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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re BRENT M., JR., et. al., Persons Coming Under the Juvenile Court Law.	B235927 (Los Angeles County Super. Ct. No. CK46872)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES., Plaintiff and Respondent, v. BRENT M., SR., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Stephen Marpet, Commissioner. Reversed in part and affirmed in part.

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

Andrea Sheridan Ordin, County Counsel, John F. Krattli, Acting County Counsel, James M. Owens and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

Brent M., Sr., (father) appeals from the juvenile court's jurisdictional and dispositional orders and findings of August 19, 2011, which include orders declaring minors, two-year-old Brent M., Jr., and eight-month-old Brent M. III (collectively "minors"), dependents of the juvenile court pursuant to Welfare and Institutions Code section 300, subdivision (b)[1] and ordering father to take parenting classes, participate in individual counseling to address domestic violence and anger management issues, to undergo random alcohol and drug testing, and to discontinue using medical marijuana.[2] Father contends that the dispositional orders are unsupported by substantial evidence.

We reverse in part and affirm in part.

FACTUAL AND PROCEDURAL BACKGROUND

Background

Father is the presumed parent of minors. Mother has a history with the Department of Children and Family Services (DCFS), having lost three children after failing to reunify for various reasons, including methamphetamine abuse. Minors came to the attention of the DCFS when mother tested positive for marijuana at Brent M. III's birth. She admitted using marijuana when pregnant to treat her anxiety, substantiating the allegations. The DCFS held a Team Decision Meeting, and the family agreed to a Voluntary Family Maintenance Case, with mother to participate in substance abuse treatment, attend narcotics anonymous meetings and randomly drug test. DCFS was to provide family preservation services.

Both parents had lengthy criminal histories. Father had numerous arrests and convictions, including a conviction for assault and battery and a 2006 arrest for inflicting corporal injury on a spouse, which charge was dismissed. Mother had a lengthy criminal

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

2 Minors' mother, Willy M. (mother) does not appeal from the orders directed to her. We refer to mother and father collectively as "the parents."

history of drug related arrests and convictions and a 2007 misdemeanor conviction for infliction of corporal injury on a spouse.

The referral and investigation

On May 4, 2011, DCFS received a referral that on a home assessment visit to the parents' home, the reporting party observed marijuana plants and fluorescent lights in a room and two marijuana plants on the top of a cabinet in the living room. A children's social worker (CSW) investigated, confirming the information. Mother reported that father had a medical marijuana card, was never under the influence when caring for the children and did not smoke marijuana in front of them, though he did smoke it in the living room. CSW told mother that the minors could access the marijuana and be exposed to second-hand smoke, even with the door closed. Mother said she would speak to father about it.

Mother had not enrolled in a substance abuse program because of claimed problems with a Medi-Cal card and was not attending Narcotics Anonymous or Alcoholic Anonymous meetings. She denied smoking marijuana since she "tested positive." If she had, she said father would have had her arrested, as he had twice before.

When father arrived home, CSW interviewed him. He was antagonistic and complained about social workers coming to his house too often. Father showed CSW his medical marijuana card, which he had to treat Methicillin-Resistant Staphylococcus Aureus. He said that he did not sell marijuana to dispensaries or smoke it in front of the minors. He only smoked it in the room where he was growing it. When CSW registered concern for minors ingesting second hand smoke, father stated: "I have to worry about a lot of stuff as a parent. I have to make sure that my children are not exposed to secondhand smoke as well[?] I researched marijuana and I do not think it is harmful." He said he would not have it in his house if it was. When CSW reflected her concern that Brent M., Jr., could possibly access the marijuana in the living room, father responded that he was not worried minors would eat the marijuana and believed it would not get them sick anyway. CSW encouraged father to move the plants.

In a subsequent telephone conversation with father, he agreed to a drug test to establish that he was not using drugs besides marijuana. CSW told father that if he did not drug test she would report it to the court as a dirty test.

