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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re M.S., a Person Coming Under the
Juvenile Court Law.

B234644
(Los Angeles County
Super. Ct. No. CK61028)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

MARIE S.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County,
D. Zeke Zeidler, Judge. Affirmed.

Janice A. Jenkins, under appointment by the Court of Appeal, for
Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant
County Counsel, and Jeanette Cauble, Senior Deputy County Counsel, for Plaintiff and
Respondent.

Marie S. (“Mother”) appeals the juvenile dependency court’s orders (1) sustaining the allegations in the juvenile dependency petition concerning her daughter, M.S., under Welfare and Institutions Code¹ section 300; and (2) dismissing the proceedings with family law exit orders granting full custody to the child’s father with monitored visits for Mother. Before this court, Mother claims insufficient evidence supported the court’s exercise of jurisdiction under section 300, subdivision (b) and therefore the court’s subsequent orders regarding custody and visitation should be vacated. For the reasons stated herein, we conclude that sufficient evidence supported the jurisdictional finding and therefore the subsequent orders were not improper. Accordingly we affirm.

FACTUAL AND PROCEDURAL HISTORY

Prior Child Welfare Involvement with the Family

The family in this matter consists of M.S., the minor subject of these proceedings, Mother, father Daniel M.² (Father), and M.S.’s. older siblings, D.M. (born in 1999), F.M. (born 2005) and H.M. (born 2007).

In late September 2005, the Department of Children and Family Services (the “Department”) received a referral after Mother and newborn F.M. tested positive for drugs at F.M.’s birth; F.M. had cocaine in her system and Mother tested positive for marijuana. The petition filed in the 2005 proceeding indicated that Mother (and Father) had lengthy criminal histories with convictions for drug and violence-related offenses, including possession and sale of controlled substances. Mother’s criminal history of drug offenses dated back to 1990. The petition further alleged that the parents had a history of drug abuse and were frequent users of cocaine and marijuana, and that the parents’ drug use and criminal activity put F.M. and older sister D.M. at risk of harm. The allegations in the 2005 petition were sustained. The parents were ordered to complete a reunification

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

² Daniel M. was a party in the original dependency proceedings, but he is not the subject of this appeal.

program of drug counseling and testing. Father complied with the court's orders. He completed a drug and alcohol treatment program in 2006, and consistently tested negative for drug use. Mother did not comply with the court's orders for drug testing, counseling, parenting, or individual counseling. In the fall of 2006, the court terminated reunification services for Mother, but continued them for Father.

Thereafter, in early 2007, Mother gave birth to H.M. A section 300 petition was filed and sustained on behalf of H.M., alleging Mother used cocaine while pregnant with her.

Father was able to reunify with the three minors, and they were ordered placed in Father's home. In September 2007, the court terminated jurisdiction with an order that the children be placed in the home with Father. He was granted primary physical and legal custody of the children. Mother did not reunify with her children, but was allowed monitored visits with them.³

In March 2009, the Department received a report that Mother had driven D.M. to school while under the influence of alcohol. A Team Decision Meeting (TDM) was held after the incident and Father agreed to Voluntary Family Maintenance (VFM) services; the VFM services ended and the matter was closed in the fall of 2009.

Current Dependency Petition.

After M.S. was born in November 2010, the Department received a referral regarding the newborn. According to the Department's initial investigation, Mother reportedly tested positive for cocaine, marijuana, and nicotine on her first prenatal visit in April 2010, but was not tested again during the pregnancy. M.S. was tested for drugs at birth and the tests were negative for drugs and harmful substances. Mother was not tested. Mother denied using any drugs while pregnant with M.S. The hospital social worker informed the Department that M.S. was healthy and had no medical concerns upon her birth.

³ Mother moved out of the home so that Father could retain custody of the children.

The Department social worker interviewed Mother at the hospital. Mother admitted she last used cocaine in February 2010; she reported completing a drug treatment program in 2007, and stated that although she had received referrals for a drug sponsor, she did not believe that she needed one. Mother stated that a friend acted as her “sponsor.” She also stated she was living with her mother and had everything set up for the baby. Mother refused to submit to a voluntary drug test or provide any additional information to the Department social worker.

