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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re AMELIA S. et al., Persons
Coming Under the Juvenile Court
Law.

B281485
(Los Angeles County
Super. Ct. No. DK20838)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

A.K.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County.
Marguerite D. Downing, Judge. Affirmed.

John M. Kennedy, under appointment by the Court of Appeal, for
Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County
Counsel, David Michael Miller, Deputy County Counsel, for Plaintiff and
Respondent.

A.K. (Father) appeals the dependency court’s jurisdictional findings and dispositional orders sustaining a Welfare and Institutions Code section 300¹ petition and removing his children, Amelia S. (born December 2010) and R.S. (born July 2015) (collectively, the Children), from his physical custody. We determine that substantial evidence supports the February 23, 2017 orders; accordingly, we affirm.

COMBINED STATEMENT OF FACTS AND OF THE CASE

1. Referral and Detention

On December 1, 2016, the Los Angeles County Department of Children and Family Services (DCFS) received a referral from its “Child Protection Hotline.” An anonymous individual asserted Father sold drugs from the home in which the Children were living, there was a “lot of drug traffic in the house all day and all night,” and there were “unsavory characters, including children, entering and leaving the house dealing drugs.” The caller reported—using a stated age that matched neither of the Children’s ages at the time—that the caller believed “the 3 y[ear] old” had “easy access” to the drugs; also stating that a child had died from an overdose, two days earlier, after purchasing drugs from Father, and that although the police had been called, “they did not do anything about the drug[] sales in the home.”²

DCFS interviewed Tamara S. (Mother) on December 6, 2016. Mother and Father are not married, but have been a couple for more than six years. Mother stated “[n]o, what? Absolutely not,” when asked if Father was dealing drugs from their home. On that day, the home was observed to be

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

² The record contains no evidence that any of the allegations made in the anonymous Child Protection Hotline referral were true.

clean, furnished, free from hazards, in possession of working utilities and appropriate bedding for the Children, well-stocked with food, and possessing “an abundance of toys” in the living room. Mother disclosed she uses marijuana, and provided the case social worker (CSW) with a copy of her medical marijuana recommendation.

When interviewed by DCFS, Amelia S. stated she was not afraid of either parent, she was safe, she never goes to sleep hungry, and she was otherwise well-cared for. When asked why a lot of different people came to the home, she said, “[M]y daddy’s skateboarding friends come here too.”

In his interview with the CSW, Father disclosed he had been a part of the “Elmwood Street” gang before having the Children. He reported he was on probation due to “[p]ossession of [a] firearm;” and he uses marijuana, which his probation officer knows about. He also admitted he did not have a medical marijuana recommendation, and said he “would get one tomorrow.” He stated he uses the drug “away from the children, around nighttime, after the children are asleep,” and that he and Mother do not use the drug at the same time. Father denied ever physically disciplining the Children. Father explained the frequent visitors to his home by saying “[w]e have visitors. I have friends. We know all of our neighbors,” and by explaining that he knows “a lot of skateboarding kids and they come around. But I don’t sell drugs.” He knew nothing about a child fatality. The next day, the CSW was provided with a copy of Father’s new medical marijuana recommendation.

The building manager reported no issues with the family, and that “when I see the kids, they’re always smiling and clean.”

Both parents were asked to take drug tests the following day, which they did. On December 12, 2016, DCFS received drug test results for Mother and Father. Mother tested positive for marijuana. Father tested positive for

marijuana, and for methamphetamine and amphetamines. Father explained his positive methamphetamine test by saying that a “few days ago” he “went out with some friends and it was only once. I never use it at home, never around my kids. It’s not an addiction.”

The CSW recommended that Father complete a drug treatment program. Mother stated she would “get the father into a rehab program ASAP and that she does not want her family to fall apart.” The CSW recommended that Father complete an in-patient drug treatment program.

On December 14, 2016, the CSW spoke with Father’s probation officer, who advised that Father was “currently on probation due to bringing . . . narcotics into jail.” The probation officer also stated that “[F]ather has a very bad and lengthy criminal record, starting [in] 1994,” and had been associated with the Barrio Elmwood Rifa gang.” Father had reported to the probation officer that “although he was in the gang years ago, he is no longer in the gang.” The probation officer also reported Father has a new conviction (in September 2016) for possession of a controlled substance, for which Father was placed on summary probation. Father’s lengthy criminal history was appended to the Detention Report. In addition to his other arrests and convictions, Father has had at least 14 law enforcement contacts related to controlled substance possession or use, dating back to 2001.

