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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re B.H. et al., Persons Coming Under the Juvenile Court Law.	B302173 (L.A. County Super. Ct. No. 18CCJP04753A-B)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. E.H., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Mary E. Kelly, Judge. Affirmed.

Christopher R. Booth, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and

Stephen D. Watson, Deputy County Counsel, for Plaintiff and Respondent.

The juvenile court asserted jurisdiction over non-offending parent Erin H.'s (Erin) two children and placed them in her custody. Then, the Los Angeles County Department of Children and Family Services (the Department) received a referral alleging Erin was abusing drugs. The juvenile court ordered Erin to submit to drug tests and, after she missed several, the Department filed a supplemental petition under Welfare and Institutions Code section 387[1] alleging the previous disposition had not been effective to protect the children. The juvenile court sustained the petition and removed the children from Erin's custody. We consider whether the supplemental petition was an appropriate procedural vehicle for the Department to raise concerns about Erin's drug abuse and whether substantial evidence supports the juvenile court's decision to sustain the petition and remove the children from her custody.

I. BACKGROUND

A. Investigation, Adjudication, and Disposition of Physical Abuse Allegations

Erin and Brendi T. (Brendi) are former domestic partners. In 2010, Brendi gave birth to their twin sons, B.H. and Br. H. (Erin is the children's biological mother.) Pursuant to a family law court order issued in 2012, Erin and Brendi shared joint legal and physical custody of B.H. and Br. H.

In July 2018, the Department filed a dependency petition alleging B.H. and Br. H. came within the jurisdiction of the juvenile court under section 300, subdivisions (a), (b), and (j).

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[1] Undesignated statutory references that follow are to the Welfare and Institutions Code.

The petition alleged Brendi and her stepfather physically abused Br. H. and both mothers failed to protect the children.

The juvenile court sustained an amended section 300, subdivision (b) count alleging Brendi's stepfather inappropriately disciplined Br. H. and she knew or should have known of the inappropriate discipline and failed to protect him. The juvenile court did not sustain any allegations concerning Erin. It declared the children dependents, removed Br. H. from Brendi's custody, placed him with Erin, and restricted Brendi to monitored visitation. The juvenile court ordered the Department to provide family maintenance services to Erin, enhancement services to Brendi, and counseling and "wrap" services to the children.

For a status review hearing in April 2019, the Department reported Br. H. was "doing well" living with Erin and his extreme behavioral issues at school and home (e.g., smearing feces on walls) had ceased. B.H.'s behavior had worsened, however, and a Department social worker believed he was "us[ing] the homes as leverage against one another," moving between Erin and Brendi when he did not get his way. Erin was "actively involved" in the children's case plan and "definitely . . . tried her best to meet with service providers for the children," but she missed meetings, allowed a therapist referral for B.H. to lapse, and brought the children to school late almost every day. The juvenile court found the parents were in compliance with their case plans and ordered services for the parents should continue.

B. Investigation of Erin's Alleged Drug Abuse and the Supplemental Petition

Before the next status review hearing, the Department received a referral alleging Erin was regularly using crack

cocaine and methamphetamine, fighting with her parents in front of the children, allowing Br. H. to play with his feces, and not cooking or cleaning for the children. A social worker spoke to Erin and she said she would submit to a drug test only if the juvenile court ordered her to do so. Erin continued to fail to bring the children to school on time and she did not follow up on therapy referrals for the children. Their behavior worsened.

At a July 2019 status review hearing, the juvenile court ordered Erin to submit to three random, consecutive drug tests. The juvenile court cautioned that if any test was missed or indicated drug use, it would make further orders to address the issue.

Erin did not report for drug tests scheduled on July 24, 2019, and July 29, 2019. She did report to the testing facility on July 25, 2019, but was unable to produce a urine sample. She appeared for a test on August 1, 2019, and tested negative for all substances.

On August 13, 2019, the Department filed a supplemental dependency petition under section 387[2] alleging the juvenile court's previous disposition was not effective in the protection or

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[2] In relevant part, the statute states: "An order changing or modifying a previous order by removing a child from the physical custody of a parent . . . and directing placement in a foster home . . . shall be made only after noticed hearing upon a supplemental petition. [¶] The supplemental petition shall be filed by the social worker in the original matter and shall contain a concise statement of facts sufficient to support the conclusion that the previous disposition has not been effective in the rehabilitation or protection of the child . . . ." (§ 387, subds. (a)-(b).)

rehabilitation of the children. The petition alleged Erin "failed to comply with the Juvenile Court orders that [she] is to submit to [three] consecutive random drug tests. [Her] failure to comply with the Juvenile Court Orders endangers the children's physical health and safety and places the children at risk of serious physical harm and damage."

