Filed 7/30/15 In re Joseph R. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re JOSEPH R., a Person Coming Under the Juvenile Court Law.	B261151 (Los Angeles County Super. Ct. No. CK92414)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JOSE R., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Marguerite Downing, Judge. Reversed.

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Julie E. Braden, under appointment by the Court of Appeal, for Defendant and Appellant.

Mark J. Saladino, County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Jessica Paulson-Duffy, Deputy County Counsel, for Plaintiff and Respondent.

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Father Jose R. appeals from the jurisdictional and dispositional findings and order of the juvenile court sustaining a petition under Welfare and Institutions Code section 342 and ordering that he not reside in the family home.[1] Father contends that there was no substantial evidence to support jurisdiction under section 300 as alleged in the petition. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Joseph R. is the four-year-old son of Mother, Maria A., and Father, Jose R. Joseph R. has two older half brothers, Adrian S., age eight, and E.M., age seven. The whereabouts of the fathers of Adrian and E. are unknown. At the time of the most recent events described below, all three children lived with Mother and Father.

1. *The Section 300 Petition*

In March 2012, the Department of Children and Family Services (DCFS) filed a petition pursuant to section 300. The petition, as amended, alleged that Father hit Adrian with his fist, struck E. in the stomach, and threw E. down on the bed, injuring him. In addition, the petition alleged that Mother knew of Father's actions but did not act to protect her children. The petition further alleged that Father had punched Mother, for which he had been convicted of spousal battery.

The juvenile court sustained the petition under section 300, ordering that the children remain in Mother's custody, with Father allowed monitored visits. The court also ordered both parents to participate in counseling programs.

Over the next few months, Mother and Father completed the programs assigned to them, and in December 2012, the court gave DCFS discretion to allow Father liberalized visitation or to return to the family home. Father returned to the home, and in the next several months, DCFS reported additional incidents of violent conduct by Father: In May 2013, Father was alleged to have struck Adrian on the face with a stick leaving a bruise; in July, he allegedly broke down the screen door of the family home because he did not have a key; and, in October, he was alleged to have hit Adrian in the face.

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[1] Unless otherwise noted, statutory references are to the Welfare and Institutions Code.

Subsequently, although the family continued to struggle in some respects, conditions improved to the point that DCFS recommended discontinuing services to the family. In July 2014, the court set a hearing date to formally terminate jurisdiction over the family.

2. *The Section 342 Petition*

Less than two weeks after the review hearing at which DCFS had recommended terminating jurisdiction, a social worker visiting the home noticed pictures on the family's iPad depicting marijuana on the kitchen table. The social worker asked the children about the pictures, and E. replied, that's "Kush, you smoke it." He explained that Father smoked in bed and outside, and Adrian stated that Father acted nice afterward. E. walked to a nearby television stand, picked up a half-dollar-size amount of marijuana, and attempted to toss it to the social worker saying, "[D]o you want some Kush?" Adrian smacked it out of E.'s hand and said, "[E.] [,] don't play with that!" and told the social worker that it was Father's.

Father told the social worker that he smoked marijuana casually, but not around the children. He had a medical marijuana card, but it had expired a year earlier.

The children were immediately removed from the home and placed in foster care. On August 8, 2014, DCFS filed a section 342 petition, alleging that the children were at risk due to Father's use of marijuana, and the practice of storing marijuana within reach of the children. On December 9, after the children had been in foster care for four months, the juvenile court sustained the petition, ordering the children returned to Mother pending DCFS verification that Father had moved out. The court ordered only monitored visits with the children for Father.

DISCUSSION

Section 342 governs new allegations of dependency for children who are already subject to the court's jurisdiction under section 300. DCFS must file a new petition pursuant to section 342 when it learns of "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." (*Ibid.*)

A section 342 proceeding is governed by the same procedures as is an original petition under section 300. Thus, at a jurisdictional hearing, regardless of whether it is the result of a petition filed pursuant to section 300 or 342, DCFS must prove by a preponderance of the evidence that the juvenile is a person who comes within the jurisdiction of the court under section 300. (§ 355.) In a challenge based on the sufficiency of the evidence, we apply the substantial-evidence standard: "We review the record to determine whether there is any substantial evidence, contradicted or not, which supports the court's conclusions." (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1649.)

A child may be adjudged a dependent of the juvenile court if "[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." (§ 300, subd. (b)(1).) In this case, DCFS made two allegations, both claiming a risk of harm arising from Father's use of marijuana.[2] The juvenile court sustained both allegations. We will analyze each in turn.

1. *Father's Use Of Marijuana*

First, the petition claimed that Father "is a current user of marijuana," and that this "renders [him] incapable of providing regular care of the children." The petition went on to allege that "[o]n prior occasions in 2014, [Father] was under the influence of illicit drugs while the children were in [his] care and supervision," and concluded that Father's "substance abuse . . . endangers the children's physical health and safety and places the children at risk of physical and emotional harm."

