Filed 12/5/18 In re T.T. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re T.T., A Person Coming Under the Juvenile Court Law. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. Ashley B., Defendant and Appellant.	B289570 (Los Angeles County Super. Ct. No. 18CCJP01440)

APPEAL from orders of the Superior Court of Los Angeles County, Danette J. Gomez, Judge. Reversed.

Christine E. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Acting Assistant County Counsel, and Brian Mahler, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

The juvenile court found jurisdiction over mother's child, sustaining one count under Welfare and Institutions Code section 300, which alleged mother's use of marijuana placed the child (born February 2016) at risk of harm.[1] Mother argues there is no nexus between her marijuana use and any past physical harm to the child or present risk of harm. She also asserts there was insufficient evidence to establish substance abuse. We agree and reverse the juvenile court's jurisdictional finding.

FACTS AND PROCEDURAL BACKGROUND

1. PCP Lab and Firearms Discovered in Home

On March 1, 2018, police searched the home mother shared with her two-year-old son, a cousin, the maternal grandparents, and other family members. Mother and her son shared a bedroom separate from the other members of the family. Police recovered multiple unsecured, unregistered, and loaded firearms in the maternal grandfather's and the cousin's bedrooms. Police also discovered a Phencyclidine (PCP) lab inside the grandfather's bedroom. Police detected a small odor of PCP throughout the home. One gallon of PCP was recovered from the living room, which was accessible to all family members. Various syringes, eye droppers, and packaging materials for PCP were located throughout the home.

When interviewed by DCFS, mother denied knowing the existence of any illegal activity or items in the home. Mother stated she did not know what PCP smelled or looked like. She told the social worker that her family had no gang ties and she

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[1] All subsequent statutory references are to the Welfare and Institutions Code.

was surprised by the police raid. Mother stated she did not see strange people coming and going from the home, and never noticed that the maternal grandfather had extra money. The dependency investigator concluded in his report that mother did not know about the grandfather's criminal activity in the home.

The maternal grandfather, who admitted to possessing guns and operating a PCP lab in his bedroom, told DCFS that he hid his criminal activity from his family.[2] Other family members interviewed by DCFS also denied knowledge of the drugs or drug lab in the home.

Mother stated that she works the graveyard shift at the post office from 9:00 p.m. to 5:45 a.m., and the maternal grandmother watches the child while she is at work. Mother usually sleeps during the day, when she is not caring for her son. When asked about her drug use, mother stated that she smokes marijuana following her night shift to help her fall asleep and deal with her severe gastritis. Mother stated that she smokes it in her car and never in the presence of or near the child. Mother indicated she would stop using marijuana.

Father, who visited his child regularly, stated that he did not know about any of the illegal activity in the home and did not suspect any abuse. He stated he did not believe mother knew of the criminal activity either. Father described her as a great mother to their son.

At this juncture, the child appeared appropriately groomed and lacked any signs of neglect or abuse. Because of PCP chemicals found in the child's home, the boy was immediately evaluated by doctors; no medical concerns were noted.

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[2] The grandfather was sentenced to three years and eight months in prison for his crimes.

2. Section 300 Petition

On March 5, 2018, DCFS filed a petition pursuant to section 300, subdivision (b)(1), alleging two counts. The first count alleged that mother created a detrimental and endangering home environment for the child evidenced by the existence of grandfather's PCP manufacturing lab, illegal drug trafficking, loaded and unsecured firearms, hazardous chemicals and syringes for PCP, and the grandfather's drug use in the home.

The second count under section 300, subdivision (b)(1), alleged that mother "has a history of substance abuse and is a current user of marijuana, which renders the mother incapable of providing regular care of the child. On prior occasions, the mother was under the influence of marijuana while the child was in the mother's care and supervision. The child is of such young age as to require constant care and supervision and the mother's substance abuse interferes with providing regular care and supervision of the child. Such substance abuse by the mother endangers the child's physical health and safety, and places the child at risk of serious physical harm, damage, and danger."

3. Detention

On March 6, 2018, the juvenile court held a detention hearing; both parents were present. The court detained the child from mother and released him to father. DCFS was ordered to provide mother with referrals to drug testing sites and parenting programs. By the time of this detention hearing, mother had moved out of the home that was raided and into the maternal great aunt's home.

On April 3, 2018, the juvenile court ordered the child to be released to mother.

4. Mother's Enrollment in Services and Drug Testing

In the month and a half between detention and the jurisdiction hearing, mother had enrolled in a drug and alcohol prevention program. An April 2018 letter from the program indicated she was compliant. She also completed four individual counseling sessions, and according to the program showed a "continuing effort" to abstain from using mind-altering substances. On March 27, 2018 and April 3, 2018, Mother had two positive tests for cannabinoids with decreasing levels of 86 nanograms per milliliter and 47 nanograms per milliliter respectively. She had two missed drug tests on March 23, 2018 and April 9, 2018.

