

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re KING J., a Person
Coming Under the Juvenile
Court Law.

B285561

(Los Angeles County
Super. Ct. No. DK12403)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

PATRICK J.,

Defendant and Appellant.

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

Jamie A. Moran, under appointment by the Court of
Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Sally Son, Deputy County Counsel, for Plaintiff and Respondent.

Patrick J., the father of now-19-month-old King J., appeals the juvenile court's jurisdiction findings and disposition order declaring King a dependent of the court and removing him from Patrick's custody after the court sustained a petition pursuant to Welfare and Institutions Code section 300, subdivisions (b)(1) and (j).¹ Patrick contends the court's jurisdiction findings and disposition order were not supported by substantial evidence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Family's History of Dependency Proceedings

China J. is the mother of four children: Frank W., now five years old; Elijah W., now three years old; Patrick J. III, now two years old; and King.² The family first came to the attention of the Los Angeles County Department of Children and Family Services (Department) in 2014, two years prior to King's birth, when both China and Elijah tested positive for marijuana at the time of Elijah's birth. China stated she used marijuana throughout her pregnancy with Elijah to treat nausea.

¹ Statutory references are to this code unless otherwise stated.

² Patrick is the presumed father of Patrick III and King, but not Frank or Elijah. King is the only child subject to this appeal. China is not a party to the appeal.

China entered a voluntary family maintenance plan with the Department, which required her to complete a substance abuse rehabilitation program and submit to random drug testing. China tested positive for marijuana or opiates five times between December 2014 and April 2015 and failed to regularly participate in a rehabilitation program. On July 21, 2015 the Department filed a dependency petition on behalf of Frank and Elijah. The juvenile court sustained the petition on August 28, 2015, finding the children were subject to dependency jurisdiction pursuant to section 300, subdivision (b), based on China's drug use. The children were not removed from the home.

China married Patrick on June 17, 2015 and gave birth to Patrick III in October 2015. Patrick III tested positive for marijuana at birth.³ The Department filed a dependency petition on behalf of Patrick III in December 2015, which alleged Patrick III came within the jurisdiction of the court due to China's marijuana use and Patrick's awareness of her drug use and failure to protect the child. The juvenile court sustained the petition on August 17, 2016. The court ordered China and Patrick to complete substance abuse programs, 12-step programs, parenting classes and individual counseling. Both parents were ordered to submit to random drug and alcohol testing. Patrick III was removed from the home and placed in foster care.

2. Detention of King

King was born in December 2016. In the five months prior to his birth China and Patrick consistently tested negative for

³ Patrick III was born prematurely, at 34 weeks. It appears at least some of China's positive drug tests from March and April 2015 occurred while she was pregnant.

drugs, but they each failed to appear for one test.⁴ In January and February 2017 China tested negative for drugs twice and failed to appear for tests three times. During the same time period Patrick tested positive for marijuana three times and failed to appear for tests six times.

Patrick told Department social workers he had missed one drug test because he did not hear his number called and missed another because he failed to bring proper identification to the testing site. On another occasion he missed a test because China had taken the family's only car to work and he could not find alternate transportation. He also stated he missed two other tests because the family car was out of service. Patrick denied he had used marijuana recently and told the social workers he had been around family members who had been smoking marijuana and his positive test result was likely from exposure to secondhand smoke.

As a result of Patrick's positive drug tests and the couple's no-shows, two Department social workers met with Patrick and China on February 10, 2017. The social workers expressed their concern for the safety of Frank, Elijah and King. China stated she was the primary earner for the family and Patrick was the primary caregiver for the three boys while she was working. She said her work schedule varied, but she often worked 12-hour shifts on the weekends. The social workers explained they were

⁴ China tested positive for opioids twice in September and December 2016, but the results were excused by the Department because China provided documentation she had received medication from her doctor related to pregnancy complications. China also failed to appear for four additional tests that were excused because she was on bed rest prior to King's birth.

concerned about Patrick's ability to provide appropriate care for a newborn and two toddlers given his recent drug test results. The social workers advised China and Patrick they would consider a voluntary family maintenance plan for King. China and Patrick became visibly upset at the suggestion. China refused participation in a voluntary plan, saying, "No, I will not put my son in the system. You can take me to Court." Two weeks after this conversation, Patrick tested positive for marijuana a fourth time.

The Department obtained a removal order and detained King, Frank and Elijah from China and Patrick on March 1, 2017. The family had been residing in the home of China's mother, Cassandra H. Patrick and China signed affidavits stating they would move out of the home so the children could continue to stay with Cassandra.