Mere use of marijuana or other drugs by a parent is not sufficient in itself to create a substantial risk under section 300, subdivision (b). (*In re Drake M.* (2012) 211 Cal.App.4th 754, 764 (*Drake M.*); *In re Alexis E.* (2009) 171 Cal.App.4th 438, 452; *In re David M.* (2005) 134 Cal.App.4th 822, 830; *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1346.) It is likewise insufficient that a parent was under the

[2] Both allegations contended that Mother had also contributed to endangering the children. Because Mother has not appealed the juvenile court's order, we examine only those sections of the allegations that pertain to Father.

influence of a drug while caring for his child. To hold otherwise would "excise[] out of the dependency statutes the elements of causation and harm." (*In re Rebecca C.* (2014) 228 Cal.App.4th 720, 728 (*Rebecca C.*).) Instead, we must follow the direction of the court in *In re Rocco M.* (1991) 1 Cal.App.4th 814 (*Rocco M.*), that "[s]ubdivision (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." (*Id.* at p. 823.) In other words, we must determine not whether there was substantial evidence of Father's drug use, but whether his use of marijuana created a substantial risk of serious physical harm or illness to the children.

In answering this question, we may consider whether the substance use rose to the level of substance abuse. The court in *Drake M.* provided guidance in distinguishing substance abuse from mere use. The court referred to the definition of "substance abuse" found in the fourth edition of the American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders (DSM-IV). (*Drake M.*, *supra*, 211 Cal.App.4th at p. 766.) Since *Drake M*, a fifth edition of the work has been published, known as the DSM-V, revising the criteria for diagnosis with what is now called "substance use disorder." (See *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1218, fn. 6.) We are not psychiatrists, and we are not qualified to parse the small differences between these two definitions. Moreover, our dependency statutes are not predicated on the DSM-IV or DSM-V. Nevertheless, we find it useful to turn to their criteria for substance abuse as guidance in determining whether a parent's drug use is likely to cause a substantial risk of serious physical injury to his children. (See *id.* at p. 1218 [finding the DSM-IV definition "a generally useful and workable definition of substance abuse for purposes of section 300, subdivision (b), . . . [b]ut . . . not a comprehensive, exclusive definition"].) Many criteria are common to both versions of the DSM, such as "(1) recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; neglect of children or household)[;] . . .

(2) recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired by substance use) . . .[; and (3)] continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights)." (*Drake M.*, *supra*, 211 Cal.App.4th at p. 766; Diagnostic and Statistical Manual of Mental Disorders: DSM-5 (5th ed. 2013) Substance-Related Disorders, p. 483.) Because the father in *Drake M.* exhibited no symptoms of substance abuse, the court held that there was insufficient evidence to sustain the juvenile court's finding of jurisdiction under section 300, subdivision (b). (*Drake M.*, at pp. 767-768.)

The court in *Rebecca C.*, *supra*, dealt with similar issues. Although the court found that it was improper to link substance abuse strictly with the factors involved in a medical diagnosis, it came to a similar conclusion as the *Drake M.* court. (*Rebecca C.*, *supra*, 228 Cal.App.4th at p. 726.) The *Rebecca C.* court held that if there is no evidence of a medical diagnosis of substance abuse or "life-impacting effects of drug use," there should be no "finding that a parent has a substance abuse problem justifying the intervention of the dependency court." (*Ibid*.)

Finally, the court's decision in *Jennifer A. v. Superior Court*, *supra*, is instructive.[3] In that case, the mother had a history of substance use, including one positive drug test and nine missed tests (which were deemed to be positive tests) in the months prior to the juvenile court's hearing. (*Jennifer A. v. Superior Court*, *supra*, 117 Cal.App.4th at pp. 1341-1343.) Nevertheless, the court held that because the mother had not been diagnosed as a substance abuser and had been performing well in other respects, and because there was no evidence of a link between the drug use and poor parenting skills, her children were to be returned to her physical custody. (*Id.* at pp. 1346-1347.)

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[3] In *Jennifer A. v. Superior Court*, unlike here, DCFS had filed a petition under section 366.26 to terminate parental rights. (*Jennifer A. v. Superior court*, *supra*, 117 Cal.App.4th at p. 1326.) We refer to the court's analysis in *Jennifer A.* because we find it helpful in the present case.

Under the standards established by these cases, DCFS has failed to produce substantial evidence to show that Father is a substance abuser. Although Father's behavior fell short of the exemplary standard set by the father in *Drake M.*, *supra*, 211 Cal.App.4th at pp. 760-761, there is no evidence in the record that marijuana has interfered with Father's work or social life, nor that he has operated an automobile or engaged in other hazardous behavior under the influence, nor that marijuana has led to social or interpersonal problems in his life. He appears to have been able to maintain employment for most or all of the time since the initial petition. In the two years prior to the incident at issue here, throughout which period DCFS social workers monitored the family closely and frequently commented on Father's parenting skills, they did not identify Father as having a drug problem or issues with substance abuse. Early on, DCFS noted that Father stated he had a medical marijuana card, but the report did not treat this as a cause for concern. In the wake of the incident, DCFS conducted interviews with the children, none of which indicated that father's use of marijuana made him act violently or irresponsibly.

