

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JORGELINA E.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Real Party in Interest.

D048461

(San Diego County
Super. Ct. No. J516103A/B)

PROCEEDINGS in mandate after referral to a Welfare and Institutions Code section 366.26 hearing. Julia C. Kelety, Judge. Petition granted.

Jorgelina E.'s niece, Dayanara V., died from injuries suffered while in the sole care of Enrique R., Jorgelina's live-in boyfriend. Jorgelina seeks writ review of the Juvenile Court's findings she caused the death of her niece by neglect within the meaning of

Welfare and Institutions Code section 300, subdivision (f)¹ and section 361.5, subdivision (b)(4). Jorgelina challenges the court's jurisdictional finding under section 300, subdivision (f) as it applies to her minor children Stephanie R. and Jorge G. She further contends the court erred by denying her family reunification services with Stephanie and Jorge under section 361.5, subdivision (b)(4), and by setting a permanency hearing under section 366.26. Jorgelina requests we reverse the court's finding that she caused the death of her niece, and direct the trial court to vacate the order for a permanency hearing under section 366.26 and to order services to facilitate family reunification with Stephanie and Jorge.

In this case of first impression, we conclude the Legislature incorporated principles of criminal liability in section 300, subdivision (f) and in section 361.5, subdivision (b)(4). Because the trial court applied a civil standard of negligence to the facts of this case and interpreted causation to include attenuated circumstances, we grant the petition and remand the case with directions.

FACTUAL AND PROCEDURAL BACKGROUND

Jorgelina lived with her boyfriend, Enrique, their baby daughter, Stephanie, then age 10 months, and her son Jorge, then age 6 years. The household also included Jorgelina's sister, Alma V., and Alma's daughter, Dayanara, a 22-month old toddler. On the afternoon of December 14, 2005, Alma was home with Dayanara; Jorgelina was away

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

from the home at work. At approximately 3:45 p.m., Alma left the home on an errand, leaving Dayanara with Enrique, Jorge, and Stephanie. At 4:09 p.m. Enrique telephoned Alma on her cellular telephone and told her Dayanara had fallen off a bed and was hurt. Alma immediately returned home and found Dayanara limp and unresponsive. Alma and Enrique took her to the hospital.

When they arrived at Children's Hospital, Dayanara was in cardiac arrest. Doctors placed her on life support and determined she was suffering from a skull fracture, severe brain trauma, a ruptured pancreas, and extensive internal bleeding. She had a number of bruises on her body. On December 15, 2005, after a neurosurgical evaluation confirmed there was no hope for recovery, medical personnel removed life support systems and Dayanara died.

The medical examiner listed Dayanara's death as homicide caused by blunt force trauma to her head and abdomen. Police arrested Enrique and charged him with first degree murder, assault on a child causing great bodily injury and felony child abuse. Enrique denied hitting Dayanara but admitted she was injured while in his care. He said he disciplined the three children by placing hot chili peppers into their mouths and did the same to Jorgelina and Alma when they objected to his treatment of the children. Enrique acknowledged he previously hit Dayanara with a small horsewhip and his bare hands and, at another time, placed her in a cold water bath until she turned blue. He admitted sexually abusing Alma.

The San Diego Health and Human Services Agency (Agency) removed Jorge and Stephanie from Jorgelina's custody and filed multiple count petitions under section 300.

The jurisdictional count pertinent to this appeal is under section 300, subdivision (f),² which authorizes a court to take jurisdiction of a child when "[t]he child's parent . . . caused the death of another child through abuse or neglect." (§ 300, subd. (f).) Agency alleged Jorgelina³ caused Dayanara's death by neglect because Jorgelina was aware Enrique was "physically abusive to the child including placing the child in ice cold bath water, horse whipping the child and placing chili peppers in the child's mouth[,] and [Jorgelina] failed to protect the child."

In January 2006, at a special hearing, the juvenile court asked the parties to submit briefs on the applicability of section 300, subdivision (f) and section 361.5, subdivision (b)(4) to Jorgelina, who was not present when Dayanara was injured. In March, the court issued its tentative "Statement of Decision." The court ruled the term "neglect" as used in

² In addition to the allegations under section 300, subdivision (f), Agency alleged Jorgelina did not adequately supervise or protect Stephanie and Jorge when she left them in Enrique's care and knew or should have known of his ongoing physical abuse of Dayanara. (§ 300, subd. (b).) Jorgelina submitted on this count and does not challenge the court's finding under section 300, subdivision (b) on appeal.