The Department interviewed Father. He indicated he was aware that Mother was pregnant. He reported that he did not speak with Mother, and that Mother lived with the maternal grandmother. Father stated that Mother had monitored visits with the children once every two weeks. He reported that he had concerns that Mother abused drugs but, did not believe she used them during her pregnancy. He stated he had gone to some of Mother’s prenatal appointments and was planning on taking the baby home with him. He reported that all of M.S.’s siblings lived with him and were doing well.

The Department decided to place M.S. on “hospital hold” while the Department assessed the Father’s home to determine whether the baby could be released to him. The social worker attempted to explain the situation to Mother, and asked to her to attend a TDM the next day at the Department’s office. Mother refused to speak to the social worker.

The social worker went to Father’s home to assess its safety and suitability and to interview the older children. D.M. reported Mother lived with the maternal grandmother, and that she saw Mother once every two weeks in the Father’s home. F.M., however, reported that she was living with Father, her siblings and Mother. She indicated Mother slept in Father’s bedroom.

Father agreed to attend the TDM, but he stated that Mother indicated that she did not want to attend. Father further stated that he did not understand why Mother “refuses to [drug] test, if she is clean.”

The Department held the TDM meeting on November 9, 2010. It was decided that the Department would file a section 300 petition on behalf of M.S. and that she would be

released to Father and detained from Mother. Mother agreed to on demand and regular drug testing. However, it was also reported that she refused to attend a substance abuse treatment program.

Detention Proceedings.

Thereafter, the Department filed a section 300 petition on behalf of newborn, M.S., alleging that M.S. was a person described under subdivision (b). The petition contained allegations that Mother had a history of substance abuse, including use of cocaine, marijuana, and alcohol. The Department further alleged that Mother was a current user of cocaine and marijuana, and had a positive toxicology screen for cocaine and marijuana in April 2010, during her pregnancy with M.S. Mother's juvenile court and criminal histories were also alleged. The petition further alleged that M.S.'s older siblings were prior dependents of the juvenile dependency court because of Mother's substance abuse. The Department recommended M.S. remain released to Father and that Mother be granted monitored visits, and ordered to participate in various programs including substance abuse treatment, therapy and random drug testing.

On November 12, 2010, the juvenile court conducted an initial detention hearing. The court ordered M.S. detained from Mother and released to Father. The court also ordered Mother to submit to weekly random testing and referrals to recommended programs.

Adjudication and Disposition Proceedings.

The Department filed a Jurisdiction/Disposition Report in mid-December 2010. When the Department met with Mother, she denied she had a current drug problem. She indicated the last time she used drugs was in January 2009. She denied that she had used drugs during her pregnancy with M.S. She also stated she was attending Narcotics Anonymous ("NA") meetings and was working with a sponsor. She stated she relapsed in 2009, but that she had completed a drug treatment program in 2007. She stated her drug history was "not as bad" as the Department had portrayed it; she claimed that she lost custody of her other children because she gave up fighting for them. Mother did not think she needed any drug treatment or counseling.

Father was interviewed. He stated that he had known Mother for about 20 years and that she had a history of abusing drugs dating back to before the birth of D.M. in 1999. Father stated that Mother had “relapsed” after the birth of F.M. He told the Department he did not spend that much time with Mother during her pregnancy with M.S. because she did not live in the home and he did not monitor her visits with the children. He reported that Mother continued to insist that she did not use any illegal substances while she was pregnant with M.S. He also observed, however, if Mother’s claim was true, then her pregnancy with M.S. was the longest time Mother had gone without using drugs. He stated that he had never been advised by Mother’s doctor that Mother tested positive for drugs in April 2010.

The December 2010 Jurisdiction/Disposition Report disclosed that Mother had four negative drug tests since November 9, 2010. The Department recommended that the juvenile court sustain the section 300 petition, remove the child from Mother’s custody, declare the child a dependent and provide Mother with reunification services. The day before the scheduled hearing, the Department filed “last minute information” which indicated that the Department had changed its recommendation: to sustain the petition and thereafter to terminate jurisdiction with a family law order to place the child in Father’s home with monitored visits for Mother.