The next day, CSW consulted with the Voluntary Maintenance (VM) CSW about mother having failed to submit to voluntary drug testing. VM-CSW said that on one occasion, father asked her to leave his home because he had to go to work and did not want anything said behind his back. He became agitated when told that VM-CSW had to speak with mother privately at times. She said father was not pleasant.

On May 9, 2011, when told of the scheduled court date, father became upset, stating, "I am done with you people. . . . You are trying to break up my family." He hung up. Later that day, he called the VM-CSW and said that the case was closed and that DCFS was no longer welcome in his home.

The section 300 petition

On May 11, 2011, DCFS filed a *nondetention* petition (the Petition) under section 300, subdivision (b). It alleged that (1) the parents created a detrimental and endangering home environment for the children by possessing marijuana plants in the home that were accessible to the children (count b-1), (2) father had a history of illicit drug use, was a current illicit user of marijuana and "on numerous occasions" was under the influence of marijuana while the children were in his care. He was therefore incapable of rendering regular care (count b-2); and (3) mother had a five-year history of substance abuse of methamphetamine and amphetamine, was a current marijuana user, including a positive test for marijuana at the time of Brent M. III's birth, and was therefore incapable of providing regular care to the children, had a criminal history of possession of controlled substances and had lost three other children to the dependency system due to drug abuse (count b-3).

The May 13, 2011 hearing

At a May 13, 2011 hearing, mother reported using marijuana for medicinal purposes but agreed to stop. Father could not promise to stop using it, as it allowed him

to stop taking stronger narcotics that made it more dangerous for the children to be around him.

The juvenile court ordered father and mother to drug test, with mother's level to go down and father's to go down or remain the same. It stated: "[T]here are legitimate reasons for having marijuana, and I understand that, so we can address that when I get more information."

Jurisdiction/disposition report

Father's uncooperative conduct continued. He told CSW to communicate with his attorney, began refusing permission for DCFS representatives to enter his home, did not want them interviewing mother separately, and tried video recording social workers who came to his house. Because of parents' history of domestic violence, with mother as perpetrator, DCFS viewed father's conduct to be suspicious.

A family preservation worker, who had been meeting with the family since April 2011, reported that father and mother had been only "minimally compliant with case goals." They did not appear for their first drug test. Mother tested positive for marijuana on June 23, 2011, and missed three additional tests. Father missed numerous drug tests. When the worker informed mother about the GAIN program, mother was excited at the prospect of obtaining employment and minors attending day care. Father wanted neither. The worker was concerned father was attempting to keep mother in the home and felt that he was controlling her services. When father was at work, mother was reluctant to allow DCFS workers into her home, fearing she would be caught by father.

But minors were reported to be physically healthy, the parents had suitable housing, and father was reportedly employed. The parents had installed a lock on the door where the marijuana was being grown.

July 7, 2011 hearing

At a July 7, 2011 hearing, the juvenile court ordered father to cooperate with the CSW in allowing mother and minors to be separately interviewed, refrain from video recording DCFS visits and visits by minor's counsel and disable any recording devices during home interviews.

Interim Review reports

On July 18, 2011, in a telephone conversation with CSW, father began laughing hysterically when told he had to drug test the next day. At a July 19, 2011 visit, father remained uncooperative interrupting questioning of mother during her interview, told mother to "keep it brief," asked for his attorney to be present, and again tried to video record the interview. Mother reported using marijuana every other day to stimulate her appetite during breast feeding. She said after Brent M. III's birth, she was drug testing and willing to complete a substance abuse program, but father talked her out of participating. CSW concluded that mother wanted to cooperate, but "father discourages her from doing so."

Father reported that he did not use marijuana daily, and "maybe not for a whole week." His doctor prescribed its use "as needed" for pain and nausea. Father said he used it outside of the house or in the room where the plants were grown. He refused to drug test. DCFS found father's behavior indicative of someone abusing methamphetamine. However, because he was not drug testing, DCFS could not determine if such behaviors were the result of substance abuse.

