Filed 11/15/12 In re M.E. CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| In re M. E., A Person Coming Under the Juvenile Court Law. | B239887 |
| LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MARCUS E.,<br><br>Defendant and Appellant. | (Los Angeles County Super. Ct. No. CK75874) |

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Elizabeth Kim, Juvenile Court Referee. Affirmed.

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

Office of the County Counsel, John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

Marcus E. (father)[1] appeals from (1) a judgment declaring his daughter, M. E., to be a dependent of the court pursuant to Welfare and Institutions Code[2] section 300, subdivision (b),[3] and (2) a dispositional order removing M. from father's custody pursuant to section 361, subdivision (c)(1).[4] He contends that the evidence was insufficient to support a finding of jurisdiction or to support the trial court's removal order. We disagree and will affirm both.

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[1] Father has four other children, three of whom are adults and none of whom resided with him. It is not clear from the record with whom his one minor child resided. The minor child is not a party to the case below nor is she a party to this appeal.

[2] All section references are to the Welfare and Institutions Code unless otherwise noted.

[3] Section 300, subdivision (b) states, in relevant part, "Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court: [¶] . . . The 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, . . . "

[4] Section 361, subdivision (c)(1) states, in relevant part, "A dependent child may not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence . . . . [¶] (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody. . . . "

## *FACTUAL AND PROCEDURAL BACKGROUND*[5]

M. came to DCFS's attention on December 2, 2011 via an emergency referral alleging general neglect by her mother, Claudia C. (mother).[6] M. was born in late November of 2011 and both she and mother tested positive for cocaine.

Mother had a history of prior DCFS involvement. Before M.'s birth, mother had three children. Her oldest child, Abigail C., born in 2001, resided with the maternal grandmother pursuant to a legal guardianship arrangement. Her two other children, N. T., born in May of 2010, and Na. T., born in October of 2008, resided with their father. N. and Na. were detained from mother's custody due to her substance abuse. Mother admitted she has no relationship with any of these children. None of these children was a party below or is a party to this appeal.

DCFS interviewed mother at the hospital shortly after it received the referral regarding M. Father was present during the interview. Mother stated that she was not currently in a relationship with father, despite the fact that she lived in his apartment prior to giving birth to M.[7] She explained that she had no contact with father after conception until approximately one month prior to M.'s birth when he asked her to

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[5] The factual and procedural background is drawn from the record, which includes a one-volume Clerk's Transcript, a one-volume Supplemental Clerk's Transcript, and a one-volume Reporter's Transcript.

[6] Mother is not a party to this appeal.

[7] The original petition provided a different address for mother than for father. Both the first amended petition and the second amended petition included the same two addresses for the parents. As a result, we assume that mother was no longer living with father at the time DCFS became involved.

come stay with him so he could care for her during her pregnancy. Mother admitted to a ten-year history of cocaine use and to not being enrolled in any substance abuse programs. She last used cocaine about a week prior to M.'s birth and she used cocaine about three to four times per week. She claimed that father was unaware of her drug usage and that she would sneak away when he wasn't around to do them. She denied receiving prenatal care while pregnant with M. Mother stated that she wanted M. to reside with father, but after "being prompted and questioned" by DCFS, she stated she "would do whatever is necessary to get her child back." DCFS provided mother with referrals to drug treatment centers, counseling and parenting courses.

DCFS also interviewed father that same day. He also denied being in a relationship with mother. He denied knowing that mother used drugs when she conceived M. and was "shocked" to find out that M. tested positive for cocaine at birth. Father stated that his friends informed him of mother's condition about a month prior to M.'s birth and he went to find her "on the streets" and brought her to his home, consistent with mother's statement. He asserted he would like custody of M. Father admitted to a history of using marijuana. DCFS scheduled an appointment for father to pick up an "On-Demand Drug Test" form so that he could test on December 6, 2011. However, father failed to do so. With respect to his criminal history, father admitted to having one and agreed to live scan but did not have a valid government issued identification card. He reported that he was currently on parole. His parole agent was Agent S.

DCFS interviewed Agent S. three days later. He reported that father had been on parole since March of 2011 and could be released from parole in April of 2012 at the earliest, assuming father's compliance. Agent S. reported that father was previously affiliated with a gang called "the Rolling 30's Crip Gang." As conditions to his parole, father was required to test for drugs once per month and to avoid any gang contact. He was also required to register with the local police agency as a "narcotics offender." Agent S. reported that father had been testing clean with no violations of his parole so far.