On December 15, 2016, DCFS applied for and received an order authorizing detention of the Children from Father based upon probable cause that they were in substantial danger and based upon the impending filing of a section 300 petition.

The petition, which DCFS filed on December 23, 2016, contained a single count alleging Father’s failure to protect under section 300, subdivision (b)(1). DCFS alleged Father has a history of substance abuse and was a

current abuser of amphetamine, methamphetamine, and marijuana, which rendered him “incapable of providing regular care for the children.” DCFS alleged his positive drug test and that he had been under the influence of all of these drugs while the Children were in his care and supervision, interfering with him providing regular care and supervision to the Children as a result of the Children’s “young age,” and subjecting the Children to risk of serious physical harm. DCFS also alleged Mother had failed to protect the Children despite knowing Father was a substance abuser.

In its Detention Report and in an Addendum Report filed on December 23, 2016, DCFS recommended detention and removal of the Children from Father (to be released to Mother), based upon Father’s extensive criminal history combined with his “abuse of illicit drugs, as evidenced by the fact that . . . the father tested positive for marijuana, amphetamines, and methamphetamines. . . .” Father was to have visits monitored by someone other than Mother.

At the December 23, 2016 detention hearing, the dependency court found that DCFS had stated a prima facie case that the Children were persons described in section 300, and that all other conditions for detention had been met. The Children were detained from Father. Father was granted liberal visitation rights, provided that Mother not be the monitor of his visits. Additionally, Father was ordered to undergo random drug testing.

2. The Jurisdiction and Disposition Reports

DCFS provided further explanation pertaining to Father’s extensive criminal history in its January 25, 2017 Jurisdiction/Disposition Report. Father’s criminal background included law enforcement contacts and convictions for possession and discharge of firearms, parole violations, misdemeanor hit and run, vandalism, possession of narcotics, and being a

felon in possession of a loaded firearm, with certain of these events occurring multiple times.

At Mother's second interview, she indicated she knew of Father's long substance abuse history, but said he had been better since they had the Children. He was a "great dad" when he was home, but "[w]hen he's gone for two days, I have no control of that." She was "shocked" by his positive methamphetamine test, and "mad at him. I know he went out but he was fine when he came home." She stated he had done an "out-patient" program "when he first came home from prison . . . [but] didn't complete it."

In Father's second interview he stated he "wasn't on drugs with my kids. I tested positive. My children don't know nothing. The test said I used [in] the past day or two. It doesn't say I used with my kids." When asked where he was when he used the methamphetamine, Father responded, "On the weekends I go out and party at my friend's house. I don't know exactly where I was. I'm a father during the week and on the weekend it's my time." Father also stated that as a result of the drug test he was going to have to surrender to go to jail (as he was in violation of his probation).³ He said, "I can do out-patient classes. A dirty test doesn't mean they're [the Children are] in danger. My priority is my children. My children are happy. The[y] need me." He then stated, "I don't need a drug program," but also said he would complete a drug rehabilitation program while in jail, also stating other programs had told him "I don't need the program. It doesn't seem like I have a problem." When asked how long he had used methamphetamine, Father responded. "I don't use it. I've experimented with it since I was a little kid."

³ Father was sentenced to serve 120 days in county jail for violating his probation based on the positive drug test.

DCFS noted Amelia S., the only one of the Children who is verbal, is “extremely bonded to her father and both [M]other and [F]ather have . . . expressed that they want their family reunified.”

DCFS recommended the Children be declared persons as defined in section 300, subdivision (b), family maintenance services be provided to Mother, family enhancement services be provided to Father, Mother complete a parenting class and attend “Al-Anon” meetings, and Father complete a parenting class and a substance abuse program with random drug testing.

On February 21, 2017, DCFS filed its Interim Review Report. Father had had several monitored visits with the Children and was reported to be attentive to their needs and played with them. DCFS reported Father was a “no-show” for drug testing on January 19 and February 6, 2017, and that the CSW was “unable to get ahold of [F]ather.”

On February 23, 2017, DCFS filed a Last Minute Information in which the CSW reported that Father’s “compliance and motivation to visit with his children has been marginal.” Mother was the driving force in organizing and arranging visits. While Father submitted a drug test on February 16, 2017, which was negative for methamphetamine, he failed to appear for another drug test on February 22, 2017. Mother stated the Children had had diarrhea on the latter date, and she was therefore unable to drive Father to the location where the on-demand drug test would take place.

3. The Jurisdiction and Disposition Hearing

The jurisdiction and disposition hearings were held on February 23, 2017. DCFS’s exhibits were all received into evidence.

The dependency court struck from the petition allegations that Mother had failed to protect the Children, found the allegations were true as to

Father by a preponderance of the evidence, and found that it possessed jurisdiction.

Pursuant to section 361, subdivision (c), the dependency court also found there was a substantial danger to the physical or emotional safety of the Children if they were to be returned home to Father, and that there was no reasonable means to protect them short of removal from Father's physical custody. The court observed that Father was in complete denial that he had a drug problem, had tested positive for amphetamine and methamphetamine, had failed to test multiple times, and had a recent arrest. The court also noted the significance of his drug use was heightened because the children were "very young." The court cited Father's statement that he "does not have to parent on the weekend," and expressed concern about Father's attitude concerning his responsibilities as a parent, stating that on the weekends Father "goes out and gets high and assumes [Mother] is parenting these children." Further, the court found that Father had not cooperated with DCFS and that services could not be put in place for Father given his attitude, noting that Mother did seem to be working harder on Father's case plan than Father.

The Children were ordered placed with Mother, and both Mother and the Children were allowed to reside in the family residence once Father surrendered to serve his upcoming prison term. Father was granted monitored visits in a neutral setting.

Father filed a timely notice of appeal.

CONTENTIONS

Father contends substantial evidence does not support either the dependency court's finding that it possessed jurisdiction over the Children

pursuant to section 300, subdivision (b), or the court's order removing the Children from his custody pursuant to section 361, subdivision (c).

DISCUSSION

I. Legal Standards

A. Substantial Evidence

“In reviewing the [dependency court's] findings and disposition, we look to see if substantial evidence, contradicted or uncontradicted, supports them. [Citation.] In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court.’ (*In re Heather A.* [1996] 52 Cal.App.4th [183,] 193; see *In re I.J.* (2013) 56 Cal.4th 766, 773.)” (*In re R.T.* (2017) 3 Cal.5th 622, 633.) The appellant bears the burden of showing there is no evidence of a sufficiently substantial nature to support the court's findings or orders. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947, citing *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

B. Jurisdiction Pursuant to Section 300, Subdivision (b)

Section 300, subdivision (b)(1), sets out four separate grounds for dependency jurisdiction. “[T]he first clause of section 300, subdivision (b)(1) is at issue here. It authorizes dependency jurisdiction if a 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.*’ (§ 300, subd. (b)(1), italics added.)” (*In re R.T., supra*, 3 Cal.5th at pp. 626-627.)

In ascertaining that section 300, subdivision (b)(1) applies and whether a child presently is in need of the court's protection, the court may consider

past events. (*In re Petra B.* (1989) 216 Cal.App.3d 1163, 1169.) However, a parent's past conduct does not establish a risk of harm to the child; there also must be reason to believe the endangering conduct will continue into the future. (See *In re Alysha S.* (1996) 51 Cal.App.4th 393, 399; *In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1134.)

C. Removal Pursuant to Section 361

Section 361, subdivision (c)(1) limits the ability of the dependency court to remove a child from the physical custody of his or her parents. To do so, the court must find by clear and convincing evidence that “[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor” “and there are no reasonable means by which the minor’s physical health can be protected” (§ 361, subd. (c)(1).) This standard of proof is greater than the preponderance of evidence standard required for taking jurisdiction over a child. (§§ 355, subd. (a), 361, subd. (c); see also *In re Basilio T.* (1992) 4 Cal.App.4th 155, 169, limited on other grounds in *In re Cindy L.* (1997) 17 Cal.4th 15, 31-35.) “The high standard of proof by which this finding must be made is an essential aspect of the presumptive, constitutional right of parents to care for their children. [Citations.]” (*In re Henry V.* (2004) 119 Cal.App.4th 522, 525; see *In re Kieshia E.* (1993) 6 Cal.4th 68, 76.) At the same time, jurisdictional findings are prima facie evidence the child cannot safely remain in the home. (§ 361, subd. (c)(1).) “The parent need not be dangerous” and the child “need not have been actually harmed before removal is appropriate.” (*In re Hailey T.* (2012) 212 Cal.App.4th 139, 146.)

II. Substantial Evidence Supports the Jurisdictional Findings and the Disposition Order

The same substantial evidence supports both the dependency court's jurisdictional findings and its decision removing the Children from Father's physical custody pursuant to section 361, subdivision (c).

Father admitted to having "experimented" with methamphetamine "since I was a little kid" and to using marijuana frequently. When tested for drugs at the request of DCFS, Father tested positive for methamphetamines, amphetamines and marijuana. Father then failed to appear for three later drug tests. Father told DCFS he did not need a drug rehabilitation program as he did not think he had a drug problem and he failed to enroll in a drug program even though he was referred to do so. Father's criminal record included a very recent conviction, on September 2, 2016, also for possession of a controlled substance, and a term of probation. Failing the drug test resulted in revocation of his probation and an order that he serve 120 days in jail.