The family preservation worker was also unsure if the parents were using drugs other than marijuana. She observed that father's teeth were rotting, and many people, who looked like substance abusers came in and out of the family home, staying for only two minutes. The worker suspected that father might be selling narcotics. CSW believed father exhibited behaviors indicative of methamphetamine abuse such as hyperactivity, aggressiveness and paranoid behaviors.

On August 19, 2011, CSW reported that father had been rude and uncooperative with the home visit and screamed at the CSW, accusing DCFS and CSW of being liars. He continued to refuse to drug test and allow DCFS access to his home. CSW threatened to detain the children if father did not drug test.

August 19, 2011 jurisdiction/disposition hearing

The parents did not attend the jurisdictional/disposition hearing. The juvenile court admitted the DCFS reports into evidence and heard arguments. DCFS argued that

father had stopped mother from participating in services and opposed child care. Father's counsel argued that count b-1 (growing marijuana in the home) should be dismissed because a remote possibility that a child might be endangered is insufficient ground to remove a child from parental custody. The marijuana in the home was behind a locked door, beyond the minors' reach. He argued that count b-2 (father being under the influence of marijuana) should be dismissed because there was no nexus between father's use and any substantial risk of physical harm to the children.

The children's counsel said that his investigators had been to the family home and "[t]he children appear appropriately taken care of." The juvenile court said that it had "a lot to detain [the minors] right now." Minors' counsel disagreed that there was a basis to detain them. The court stated, "This case came in May. So far [parents] have done nothing. They have refused to do anything." It noted that father refused to allow mother to participate. The children's counsel reminded the court that there was no order that the parents do anything. The juvenile court remarked that a "surrendered wi[f]e" is a form of domestic violence.

The juvenile court struck counts b-1 and b-2 of the Petition and amended count b-3 sua sponte to include an allegation that father knowingly permitted mother to use marijuana when she was pregnant with Brent M. III, putting the children at risk. It made a true finding on that count as amended.[3] Father's counsel objected to the amendment.

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[3] Count b-3 as amended and sustained states: "[The children's mother] has a five-year history of illicit drug abuse, including methamphetamine and amphetamine and is a current user of marijuana, which renders the children's mother incapable of providing regular care of the children. The mother used marijuana during the pregnancy with the child [Brent M. III]. The mother had positive toxicology screen for marijuana on 03/08/11, at the child's birth. The mother has a criminal history of two convictions of Possession of a Controlled Substance. The children's sibling, Jessica [B.] received permanent placement services due to the mother's substance abuse. The mother's illicit drug abuse endangers the children's physical health and safety and creates a detrimental home environment for the children, placing the children at risk of physical harm and danger. *Father knowingly allowed Mo[ther] to use marij[uana] when she was pregnant [with Brent M. III.] [and] this conduct by [father] put the children at risk.*" (Italics added.)

The juvenile court ruled that minors were dependents of the court and placed them in the home of parents, so long as the parents comply with the case plan. Mother was to complete a substance abuse program with weekly random drug and alcohol testing, participate in domestic violence support group, comply with family preservation, and participate in individual counseling to address anger management and her history of drug abuse. Any missed or dirty tests would result in the children being detained from mother. Father was ordered to participate in parenting classes and individual counseling to address domestic violence and anger management, to comply with family preservation and participate in weekly, random drug tests. The court ordered that "[i]f father has any missed or dirty tests, if his numbers don't go down, then the children will be detained upon the first test that the medication—that his marijuana doesn't go down." Father's counsel objected and asked if the court was "stating that father must stop smoking marijuana, and his levels must be going down from now." The juvenile court responded in the affirmative. Father's counsel argued that the court dismissed the allegation concerning father's marijuana use. The court responded, "I understand, but I think that there is no question that the history of this case is sufficient that there is enough evidence for me to make a dispositional case plan consistent with all of the information before the court."[4]

DISCUSSION

I. Propriety of amendment to count b-3

A. Background

The original petition contained only two counts that pertained to father; count b-1 relating to his possession of marijuana plants and count b-2 relating to his use of marijuana while caring for the minors. The juvenile court dismissed those counts at the