Agency also alleged Stephanie suffered a facial bruise as a result of physical abuse caused by the unreasonable acts of her parents (§ 300, subd. (a)) and Jorge was at substantial risk of serious physical harm because of Stephanie's injury (§ 300, subd. (j)). Jorgelina contested these allegations at the jurisdiction hearing. The court determined Agency did not prove the allegations of physical abuse to Stephanie under section 300, subdivision (a) and the correlative risk of harm to Jorge under section 300, subdivision (j) because the injury to Stephanie's cheek was not inconsistent with a child of that age learning to walk.

³ In Stephanie's case, the count under section 300, subdivision (f) included allegations Enrique caused Dayanara's death by abuse or neglect. In Jorge's case, apparently because Enrique was not Jorge's biological father, Agency did not allege jurisdictional facts based on Enrique's abuse of Dayanara. Jorgelina does not challenge jurisdiction in Stephanie's case under section 300, subdivision (f) as to Enrique.

section 300, subdivision (f) and section 361.5, subdivision (b)(4) included "a failure to act reasonably toward a child" and "a parent who was aware of the danger posed by another and failed to take steps to protect the child." The court rejected Jorgelina's argument that neglect cannot be a legal cause of death unless the parent had a duty to protect the child but the court did not otherwise address the issue of causation.

Jorgelina initially denied any knowledge of Enrique's abuse of Dayanara. She asserted she never saw him hit any of the children or Alma. After police told her Enrique admitted he hit Dayanara with a horsewhip and immersed her in cold water, Jorgelina said she was aware of the incidents. She hid the horsewhip and told Enrique to stop hitting Dayanara. The last incident took place three or four months before Dayanara's death. Jorgelina explained the bruise on Stephanie's cheek (see fn. 2) occurred when she was playing on her parents' bed and fell against its headboard.

Because of the severity of Dayanara's injuries, doctors performed a CAT scan and body x-rays on Stephanie. Other than the one bruise on her cheek, there was no sign of injury. Jorge denied any abuse. Jorge said he did not see Enrique hit Stephanie or Dayanara but when Dayanara cried, Enrique would take her into the bathroom and hit her. Dayanara was afraid of Enrique, who also hit Stephanie. Jorge saw Enrique hit Alma and make her cry.

At the contested jurisdiction hearing, the medical examiner testified there was medical evidence of a "very significant impact" to the back of Dayanara's head causing a y-shaped skull fracture extending to the base of her skull. The lining between the inside of the skull and the brain was torn, resulting in subdural hemorrhages from the tearing of

blood vessels. The pattern of injuries was inconsistent with a fall off a bed because there were injuries to the back of Dayanara's head, both sides of her face and head, and abdomen. The pattern indicated the injuries were caused by multiple impacts from different directions.

The bruises on Dayanara's body and the more severe injuries appeared to be the same age; however, the medical examiner could not rule out the possibility the injuries to the abdomen occurred earlier than those to the head. Had the abdominal injuries been inflicted earlier, a person would not be aware the child was injured unless he or she witnessed the abuse or was "clairvoyant." The medical examiner reiterated she had no reason to believe the injuries did not occur at the same time. There was no evidence of old scarring, fractures or bruising. However, the examiner found evidence of a "very small" subdural bleed that appeared to be approximately one to two weeks old. There was no conclusion that the injury was accidental or nonaccidental. When asked whether the injury would have been visible, the medical examiner declined to express an opinion.

The social worker asserted Jorgelina caused Dayanara's death because she did not protect Dayanara or prevent Enrique from abusing her. Jorgelina knew Enrique hit Dayanara with a horsewhip, inflicting bruises above her eye and on her legs. Jorgelina was home when Enrique placed Dayanara in a cold water bath. She did not call the police or advise her sister Alma to move away with Dayanara. The social worker believed Jorgelina should have made efforts to remove Dayanara from the home or have Enrique move out. The social worker was aware Jorgelina did not speak English and was in the United States without appropriate documentation.

The court found Jorgelina's failure to protect Dayanara rose to the level of causing death by neglect and sustained the allegations under section 300, subdivision (f). The court acknowledged that, medically, Dayanara's death resulted from the injuries Enrique inflicted. However, Jorgelina was aware of Enrique's pattern of abuse and did not take steps to protect Dayanara. Although Jorgelina's circumstances were "precarious," it was her responsibility to protect the children in her home.

At the disposition hearing, the social worker recommended the court not provide family reunification services because Jorgelina did not express anger at Enrique for the harm he inflicted on Stephanie and Jorge, and she did not show remorse or accept responsibility for not creating a protective environment for her children and niece. Jorgelina was cooperative and involved with services offered by Agency when the children were detained. Jorgelina was attending a 52-week child abuse program and a parenting class. Her visits with Stephanie and Jorge were positive and Jorge had a primary attachment to his mother.

