Filed 11/21/17 In re R.M. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re R.M., a Person Coming Under the Juvenile Court Law.	B282071 (Los Angeles County Super. Ct. No. DK16116)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.M., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Emma Castro, Referee. Affirmed.

Daniel G. Rooney, under appointment by the Court of Appeal, for Defendant and Appellant.

Marcy C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Kimberly Roura, Deputy County Counsel, for Plaintiff and Respondent.

The juvenile court sustained a Welfare and Institutions Code section 342[1] subsequent petition, finding methamphetamine abuse by J.M. (father) placed his three-year-old daughter, R.M., at substantial risk of serious physical harm. Although the child had never resided in father's home, the juvenile court also ordered that she not be placed in his custody. Father concedes his "own actions of dirty and missed tests quickly eliminated any possibility of custody;" nonetheless, he appeals, asserting there was no nexus between his illegal drug abuse and the risk of harm to his child. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

R.M., born in 2014, initially came to the attention of the Department of Children and Family Services (DCFS) in early 2016 because of domestic violence between her mother and the father of one of R.M.'s half siblings. J.M. (father) was deemed R.M.'s presumed father and also a non-offending parent.[2] R.M. remained with her mother and half-siblings under a DCFS family maintenance plan.

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

[2] R.M.'s parents were not married and did not reside together. The child had never lived in father's home, but the juvenile court's initial order permitted her placement with either parent.

During this period, father was facing criminal charges. He was incarcerated for a period of time in 2016. Father was released from custody in October 2016 and immediately tested positive for methamphetamine.[3] Yet, he denied using the drug. Father missed the next three scheduled drug tests—which were accordingly deemed to be positive. He tested on November 28, 2016, and again the results were positive for methamphetamine. After that test, father admitted methamphetamine abuse, but blamed it on the stress of the DCFS proceedings.

Father had been authorized unmonitored visitation. After the first positive drug test, DCFS instituted monitored visits for him and initiated a section 388 petition for a court order to that effect. Father did not oppose the request for monitored visitation, and the section 388 petition was granted in January 2017.

DCFS apparently did not realize until that hearing that the earlier juvenile court order granted father co-physical custody with mother. DCFS initiated a section 342 subsequent petition[4]

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[3] The record indicates he was on parole. As a condition of parole, father was required to register as a drug offender.

[4] Section 342 currently provides, "In any case in which a minor has been found to be a person described by Section 300 and the petitioner alleges new facts or circumstances, other than those under which the original petition was sustained, sufficient to state that the minor is a person described in Section 300, the petitioner shall file a subsequent petition. This section does not apply if the jurisdiction of the juvenile court has been terminated prior to the new allegations. [¶] All procedures and hearings required for an original petition are applicable to a subsequent petition filed under this section."

to allege an additional basis for jurisdiction under section 300, subdivision (b)(1) based on father's methamphetamine abuse.

The hearing on the subsequent petition was conducted on February 27, 2017. Father was present, represented by counsel. His most recent positive drug test was January 24, 2017. Father submitted on the reports and documentary evidence, including a progress letter from his drug treatment program evidencing consistent weekly drug testing with four negative test results beginning January 25, 2017.

Father's counsel argued there was no nexus between his drug abuse, which he largely denied despite the positive and missed tests, and any risk to R.M. The juvenile court disagreed, noting R.M.'s young age and father's positive drug tests were for "serious drugs such as methamphetamine and amphetamine . . . not marijuana." The juvenile court sustained the allegations in the section 342 subsequent petition and ordered that the child not be placed in his care.

By the time of this hearing, father had completed a parenting program. His visits with R.M. were not going well, however; he and the child, who had never resided in the same home, were not bonding. The juvenile court ordered family reunification services for father, including his participation in a drug program with regular and random testing, individual counseling, and joint counseling with R.M. The child remained placed in her mother's home.

DISCUSSION

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

Inferences may constitute substantial evidence, provided they are the products "'of logic and reason' and 'rest on the evidence.' . . . 'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.'" (*Id.* at p. 967.)