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[4] On March 23, 2012, we granted the DCFS's request that we take judicial notice of postjudgment evidence that minors' whereabouts, allegedly with mother, were unknown. Warrants for mother and the minors were issued. No warrant was issued for father because father did not know their whereabouts. This information is not germane to the dispositional issues before us.

jurisdiction/disposition hearing. The sustained count b-3, which originally related only to mother's history of substance abuse, applied to father only because the juvenile court amended it sua sponte at the conclusion of that hearing to allege that father knowingly allowed mother to use marijuana when she was pregnant with Brent M. III.

In its disposition order, the juvenile court ordered father (1) to take parenting classes, (2) to participate in individual counseling to address domestic violence and anger management issues, (3) to drug test, and (4) to stop using medical marijuana.

On April 3, 2012, we requested supplemental briefing on the questions of whether the amendment of count b-3 violated father's right to due process and whether it was supported by the evidence.[5]

B. Contentions

In his supplemental letter brief, father claims that he was deprived of due process by virtue of the amendment to count b-3. He argues that the amendment constituted a material, substantial variance from the Petition so as to deprive him of notice and an opportunity to be heard to his prejudice.

DCFS filed a supplemental brief in which it declined to respond to our questions, stating: "Because the DCFS did not request that the court make the referenced amendment to count b-3, the DCFS will not be taking a position with respect to [those] issues." However, DCFS contends that even if we find father to be non-offending, a jurisdictional finding involving one parent is sufficient to establish dependency jurisdiction over the children and order the non-offending parent to participate in

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5 The parties did not raise the question in their briefs as to the propriety of the juvenile court's belated amendment to count b-3 of the Petition. Consequently, on April 3, 2012, we requested briefing on the following questions: (3) "Did the amendment to count b-3 deprive appellant of due process? (4) Was there substantial evidence before the juvenile court to support the finding that 'father knowingly allowed mother to use marijuana when she was pregnant with Brent M. III and this conduct by father put the children at risk?" On April 18, 2012 and May 3, 2012, briefs were filed by DCFS and father, respectively.

services. DCFS argues that the evidence here supports the juvenile court's dispositional orders against father.

We conclude that (1) the amendment to count b-3 violated father's right to due process, and (2) there is insufficient evidence to support the amendment.

C. Due process

"[T]he interest of a parent in the companionship, care, custody, and management of his children is a compelling one, ranked among the most basic of civil rights [citations], the state, before depriving a parent of this interest, must afford him adequate notice and an opportunity to be heard." (*In re B.G.* (1974) 11 Cal.3d 679, 688–689.) This fundamental right "has little, if any, value unless the parent is advised of the *nature* of the hearing giving rise to that opportunity, including what will be decided therein. Only with adequate advisement can one choose to appear or not, to prepare or not, and to defend or not." (*In re Stacy T.* (1997) 52 Cal.App.4th 1415, 1424.)

"Notice of the specific facts upon which removal of a child from parental custody is predicated is fundamental to due process. [Citations.]" (*In re Jeremy C.* (1980) 109 Cal.App.3d 384, 397.) "Notice of the specific facts upon which the petition is based is necessary to enable the parties to properly meet the charges." (*Ibid.*) Procedural due process requires notice and an opportunity to be heard before the government can deprive a person of a protected life, liberty or property interest. (See *Robinson v. City of Chowchilla* (2011) 202 Cal.App.4th 368, 377.)