On March 6, 2017 the Department filed a petition to declare King a dependent child of the juvenile court under section 300, subdivisions (b)(1) and (j). The petition alleged China was unable to provide regular care for King due to her history of substance abuse and mental and emotional problems and alleged Patrick had a history of substance abuse and was a current abuser of marijuana, which rendered him incapable of providing regular care for King.⁵

The detention report detailed the parents' limited compliance with the case plan imposed in connection with Patrick III's removal from their care, including their recent failures to appear for drug testing and Patrick's positive tests.

⁵ A subsequent petition pursuant to section 342 was filed on the same date on behalf of Frank and Elijah.

The report stated Patrick had begun a 12-step program. Initially his aunt had been his sponsor, but recently his sister had become his sponsor. Patrick's sister told the social worker she had been meeting regularly with Patrick for about a month and said he was on step one of a 12-step program and would begin attending Narcotics Anonymous meetings with her. Patrick had completed a substance abuse awareness program in June 2016. He had also begun a parenting class prior to King's birth, but the service provider would not issue a certificate of completion because Patrick was not the biological father of the children in the home at the time. Patrick subsequently enrolled in another parenting class and had attended two sessions by the time the detention report was prepared. Patrick had not enrolled in the court-ordered individual counseling, explaining he had been unable to find a free or low-cost option. In early January 2017 Patrick stated he had saved enough money for a month of counseling sessions and intended to enroll within a week, but at the time of the detention report he had not provided the Department with any proof of attendance.

The Department reported China had tried to comply with her case plan but complained full participation in programs was difficult because she had been on bed rest at the end of her pregnancy. China also told the social worker she was struggling to find childcare that would allow both her and Patrick to participate in court-ordered programs and counseling.

At the detention hearing on March 7, 2017 the court found a *prima facie* case for detaining King and ordered him placed

with Cassandra.⁶ The court ordered monitored visits for King with China and Patrick twice per week for one hour. Patrick and China were ordered to submit to weekly drug tests.

3. *The Jurisdiction/Disposition Report*

In a May 23, 2017 jurisdiction/disposition report the Department stated Patrick had been ordered to drug test five times in March and April 2017 and was a no-show for each test. China had also failed to appear for any of her ordered drug tests in March and April. In an interview with a social worker Patrick acknowledged China had a history of marijuana use but said, “It never affected her as a parent. She didn’t do it around the kids.”

Patrick admitted to the social worker he had used marijuana in January and February 2017 but said China had not been aware of his use. He said, “I was ashamed to tell her. . . . She was working, I wasn’t working. I was going through my own thing. I didn’t think it’d come up on my test. Things happen.” Patrick further stated, “Yeah I slipped up but before that I had 30 clean tests. It was spur of the moment.” Patrick also told the social worker, “Just I want my kids back. I know that it’s a process. I had a misstep, and I’m trying to fix it now. I’m human. I’m trying to fix it though. I’m trying to get my kids into a stable environment.”

Patrick and China moved to Las Vegas, Nevada in April 2017 because it was the only place they could afford housing. Prior to moving they visited King regularly, and they were trying

⁶ Frank and Elijah were released to their father. The Department was ordered to make its best efforts to place Patrick III with Cassandra.

to visit once a week after moving. China reported she video-chatted with the children every day.

The Department stated it recognized China and Patrick had made progress with their court-ordered services but expressed concern they were “not forthcoming with their current situation.” The Department concluded, “It is the Department’s hope that [China and Patrick] will reengage in drug treatment and mental health services while working towards reunification with their children” The Department recommended reunification services be provided to both parents.

4. The Jurisdiction/Disposition Hearing

The jurisdiction hearing was held on May 23, 2017. The Department’s reports and attachments were admitted into evidence. The court accepted as stipulated testimony the representation of China’s and Patrick’s attorneys that, if called as witnesses to testify, they would each testify in accordance with the statements contained in the Department reports.

Patrick moved to dismiss the petition in its entirety or, in the alternative, to strike the two counts pertaining to him. During argument Patrick’s counsel represented that, in late January 2017, China was working four days per week during which time Patrick was the primary caregiver for the children.⁷ She argued there had been no complaints about the care Patrick

⁷ It appears Patrick’s counsel was relying on statements made in Department reports prepared for Patrick III’s case, which were not included in the record on appeal. There have been no objections, in the trial court or on appeal, to the characterization of the documents made by Patrick’s trial counsel.

was providing for the children and, therefore, no nexus between his marijuana use and any danger to King. China joined in Patrick's motion to dismiss. The Department and King's counsel opposed the motion. The motion to dismiss was denied.

During the hearing the court asked the Department what evidence established that King was in Patrick's care when Patrick was using marijuana. Counsel acknowledged there was no direct evidence but pointed to statements in the reports that Patrick was the primary caregiver while China was working: "The Department's logic is that if [Patrick is] caring for the children all day while mother is at work, and he's abusing marijuana, that the children of tender years have been around the father while he's been under the influence."