On December 22, 2010, the juvenile court proceeded with an adjudication of the section 300 petition. The Department offered its reports and Mother’s drug test results, which the court entered into evidence. Mother testified at the hearing. She stated the last time she used cocaine and marijuana was in 2008. She testified she completed a drug treatment program in 2006, but did not enter another program after her relapse in 2008. She stated she followed up with NA meetings and a sponsor. She claimed that she attended an NA meeting once a week. She also claimed that she was unaware that she had tested positive for cocaine and marijuana in April of 2010, and denied telling the social worker that she had used drugs in 2010. The section 300 hearing was continued.

Thereafter, the Department submitted “last minute information” for the continued hearing, indicating that Mother took a drug test on December 23, 2010 ,which disclosed

positive results for opiates/codeine and Morphine. Mother claimed, however, that she had been prescribed these drugs by her doctor to treat the post-pregnancy pain and back pain. The Department also indicated that Mother was not participating in any substance abuse program and that she stated she did not need any programs or counseling.

The adjudication proceeding was continued a number of times to obtain a copy of the April 2010 drug test results from the doctor's office. The Department submitted a copy of those results on February 14, 2011, but the court continued the matter because the lawyer handling the case for the Department was unavailable.

On March 4, 2011, the contested adjudication resumed. The Department presented a copy of an April 2010 drug test result which showed that cocaine metabolite, marijuana metabolite, and nicotine were detected in Mother's urine. Mother's counsel objected to its admission of the drug test into evidence, arguing that the department had not established a chain of custody for admission of the evidence. The court indicated that the matter would be continued again to allow the Department the opportunity to gather evidence to establish a chain of custody for the test results. Mother, who was present at the hearing, interjected and asked the court: "Can we end today? Give custody to the Father." The court informed Mother that it first had to determine whether the allegations in the petition were true, and indicated that her counsel was objecting to the evidence supporting the petition.

Mother also testified on March 2011 hearing. Mother stated that she gave the urine sample in April 2010 to find out whether she was pregnant. She testified that she used an unlabelled Dixie cup (without her name on it) for her sample; and that she placed her sample on the counter next to a cup containing another person's sample and that the two cups were indistinguishable. She told the court that she believed the results showing a positive test for cocaine and marijuana were not accurate because she denied using drugs at that time and because her doctor never told her of the drug test results. She further testified that the last time she had taken drugs was in 2009.

The matter was continued for the Department to authenticate and validate the April 2010 drug test. On April 28, 2011, the Department reported that Mother had

missed all weekly drug testing since February 2011. The Department further indicated that Mother no longer wanted family reunification services and that she wanted M.S. to remain with Father.

At the next hearing on June 20, 2011, the juvenile court did not admit the copy of the April 19, 2010, drug test results because the Department could not establish a chain of custody for the test. Nonetheless, the court admitted the evidence of the December 23, 2010, test which was positive for opiates/codeine and Morphine, and took judicial notice of prior sustained section 300 petitions, minute orders and disposition case plans in the file in connection with M.S.'s siblings.

The juvenile court then rendered its decision. It noted that Mother had opportunities to drug test and had stopped testing. The court considered the December 2010 positive test⁴ and subsequent missed tests to be "dirty" (i.e., positive). The court noted that Mother had failed to reunify with other children, and did not provide proof of resolving the issues that brought those children before the juvenile court. The court also observed that Mother's visits with M.S.'s siblings were still monitored. The juvenile court then amended and sustained the section 300 petition as follows:

b-1 [¶] The child [M.S.]'s mother, Marie [S.] has a history of substance abuse including cocaine, marijuana and alcohol. The child's siblings, . . . were prior dependents of the Juvenile Court due to the mother's substance abuse and the mother's visits with them are still monitored. The mother has a criminal history of convictions of transport (sic) sell narcotic controlled substance and two convictions of possession of narcotic controlled substance. The mother's history of illicit drug use and failure to reunify with siblings endangers the child's physical and emotional health, safety and well-being, creates a detrimental home environment and places the child at risk of physical and emotional harm, damage and failure to protect.

⁴ The court rejected Mother's explanation for the positive drug test because, in the court's view, Mother did not provide the court with sufficient evidence that she had been prescribed the drugs.

The juvenile court declared M.S. a dependent of the court, removed her from Mother's custody, and placed her in the home of Father. Mother's visits were ordered to be monitored at least twice per week with a mutually agreed upon monitor.