The court found that section 361.5, subdivision (b)(4)⁴ applied to Jorgelina. Family reunification was not in the children's best interests because Jorgelina was not in a position to protect her children from abuse: she refused to acknowledge that Enrique was abusive, she was passive, and her status as an undocumented immigrant left her vulnerable and dependent. The court denied Jorgelina reunification services and set a

⁴ Section 361.5, subdivision (b)(4) provides that: "Reunification services need not be provided to a parent . . . when the court finds, by clear and convincing evidence, . . . [t]hat the parent . . . has caused the death of another child through abuse or neglect."

permanency plan hearing for Jorge and Stephanie under section 366.26. Jorgelina then filed a petition for writ review under California Rules of Court, rule 38.1, we issued an order to show cause and the parties waived oral argument.

DISCUSSION

A

Introduction

Jorgelina contends this case concerns "the legal limits of the jurisdiction of the juvenile court, as defined by the Legislature." She maintains she did not cause her niece's death under theories of tort or criminal liability, and argues she had no legal duty to protect Dayanara. Jorgelina asserts the court's finding under section 300, subdivision (f) and denial of services under section 361.5, subdivision (b)(4) were erroneous and therefore the court was required to offer her family reunification services for at least six months before setting a section 366.26 hearing.

Agency responds that Jorgelina's failure to protect Dayanara was a legal cause of Dayanara's death because Jorgelina was aware of Enrique's abuse and did not intervene to protect her. Agency maintains the existence of a legal duty to the child is not required before a parent can be held responsible for the death of another child by abuse or neglect.

This issue on review presents a question of statutory construction. We exercise our independent judgment when interpreting a legislative act. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) In construing statutory enactments, we look to the words of the statutes to determine legislative intent and to fulfill the purpose of the law. (*Gooch v. Hendrix* (1993) 5 Cal.4th 266, 282; *In re Heraclio A.*

(1996) 42 Cal.App.4th 569, 574.) Ordinarily, when the language of the statute is clear and unambiguous, we follow the plain meaning of the statute and need not examine other indicia of legislative intent. (*In re Alanna A.* (2005) 135 Cal.App.4th 555, 563.) As suggested by the parties' arguments incorporating principles of criminal and tort law, we must discern the meaning of the phrase "caused the death of another child [by] . . . neglect." (§§ 300, subd. (f); 361.5, subd. (b)(4).)

B

Before January 1, 1997, dependency jurisdiction under section 300, subdivision (f) was authorized when the juvenile court found that the child's parent or guardian "*has been convicted of causing* the death of another child through abuse or neglect." (Stats. 1987, ch. 1485, § 4, p. 5605, italics added; Stats. 1996, Ch. 1082, § 1.5, p. 7431; see 10 Witkin, Summary of Cal. Law (10th ed. 2005) Parent and Child, § 547, p. 671.) In 1996, the Legislature proposed eliminating the requirement of a criminal conviction. First, a jurisdiction hearing in juvenile court often occurred before the resolution of criminal charges arising from the child's death. This timing issue often foreclosed a juvenile court finding of jurisdiction under section 300, subdivision (f) until the parent causing another child's death was convicted of the offense in criminal court. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2679 (1995-1996 Reg. Sess.) as amended May 14, 1996, p. o (Bill Analysis).)

Second, the Legislature was concerned about imposing the criminal standard of proof beyond a reasonable doubt in dependency proceedings. The standard to establish dependency jurisdiction is by preponderance of the evidence. (§ 355, subd. (a) ["Proof

by a preponderance of evidence must be adduced to support a finding that the minor is a person described by Section 300."].) In amending section 300, subdivision (f), the Legislature reduced the standard of proof implicitly required by the earlier version of the subdivision to the lesser standard of proof required to establish dependency jurisdiction under other grounds listed in section 300. (Bill Analysis, at p. o.)

In amending section 300, subdivision (f) to authorize the juvenile court to make factual findings concerning a parent's culpability in another child's death, the Legislature also expressed concern about the effect any findings of fact made by the juvenile court might have on the related criminal prosecution for the child's death. (Bill Analysis, at p. o ["Care must be taken that the juvenile court action does not create a bar (collateral estoppel) as to any issues of fact."].)

