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

In re Y.W., a Person Coming Under the
Juvenile Court Law.

H039959
(Santa Clara County
Super. Ct. No. JD021781)

SANTA CLARA COUNTY
DEPARTMENT OF FAMILY AND
CHILDREN'S SERVICES,

Plaintiff and Respondent,

v.

D.S.,

Defendant and Appellant.

Appellant is the mother of Y.W., a dependent of the juvenile court. Mother asserts the trial court erred in sustaining the petition pursuant to Welfare and Institutions Code section 300¹ petition as to her, because there was not substantial evidence that Y.W. faced a risk of serious physical harm under mother's care. In addition, mother asserts the court erred in not placing Y.W. with her under section 361.2, subdivision (a), because there was not clear and convincing evidence that the placement would be detrimental to Y.W. Finally, mother argues the court abused its discretion by restricting mother's visits with Y.W.

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

STATEMENT OF THE FACTS AND CASE

Y.W. was born in July 2000. While mother was in the hospital for Y.W.'s birth, the hospital reported her to the Santa Clara County Department of Family and Children's Services (Department) for child abuse. The hospital representative expressed concerns over mother's mental health and inability to care for a newborn child. The emergency response social worker went to the hospital where she interviewed mother. Mother admitted that she was not very stable and that her maternal aunt was caring for her 20-month-old child because mother was unable to care for her. Mother voluntarily arranged for the paternal grandmother to care for Y.W. and to seek legal guardianship. The Department closed the referral.

The paternal grandmother cared for Y.W. until the grandmother died when Y.W. was three years old. After the grandmother's death, Y.W. went to live with her father and his girlfriend, L.O. Father was in and out of jail for much of Y.W.'s life, and he would leave Y.W. in the care of L.O. any time he was incarcerated.

Father was sentenced to prison for three years in 2010 for domestic violence against L.O. At the time, Y.W. remained in L.O.'s care. Father was released from prison in December 2012. In January 2013, father went to L.O.'s house and tried to forcibly take Y.W. with him. Y.W. fought her father and ran back into L.O.'s home. L.O. called the police and father was arrested for making terrorist threats and a probation violation.

Shortly thereafter, mother contacted the police asking to file kidnapping charges against L.O., because Y.W. was staying with L.O. In March 2013, the police requested intervention from the Department, and an emergency response social worker responded. The social worker interviewed mother, Y.W. and L.O. Y.W., who was 12 years old at the time, told the social worker that she considered L.O. her "mom," and that mother had abandoned her. Y.W. said that the last time she saw mother was when Y.W. was four

years old. Y.W. further said that felt safe with L.O., was close with L.O.'s family, and did not want to go with mother.

Mother admitted she had not cared for Y.W. since Y.W. was a toddler, and that she had a criminal history for sales and possession of drugs. Mother told the social worker she wanted Y.W. returned to her that day, despite the fact that she had no relationship with Y.W.

L.O. confirmed that she had been Y.W.'s primary caregiver since Y.W. was three years old. She told the social worker she wanted to work with mother so both of them could be involved in Y.W.'s life.

After the interviews, Y.W. was placed in protective custody. On April 2, 2013, the Department filed a section 300, subdivision (b) petition on behalf of Y.W. alleging that Y.W. was at serious risk of harm from her parents' inability to care for her or supervise her. The petition further alleged that mother had not cared for Y.W. for the past eight years because of her criminal activity, mental health issues, and unstable living environment. Finally, the petition alleged mother had two other children who were primarily cared for by friends and relatives due to her inability to provide a stable home.

On April 3, 2013, the court ordered Y.W. detained, and on April 10, 2013, the Department placed Y.W. with L.O.

The court held a contested jurisdiction and disposition trial on July 8, 2013. During the trial, the court considered testimony from both parents, and the social worker assigned to the case.

Mother had two other children besides Y.W., both of whom were being cared for by others. In May 1999, mother left her eldest child, J.B. in the care of a friend when J.B. was six-months old to go to a nightclub. Mother did not return for two weeks. Three months later, mother left J.B. with a caregiver where J.B. has remained ever since. Over

the years, mother has tried to regain contact with J.B. by reporting that the caregiver had kidnapped J.B.