Thereafter, Father filed a "Custody Order—Juvenile—Final Judgment," which the court signed. Father was granted sole legal and physical custody of M.S., and Mother's visits were ordered monitored because Mother had not made substantial progress in her court-ordered programs.

Mother filed a timely notice of appeal.

DISCUSSION

Mother contends substantial evidence does not support the finding under section 300, subdivision (b) that M.S. was currently at substantial risk of serious physical harm due to Mother's history of illicit drug use and failure to reunify with siblings, and therefore the court's subsequent family law orders were also infirm and must be vacated.⁵ We conclude substantial evidence supports the finding.

At issue here is the juvenile court's assumption of jurisdiction under section 300, subdivision (b). This subdivision provides, in pertinent part, that a child comes within the jurisdiction of the juvenile court if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, . . . by the inability of the

⁵ After the court sustained the jurisdictional allegation in the petition, the court terminated jurisdiction and issued a family law exit order awarding Father full legal and physical custody of M.S. with monitored visits for Mother. Arguably termination of the court's jurisdiction renders the appeal moot. (See *In re James B.* (1986) 184 Cal.App.3d 524, 528 [the court's termination of jurisdiction after sustaining the petition and issuing disposition orders raises an issue of mootness with respect to a subsequent challenge to the exercise of jurisdiction].) This notwithstanding, we concur with the parties that the sustained jurisdictional findings against Mother have had an adverse effect on her custody rights and could affect Mother in the future, if dependency proceedings were ever initiated, or even contemplated, with regard to M.S. or Mother's other children. (*In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1547 [appeals in dependency matters are not moot if "the purported error is of such magnitude as to infect the outcome of [subsequent proceedings]. . ."].) Consequently, we conclude Mother's challenge to the jurisdictional findings is not moot.

parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse." Proof of current risk at the time of the jurisdiction hearing is not required to support jurisdiction pursuant to section 300, subdivision (b), but may be satisfied by showing the child has suffered or there is a substantial risk that the child will suffer serious physical harm or abuse. (*In re Adam D.* (2010) 183 Cal.App.4th 1250, 1261.)

A parent's substance abuse may constitute the requisite neglectful conduct supporting dependency jurisdiction. The statute explicitly permits jurisdiction based on "inability of the parent [] to provide regular care for the child due to the parent's . . . substance abuse." (§ 300, subd. (b).) The dependency statutes also recognize that "a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child." (§ 300.2.) As for the element of causation, drug-induced parental neglect might cause harm, particularly for "children of such tender years that the absence of adequate supervision and care poses an inherent risk to their physical health and safety." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) Furthermore, there are various ways in which a parent's substance abuse problem might create a risk that the child will ingest drugs. (*Id.* at p. 825.) The element – risk of injury – requires "evidence indicating that the child is exposed to a substantial risk of serious physical harm or illness." (*Id.* at p. 823.)

Jurisdictional facts must be supported by proof by a preponderance of the evidence. (*In re Sheila B.* (1993) 19 Cal.App.4th 187, 198.) "By 'a preponderance of evidence' is meant such evidence as when weighted with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein." (*In re Corey* (1964) 230 Cal.App.2d 813, 823.)

We review the juvenile court's jurisdictional findings against the substantial evidence rule. (See, e.g., *In re David M.* (2005) 134 Cal.App.4th 822, 828 (*David M.*).) "In juvenile cases, as in other areas of the law, the power of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination as to whether or not there is any substantial evidence, whether or not contradicted, which will support

the conclusion of the trier of fact.” (*In re Katrina C.* (1988) 201 Cal.App.3d 540, 547.) In determining whether substantial evidence supports the factual findings, all intendments are in favor of the judgment and we must accept as true the evidence which tends to establish the correctness of the findings as made, taking into account as well all inferences which might reasonably have been drawn by the trial court. The appellate “court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate].” (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.) “Under the substantial evidence rule, we have no power to pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or determine where the weight of the evidence lies.” (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1135, disapproved on another ground in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748-749, fn. 6.) “Where there is more than one inference which can reasonably be deduced from the facts, the appellate court is without power to substitute its deductions for those of the trier of fact.” (*In re Katrina C.*, *supra*, 201 Cal.App.3d at p. 547.)