The juvenile court found by a preponderance of the evidence that the allegations in the petition were true and sustained the petition under section 300, subdivisions (b)(1) and (j).

Proceeding to disposition the court found by clear and convincing evidence a substantial danger existed to King and there were no reasonable means to protect him without removing him from his parents' custody. The court ordered King committed to the custody of the Department for suitable placement and directed the Department to provide reunification services. Services were to include substance abuse treatment and drug testing, parenting classes, individual counseling and monitored visitation at least twice per week.⁸

⁸ At the six-month review hearing (§ 366.21, subd. (e)), which was held after Patrick filed his notice of appeal but prior to the filing of his opening brief, the juvenile court found China and Patrick had failed to comply with their case plan, terminated

Patrick filed a timely notice of appeal from the jurisdiction findings and disposition orders.

DISCUSSION

1. *Governing Law and Standard of Review*

The purpose of section 300 “is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm.” (§ 300.2; see *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1383; *In re Giovanni F.* (2010) 184 Cal.App.4th 594, 599.) Section 300, subdivision (b)(1), allows a child to be adjudged a dependent child of the juvenile court when “[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . or by the inability of the 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.”

Although section 300 generally requires proof the child is subject to the defined risk of harm at the time of the jurisdiction hearing (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126), the juvenile court need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child. (*In re Kadence P.*, *supra*, 241 Cal.App.4th at p. 1383;

reunification services and scheduled a selection and implementation hearing pursuant to section 366.26. Neither parent sought review of the order setting that hearing. (See Cal. Rules of Court, rules 8.450 and 8.452.)

In re N.M. (2011) 197 Cal.App.4th 159, 165.) The court may consider past events in deciding whether a child currently needs the court's protection. (*Ibid.*) A parent's "[p]ast conduct may be probative of current conditions' if there is reason to believe that the conduct will continue." (*In re S.O.* (2002) 103 Cal.App.4th 453, 461; accord, *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1216 (*Christopher R.*).

In addition, the Legislature has declared, "The provision of 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. Successful participation in a treatment program for substance abuse may be considered in evaluating the home environment." (§ 300.2.) Exercise of dependency jurisdiction under section 300, subdivision (b), is proper when a child is "of such tender years that the absence of adequate supervision and care poses an inherent risk to [his or her] physical health and safety." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824; accord, *Christopher R.*, *supra*, 225 Cal.App.4th at p. 1216.)

We review the juvenile court's jurisdiction findings and disposition order for substantial evidence. (*Los Angeles County Dept. of Children & Family Services v. Superior Court* (2013) 215 Cal.App.4th 962, 966; *In re R.C.* (2012) 210 Cal.App.4th 930, 940.) Under this standard "[w]e review the record to determine whether there is any substantial evidence to support the juvenile court's conclusions, and we resolve all conflicts and make all reasonable inferences from the evidence to uphold the court's orders, if possible." (*In re Quentin H.* (2014) 230 Cal.App.4th 608, 613; accord, *In re Drake M.* (2012) 211 Cal.App.4th 754, 763 (*Drake M.*).

2. *The Court's Jurisdiction Finding Is Supported by Substantial Evidence*

Patrick contends the finding King was at substantial risk of harm due to Patrick's substance abuse is not supported by substantial evidence because there was no evidence that he had a substance abuse problem or that his use of marijuana prevented him from appropriately caring for King.

Patrick argues the Department "established marijuana use by [Patrick], something [he] admitted to the social worker, but [the Department] did not establish marijuana abuse." Patrick is correct that a parent's use of drugs or alcohol, standing alone, is insufficient to support dependency jurisdiction under section 300, subdivision (b). (*In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003 ["[i]t 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 Alexis E.* (2009) 171 Cal.App.4th 438, 452 ["it is true that the mere use of marijuana by a parent will not support a finding of risk to minors"].) Here, however, substantial evidence supported the juvenile court's finding Patrick's marijuana use rose to the level of substance abuse.⁹ At