5. Jurisdiction and Disposition Hearing

The juvenile court held the combined jurisdiction and disposition hearing on April 18, 2018. The juvenile court accepted into evidence the jurisdiction disposition report and its attachments, and three last minute information reports with attachments. The court accepted stipulated testimony that if the dependency investigator were to be called to testify, he would state mother had moved from the residence that was raided and to a new home. DCFS had assessed Mother's new home and found it appropriate. The court then heard argument. Because the juvenile court dismissed the count related to the grandfather's criminal activities, we focus on counsel's argument about mother's marijuana use.

Mother's counsel requested the petition be dismissed in its entirety. Counsel argued that the decreasing levels of marijuana shown in the drug tests indicated that mother had stopped smoking marijuana and appreciated the seriousness of the allegations brought against her. Counsel asserted that the levels

of cannabinoids present were indicative of medicinal use. Counsel also argued DCFS had not provided any evidence of a nexus between mother's use of marijuana and any suggestion of abuse or neglect of the child.

Father's counsel and minor's counsel joined in mother's request to dismiss the allegations about her drug use. Minor's counsel argued there was no evidence of neglect or abuse of the child, but requested the court sustain the allegation about a dangerous home environment caused by the maternal grandfather's criminal activities.

The juvenile court dismissed the first section 300, subdivision (b) allegation regarding the dangerous home environment based on the existence of PCP and guns in the home. The court relied on the dependency investigator's conclusion that mother truly did not know about the maternal grandfather's criminal conduct. The juvenile found true the remaining subdivision (b) count alleging mother's marijuana use endangered the child.

The court reasoned: Mother "says she smokes [marijuana] while her son is usually asleep. That's when she gets home. Again, these are the early hours of the morning. He's two-years-old. One would assume he doesn't sleep all day long. So the court would infer that these are the hours in which she's supposed to be caring and supervising for her son, and although she said she wanted to stop using, and it was on March 18, 2018, we have [a DCFS report] which shows that she was a no-show on March 23rd, 2018, which is considered a positive test. [¶] She tested positive on March 27th and April 3rd, and on April 9th she was a no-show, and although [mother's counsel] argues that this

is a low amount, there's no evidence of that other than counsel's argument."

The juvenile court proceeded immediately to disposition. The court ordered the child into his parents' shared custody, and family maintenance services and family preservation referrals for mother and father. The court ordered mother to participate in substance abuse counseling, awareness counseling, parenting programs, and on-demand drug testing.

DISCUSSION

Mother contends the court erred in finding jurisdiction over the child based on her use of marijuana. Section 300, subdivision (b), requires proof 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.' [Citation.] 'The third element "effectively requires a showing that at the time of the jurisdiction hearing the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur). [Citations.]" ' " (*In re J.O.* (2009) 178 Cal.App.4th 139, 152.) "Section 300, 'subdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a substantial risk of serious physical harm or illness. [Citation.]' " (*In re David M.* (2005) 134 Cal.App.4th 822, 829; accord, *In re John M.* (2013) 217 Cal.App.4th 410, 418.)

We review the juvenile court's jurisdictional findings for substantial evidence. (*Los Angeles County Dept. of Children & Family Services v. Superior Court* (2013) 215 Cal.App.4th 962, 966.) "Substantial evidence is relevant evidence which

adequately supports a conclusion; it is evidence which is reasonable in nature, credible and of solid value." (*In re R.C.* (2012) 210 Cal.App.4th 930, 941.) Although substantial evidence may consist of inferences, the inferences " 'must be "a product of logic and reason" and "must rest on the evidence" [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations].' " (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393–1394, italics omitted.) Conflicts in the evidence and reasonable inferences are resolved in favor of the prevailing party. (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 564.) "[I]ssues of fact and credibility are questions for the trier of fact." (*Ibid.*)

1. Insufficient Evidence of a Substantial Risk of Harm

"It is undisputed that a parent's use of marijuana 'without more,' does not bring a minor within the jurisdiction of the dependency court." (*In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003.) DCFS must present evidence of a specific, nonspeculative and substantial risk of serious physical harm to the child based on mother's substance abuse. (*Ibid.*; *In re David M., supra,* 134 Cal.App.4th at p. 830.)

Here, DCFS failed to produce any evidence that mother's use of marijuana, which occurred when she arrived home after her night shift and while her child was sleeping, created a specific, nonspeculative, and substantial risk of serious physical harm to the child. DCFS asserts on appeal that mother's marijuana use "resulted in her not managing to adequately care for and protect" the child. There is no evidence that mother's care was inadequate. On the contrary, the evidence was that the child was appropriately groomed and without apparent health problems. DCFS highlights that it was unclear who cared for the

child in the morning. Despite it being DCFS's burden to prove the specific risk of harm, DCFS never obtained information about this period of time in the morning that it opines the child was not cared for and protected. The only evidence before the court was that the child was healthy and well-cared-for and that the maternal grandmother assisted mother with childcare when she was at work.

