opinion on its merits. The dispositional order is reversed and the matter remanded to the juvenile court with instructions that further proceedings be consistent with this opinion.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.