As relevant to the supplemental petition, Brendi told a social worker she believed Erin was abusing methamphetamine because people were "in and out" of her home and her demeanor and appearance had changed over the last year. Erin denied neglecting the children. She admitted she had been a drug user in the past, but she said she enrolled in a drug treatment program and had been clean for five years. She did acknowledge, however, that her father was "aggressive and abusive" toward the children. Both children told the Department they felt safe living with Erin and had not seen her using pills, needles, or powders.

The day after the supplemental petition was filed, the juvenile court detained the children from Erin and placed them with Brendi. The court ordered the Department to provide services and on-demand drug testing for Erin, and restricted her to monitored visits with the children.

In advance of the adjudication hearing on the supplemental petition, the Department conducted follow-up interviews with the family. B.H. and Br. H. said Erin had a lot of friends come over to spend time with her in a shed in the backyard. A school administrator told a Department social worker that since the beginning of the school year (when the children had been living with Brendi), there had been a "night and day" difference in their schooling—they had been arriving to school on time and demonstrated improved behavior. The Department also

discovered there had been 23 calls for police assistance to Erin's home between January 2018 and August 2019. In one incident, one of Erin's friends was placed on a mental health hold after making delusional statements and producing a gun; in another, Erin's sister attacked her with a machete.[3] Erin denied using drugs, claimed she had satisfied testing requirements, and accused Brendi of targeting Br. H. for mistreatment because she is homophobic. Erin also "threatened and cussed out" Department social workers and accused the Department and the juvenile court of discriminating against her based on her sexual orientation.

C. The Hearing on the Supplemental Petition

The juvenile court held an adjudication hearing on the supplemental petition in September 2019. By that time, Erin had tested negative for all substances on August 21, 2019, August 28, 2019, and August 30, 2019.

At the hearing, Erin acknowledged she had taken only one drug test when the Department filed the supplemental petition, but she emphasized she had since submitted to three additional tests with negative results. Erin argued "[t]he Department has not informed the court of any missed test, dirty test, diluted test," so the factual allegations in the supplemental petition were "no longer accurate, and it must be dismissed."

The attorney for the children urged the court to sustain the petition and "perhaps . . . conform[it] to proof where it reads, [Erin] failed to comply with the juvenile court orders that [she] is to submit to three consecutive, random drug tests. [¶] Perhaps it

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[3] Br. H. witnessed both incidents.

can read, [Erin's] failure to comply due to mental health issues or [Erin's] mental health issues placed the children at risk. That could be an option since we do have [Erin] now testing [negative] consistently." When the Department suggested there was no need to modify the petition, the juvenile court said, "[w]ell, the way it reads now is that [Erin] failed . . . to submit to three random drug tests, but she did that." The Department countered that Erin missed several tests before the petition was filed and did not submit to three tests until later.

Considering the "totality of the evidence," the juvenile court sustained the petition as pled. The court found its previous disposition placing the children with Erin was not effective in securing their rehabilitation and protection. The juvenile court further found there would be a substantial danger to the children's physical health, safety, protection, and physical well-being if they were returned to Erin's custody and there were no reasonable means by which their physical health could be protected without removing them from Erin's physical custody.

The juvenile court ordered the children placed with Brendi. Erin was ordered to submit to random, on-demand drug testing, plus a full drug rehabilitation program if any tests were missed or positive. She was also ordered to participate in anger management and parenting classes, and to undergo a psychiatric evaluation and participate in individual counseling. She was allowed unmonitored visitation with the children.

II. DISCUSSION

Erin contends the juvenile court relied on a misguided understanding of its "broad powers" as an improper "workaround" to the procedural requirements imposed by section

387. Although the juvenile court considered the scope of its authority under section 385, it sustained the petition under the section pled, section 387. Substantial evidence supports that decision. Erin missed two tests and failed to produce an acceptable sample for a third before the Department filed the petition. Erin's suggestion that she could satisfy the "three random, consecutive drug tests" condition at any time, even after missing several tests and after the Department filed a supplemental petition to bring those missed tests to the juvenile court's attention, is not a plausible construction of the court's previous drug testing order.