DCFS also asserts that the trial court could reasonably infer mother's marijuana use interfered with her ability to perceive PCP in the home. Yet, this inference advanced by DCFS is not reasonable, as the only evidence was that mother smoked marijuana in the morning. She was sober inside the home at other times of the day. Had the marijuana been the thing that inhibited her ability to detect PCP, then mother would have been able to detect PCP during the remainder of the day when she was not under the influence. Because the DCFS investigator (who the court credited) believed mother really did not know about the PCP lab, DCFS's proposed inference is not reasonable. DCFS reports show mother did not know of the grandfather's criminal activities because he concealed them from her and because she was unfamiliar with PCP. No evidence contradicts this.

2. Tender Years Doctrine Was Inapplicable Without Evidence of Substance Abuse

DCFS also asserts that because the child was of tender years, the risk of harm to the child can be inferred. Pursuant the tender years doctrine, children under six years of age are considered to be " 'of such tender years that the absence of adequate supervision and care poses an inherent risk to their physical health and safety. [Citations.]' . . . [For children of tender years,] the finding of substance abuse is prima facie

evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 767 (*Drake M.*).) Because the child was two years old at the jurisdiction hearing, the tender years doctrine could satisfy the risk of harm element of section 300, subdivision (b), if there was evidence that mother was a substance abuser. However, mother argues and we agree there was insufficient evidence to support a finding of substance abuse.

At the outset, we observe mother and DCFS disagree about the standard we should apply in evaluating substantial evidence of a substance abuse problem. Mother cites *Drake M., supra,* 211 Cal.App.4th at page 766 for the principle that "a finding of substance abuse for purposes of section 300, subdivision (b), must be based on evidence sufficient to (1) show that the parent or guardian at issue had been diagnosed as having a current substance abuse problem by a medical professional; or (2) establish that the parent or guardian at issue has a current substance abuse problem as defined in the DSM–IV–TR." DCFS contends that we should decline to follow *In re Drake M.*, as other courts have done, and that a medical diagnosis of substance abuse or some equivalent is not necessary.

Fortunately, we addressed this very issue in *In re Rebecca C.* (2014) 228 Cal.App.4th 720 (*Rebecca C.*), and have concluded that a medical diagnosis or the equivalent is not necessary for a finding of substance abuse, although it can be considered in reviewing for substantial evidence. There, the mother argued that DCFS failed to provide substantial evidence of substance abuse to support jurisdiction per *Drake M.* because the mother was not diagnosed with a substance abuse pathology based upon

recognized medical factors. (*Id.* at p. 725.) We found that argument unpersuasive and analyzed the holdings in *Drake M.* and another case the mother cited for the same principle, *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322 (*Jennifer A.*).

We concluded "neither case supports the rule that a diagnosis of a substance abuse problem is a required element of proof to find a substance abuse problem. On the contrary, the rule to be taken from *Jennifer A.* and *Drake M.* is that the absence of a medical diagnosis of substance abuse, and a lack of evidence of life-impacting effects of drug use, will not support a finding that a parent has a substance abuse problem justifying the intervention of the dependency court." (*Rebecca C., supra,* 228 Cal.App.4th at p. 726.) We then held that there was substantial evidence of substance abuse where evidence showed mother used drugs for a period of years, had a history of criminal and dependency actions precipitated by her drug use, had prior involvement in a drug program, relapsed on drugs, lied about drug use, and admitted she had a substance abuse problem. (*Ibid.*) We ultimately reversed the jurisdictional findings because there was insufficient evidence that the mother's substance abuse caused a substantial risk of harm to the teenage child. (*Id.* p. 727.)

Here, we review for substantial evidence of "a medical diagnosis of substance abuse" or "evidence of life-impacting effects of drug use" in light of our holding in *Rebecca C.* (*Rebecca C.*, *supra*, 228 Cal.App.4th at p. 726.) Not only is there no evidence that mother had been diagnosed with a substance abuse problem, there is also no evidence showing mother was *abusing*

marijuana, a drug legal in California.[3] Mother admitted to smoking outside of the child's presence when she finished her night shift to help her sleep and cope with stomach pain. Mother also twice tested positive for decreasing amounts of cannabinoids and twice missed tests in the month and half between detention and the jurisdiction hearing. DCFS's evidence established use of marijuana.

Yet, there was no evidence whatsoever that mother used marijuana to the point that it constituted abuse. DCFS did not show that mother used the drug continuously or at a high dosage. In fact, there is no evidence regarding whether the drug tests showed high or low levels of cannabinoids, only that the level decreased between tests. DCFS did not show that mother failed to satisfy any significant obligations at work or home, or that she had legal or social problems resulting from her use of marijuana. DCFS failed to show the child was not properly cared for or unhealthy. Unlike the *Rebecca C.* parent, mother had no criminal or dependency history, no prior history with drug programs, no relapses, and no admission that she was a substance abuser. There is simply no evidence of substance *abuse* by mother in this case.

We reverse the jurisdictional finding for insufficient evidence of substance abuse and risk of harm to the child.

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[3] We observe "legal use of marijuana can be abuse if it presents a risk of harm to minors." (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 452.)

DISPOSITION

The jurisdiction and associated disposition orders are reversed.

RUBIN, Acting P.J.

WE CONCUR:

GRIMES, J.

DUNNING, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.