The provisions of the Code of Civil Procedure sections 469 to 475, dealing with amendment of pleadings, apply to amending section 300 petitions. (§ 348; Cal. Rules of Court, rule 5.524(d).) While amendments of pleadings to conform to proof are favored in dependency proceedings, they should not be granted if the pleading as drafted prior to the proposed amendment would have misled the adversarial party to its prejudice. (*In re David H.* (2008) 165 Cal.App.4th 1626, 1640; Cal. Juvenile Dependency Practice (Cont.Ed.Bar 2011) Petition, Case Plan, Discovery, Subpoenas, and Pretrial Motions, § 3.15, p. 173.) "Only if the variance between the petition and the proof offered at the jurisdictional hearing is so great that the parent is denied constitutionally adequate notice

of the allegations against him or her should a juvenile court properly refuse to allow an amendment to conform to proof or should a reviewing court entertain a challenge to the sufficiency of the petition that was not raised below." (*In re David H., supra,* at p. 1640; *In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1041–1042.) If a proposed amendment of the pleadings during trial is prejudicial to the opposing party, it is reversible error to grant leave to amend to conform to proof. (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 912.)

The juvenile court's sua sponte amendment of count b-3 prejudiced father and violated his due process rights to notice and opportunity to be heard.[6] At the time of the jurisdiction/disposition hearing, the only allegations against father related to his possession of marijuana plants and use of marijuana while caring for the minors (counts b-1 & b-2). Father and mother did not attend the hearing. At the end of the hearing, only after the arguments by counsel were completed, did the juvenile court dismiss counts b-1 and b-2 and amend count b-3 to add that father, "*Knowingly* allowed mother to use marijuana when she was pregnant." (Italics added.)

This was an entirely different theory against father than that originally alleged in the Petition, requiring presentation of entirely different evidence. Based upon the Petition when the jurisdiction/disposition hearing commenced, father had to establish that the minors were not at risk because he had marijuana plants in his house and used marijuana. The amendment to the Petition did not pertain to his marijuana use at all. Instead, it related to whether he knowingly allowed mother to use marijuana when she

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6 Given our conclusion that the juvenile court's amendment violated due process, we do not consider the thorny issue, about which we have serious question of whether under any circumstance the juvenile court could amend the Petition sua sponte. In doing so, serious separation of powers issues arise. California Rules of Court, rule 5.520(a) provides that the social worker or probation officer have sole discretion to determine whether to file a petition under section 300. This suggests that they also have sole discretion over its content and, by extrapolation, whether to add new claims by amendment. No request was made by DCFS at the jurisdictional hearing to amend the Petition. Further, where the juvenile court amends a petition sua sponte to add an allegation, it can give the appearance of being an advocate against the parent.

was pregnant.[7] Given this vast disparity between the original claims against father and the amended claim, we cannot say that he was accorded proper notice of the claims against him and an opportunity to be heard by virtue of the juvenile court's sua sponte amendment of the Petition. This conclusion is highlighted by the absence of father from that hearing, with no notice of the nature of the allegation ultimately found true against him, and hence no opportunity to decide whether to attend and defend against that charge.

D. No evidence to support amended count

The amendment to the Petition must fail for another, nonconstitutional reason. There was not a scintilla of evidence to support the allegation that father knowingly allowed mother to use marijuana when she was pregnant. While the record is replete with evidence of mother's past drug issues, as well as her use of marijuana during pregnancy, the record is barren of any evidence that father knew of her use during pregnancy. There is no evidence of when or where mother used the marijuana, where father was at the time such use occurred and related matters that might bear on father's knowledge regarding mother's marijuana use during pregnancy. In fact, there is evidence that father did not tolerate mother's marijuana use, as mother reported that father had twice before had her arrested for using marijuana.

Consequently, it was improper to amend the Petition to conform to the proof, when there was no proof of the allegation which was added. Because the true finding against father was on an improperly added allegation, that finding can provide no basis of support for the dispositional orders, as discussed in part IIB, *post*. Therefore, for purposes of our analysis, father was a nonoffending parent.

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[7] It is unclear whether count b-3 pertained only to mother's one-time use of marijuana when pregnant (the one for which mother tested positive when Brent M. III was born) or whether, it pertained to her continuous use during her pregnancy.