Mother's youngest child was J.S., who was born in May 2006. There had been a substantiated report of child abuse of J.S. in August 2008. A maternal aunt in San Francisco began to care for J.S. Mother had custody of J.S. again in 2012, and there were two additional referrals of child abuse. At the time of the trial in July 2013, mother had given J.S. to her godmother in Stockton, California to care for him. Mother did not know when J.S. would return to live with her, or where he would be starting the school year.

Mother admitted she had not cared for her three children due to an unstable living environment. She could not explain why she did not visit or contact Y.W. over the past eight years.

Mother stated that she went to the mental health clinic in 2011 for anxiety attacks, and disagreed with the clinician's diagnosis of major depressive disorder. Mother had received mental health treatment from emergency psychiatric services in 2004 for stress over her mother's death. She did not recall if she received any mental health treatment between 2004 and 2011. Mother had been prescribed medication for her mental health issues in the past, including Celexa and Trazodone.

The social worker testified that mother's mental health issues impacted her coping skills and placed her in a position where she could not parent successfully. She also testified that concerns about mother's mental health here noted in the referrals from the hospital at Y.W.'s birth, mother's sister in 2008, and school personnel in 2012.

At the conclusion of trial, the court took jurisdiction of Y.W. The court found that father's domestic violence and mother's mental health issues supported the court taking jurisdiction. In addition, the court found mother's instability over the past 10 years, and her history of placing her children with other caregivers demonstrated her inability to care for her children.

The court ordered reunification services for the parents, and ordered supervised visitation for both parents. In addition, the court granted the social worker discretion to increase the frequency and duration of visits, and to permit unsupervised and overnight visits with the parents.

Mother filed a notice of appeal.

DISCUSSION

On appeal, mother asserts the trial court erred in its decision on the section 300 petition, in its refusal to place Y.W. with her, and its order that her visits with Y.W. be supervised.

Section 300 Petition

Mother argues the court erred in sustaining the allegations in the section 300 petition as to her, because there was not substantial evidence that Y.W. faced a risk of serious physical harm in her care.

It should be noted at the outset that mother does not challenge the court's taking jurisdiction over Y.W. based on the sustained allegations against father. Rather, mother asserts the allegations against her in the petition are related to her historic failure to provide for her children, and do not demonstrate a current risk of harm to Y.W. (See § 300, subdivision (b).) As a result, mother argues, the dependency jurisdiction in this case is not properly based on her conduct.

A child may be declared a dependent child under section 300, subdivision (b) if “[t]he 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, . . . or by the inability of the parent . . . to provide regular care for the child due to the parent’s . . . substance abuse.” The Department has the burden of showing, by a preponderance of the evidence that the circumstances are such that the child has been or will be harmed due to the parent’s

failure or inability to provide for the child. (*In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318.) There must be evidence of “three elements: (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 (*Rocco M.*).

“[T]he purpose of section 300, subdivision (b) is to protect the child from a substantial risk of *future* serious physical harm and that risk is determined as of the time of the jurisdictional hearing.” (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1397 (*Savannah M.*)). “While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm.” (*Rocco M., supra*, 1 Cal.App.4th at p. 824.) Jurisdiction thus may be unwarranted where the facts alleged in the petition represent an isolated instance of past parental neglect not likely to recur. (*Savannah M., supra*, 131 Cal.App.4th at p. 1398.)

On appeal, we review the jurisdiction findings under the substantial evidence standard. “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.] The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the order. [Citations.]” (*In re A.M.* (2010) 187 Cal.App.4th 1380, 1387-1388.)

Here, mother does not dispute any of the court’s findings about her parenting skills. She concedes she suffers from mental health issues, she historically has had an

unstable living environment, and she has a criminal record. She agrees that she never cared for J.B., did not care for Y.W. for eight years, and arranged for someone else to care for J.S. However, mother asserts these facts do not demonstrate that Y.W. would be at risk of physical harm if placed in her care.