On appeal, father continues to assert there was no nexus between his drug abuse and the finding of a substantial risk of serious harm to R.M. He also contends the order denying him custody was improper because the order for monitored visitation provided a "reasonable alternative means to protect the child." He supports these contentions in a somewhat curious fashion: Father concedes he "himself forfeited the possibility" of unmonitored visits with R.M. as a result of his drug abuse. Because this very conduct resulted in the juvenile court's order for monitored visitation, however, he maintains he is no longer in a position to place R.M. at any risk of serious physical harm. Ergo, no substantial evidence can support the jurisdictional finding based on his drug abuse. Father then adds, "[t]he record is devoid of any information regarding the 'seriousness' of methamphetamine and amphetamine usage [when compared to] the . . . 'seriousness' of marijuana." He argues the absence of this type of evidence means the juvenile "court's declaration and comparison were thus merely conclusory statements, rather than factually based findings" and are not sustainable on appeal.

The last contention requires little discussion. We reject the suggestion that expert testimony is necessary before a juvenile court can recognize—and act upon—the fact that methamphetamines and amphetamines are more serious drugs than marijuana. It is common knowledge they are. No more is required on that score.

Dependency jurisdiction is properly asserted if DCFS "produce[s] sufficient evidence that father was a substance abuser." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 767 (*Drake M.*).) We recognize, as did the *Drake M.* court, that a parent's abuse of drugs does not necessarily justify jurisdiction under section 300, subdivision (b)(1). But we also agree "[t]he trial court is in the best position to determine the degree to which a child is at risk based on an assessment of all the relevant factors in each case. That being said, [when the child is] 'of such tender years . . . the absence of adequate supervision and care poses an inherent risk to their physical health and safety. . . .' [I]n cases involving [young children], 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." (*Id.* at pp. 766-767; *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1219.)[5]

At the time of the hearing on the section 342 petition, the evidence established father's methamphetamine abuse was ongoing. His recent negative drug-test results were commendable, but they spanned only four weeks. He was participating in a drug program and was currently on parole with a parole condition that he register as a drug offender. None of the drug abuse or parole evidence was before the juvenile court

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[5] In his reply brief, father takes issue with the use of the phrase "prima facie," arguing it results in the juvenile court impermissibly shifting the burden of proof away from DCFS to the parent. We cannot agree. While it may be more apt to say such evidence raises a reasonable inference that drug abuse places a young child at substantial risk of serious physical harm, use of the phrase "prima facie" in this context is neither ambiguous nor improper.

when it first assumed dependency jurisdiction over R.M. The new evidence, including the reasonable inference that a parent abusing methamphetamine cannot be depended upon to regularly care for a three-year-old child, constituted substantial evidence to support the juvenile court's determination on the section 342 petition. (*In re David M.* (2005) 134 Cal.App.4th 822, 828.)

Finally, father asserts monitored visitation should be viewed as a "'reasonable means by which the minor's physical health can be protected without removing the minor.' (§ 361, subd. (c)(1).)" In other words, so long as a juvenile court order for monitored visitation is in place, an order "removing" the dependent child from the parent's custody cannot be justified. Father cites no authority for this proposition.

His reliance on section 361, subdivision (c)(1) is unavailing. Section 361, subdivision (c)(1) is not implicated unless R.M. was residing with father when the subsequent petition was initiated. As our colleagues in Division Seven have held, "the rigorous requirements of section 361, subdivision (c), apply only when the issue is whether to remove a dependent child from the physical custody of a parent *with whom the child was residing at the time the dependency petition was initiated*. That provision does not address the court's authority when considering the appropriate restrictions on the rights of an offending nonresident custodial parent, that is a parent who has some right to physical custody of a child (whether sole or joint) but was not residing with him or her at the relevant time." (*In re Anthony Q.* (2016) 5 Cal.App.5th 336, 347, italics added.) By virtue of the earlier juvenile court order, father was designated as a custodial parent. But when dependency proceedings were initiated as a result of mother's domestic violence with another man, R.M. was not residing with

father. She still was not residing with him when the section 342 subsequent petition was filed. The juvenile court did not err in denying him custodial status.

DISPOSITION

The order is affirmed.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, 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.