⁹ In *Drake M.*, *supra*, 211 Cal.App.4th at page 766, Division Three of this court held, for purposes of section 300, subdivision (b), a finding of substance abuse "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." After the decision in *Drake M.* the DSM-IV-TR's definition of "substance abuse" was replaced in the more recent Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) by a more broadly defined

the time of Patrick's drug use in early 2017, his older child had already been removed from the home due to his wife's drug use; he had been ordered to submit to drug testing; and, although he had completed a drug rehabilitation program, he was only working on the first step of his 12-step Narcotics Anonymous program. Despite these factors, and his awareness he was under Department and court scrutiny, Patrick not only chose to use marijuana, but also lied to the social worker about it, claiming his positive test results were due to secondhand smoke. Even after Patrick admitted his use, he minimized his culpability,

classification of "substance use disorders," which combines substance abuse and dependence. (See *Christopher R.*, *supra*, 225 Cal.App.4th at p. 1218, fn. 6.) "DSM-5 identifies 11 relevant criteria, including cravings and urges to use the substance; spending a lot of time getting, using, or recovering from use of the substance; giving up important social, occupational or recreational activities because of substance use; and not managing to do what one should at work, home or school because of substance use. The presence of two or three of the 11 specified criteria indicates a mild substance use disorder; four or five indicate a moderate substance use disorder; and six or more a severe substance use disorder." (*Ibid.*) As we held in *Christopher R.*, "We recognize the *Drake M.* formulation as a generally useful and workable definition of substance abuse for purposes of section 300, subdivision (b). But it is not a comprehensive, exclusive definition mandated by either the Legislature or the Supreme Court, and we are unwilling to accept [the] argument that only someone who has been diagnosed by a medical professional or who falls within one of the specific DSM-IV-TR [or DSM-5] categories can be found to be a current substance abuser." (*Christopher R.*, at p. 1218.) Patrick has not proffered a particular definition or interpretation of "substance abuse" that he believes should be applied in this case.

stating he did not think his drug use would come up on his test, it had been “spur of the moment” and “things happen.” This failure to take responsibility for his actions coupled with his demonstrated inability to desist from marijuana use notwithstanding prior treatment and concrete knowledge of potential adverse consequences support a finding of substance abuse.

Patrick next argues there was insufficient evidence to establish his use of marijuana interfered with his ability to properly care for King. Specifically, Patrick argues there had been no allegations of harm to King or the other children and King was healthy, happy and developmentally appropriate. Patrick’s argument ignores that, with respect to a child 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 harm.” (*Christopher R.*, *supra*, 225 Cal.App.4th at p.1219; accord, *In re Kadence P.*, *supra*, 241 Cal.App.4th at p. 1385.) Because King was not yet six months old at the time of the jurisdiction hearing, the finding of substance abuse effectively created a presumption that Patrick was unable to provide appropriate care for King, a presumption reinforced by evidence Patrick was the primary caregiver for King and his two older brothers (both under five years old at the time) while China worked 12-hour shifts multiple times per week. Patrick’s use of marijuana during this time reasonably supports the inference he was impaired when solely responsible for the children. Other than making general statements about King’s apparent good health, Patrick did not provide any evidence to rebut the inference he was at times under the influence of marijuana when caring for King and his brothers. In

sum, there was substantial evidence to support the finding Patrick’s persistent drug use created a substantial risk of harm to King. (See *Kadence P.*, at pp. 1384-1385 [mother’s continuous substance abuse and attempts to conceal it placed infant daughter at substantial risk of harm]; *Christopher R.*, at pp. 1219-1220 [father’s persistent drug use rendered him incapable of providing regular care for infant child].)¹⁰

3. *The Court’s Disposition Order Is Supported by Substantial Evidence*

Before the court may order a child removed from the physical custody of a parent with whom the child was residing at the time the dependency proceedings were initiated, it must find by clear and convincing evidence that the child would be at substantial risk of physical or emotional harm if returned home and there are no reasonable means by which the child can be protected without removal. (§ 361, subd. (c); *In re T.V.* (2013) 217 Cal.App.4th 126, 135; see *In re Anthony Q.* (2016) 5 Cal.App.5th 336, 347.) “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.” (*In re T.V.*, at pp. 135-136.)

The evidence supporting the court’s jurisdiction finding also supports the court’s disposition order. Nevertheless, Patrick contends removal was not necessary because King was being

¹⁰ In light of our affirmance of the juvenile court’s finding of jurisdiction under section 300, subdivision (b), we need not address Patrick’s argument the finding of jurisdiction under subdivision (j) was improper. (See *In re Kadence P.*, *supra*, 241 Cal.App.4th at p. 1385, fn. 6.)

adequately cared for by his grandmother and a home-of-parent order could have allowed for that arrangement to continue. However, this alternative would not have adequately protected King from the danger posed by Patrick's substance abuse. If Patrick had retained legal custody of King, he could have removed King from Cassandra's home at any time or moved back in with Cassandra himself. This would return King to the same environment in which the court had found there was a substantial risk of harm. In addition, Patrick missed all five drug tests ordered since King's detention, which is "properly considered the equivalent of a positive test result." (*In re Kadence P.*, *supra*, 241 Cal.App.4th at p. 1384.) The juvenile court's finding there were no reasonable means to protect King without removal was proper.

DISPOSITION

The juvenile court's findings and orders are affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J.

WILEY, J.*

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