II. Sufficiency of evidence to support dispositional orders

A. Background

The juvenile court found to be true the allegation that it added sua sponte at the jurisdictional hearing that father knowingly allowed mother to use marijuana when pregnant. It ordered that father (1) take parenting classes, (2) participate in individual counseling to address domestic violence and anger management issues, (3) undergo random alcohol and drug testing, and (4) discontinue using medical marijuana. Defense counsel objected to these orders.

B. Contention

Father's sole contention on appeal is that there is insufficient evidence to support the juvenile court's dispositional orders against him because the allegations against him regarding his marijuana use were dismissed. The only allegation in the sustained petition that refers to father is the amended count b-3 which alleges that father knowingly '"allowed' mother to smoke marijuana during her pregnancy with Brent [M.] III." Thus, the orders pertaining to father do "not appear likely to address any of the issues that brought the children under the court's jurisdiction. . . ." Father emphasizes his challenge to the order requiring him to stop using medical marijuana, arguing that "[t]here is no nexus between father's legal use of medical marijuana and any risk of harm to the children."

C. Lack of properly sustained allegation against father does not preclude all orders against him

The juvenile court can obtain jurisdiction over children based upon the actions of one parent, though the other parent is a model parent. (*In re Alysha S.* (1996) 51 Cal.App.4th 393, 397.) A "minor is a dependant if the actions of either parent bring [him or] her within one of the statutory definitions of a dependant." (*Ibid*.) As the DCFS correctly points out, the focus of the dependency system is on the child, not the parents. (*D.M. v. Superior Court* (2009) 173 Cal.App.4th 1117, 1129; *In re Alysha S., supra,* at p. 397.) The overarching goal of dependency proceedings is to safeguard the welfare of California's children. (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1228.) "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." (§ 300.2.)

Given the focus on the children's well-being, once jurisdiction over the children is established, the juvenile court can enter orders binding on a nonoffending parent. (See *In re I.A.* (2011) 201 Cal.App.4th 1484, 1491–1492.) The paramount question regarding such orders is whether they are necessary to protect the children from the issue that brought them before the juvenile court. That court has broad discretion to address issues harmful to the well-being of the children, some cases concluding that it may do so even where such issues are not the direct cause of the child's detention. (See *In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1008 [in the context of discussing reunification, the Court of Appeal approved ordering parent to drug and alcohol testing though juvenile court found the allegation of drug or alcohol abuse negatively affecting parent's ability to care for children to be unproven].)

Here, a jurisdictional finding was made against mother. Neither she nor father contests that finding. The children were therefore properly made dependents of the juvenile court, and both parents are subject to its orders that are aimed at protecting the children from the issues that brought them before the court.

D. Limits on scope of dispositional orders

"When a child is adjudged a dependent child of the court on the ground that the child is a person described by Section 300, the court may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child." (§ 362, subd. (a).) "The juvenile court may direct any and all reasonable orders to the parents or guardians of the child who is the subject of any proceedings under this chapter as the court deems necessary and proper to carry out the provisions of this section, . . . That order may include a direction to participate in a counseling or education program, including, but not limited to, a parent education and parenting program operated by a community college, school district, or other appropriate agency designated by the

court. . . ." (§ 362, subd. (c).) The juvenile court has wide latitude in making orders necessary for the well-being of a dependent minor.

But section 362 also limits such orders to those that are "designed to eliminate the conditions that brought the minor to the attention of the court." (*In re Jasmine C.* (2003) 106 Cal.App.4th 177, 180; § 362, subd. (c) ["The program in which a parent or guardian is required to participate shall be designed to eliminate those conditions that led to the court's finding that the child is a person described by Section 300"].) Thus, juvenile court jurisdiction over children pursuant to section 300 is not a license to recreate a perfect family, but simply to rectify those problems that brought the case before the DCFS and which created a danger to the children.

In that regard, here, the children were before the juvenile court only because of mother's marijuana use, father being nonoffending. Thus, any orders that were issued needed to remain faithful to the essential purpose of the wardship; mother's drug issues and any apparent dangers to the children resulting from them.