Erin further contends that even if the juvenile court's section 387 finding is supported by substantial evidence, the Department should have filed a subsequent petition under section 342 instead of a supplemental petition under section 387. We hold to the contrary: there is no reason the Department must proceed under section 342 whenever it could proceed under that statute. And the juvenile court's placement decision upon adjudicating the section 387 petition is sound: Erin's demonstrated non-compliance with court orders and service providers, combined with her history of drug abuse, erratic behavior, and the frequency with which police were called to her home, support the juvenile court's decision to remove the children from Erin and place them with Brendi.

A. Overview of Section 387 and Related Statutes

"A section 387 supplemental petition is used to change the placement of a dependent child from the physical custody of a parent to a more restrictive level of court-ordered care." (*In re T.W.* (2013) 214 Cal.App.4th 1154, 1161 (*T.W.*).) "The petition

must allege facts that establish by a preponderance of the evidence that a previous disposition order was ineffective, but it need not allege any new jurisdictional facts or urge additional grounds for dependency because the juvenile court already has jurisdiction over the child based on its findings on the original section 300 petition. [Citations.] If the court finds the allegations are true, it conducts a dispositional hearing to determine whether removing custody is appropriate. [Citations.] "'The ultimate 'jurisdictional fact' necessary to modify a previous placement with a parent or relative is that the previous disposition has not been effective in the protection of the minor.'" [Citation.]" (*In re F.S.* (2016) 243 Cal.App.4th 799, 808, disapproved on another ground in *Conservatorship of O.B.* (Jul. 27, 2020, S254938) ___ Cal.5th ___ [2020 WL 4280960].)

"If the court finds the previous disposition is no longer effective or the placement with the relative is not appropriate, then, in a separate disposition phase, the court must determine whether removal of the child from his or her placement is required. [Citations.]" (*In re H.G.* (2006) 146 Cal.App.4th 1, 12 (*H.G.*).) Under section 361, subdivision (c), a dependent child may not be removed from a parent unless the juvenile court finds "[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 physical health can be protected without removing the minor from the minor's parent's . . . physical custody." (§ 361, subd. (c)(1).) "'The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child.' [Citation.] The court may

consider a parent's past conduct as well as present circumstances. [Citation.]" (*In re N.M.* (2011) 197 Cal.App.4th 159, 169-170.)

Our review of the issues presented in this appeal is for substantial evidence. (*T.W.*, *supra*, 214 Cal.App.4th at 1161; *H.G.*, *supra*, 146 Cal.App.4th at 12-14.)

B. Substantial Evidence Supports the Juvenile Court's True Finding on the Supplemental Petition's Factual Allegations

Section 385 provides that "[a]ny order made by the court in the case of any person subject to its jurisdiction may at any time be changed, modified, or set aside, as the judge deems meet and proper, subject to such procedural requirements as are imposed by this article." (§ 385.) Erin contends that, rather than sustaining the Department's section 387 petition, the juvenile court improperly relied on section 385 as a "workaround" to section 387's procedural requirements. The appellate record does not support Erin's characterization of the juvenile court's actions. Although the juvenile court referred to its "broad powers" under section 385 and inquired as to whether it could order additional services for Erin even if it dismissed the section 387 petition—a suggestion Erin's attorney endorsed—it ultimately sustained the supplemental petition under the statute pled, section 387.

There is substantial evidence that the requirements of section 387 were met as the Department alleged in its petition. As reflected in the minute order from the July 24, 2019, status review hearing that followed the referral alleging Erin was

abusing drugs,[4] the juvenile court ordered Erin to "submit to [three] random, consecutive drug tests. If any test is missed or dirty, the Court will make further orders to address the issue. If all tests are clean, there will not be any further action taken by the court."

Erin does not dispute she did not complete three consecutive drug tests in the week following the July 24, 2019, order, but she emphasizes she later submitted to three tests *after* the Department filed the supplemental petition. According to the unambiguous terms of the juvenile court's status review hearing order for drug testing, however, the missed tests that prompted the supplemental petition sufficed to establish a violation. Erin's position that she could defeat the filing of the supplemental petition and wipe away her non-compliance with the court's order by choosing to later submit to drug testing defeats the purpose of random testing, ignores the court's express warning that missed tests may warrant further orders, and invites the sort of game playing with juvenile court orders that should not be sanctioned.