If supported by substantial evidence, the judgment or finding must be upheld, even though substantial evidence may also exist that would support a contrary judgment and the dependency court might have reached a different conclusion had it determined the facts and weighed credibility differently. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) Thus, the pertinent inquiry when a finding is challenged on sufficiency of the evidence grounds is whether substantial evidence supports the finding, not whether a contrary finding might have been made. (*Ibid.*) Applying this deferential standard, we view the evidentiary record in the light most favorable to the order. (*In re Diamond H.*, *supra*, 82 Cal.App.4th at p. 1135.)

Here Mother claims that there was insufficient evidence that her drug abuse caused any actual harm to M.S. or presented a future risk of harm. She asserts that M.S. was a full term, healthy baby who had a negative toxicology test at birth. She maintains that there was no evidence that she used drugs while pregnant or was a current drug user which would render her incapable of caring for the baby.

The Department did not present admissible evidence that M.S. was directly exposed to drugs either in utero or when she was born. In addition, there was no evidence presented that Mother had harmed, or failed to supervise or neglected M.S. However, the juvenile court does not have to wait for a child to actually be hurt before it can intervene. (*In re Diamond H.*, *supra*, 82 Cal.App.4th at p. 1136, overruled in part on other grounds pursuant to *Renee J. v. Superior Court*, *supra*, 26 Cal.4th at p. 749.) “[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.) Jurisdiction thus may be unwarranted where the facts alleged in the petition represent an isolated instance of past parental neglect. Thus, for example, jurisdiction could not be based on a single incident of sexual abuse by an acquaintance in whose care the children were placed, where the evidence showed that he would never be trusted with them again. (*Id.* at p. 1398.) Likewise, jurisdiction was not warranted where the child was placed with a babysitter known to use marijuana, where the only evidence was that he would never be placed in her care again. (*In re David M.*, *supra*, 134 Cal.App.4th at p. 831.) To support jurisdiction, there must be evidence that the child “will suffer, in the future, serious physical harm as a result of her parents’ negligent failure to protect her from the conduct of a custodian or caretaker. (§ 300, subd. (b).)” (*In re Savannah M.*, *supra*, 131 Cal.App.4th at p. 1398.)

The record contains ample evidence that Mother’s prior drug use impaired her ability to safely parent the other children and that Mother had not yet resolved the substance abuse issues that had resulted in the filing of the dependency proceedings in this case and in the prior cases. Mother has a lengthy history of abusing drugs and her efforts to address her addiction have not been successful. Although she had reported that she attended a drug treatment program in 2006, she relapsed. She abused drugs during two of her prior pregnancies. Mother also told different stories about the last time she had used drugs—at first reporting to the social worker that she had last used drugs in February 2010, but later claiming that she had not used drugs since 2009. In court she

told different versions as well, initially stating that she had last used drugs in 2008, but then later testifying that she had used them in 2009. Moreover, Mother drove one of her children to school while under the influence of drugs in 2009.

In general, previous acts of neglect, standing alone, may not be sufficient to establish a substantial risk of harm. Here, however, the risk of harm from those acts was ongoing. Indeed, other than claiming that she attended NA meetings and worked with her friend/sponsor, Mother did nothing else to address her ongoing issue with drug abuse. During these proceedings, she refused to participate in any drug treatment programs, claiming that she did not think she had a problem nor needed to participate in the programs.⁶ Mother also stopped participating in court-ordered drug testing during these proceedings, several months prior to the final section 300 hearing in June 2010. She also had a positive drug test in December 2010. This is more than sufficient evidence to support a finding that Mother's unresolved drug problems posed a substantial risk of harm to M.S. Given Mother's history of drug use, her ultimately unsuccessful efforts to address her drug problem and her failure to continue to participate in testing or other recommended programs, the court had reason to doubt Mother's commitment to sobriety at the time of the jurisdictional hearing. Taken as a whole this evidence supports an inference that M.S. was at risk of being placed in a harmful environment in the future.

Consequently, sufficient evidence supports the court's jurisdictional finding.

Furthermore, Mother's objection to the custody and visitation orders is based entirely upon her challenge to the court's exercise of jurisdiction. In light of our conclusion on jurisdiction, Mother's complaint about the custody and visitation orders fails.

⁶ The record also reflected that Mother had not participated in other aspects of the case plan, including participating in the recommended parenting education and individual counseling.

DISPOSITION

The orders are affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.