E. Standard of review

We review jurisdictional and dispositional findings under the substantial evidence standard. (*In re E.B.* (2010) 184 Cal.App.4th 568, 574; *In re A.S.* (2011) 202 Cal.App.4th 237, 244.) Under this standard, we determine whether there is any substantial evidence, contradicted or uncontradicted, which supports the conclusion of the trier of fact. (*In re Tracy Z.* (1987) 195 Cal.App.3d 107, 113.) All evidentiary conflicts must be resolved in favor of the respondent. When there is more than one inference which can reasonably be deduced from the facts, we are without power to substitute our own deductions for those of the trier of fact. (*In re John V.* (1992) 5 Cal.App.4th 1201, 1212.)

F. Propriety of the orders imposed on father

The propriety of the orders against father must be evaluated in light of the fact that the children's wardship was not brought about by reason of any of his conduct. The originally alleged allegations against him, possession of marijuana plants in the home and using marijuana when minors were in his care, were not sustained but were dismissed.

Only the amendment to count b-3, that appellant knowingly allowed mother to use marijuana when pregnant was sustained, but, as we have concluded in part I, *ante*, that finding cannot stand and therefore cannot be a basis for any of the orders against father.

1. Counseling for domestic violence and anger management

The juvenile court ordered father to individual counseling to address domestic violence and anger management. There was substantial evidence that father had anger control issues which were directed against DCFS workers and their efforts to get mother to comply with the case plan. Father was unpleasant to the VM-CSW. He hung up the phone on one DCFS worker, claiming DCFS was trying to break up his family, and attempted to video record DCFS interviews with him and his wife and place them on the internet. He had a criminal record which included some violence, including an assault and battery conviction. Unless father was required to deal with his anger issues, it is likely that he would continue to interfere with the court's case plan for mother. Thus, there was a significant nexus between the order for counseling and the issue that brought the minors within the juvenile court's jurisdiction; mother's need to deal with her drug issues.

While there was no direct evidence that father had engaged in any domestic violence, he had been arrested on such a charge several years earlier, though the charge was dropped. Mother had a conviction for corporal injury on a spouse, making the family situation ripe for violence. Anger management issues are closely related to domestic violence. Those issues are so interwoven, it would be virtually impossible for a counselor to deal with one without at least touching upon the other. Moreover, the gravamen of the counseling, regardless how the issues are denominated, was that father needed counseling to deal with his interference with mother's compliance with the case plan. Thus, while we find no legal or evidentiary support for the juvenile court's finding that mother was, what the juvenile court termed, a "surrendered wife," and that a "surrendered wife" is a form of domestic abuse, we nonetheless find sufficient evidence to support the counseling order.

2. Parenting classes

The juvenile court ordered father to participate in parenting classes. We also find sufficient evidence to support this order. The juvenile court had jurisdiction over the minors by reason of mother's use of marijuana. Father made statements indicating a lack of understanding and sensitivity to the risks attendant upon marijuana use with small children. He showed little concern for second-hand smoke, stating: "'I have to worry about a lot of stuff as a parent. I have to make sure that my children are not exposed to secondhand smoke as well. I researched marijuana and I do not think it is harmful.'" He also was either unaware or indifferent to the risk to young children of gaining access to marijuana. He stated: "'I am not worried about him eating the marijuana. He can eat as much as he wants and still not get sick. We have plants in our yard and he can eat those too but I feel that children are more concerned with eating food and he will not eat them but even if he does I am not worried about it. Now edibles [,] those are what I am concerned with because they look like cookies and brownies and stuff that children would eat and I do not allow edibles nor any other kind of alcohol or drugs in my home, and everyone knows that, but him eating marijuana leaves I am not worried about. . . . '" These naïve and inaccurate statements pertaining to the safety and welfare of his children suggest that father was in need of parenting classes to learn the dangers to his children of the manner which he or mother used and stored marijuana.