Section 361.5, subdivision (b)(4) originally mirrored the language of its jurisdictional counterpart and authorized the court to deny reunification services to a parent convicted of causing another child's death. After the Legislature modified section 300, subdivision (f) to not require a criminal conviction, the Legislature made the same modification to section 361.5, subdivision (b)(4).⁵ (Compare Sen. Amend. to Assem. Bill No. 1524 (1995-1996 Reg. Sess.) Aug. 6, 1996 with Sen. Amend. to Assem. Bill No. 1524 (1995-1996 Reg. Sess.) Aug. 23, 1996.)

Based on the former language of section 300, subdivision (f) and the reasons for its modification, we conclude the Legislature intended section 300, subdivision (f) to

continue to be governed by principles of criminal law, but with a lesser standard of proof. Subdivisions (d), (e) and (i) of section 300 provide jurisdiction when "the parent or guardian knew or reasonably should have known" of a household member's abuse or neglect of the parent's child. This phrase is not present in section 300, subdivision (f). When a critical word or phrase is present in some subdivisions of a statute, omission of that word or phrase in another subdivision of the statute generally shows a different legislative intent. (See *In re Reeves* (2005) 35 Cal.4th 765, 786; *In re Young* (2004) 32 Cal.4th 900, 907.) The Legislature's omission in section 300, subdivision (f) of language found in other subdivisions of section 300 suggests the Legislature did *not* intend to import ordinary standards of civil negligence into section 300, subdivision (f).

Penal Code section 7 defines "neglect" and "negligence" as "a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns." "Such criminal negligence is of a higher order of culpability than ordinary civil negligence" (*Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 454; *People v. Penny* (1955) 44 Cal.2d 861, 879.) " 'Criminal negligence' requires [the trier of fact] to apply an objective standard" in determining "whether a reasonable person in the defendant's position would have appreciated the risk his or her conduct posed to human life." (*People v. Lara* (1996) 44 Cal.App.4th 102, 108, citing *People v. Watson* (1981) 30 Cal.3d 290, 296.) " The facts must be such that the consequences of the negligent act or acts could reasonably have

been foreseen and it must appear that the death or danger to human life was not the result of inattention, mistaken judgment or misadventure but the natural and probable result of an aggravated, reckless or flagrantly negligent act.' " (*People v. Kinkead* (2000) 80 Cal.App.4th 1113, 1123.)

We conclude the juvenile court applied an incorrect legal standard when it ruled that findings under section 300, subdivision (f) and section 361.5, subdivision (b)(4) could be sustained if the evidence showed the parent was aware of the "danger posed by another" and did not "act reasonably toward a child." Although the court correctly rejected Jorgelina's argument that she was not responsible for Dayanara's death because she did not have a legal duty to the child, the court did not otherwise enunciate or apply the appropriate legal standard for neglect or causation to the facts of this case. However, we need not remand the case to allow the trier of fact to determine whether Jorgelina's acts or omissions rose to the level of criminal negligence because, under these circumstances, there is insufficient evidence to support a finding Jorgelina *caused* Dayanara's death.

C

In addition to neglect (or abuse), section 300, subdivision (f) and section 361.5, subdivision (b)(4) require a causal connection between the parent's acts or omissions and another child's death. A cause is "[s]omething that produces an effect or result." (Black's Law Dict. (8th ed. 2004) p. 234, col. 1.) Under criminal standards, "the death must be the

evidence. (§ 361.5, subd. (b).)

probable consequence naturally flowing from the commission of the unlawful act or the criminal negligence. [Citations.]" (*People v. Wong* (1973) 35 Cal.App.3d 812, 830.) A causal connection occurs when the acts of the defendant are a substantial factor contributing to the resultant death. (*People v. Caldwell* (1984) 36 Cal.3d 210, 220.) "[N]o cause will receive juridical recognition if the part it played was so infinitesimal or so theoretical that it cannot properly be regarded as a *substantial factor* in bringing about the particular result.'" (*Id.* at p. 220.)

Agency argues Jorgelina should have acted more effectively to prevent the abuse and, had she done so, Enrique would not have killed Dayanara. Although Jorgelina (or Alma) might have done *something* to prevent Dayanara's death, Jorgelina's failure to act or to act effectively is not so closely connected to the fatal incident of abuse that it can "properly be regarded as a *substantial factor* in bringing about the particular result." (*People v. Caldwell, supra*, 36 Cal.3d at p. 220.)

Relying in part on *In re Ethan N.* (2004) 122 Cal.App.4th 55 (*Ethan N.*), the court found Jorgelina caused Dayanara's death by neglect because Jorgelina was aware of Enrique's pattern of abuse and did not take steps to protect the child. However, the record shows, and Agency concedes, that Jorgelina intervened to protect Dayanara from Enrique's abuse. Moreover, the pattern of abuse in this case is significantly different from that found in *Ethan N.* and *Patricia O. v. Superior Court* (1999) 69 Cal.App.4th 933 (*Patricia O.*).