DCFS detained M. due to mother's drug use then filed a petition on December 7, 2011. No allegations were made against father. The trial court found that DCFS had made a prima facie case for detention. It found father to be merely an alleged father, because mother was married to another man[8] at the time M. was born, but it ordered that father be provided with visitation.

In its last minute information filed with the trial court on December 13, 2011, DCFS reported that father had an extensive criminal history dating back to 1976 when he was arrested for robbery at the age of 12. He was also arrested for robbery at the age of 16 in 1980. In 1982, father was charged with robbery but the charge was dismissed for insufficient evidence. Father was charged with murder and grand theft in 1983; the disposition of those charges is unknown. But in that same year, he was convicted of

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[8] Mother was married to Evelio Rudy C. (Rudy) since 2001. She testified her last contact with Rudy was in approximately 2005 due to his incarceration. DCFS reported that Rudy had been in custody since 2003. Rudy did not assert any parental rights with respect to M. He is not a party to this appeal.

second-degree burglary. In 1984, he was charged with rape by force but the disposition of that charge is not clear from the record. He was, however, convicted of robbery that same year. After being released, he returned to prison for violating his parole in 1986. It appears he was charged with robbery again in 1989 but the charged was dismissed. He was also charged with battery by a prisoner in 1989, but that charge was rejected. In 1990, father was charged with possession of cocaine with intent to sell and was convicted of that offense in 1991. He was charged with attempted larceny and convicted of possessing marijuana with intent to sell in 1992. In 1993, father was convicted of possession of cocaine with intent to sell and of rioting. In 1994, his probation was revoked for purchasing cocaine. He was convicted of larceny in 1995. He was convicted of possession of marijuana with intent to sell in 1997. In 2001, he was arrested and charged as a fugitive from justice and was again convicted with possession of cocaine with intent to sell. He was convicted with obstructing/resisting an executive officer in 2002 as well. Most recently, father was arrested in 2009 and convicted in 2010 of transporting and possessing cocaine with intent to sell. He later testified that he'd spent more than half of his life in custody and the longest he'd been out of custody was five years, from 2004 to 2009. On the basis of this history, DCFS filed a first amended petition that included an allegation against father that M. was at risk of physical harm due to father's extensive criminal history. The trial court dismissed the original petition on January 3, 2012.

DCFS reported the details of a follow-up interview with father in its jurisdiction/disposition report filed on January 4, 2012. The interview occurred on

December 21, 2012. Father explained that he knew mother for a total of about three years and that they were in a "casual relationship" for about eight months prior to his 2009 arrest. He asserted that he "got her pregnant" when he was released from prison in early 2011. He claimed that he was not aware that she was using cocaine at that time. Father insisted that he wanted to take care of the baby, had everything needed to care for her and was willing to do whatever was asked, including taking parenting courses, in order to have custody of M. He stated he used marijuana in the past but hadn't used it recently and was no longer involved with his prior gang. He also stated that he "was smart enough and set aside some of the money [he] made," but it was unclear to what money he referred or from where it came.

DCFS also reported that father was consistent in his visitation with M. He visited on every scheduled appointment and appeared appropriate during his interactions with the child. DCFS reported that he properly held the baby, fed and burped her, changed her diaper and calmed her when she was fussy.

At the hearing on February 14, 2012, DCFS reported that father tested positive for marijuana on February 9, 2012. He missed tests on February 13, 2012 and February 16, 2012 and again tested positive for marijuana on February 17, 2012. As a result, DCFS filed a second amended petition on February 22, 2012 which included the additional allegation that father's marijuana use rendered him incapable of providing regular care for M. The trial court dismissed the first amended petition. And, based on DCFS's report showing that a DNA analysis proved that father was the biological father

of M. and briefs filed by the parties regarding whether the presumption that Rudy was M.'s father was rebutted, the trial court found father to be M.'s presumed father.