3. Drug testing and no medical marijuana use

The juvenile court's order that father participate in weekly random drug tests and stop using of medically prescribed marijuana, however, stands on a completely different footing than the juvenile court's other orders. The juvenile court threatened father that "[i]f father has any missed or dirty tests, if his numbers don't go down, then the children will be detained upon the first test that the medication—that his marijuana doesn't go down."

Several cases indicate that the mere use of marijuana, even illegally, is not alone sufficient to detain the minors. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 447–448, 451–453 (*Alexis E.*) ["mere use of marijuana by a parent will not support a finding of risk

to minors"]; *In re David M.* (2005) 134 Cal.App.4th 822, 829–830 [assertion of jurisdiction not supported by substantial evidence because no evidence mother's drug abuse caused or created a substantial risk of serious physical injury]; *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1346 [mother's marijuana use does not mean return of children to her would create a substantial risk of serious physical injury, as there was no evidence to establish mother displayed clinical substance abuse, no medical professional diagnosed mother as having a substance abuse problem, no medical professional testified at the 18–month review hearing, and there was no testimony of a clinical evaluation].)

If the use of marijuana is insufficient by itself to obtain dependency jurisdiction and detain minors, it is also insufficient by itself to support a dispositional order to drug test and cease using legal medical marijuana on risk of detaining the children upon a dirty test. "Rather, the risk of detriment must be *substantial*, such that returning a child to parental custody [or taking a child from parental custody] represents some danger to the child's physical or emotional well-being." (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1400.) DCFS has the burden of establishing detriment and "[t]he standard for showing detriment is a 'fairly high one.'" (*Ibid.*) That evidentiary showing has not been made here.

There is no evidence that father was a drug abuser or that his use of marijuana created a substantial risk of detriment to the minors. *In re Yvonne W., supra,* 165 Cal.App.4th at p. 1400.) His use of that drug was legal and appropriate for his medical condition. While the focus of dependency proceedings is on the children's welfare, it does not require that the parents' rights must be ignored. There is also no evidence that father had a drug problem. He had no drug-related convictions nor is there any indication in the record that he was a marijuana user before he had a medical marijuana card allowing him to use it. There was no clinical or medical evidence that father had a drug problem. (*Jennifer A. v. Superior Court, supra,* 117 Cal.App.4th at p. 1346.)

The DCFS family preservation worker merely speculated that father may have been using drugs other than marijuana because his teeth were rotting, people who looked

like substance abusers, came in and out of his home after staying for only a few minutes, and father exhibited behavior indicative of methamphetamine abuse, such as hyperactivity, aggressiveness and paranoid thoughts and behaviors. Such unsupported speculation simply fails to meet the "'fairly high'" burden of proof on the DCFS. (See *In re Yvonne W., supra,* 165 Cal.App.4th at p. 1400.)

The uncontradicted evidence is that father did not smoke marijuana in front of, or when caring for, the minors, was not under the influence when caring for the minors and his parenting was not affected by its use. Father said that he only smoked marijuana outside of the house or in the room where it was grown. He was far less impacted by taking marijuana than the other drugs he had been taking for his physical ailments. The children's counsel said that his investigators had been to the family home and "[t]he children appear appropriately taken care of." The DCFS reported that the minors were physically healthy, the parents had suitable housing and father was employed. Moreover, the DCFS filed a nondetention Petition, reflecting that its concern about the children's health and safety was not of the highest level.

While the CSW was concerned about the impact of second-hand marijuana smoke on the minors, there was no evidence that the house smelled of marijuana smoke. When the CSW indicated concern that the parent's young children might gain access to marijuana that was in the living room and the marijuana growing room, the parents placed a lock on the door to that room. CSW did not mention in her reports observing marijuana outside of that room again.

In summary, there was no significant evidence that father was using controlled substances or that his legal use of marijuana was affecting his parenting or endangering the children. Consequently, there was no evidence to justify the juvenile court's order that he drug test and stop using marijuana for medicinal purposes.

DISPOSITION

We reverse the juvenile court's amendment of count b-3 and the order requiring father to drug test and to stop smoking medical marijuana. The orders appealed from are otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD