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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re KEVIN G., et al., Persons Coming  
Under the Juvenile Court Law.

B284837  
(Los Angeles County  
Super. Ct. No. DK21946)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

ESTEBAN G.,

Defendant and Appellant.

APPEAL from orders of the Superior Court for Los Angeles  
County, Kristen Byrdsong, Commissioner. Reversed.

Zaragoza Law Office and Gina Zaragoza, under appointment by  
the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant  
County Counsel, and Jeanette Cauble, Principal Deputy County  
Counsel, for Plaintiff and Respondent.

Esteban G. (father) appeals from the jurisdictional and disposition orders of the juvenile court regarding his children, Kevin G. (born April 2015) and Kimberly G. (born March 2016), and Kevin and Kimberly's half-siblings, J.J. and Aaron J. He contends there was insufficient evidence to support the juvenile court's finding of jurisdiction under Welfare and Institutions Code<sup>1</sup> section 300, subdivision (b). We agree. Accordingly, we reverse the orders.

## **BACKGROUND**

Until sometime in November 2016, father lived with Angelica Z. (mother), the mother of all four children, in the home of the maternal grandparents. On November 1, 2016, the maternal grandmother (MGM) called law enforcement because mother had scratches on her neck caused by a fight mother and father had in their car in the presence of Kevin. The Los Angeles Department of Children and Family Services (the Department) was called to investigate for possible emotional abuse of all four children.

During the investigation of the referral, father admitted he had a history of methamphetamine use, but he denied ongoing use. He agreed to take a drug test, and the results came back positive for amphetamines, methamphetamine, and marijuana. After the test results were received by the Department, mother, who had not known about father's use of methamphetamine until then, agreed to a safety

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<sup>1</sup> Further undesignated statutory references are to the Welfare and Institutions Code.

plan that included having father move out of the home and initiating family court proceedings to obtain full legal custody of Kevin and Kimberly.<sup>2</sup> Father moved out of the house shortly after that, in November 2016, and mother initiated the family court proceedings.<sup>3</sup>

In February 2017, the Los Angeles County Sheriff's Department Parole Compliance Unit went to mother's home in an attempt to apprehend father. Father was on parole from an automobile theft conviction, and he had stopped checking in with his probation officer after he tested positive for methamphetamine; he also had been arrested multiple times while on parole. Although father was not at mother's home, the Department's Multi-Agency Response Team (MART) was contacted to conduct an investigation because there were children living at the residence.

The MART social worker interviewed mother to determine if there were any child abuse concerns. The social worker explained to mother that the Department had concerns due to father's unresolved history of methamphetamine use and his noncompliance with probation conditions.

Mother told the social worker that she did not know about father's methamphetamine use until he tested positive in November 2016. She

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<sup>2</sup> Mother and Jesus J., the father of J.J. and Aaron, have shared legal custody of J.J. and Aaron under a prior family court order.

<sup>3</sup> According to the detention report, mother sought full legal and physical custody of Kevin and Kimberly, with unmonitored visitation for father. There is some question whether the visitation requested was to be monitored or unmonitored (counsel for father stated that it was to be monitored); the record does not include the papers mother filed in family court.

said that father moved out of the house after that and was living with either his mother (PGM) or his new girlfriend. She stated that father had not spent the night at mother's house since he moved out, but that he came to the house once a week to visit Kevin and Kimberly. She also said that father sometimes had visits with the children at PGM's home. When asked whether father appeared to be under the influence of methamphetamine during his visits, mother said that she could not tell based on his physical appearance or behavior.

Mother denied any physical, emotional, or sexual abuse of the children, but admitted that she experienced domestic violence by Jesus J. and by father at the end of each of the relationships. She also admitted that MGM called law enforcement twice during her relationship with father when father was "being aggressive."

The MART social worker examined Kevin and Kimberly, and found no rashes, bruises, marks, or signs indicative of failure-to-thrive. The social worker also interviewed J.J. and Aaron at their school.

Aaron said that father used to scream at mother and MGM before MGM made him move out. He said that since then, father had not slept in the house (although he sometimes slept in a van parked outside the house), and he never supervised the children without mother present. He said that father never hit him or his siblings, but he would slam doors and act "scary." He denied any knowledge of drug use by anyone in the home.

J.J. told the social worker that she was much happier since father moved out in November. She said that although she never saw father or mother hit, push, or choke each other, father used to scream at

mother. When that happened, mother and father would leave the house and walk to a nearby gas station to fight away from the children. She never saw bruises on mother, but confirmed that mother had scratches on her neck and/or face after a fight in the car (which prompted the November 2016 investigation by the Department). She said that MGM had called the police a couple of times during their arguments.

J.J. stated that father never hit her or her siblings, but he scared them because of his screaming. When asked about drug use, J.J. said that father used to smoke “white rolled up paper with stuff inside” in the home until Kevin was born. After that, father went to a nearby alley to smoke away from the children. She never saw any baggies with powder or other drug paraphernalia in the home, and denied any drug or alcohol use by mother or the maternal grandparents.

J.J. told the social worker that after father moved out he sometimes slept in a van parked outside the house. She also said that he sometimes came to the house for about 20 minutes to play with Kevin and Kimberly, bring groceries, or get his belongings that were stored in the van.

The social worker was not able to meet with father face-to-face, but spoke with him by phone. Father would not answer any questions about his drug use, saying that the social worker was trying to get him into trouble with his probation officer. Father agreed to meet with the social worker and drug test the following day; he made an appointment but did not show up.

The Department filed a petition under section 300, subdivision (b), alleging that father had a nine-year history of substance abuse and was

a current user of amphetamine, methamphetamine, and marijuana that rendered him incapable of providing regular care and supervision of Kevin and Kimberly. The petition also alleged that father had a positive toxicology screen for those substances in November 2016, and that on prior occasions he was under the influence of illicit drugs and marijuana while the children were under his care and supervision. The petition also alleged that mother knew of father's substance abuse but failed to protect all four children (the petition named J.J. and Aaron in addition to Kevin and Kimberly), in that she allowed father to have unlimited access to the children. Finally, the petition alleged that Kevin and Kimberly were of such a young age that they required constant care and supervision, and that father's substance abuse interfered with his being able to provide regular care and supervision of them.

The Department filed a report in advance of the detention hearing that set forth the above facts. The report also listed father's extensive arrest history, going back to 2008, with multiple drug-related convictions as well as convictions for possession of weapons. At the detention hearing held on March 7, 2017, the juvenile court found that a prima facie showing had been made, and ordered the children detained from father and released to mother. The court also ordered that father's visits with the children be monitored, not by mother, and that they take place outside of mother's home.

In the report filed for the jurisdiction/disposition hearing scheduled for May 25, 2017, the Department reported on the investigation conducted by the dependency investigator (DI) assigned to the case.

The DI met with all four children and mother five weeks after the detention hearing. The two older children confirmed that father no longer lived with them, and both said they never witnessed any domestic violence between mother and father; J.J. told the DI that when father lived with them he was loud and used bad words. With regard to father's drug use, Aaron said that he did not know about it, and J.J. said that father used to smoke cigarettes in the alley by their home. Kevin and Kimberly were too young to talk with the DI, but they appeared to be happy and had no signs of abuse or neglect. Mother told the DI that she did not know the extent of father's criminal history; she knew he went to jail but did not know why. She also did not know that father was using drugs when they were living together, and was shocked when the social worker told her he tested positive for drugs. She said that father had written to her three times since he was incarcerated, but she did not communicate with him because she did not want to lose her children.

The DI interviewed father on April 10, 2017. Father admitted that he had a drug problem, but he denied ever caring for the children while he was under the influence. He said that mother did not know that he was using methamphetamine. He told the DI that when he was asked by the Department to drug test during its earlier investigation he knew it would come back positive, and when he was asked to leave mother's home, he did. He said that he stopped reporting to probation after the positive test.

Father told the DI that since he had been in custody he had completed two parenting classes. He said that he also requested

substance abuse classes but was told he did not have enough time left to serve to complete the class (his anticipated release date was June 4, 2017), although he was put on the merit waiting list for the class. He also said that he would like to enroll in an inpatient drug program, and that his new probation officer will help him get into one when he is released. Father also reported that he has four other children with a different mother.

The only evidence presented at the jurisdiction hearing was the detention report and the jurisdiction/disposition report. The Department asked the juvenile court to strike the allegation against mother from the petition, but to keep all four children as parties. Counsel for father asked the court to dismiss the petition, arguing there was no evidence of current risk to the children. Counsel noted that there had been an incident between mother and father, but father moved out and mother and father complied with the social worker's instruction to file in family court for custody orders that sought monitored visitation for father.

The juvenile court ordered the petition amended to strike the allegation against mother, and sustained the petition as amended. The court found that all four children were persons described by section 300, subdivision (b) based on father's long history of substance abuse and his testing positive for methamphetamine. Moving on to the disposition, the court terminated jurisdiction as to J.J. and Aaron, ordering that the original family law order between mother and Jesus J. remain in place. As to Kevin and Kimberly, the court stated it "is terminating jurisdiction upon receipt of a family law order, granting mother sole



physical and legal custody and monitored visits for . . . father.” At the Department’s request, the court also ordered father to participate in a substance abuse program.

On June 5, 2017, the juvenile court issued an order stating it was in receipt of a juvenile custody order; it lifted the stay on its previous order and terminated jurisdiction. Father timely filed a notice of appeal from the jurisdiction and disposition orders.

## DISCUSSION

Father contends there was insufficient evidence to support the juvenile court’s jurisdictional finding because there was no evidence that the children had suffered or were at risk of suffering serious physical harm or illness due to his drug use at the time of the jurisdiction hearing. We agree.

Section 300 provides, in relevant part, that a child is within the jurisdiction 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, . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent’s or guardian’s . . . substance abuse.” (§ 300, subd. (b).) The purpose of section 300 is “to limit court intervention to situations in which children are threatened with serious physical or emotional harm” as a result of their parents’ conduct. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 303.) To establish jurisdiction under section 300, subdivision (b), the Department must show specifically how the child

has been or will be harmed by a parent’s conduct. (*In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318.) Moreover, that showing must establish that “*at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur).*” [Citation.]” (*In re James R.* (2009) 176 Cal.App.4th 129, 135, italics added.)