Erin further argues that, notwithstanding her initial failure to comply with the drug testing order, the evidence indicates "[B.H.] and [Br. H.] were doing great in [her] loving care" and does not support the conclusion that the previous disposition had not been effective in protecting the children. Even if Erin's home was generally clean and both children were comfortable living with her, her disregard for court orders (including the drug testing order and the order limiting her to monitored visitation, when on one occasion she picked the

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[4] The appellate record does not include a reporter's transcript for this hearing.

children up from school) plus the nearly two dozen calls for police assistance in less than two years provide ample grounds for the juvenile court to conclude the children's placement with her was not effective to protect them.

C. The Department Was Not Required to File a Subsequent Petition Under Section 342

Section 342 states that when "a minor has been found to be a person described by Section 300 and the petitioner alleges new facts or circumstances, other than those under which the original petition was sustained, sufficient to state that the minor is a person described in Section 300, the petitioner shall file a subsequent petition. . . ." (§ 342, subd. (a).) One court described the difference between a section 342 subsequent petition and a section 387 supplemental petition as follows: "A subsequent petition is filed when new, independent allegations of dependency can be made after the court has initially declared a minor to be a dependent child. [Citation.] A supplemental petition is filed, inter alia, when a dependent child has been placed with a parent, but the department now seeks to remove the child, effectively requesting the court to modify its previous placement order. [Citation.]" (*In re Barbara P.* (1994) 30 Cal.App.4th 926, 933.) No matter whether the Department proceeds by way of a subsequent petition under section 342 or a supplemental petition under section 387, the juvenile court must hold the same hearings as it would for an original dependency petition under section 300. (Cal. Rules of Court, rule 5.565(e)(1) ["The procedures relating to jurisdiction hearings prescribed in chapter 12, article 2 apply to the determination of the allegations of a subsequent or supplemental petition"].)

Erin contends that by filing a supplemental petition under section 387 rather than a subsequent petition under section 342, the Department faced a lighter burden at the jurisdiction stage. Specifically, she complains the Department was required to prove only that the previous disposition was ineffective to protect the children, rather than proving facts sufficient to establish the children were described by section 300 for reasons other than those stated in the original petition.

Even excusing Erin's failure to object in the juvenile court to the Department's decision to proceed by way of a section 387 petition, there is no reason to conclude the Department cannot proceed by way of a supplemental petition whenever it might instead proceed by way of a subsequent petition. The children were already dependents of the juvenile court and the Department sought only to change their placement—the Department therefore had discretion to decide seeking a further basis for dependency jurisdiction was not needed. Moreover, with the filing of the section 387 petition, the Department still faced the burden of proving by clear and convincing evidence that removal of the children from Erin's custody was warranted under section 361 at the disposition stage. As we next explain, the juvenile court did not err in deciding that standard was met.

D. Substantial Evidence Supports the Order Removing the Children from Erin's Custody

Erin contends the removal order was not supported by substantial evidence because there were other reasonable means of protecting the children. Specifically, she contends the juvenile court could have ordered "more frequent or unannounced Department visits to the home," assistance for Erin to "find a new

residence away from her burdensome parents, or, as suggested by [Erin] at trial, exiling [her] partner, the one with the methamphetamine-related arrest, from the home when the children are present."

Erin has a history of drug abuse and, although she tested negative for all substances on four occasions in the two months prior to the hearing on the section 387 petition, she also missed several tests. Erin's live-in girlfriend was arrested for possession of methamphetamine in 2019 and the children reported that Erin entertained friends in a shed. Police were called to Erin's house on nearly two dozen occasions in less than two years, including when Erin was attacked with a machete and when a friend in possession of a gun suffered a mental health emergency. Erin also failed to cooperate with service providers and ignored restrictions on her visitation with the children. Under these circumstances, there was substantial evidence that Erin would not have accepted assistance in finding a new residence or complied with restrictions on her girlfriend's presence when the children were in her custody. Moreover, the volatile nature of the home environment, with the potential for sudden acts of violence by Erin's visitors, made visits by Department social workers, however frequent, an inadequate means to ensure the children's safety.

DISPOSITION

The juvenile court's orders sustaining the section 387 petition and removing B.H. and Br. H. from Erin's custody are affirmed.

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BAKER, Acting P. J.

We concur:

MOOR, J.

KIM, J.