On February 29, 2012, DCFS reported that father tested negative for all drugs on February 23, 2012. Father testified at the hearing that he missed prior drug tests because he "blanked them out," i.e., forgot about them. He also testified that he was not a "habitual user of marijuana," that he had only used it on Super Bowl Sunday of 2012, and that, during the previous three years, he had been clean. On first blush this statement suggests that father's usage was a one-time occurrence during a fairly lengthy period of sobriety. However, it is important to note that for the bulk of the three-years he describes, father was in custody. When he smoked marijuana in February of 2012, he had been out of prison for just under one year. And, by smoking marijuana, he violated a condition of his parole.[9]

Father also testified that he was committed to staying out of jail and to staying sober for his daughter M.'s sake. Father has four other children, three of whom are adults. The other is a daughter who is approximately 16 years old. He offered no explanation of why he was willing to make such a commitment on behalf of M. but had not been able to do so previously for any of his four other children. Additionally, he

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[9] There is nothing in the record showing that Agent S. was aware of father's smoking marijuana in February of 2012. Thus we do not know whether father suffered any consequences of his violating one of the conditions of his parole.

Father testified that it was permissible under the terms of his parole for him to smoke marijuana as long as he had a doctor's recommendation. He neither stated that he had such a recommendation nor produced any evidence of such a recommendation, however.

offered no evidence that he attended any therapy or counseling of any kind that addressed his history of violent and drug-related convictions.

The trial court sustained counts b-1 and b-2 against mother,[10] sustained count b-3 as amended against father,[11] and sustained count b-4 against father.[12] It stated that father's "drug-related lifestyle" placed M., who was only about three months old at the time, at risk of severe physical harm or illness and declared M. to be a dependent of the court. It ordered her removed from her parents' custody. The trial court ordered random drug testing for father plus a full drug program if any test was missed or dirty. Father was also ordered to participate in individual counseling and parenting courses

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[10] With respect to mother, count b-1 stated, "[T]he child M. . . . was born suffering from a detrimental condition consisting of a positive toxicology screen for cocaine. Such condition would not exist except as the result of unreasonable acts by the child's mother . . . placing the child at risk of physical harm and damage. Said substance abuse by the mother endangers the child's physical health and safety and places the child at risk of physical harm and damage." Count b-2 stated, "The child M.['s] mother . . . has a 10 year history of illicit drug abuse and is a current abuser of cocaine, which renders the mother incapable of providing regular care of the child. The mother used illicit drugs during the mother's pregnancy with the child and had a positive toxicology screen for cocaine . . . at the child's birth. The child's mother failed to reunify with [the] child's siblings . . . due to the mother's illicit drug use. The mother's use of illicit drugs endangers the child's physical health and safety and creates a detrimental home environment for the child, placing the child at risk of physical harm and damage."

[11] With respect to father, count b-3 stated, "The child, M.['s] father . . . has a criminal history including a 2/24/10 conviction for Possession/Purchase of sale narcotic/controlled substance. The child's father['s] . . . criminal history and conduct endangers the child's physical safety and emotional well being and places the child at risk of physical and emotional harm and damage."

[12] Count b-4 stated, "The child M.['s] . . . father . . . is [a] current user of marijuana which renders the child's father . . . incapable of providing regular care and [places] the child at risk of abuse or neglect. Furthermore, on February 9, 2012 and February 17, 2012, father tested positive for marijuana. The child's father use of marijuana endangers the child's physical and emotional health and safety."

and to comply with the conditions of his parole. DCFS was permitted to liberalize father's visits with M., including allowing overnight visits. This appeal followed.

## *CONTENTIONS*

Father first contends that the evidence did not support the trial court's finding of jurisdiction pursuant to section 300, subdivision (b) because DCFS failed to show that M. suffered or was at risk of suffering severe physical harm or illness as a result of father's criminal history or his use of marijuana.[13] He next contends that the trial court's removal order was not supported by the evidence because DCFS failed to show that there was a substantial danger to M.'s physical health, safety, protection or physical or emotional well-being if she were returned to father's custody. As a result, father asserts that the judgment and the dispositional order should be reversed and the case remanded with instructions to place M. with father.

DCFS contends that M. is at risk in father's care due to his extensive criminal history, recent criminal conduct, and resulting high risk of recidivism.

## *DISCUSSION*

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[13] If we were to reverse the judgment as to father, dependency jurisdiction would remain over M. pursuant to the trial court's findings with respect to mother. Although a reviewing court may affirm a trial court's finding of jurisdiction over a minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence (here, the bases for finding jurisdiction as to mother are unchallenged) and, as a result, need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451), we elect to exercise our discretion and reach the merits of father's challenge because the finding of jurisdiction as to him could be prejudicial or could potentially impact the current or future dependency proceedings (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1015; see also, *In re I.A.* (2011) 201 Cal.App.4th 1484, 1494).

1. *Standard of Review*

"In a challenge to the sufficiency of the evidence to support a jurisdictional finding, the issue is whether there is evidence, contradicted or uncontradicted, to support the finding. In making that determination, the reviewing court reviews the record in the light most favorable to the challenged order, resolving conflicts in the evidence in favor of that order, and giving the evidence reasonable inferences. Weighing evidence, assessing credibility, and resolving conflicts in evidence and in the inferences to be drawn from evidence are the domain of the trial court, not the reviewing court. Evidence from a single witness, even a party, can be sufficient to support the trial court's findings. [Citations.]" (*In re Alexis E., supra,* 171 Cal.App.4th at pp. 450-451.)

" '[I]n dependency proceedings the burden of proof is substantially greater at the dispositional phase than it is at the jurisdictional phase if the minor is to be removed from his or her home. [Citations.] . . . This heightened burden of proof is appropriate in light of the constitutionally protected rights of parents to the care, custody and management of the children. [Citation.]' [Citations.] [¶] 'Of course, on appeal, the substantial evidence test is the appropriate standard of review. Thus, in assessing this assignment of error, "the substantial evidence test applies to determine the existence of the clear and convincing standard of proof . . . . " [Citation.]' [Citation.]" (*In re Henry V.* (2004) 119 Cal.App.4th 522, 528-529.)

2. *Substantial Evidence Supports the Trial Court's Jurisdictional Findings*

There were two allegations sustained against father. With respect to the first allegation, count b-3, father contends that there was insufficient evidence to find that his criminal history placed M. at risk of suffering severe physical harm.[14] We disagree.

Section 300, subdivision (b), states that the following will cause a child to fall under the jurisdiction of the court and be adjudged a dependent of such court: "The 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, . . . . " "While evidence of past conduct may be probative of current conditions, . . . '[t]here must be some reason to believe the acts may continue in the future.' [Citations.]"[15] (*In re Rocco M*. (1991) 1 Cal.App.4th 814, 824.) "Cases finding a substantial physical danger tend to fall into two factual patterns. One group involves an *identified, specific hazard* in the child's environment--typically an adult with a proven record of abusiveness. [Citations.] The second group involves children of such tender years that the absence of adequate supervision and care poses an inherent risk to their physical health and safety. [Citations.]" (*Id.* at p. 824.) As M. was approximately three months old at the time of the jurisdictional hearing, this case involves the second group.

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[14] M. was detained at birth and was never in the care of either father or mother. As a result, the issue in dispute is whether she was at risk of suffering severe physical harm or illness as no actual physical harm or illness was ever alleged.

[15] An initial exercise of dependency jurisdiction under section 300, subdivision (b), may be satisfied by a showing that the child has suffered serious physical harm or abuse alone. (*In re Adam D.* (2010) 183 Cal.App.4th 1250, 1261.) However, as it is not alleged that M. was actually harmed, our discussion focuses only on whether she was at risk of suffering such harm.

Father has a long criminal history that spans most of his life and has resulted in his spending more than half of his life behind bars. At the age of 47, the longest period in his adult life that he remained outside of custody was five years. Father testified that he felt "at home" while in prison and that each time he was previously released it was like being "on vacation." Although he claimed to be committed to a crime-free lifestyle for M.'s sake, the evidence suggests otherwise. For example, father had four other children yet had not refrained from engaging in criminal activities on their behalves. Additionally, less than one year after he was released from prison father had already illegally smoked marijuana. Father testified that as a condition of his parole he was required to "stay away from drugs, using them, selling them, or anything." According to such testimony, father's illegal use of marijuana violated the terms of his parole. Additionally, father's smoking marijuana while knowing that he was subject to drug testing as he attempted to gain custody of his daughter showed a total disregard for the dependency process. These facts support the trial court's conclusion that the risk of recidivism in this case was very high.

While a parent's criminal history alone may not, in most cases, be enough to warrant jurisdiction pursuant to section 300, subdivision (b), the combination of such an extensive criminal record, recent actions showing a disregard for parole restrictions and a lackadaisical approach to illegal drug use, and M.'s tender age, is more than sufficient evidence to support a jurisdictional finding. This evidence supports the conclusion that father, a registered narcotics offender, is very likely to continue his prior criminal lifestyle placing M. at risk of being harmed by exposure to this lifestyle and its

consequences. For example, his absence due to another incarceration would make him unable to provide the care and supervision necessary for a three-month old child. "Juvenile dependency law in general does not require a child to be actually harmed before [DCFS] and the courts may intervene. [Citation.]" (*In re Leticia S.* (2001) 92 Cal.App.4th 378, 383, fn. 3.)

In arguing otherwise, father heavily relies on *In re David M.* (2005) 134 Cal.App.4th 822. His reliance is misplaced. In *In re David M.*, the court found that the mother's single positive drug screen for marijuana was not sufficient to establish her baby was at risk for severe physical harm or illness where the baby's drug screen was negative, the baby's older sibling was not exposed to drugs, drug paraphernalia or marijuana smoke, and the older sibling was healthy, well cared for, loved and was being raised in a clean and tidy home. Although there were allegations that both parents suffered from mental health issues, neither had a criminal history.

The facts before us are drastically different. Father has an extensive criminal history involving violence and drug sales. Additionally, this case involved not just one, but two positive tests for marijuana and three missed tests, which are generally treated as positive. Further, father's usage of marijuana was a violation of the terms of his parole and occurred *during* the dependency process supporting the conclusion that he was likely to continue engaging in criminal conduct in the future. Thus, the analysis in *In re David M.* is wholly inapplicable and does not support father's contention with respect to count b-3 relating to M.'s risk from father's criminal history.

Because we will affirm the trial court's finding of jurisdiction on the basis of count b-3 as it applied to father, we need not consider whether substantial evidence also supported count b-4. (*In re Alexis E.*, *supra*, 171 Cal.App.4th at p. 451.)

3. *Substantial Evidence Supports the Trial Court's Removal Order*

Father next contends that the trial court's removal order was not supported by the evidence because DCFS failed to show that returning M. to father's custody would place M.'s physical health, safety, protection or physical or emotional well-being in substantial danger. We disagree.

"A dependent child may not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence . . . [¶] [that] (1) [t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody." (§ 361, subd. (c).) " 'A removal order is proper if it is based on proof of parental inability to provide proper care for the minor and proof of a potential detriment to the minor if he or she remains with the parent. [Citation.] 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. [Citations.]' [Citations.]" (*In re Miguel C.* (2011) 198 Cal.App.4th 965, 969.) This provision has

been construed to allow removal for substantial risk of either physical or emotional harm. (*In re H.E.* (2008) 169 Cal.App.4th 710, 721.)

Father asserts that the trial court erred in ordering M.'s removal from his custody "based on one instance of marijuana use, and upon a criminal record rather than any ongoing criminal activity on father's part." Father relies on *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322 to support this contention.

In *Jennifer A.*, young children were removed from their mother's custody because she had left them alone on one occasion when she went to work. The lower court found that returning the children to her custody placed them at risk after DCFS brought the mother's missed and positive tests for marijuana to its attention. Although the mother's missed and positive drug screens raised concerns, the court in *Jennifer A.* found that because there was no evidence linking the mother's marijuana use to her parenting judgment or skills and the petition did not raise drug abuse as a ground for removing the children from mother's care, the lower court's ruling was not supported by the evidence.

This case is not helpful to father and is easily distinguished. First, *Jennifer A.* involved an entirely different phase of the dependency process. It was a writ petition seeking relief from the trial court's order terminating reunification services and setting a section 366.26 hearing to consider a permanent plan and the termination of parental rights. The case involved the trial court's determination pursuant to section 366.22, subdivision (a), rather than section 361, subdivision (c)(1). Also, the issue in *Jennifer A.* turned, in large part, on the fact that evidence of that mother's drug use did

not support the allegation of neglect in the petition, which was based on her leaving the children alone while she went to work. Here, however, father's recent drug use supports the allegation in the petition relating to his criminal history as it is evidence of a newly committed criminal act. Father's argument fails because his drug use was not a one-time incident that can be viewed separate and apart from his long criminal history. His drug use was a recent addition, further lengthening such history.

As our Supreme Court has stated, children "have compelling rights . . . to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) The evidence was sufficient to support the trial court's determination that M., at her tender age, should not bear the risk of father's likelihood of recidivism and father's resulting inability to provide her with proper care. The evidence also supports the conclusion that were she placed with father, she would be at risk of being physically harmed by exposure to father's criminal lifestyle and its consequences and also emotionally harmed by father's potential return to custody after she has bonded with him.

## ***DISPOSITION***

The judgment and dispositional order are affirmed.

***NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS***

CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

ALDRICH, J.