“We review the juvenile court’s jurisdictional findings for sufficiency of the evidence. [Citations.] We review the record to determine whether there is any substantial evidence to support the juvenile court’s conclusions, and we resolve all conflicts and make all reasonable inferences from the evidence to uphold the court’s orders, if possible. [Citation.] ‘However, substantial evidence is not synonymous with *any* evidence. [Citations.] A decision supported by a mere scintilla of evidence need not be affirmed on appeal. [Citation.] Furthermore, “[w]hile substantial evidence may consist of inferences, such inferences must be ‘a product of logic and reason’ and ‘must rest on the evidence’ [citation]; *inferences that are the result of mere speculation or conjecture cannot support a finding* [citations].” [Citation.] “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.” [Citation.]’ [Citation.]” (*In re David M.* (2005) 134 Cal.App.4th 822, 828, disapproved on other grounds in *In re R.T.* (2017) 3 Cal.5th 622.)

There is no dispute in this case that father was a substance abuser. Thus, the only issue is whether there was substantial evidence

presented showing he was unable to provide regular care for the children at the time of the jurisdiction hearing due to his substance abuse such that the children were at substantial risk of serious physical harm or illness. (§ 300, subd. (b).)

Father contends the Department failed to meet its burden because by the time of the hearing he was not in a position to provide such care because he had moved out of mother's home and mother had filed in family court for orders granting her sole legal and physical custody. The Department contends it met its burden because the evidence showed that father was using methamphetamine, which is "an inherently dangerous drug" and Kevin and Kimberly were "inherently at risk of harm due to their tender years."<sup>4</sup> (Citing *In re Alexzander C.* (2017) 18 Cal.App.5th 438, 449; *In re Drake M.* (2012) 211 Cal.App.4th 754, 766-767.) Father has the better argument.

The evidence presented in this case shows that at the time of the jurisdictional hearing, father had not lived in mother's home for six months, he was never left alone with the children when he visited them at mother's home (although the children occasionally visited with father at PGM's home), and mother had filed in family court for sole legal and physical custody. The Department contends that despite this evidence, Kevin and Kimberly nevertheless were at risk of harm because mother did not have control over the type of contact father had with the

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<sup>4</sup> The Department concedes that the juvenile court erred in finding that J.J. and Aaron were persons described by section 300, subdivision (b), because mother was stricken from the petition and their father was not named in the petition; therefore neither parent was found to have engaged in any conduct that placed J.J. and Aaron at risk of harm.

children at PGM's home, and there is evidence that mother was asking for unmonitored visits for father in her family court filing. In light of the undisputed evidence that the children showed no signs of physical or emotional dispute, it is mere speculation that father's contact with the children at PGM's home placed the children at substantial risk of serious physical harm.

This leaves us with a single piece of evidence to show risk of harm: the statement in the detention report that mother's filing in family court sought monitored, rather than unmonitored, visitation for father. But given the undisputed evidence that mother has shown a strong determination to protect her children -- by leaving the home during arguments with father when he was living there, requiring father to move out of the home after he tested positive for drugs, filing for sole custody of the children, and refusing to respond to father's letters while he was in custody -- and the failure of the Department to produce mother's family court filings in response to father's assertion that mother sought monitored, rather than unmonitored, visitation, we conclude this does not constitute substantial evidence showing a substantial risk of serious physical harm to Kevin and Kimberly.

In many respects, this case is similar to *In re A.G.* (2013) 220 Cal.App.4th 675, in which the mother was incapable of caring for her children due to mental illness, but the father had always been, and was currently able to properly care for them and to protect them from harm due to mother's illness. (*Id.* at pp. 677, 684.) As in this case, the juvenile court found jurisdiction under section 300, subdivision (b), ordered that a custody order be filed in family court granting the father

sole legal and physical custody with monitored visits for the mother, and terminated jurisdiction. (*Id.* at pp. 681-682.) Reversing the juvenile court’s jurisdictional and disposition orders, the appellate court observed that “matters such as this one belong in family court, where it ultimately ended up after the juvenile court determined the minors were not at risk in Father’s custody and awarded Father custody and Mother monitored visitation.” (*Id.* at p. 686.) The court held that “[a]t the adjudication hearing, the juvenile court should have dismissed the petition, staying the order until Father obtained from the family court an award of custody to him and monitored visitation to Mother.” (*Ibid.*) Therefore, it reversed the jurisdictional and disposition orders and remanded the matter to the family court for a hearing on the custody and visitation issue. (*Ibid.*)

We do the same here. We reverse the juvenile court’s jurisdictional and disposition orders and remand the matter to the family court for a hearing on custody and visitation with regard to Kevin and Kimberly.

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## **DISPOSITION**

The jurisdiction and disposition orders are reversed. The matter is remanded to family court for a hearing on custody and visitation with regard to Kevin G. and Kimberly G.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.