In *Ethan N.*, the court found mother's "active participation or neglect" caused the infant's death and on that basis denied her reunification services. (*Ethan N., supra*, 122

Cal.App.4th at p. 62.) The victim was a 39-day-old infant who died as a result of "a golf ball-sized wad of paper lodged deep in his esophagus." (*Id.* at p. 61.) The infant also suffered severe injuries to his rectum and anus, 12 broken ribs in various stages of healing, injuries to his face, and other wounds. Such injuries would have been obvious. The mother did not seek medical care for her infant. (*Ibid.*)

In *Patricia O.*, the court found the mother's failure to protect the baby rose to the level of criminal neglect. (*Patricia O.*, *supra*, 69 Cal.App.4th at pp. 940, 942.) The mother's boyfriend physically abused her baby, inflicting chronic injuries that would have caused obvious pain and symptoms. (*Id.* at pp. 938-939.) The baby's injuries included a four-to-six-week-old spinal fracture, a mature healing fracture of the right humerus, another injury to the humerus approximately one to three weeks old, and other injuries and bruises of varying ages. (*Id.* at pp. 936, 938.) The conclusion the mother knew the abuse was ongoing and permitted it to continue was supported by the nature of the injuries to the baby, who was in his mother's care, and because mother saw her boyfriend hit one of her children and was informed of his abuse "1000 times." (*Id.* at p. 937.)

On December 14, 2005, when Jorgelina left for work, Dayanara was in the care and custody of her mother, Alma. Jorgelina was not present when Dayanara was injured. Although Jorgelina knew of Enrique's abusive behaviors, she asserted the last incident of abuse occurred approximately three or four months before the fatal incident. Medical evidence presented at trial does not contradict her assertion. There is no doubt Enrique's use of a horsewhip on Dayanara was a serious incident of child abuse; however, the

record does not reflect when it occurred⁶ or whether Jorgelina was present during the abuse.

In contrast to the mothers in *Ethan N.* and *Patricia O.*, who were present during multiple acts of physical abuse and did not take any steps to protect their children, Jorgelina did not knowingly permit the abuse of Dayanara to continue. As Agency acknowledges, Jorgelina took steps to protect Dayanara by hiding the horsewhip, encouraging Alma to take photographs of the child's bruises, and telling Enrique not to hit Dayanara. Jorgelina's actions do not appear to have been "aggravated, reckless or flagrantly negligent." (*People v. Kinkead, supra*, 80 Cal.App.4th at p. 1123.) The ultimate failure of these interventions does not mean Jorgelina played a substantial role in bringing about Dayanara's death.

"[W]hen child abuse results in the death of a child, such abuse 'is simply too shocking to ignore'" (*Ethan N., supra*, 122 Cal.App.4th at p. 65, quoting *In re Alexis M.* (1997) 54 Cal.App.4th 848, 850-851.) Dayanara's death is no less shocking than the children's deaths in *Ethan N.* and *Patricia O.* The abuse leading to Dayanara's death will not be ignored by the courts. The culpability of the alleged perpetrator will be addressed in criminal proceedings. The juvenile court will take into account the protective risks in Jorgelina's home in determining whether her children can be safely returned to her care.

⁶ In its response, Agency asserts this incident happened "[w]eeks before Dayanara's death." We are unable to confirm this incident occurred close in time to the fatal beating by referencing the citation provided or by reviewing the record.

Nevertheless, even under these sad circumstances, we conclude the finding that Jorgelina caused Dayanara's death by neglect is not supported by the evidence.

DISPOSITION

Let a writ issue directing the superior court to vacate its finding under section 300, subdivision (f) and order denying reunification services for Jorgelina and setting a section 366.26 permanency planning hearing, and enter a new order providing her with six months of reunification services. (§§ 361.5, subd. (a); 16501; 16501.1; see also *In re Dino E.* (1992) 6 Cal.App.4th 1768, 1776-1779.) The stay issued July 21, 2006, is vacated. This decision is final immediately as to this court. (Cal. Rules of Court, rule 24(b)(3).)

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.

Filed 9/12/06

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ORDER CERTIFYING OPINION
FOR PUBLICATION

THE COURT:

The opinion filed August 30, 2006, is ordered certified for publication.

The attorneys of record are:

Timothy A. Chandler, Alternate Public Defender, Robert Gulemi and Frank
Birchak, Deputy Alternate Public Defenders; and Kathleen M. Mallinger for Petitioner.

No appearance for Respondent.

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BENKE, Acting P. J.