We find evidence of mother's past conduct sufficient to support the court's findings sustaining the petition. The accumulation of mother's criminal history, her mental health issues and her consistent pattern of placing her children with various caretakers posed a risk of harm to Y.W. At the time of the hearing, mother had not demonstrated an ability to provide a stable environment to Y.W., admitting to Y.W. at a recent visitation that sometimes mother does not have food in her house. The trial court was correct in its assessment that, "at this time [mother] does not have the emotional wherewithal or the stability in her life to parent [Y.W.]. The social worker described it as coping skills. [¶] The court has no confidence that [mother] is prepared at this time to accept [Y.W.] into her home and provide for her." We find substantial evidence supports the petition with regard to mother.

Placement With Mother Under Section 361.2, Subdivision (a)

In connection with mother's argument that the allegations in the section 300 petition about her were not sufficient to sustain the petition, mother also asserts the trial court erred in refusing to place Y.W. with her pursuant to section 361.2, subdivision (a). Mother claims that unlike father, she should be considered the "nonoffending" parent under the statute. Moreover, she argues there was not clear and convincing evidence that it would have been detrimental to place Y.W. with her.

The statutory right is found in section 361.2, subdivision (a), which provides: "When a court orders removal of a child pursuant to Section 361[,] [i.e., removal from the current residence for protective purposes], the court shall 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[,] [i.e., to the attention of child welfare authorities], 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.”

Before choosing not to place a dependent minor with a nonoffending noncustodial parent, the juvenile court must determine by clear and convincing evidence that it would be detrimental to do so. (*In re John M.* (2006) 141 Cal.App.4th 1564, 1569 (*John M.*); cf. § 361.2, subd. (a).) “ ‘Under this burden of proof, “evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind.” [Citation.]’ ” (*In re Alvin R.* (2003) 108 Cal.App.4th 962, 971.) On review, this court inquires whether substantial evidence supports the juvenile court’s decision. (*John M.*, *supra*, 141 Cal.App.4th at p. 1569.) Substantial evidence is evidence that is reasonable, credible and of solid value. (*In re Jasmine C.* (1999) 70 Cal.App.4th 71, 75.)

Here, we note that mother does not qualify as the nonoffending parent under section 361.2, subdivision (a), because, as we stated above, the allegations in the section 300 petition as to her were supported by substantial evidence. Moreover, even if mother were the nonoffending parent, there was clear and convincing evidence that it would be detrimental to place Y.W. with mother. At the time of the disposition hearing, Y.W. had never actually lived with mother. In fact, the pair barely knew each other, having only had a handful of supervised visits during the pendency of the case. Mother had not cared for Y.W. in eight years. Y.W. stated that she considered L.O. her mother, as L.O. had cared for her almost her entire life when and mother and father had not. The court’s placement of Y.W. with L.O. was by far the optimum choice for Y.W. under the

circumstances. There was substantial evidence to support the courts finding that placement with mother would have been detrimental to Y.W.

Supervised Visitation

Mother asserts the trial court abused its discretion when it ordered Mother to have supervised visits with Y.W.

“[A]ny order placing a child in foster care, and ordering reunification services, shall provide as follows: [¶] (1)(A) Subject to subparagraph (B), for visitation between the parent or guardian and the child. Visitation shall be as frequent as possible, consistent with the well-being of the child. [¶] (B) No visitation order shall jeopardize the safety of the child. . . .” (Welf. & Inst. Code, § 362.1, subd. (a).)

The juvenile court has discretion in setting visitation orders. Visitation orders will only be reversed when the record clearly shows discretion was abused. (*In re Megan B.* (1991) 235 Cal.App.3d 942, 953.)

Mother contends that the court’s visitation order was not consistent with Y.W.’s well-being, because there was no need that the visits be supervised. Mother asserts the court abused its discretion in making the visitation order.

Given mother’s history of instability, mental illness, and inability to parent her three children over the years, supervised visits were appropriate in this case. Moreover, the court granted the social worker discretion to allow unsupervised and overnight visit if appropriate. If the supervised visits proceed well, there is a possibility of unsupervised and longer visits in the future.

DISPOSITION

The order is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.