On this record, in the absence of any evidence that Father's use of marijuana placed his children at a substantial risk of serious physical harm, we conclude that the juvenile court erred by upholding DCFS's first allegation.

2. *Access To Marijuana By Children*

The petition's second allegation claimed that Father "created a detrimental and endangering home environment for the children in that marijuana was found in the child's home within access of the children. On [August 6, 2014], the child [E.] accessed [Father]'s marijuana. Such a detrimental and endangering situation established for the children by . . . [Father] endangers the children's physical health and safety and places the children at risk of physical harm, damage and danger."

Leaving marijuana in a location where it could be easily accessed by the children was undeniably a serious error on the part of Father and Mother. At least one court has held that placing a child in situations in which he has access to hazardous drugs and may ingest them is sufficient evidence to support a finding of a substantial risk of serious

physical harm under section 300. (*Rocco M., supra*, 1 Cal.App.4th at p. 825.) Other courts have noted the lack of the child's exposure to drugs as a factor showing a lack of risk of harm. (E.g., *Drake M., supra*, 211 Cal.App.4th at pp. 768-769 ["There was no evidence showing that Drake was exposed to marijuana, drug paraphernalia or even secondhand marijuana smoke."])

Nevertheless, it does not follow that a single incident in which children were put at risk of ingesting drugs is sufficient for jurisdiction under section 300. As the court in *Rocco M.*, *supra*, noted, "[w]hile evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm. [Citations.] Thus the past infliction of physical harm by a caretaker, standing alone, does not establish a substantial risk of physical harm; 'there must be some reason to believe the acts may continue in the future.'" (*Rocco M.*, *supra*, 1 Cal.App.4th at p. 824, quoting *In re Jennifer P.* (1985) 174 Cal.App.3d 322, 326 (*Jennifer P.*).) In *Rocco M.*, the court found a substantial risk of serious physical harm because there was a pattern of continuous neglect by the juvenile's mother. (*Id.* at p. 825.) The mother's use of drugs and alcohol were serious enough that she could no longer serve meaningfully as a parent. (See *id.* at pp. 817-818.) In this context, it was reasonable for the court to determine that mother's negligence in leaving drugs in a location where Rocco could find and ingest them created sufficient risk of serious physical harm to support jurisdiction under section 300. (*Id.* at p. 825.)

In contrast, courts have often found that single or isolated missteps by parents, even significant and dangerous ones, are not sufficient indications of risk of future physical harm to support the jurisdiction of the juvenile court. For example, in *In re J.N.* (2010) 181 Cal.App.4th 1010, 1015-1016, a father was involved in two drunk driving accidents on the same night while driving his children in the family car. The mother, also under the influence of alcohol, did nothing to prevent her husband from driving under the influence. (*Ibid.*) One of the children was not secured in a safety seat and received a head injury in the second accident, during which the car crashed into a light pole. (*Ibid.*) Although it characterized the incident as "egregious" and

"profound[ly] serious[]" (*Id.* at pp. 1025-1026), the court held that invoking jurisdiction was error because "there was no evidence from which to infer there is a substantial risk such behavior will recur." (*Id.* at p. 1026.)

Similarly, in *Jennifer A. v. Superior Court,* discussed above, the court found that one positive drug test and nine more missed tests (which were deemed to be positive tests) were insufficient to justify jurisdiction because the mother had tested negative 84 times during the course of two years. (*Jennifer A. v. Superior Court, supra*, 117 Cal.App.4th at p. 1343.) According to the court, "Mother was not required to demonstrate perfect compliance." (*Ibid.*) Because she had substantially complied with the terms of her reunification plan and was in most ways acting as a good parent, the court found there was no substantial risk of serious physical harm if the children were returned to her custody. (*Id.* at p. 1346.)

This case is similar to those described above. Although the parents made a serious and dangerous mistake by leaving the marijuana in a location where the children could access it, there was no evidence that this was a common occurrence. Instead, the record describes a clean, well-maintained family home. Although the children were familiar enough with their father's marijuana use that they could identify the substance and describe its use, the evidence indicated that most of the drug use took place in Father's bed, in the restroom, and outdoors, suggesting that Father made some effort to keep the marijuana away from the children. Furthermore, the evidence of Father's behavior after the children were taken away shows that he has taken steps to prevent similar situations from reoccurring. He passed five random drug tests, participated in monthly parenting classes along with Mother, and completed a counseling program, attending 45 sessions in less than four months.

Because there is no substantial evidence that Father's negligence in leaving the marijuana where the children could access it was a common occurrence, the juvenile court erred in upholding the petition's second allegation.

DISPOSITION

The dependency court's jurisdictional order is reversed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.