Father stated that the weekends were his time, time to be away from his children, although he also stated that he loved them. As the court described Father's attitude, Father believed the weekend is "my time" and it is acceptable to abandon his family for entire weekends so that he can "go out and party at [a] friend's house" (which is where he used the methamphetamine that resulted in his positive test).

The dependency court appropriately referenced all of these facts in reaching its determinations. (*In re N.M.* (2011) 197 Cal.App.4th, 159, 165-166 [court may consider past events in determining child's present need for protection]; *In re Petra B.*, *supra*, 216 Cal.App.3d at p. 1169 [same].)

In his effort to overturn the dependency court’s orders, Father relies on three cases. Father’s reliance on *In re Drake M.* (2012) 211 Cal.App.4th 754 (*Drake M.*) is misplaced. In *Drake M.*, there was no evidence the father had suffered from any “recurrent substance-related legal problems.” (*Id.* at p. 767.) Additionally, the father tested negative for all other drugs (and he possessed a valid medical marijuana recommendation). (*Id.* at pp. 759, 768.) Here, by contrast, there is evidence of more than a decade’s worth of recurring substance-related legal problems (including the recent conviction), and a failed drug test for amphetamines and methamphetamines, followed by three failures to test for drugs. Failures to test may be taken to indicate that the tests would have been positive had they been taken. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1218-1219.)

The court in *Drake M.* noted, “[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.” (*Drake M., supra*, 211 Cal.App.4th at p. 766.) Where the minors are of “tender years,” a 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 p. 767; see also *In re Christopher R., supra*, 225 Cal.App.4th at p. 1219.)

Father’s citation of *In re David M.* (2005) 134 Cal.App.4th 822, abrogated on different grounds in *In re R.T., supra*, 3 Cal.5th at page 628, also is not persuasive. There, during the time between the detention hearing and the jurisdiction hearing—a period of four and one-half months—the mother “tested negative for drugs approximately 18 times” and “mother’s missed tests were excused.” (*Id.* at p. 830.) The court, rightly, focused on the risk of substantial harm “*at the time of the hearing*” (*id.* at pp. 831-832, original italics), and, under those circumstances, found there did not appear

to be a future risk of harm. Here, at the time of the combined jurisdictional and disposition hearings, Father had a failed drug test, followed by multiple, unexcused missed tests, and his testimony evinced a refusal to acknowledge any substance abuse problem, notwithstanding his record of drug-related contacts with the law. This is substantial evidence supporting the dependency court's exercise of jurisdiction, and also of the order for removal.

In *In re Rebecca C.* (2014) 228 Cal.App.4th 720, the child was born in 1999, was a young teen at the time of the case and no presumption of harm was applied. (*Id.* at pp. 722, 728.) By contrast, the Children here are of tender years, and the dependency court's substance abuse findings constituted prima facie evidence of a substantial risk of harm. (*Drake M., supra*, 211 Cal.App.4th at p. 767). Further, when she was confronted with her positive test, the mother in *Rebecca C.* "committed herself to a program [of drug rehabilitation]." (228 Cal.App.4th at p. 727.) Here, by contrast, Father claimed he had no such problem.

We agree with Father that a parent's use of alcohol, marijuana, or even cocaine—standing alone—may not support dependency court jurisdiction, or removal. (*In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003.) However, in that case the minor was 11 years old (*id.* at p. 1001) and was "old enough to avoid the kinds of physical dangers which make infancy an inherently hazardous period of life." [Citation.] (*Id.* at p. 1004.) And, similar to *Rebecca C.*, "at the time of the jurisdictional hearing Mother had tested clean for marijuana and methamphetamine for three months." (210 Cal.App.4th at p. 1004.) That is not the situation here, where allegedly "mere" occasional drug usage did not stand alone.

In this case, there is substantial evidence Father has a substance abuse problem, one in which, the court inferred, he engages on the weekends when

he believes it is “his time” to be away from the Children and “party.” He has done so even while being on probation for a drug offense. Father also demonstrated resistance to complying with the dependency court’s requirement that he submit to drug testing following his testing positive for amphetamine and methamphetamine.

Thus, there was substantial evidence to support the findings and orders of the dependency court.

DISPOSITION

The February 23, 2017 order finding the Children to be persons as defined by section 300, subdivision (b) and the order removing them from Father’s custody, are affirmed.

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GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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