Filed 5/3/18 In re Ryan G. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re RYAN G. et al., Persons Coming Under the Juvenile Court Law.	B284624 (Los Angeles County Super. Ct. No. DK21376)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RAYVIN G. et al., Defendants and Appellants.	

APPEAL from orders of the Superior Court of Los Angeles County. Natalie Stone, Judge. Affirmed.

Nancy E. Nager, under appointment by the Court of Appeal, for Defendant and Appellant Rayvin G.

Elizabeth C. Alexander, under appointment by the Court of Appeal, for Defendant and Appellant Jonathan W.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel and Sally Son, Deputy County Counsel, for Plaintiff and Appellant.

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The juvenile court exercised dependency jurisdiction over two young boys. The mother of both boys, and the father of one of them, challenge the sufficiency of the evidence supporting the court's exercise of jurisdiction, and the father also challenges the sufficiency of the evidence supporting the removal of his son from his custody. We conclude substantial evidence supports at least one basis for dependency jurisdiction as to each child, as well as the court's removal order. We accordingly affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *The Family*

Rayvin G. (mother) has two sons with two fathers. Ryan G. (Ryan) was born in April 2010, and his father is Ivory G. (Ivory). Myles W. (Myles) was born in June 2015, and his father is Jonathan W. (Jonathan).

B. *Initial Conduct*

In August 2015, Ivory got into a verbal fight with mother and Jonathan, and ended up stabbing mother. Ryan witnessed the melee.

In early November 2016, while attending a funeral and at the reception thereafter, Mother hit Jonathan's sister in the face, threatened to kill her, and vandalized her car with a skateboard and a level.

Over Thanksgiving weekend in November 2016, Ivory was fatally shot. Ryan witnessed either the shooting or its immediate

aftermath. This caused Ryan great trauma and has affected his behavior—he cries, yells, and is sometimes disruptive at school. The Los Angeles County Department of Children and Family Services (Department) got involved soon after Ivory's death, and Ryan's school recommended that mother take Ryan to therapy. Mother steadfastly refused to do so.

In January 2017, school officials reported that Ryan had an injury to his face. The Department interviewed Ryan. Ryan explained that Jonathan had "smacked" or "slapped" him on the back," and that this "whipping" prompted him to flee into his bedroom, where he ran into a metal chair and injured his face. He said mother did "nothing" during the incident. Ryan indicated that this was not the first time Jonathan had hit him with an "open" "hand," and said he was afraid of a "really bad butt whipping" when he went home. Ryan reported that Jonathan had also hit Myles.

Jonathan initially stated he had only hit Ryan one time on the buttocks, but later denied ever hitting Ryan or Myles. During subsequent interviews, Ryan changed his story, stating that Jonathan had "whip[ped] [Ryan's] hand and [his] back very softly."

C. *Subsequent Conduct*

In March 2017, a Department social worker made an unannounced visit to mother's home. The home reeked of marijuana.

Mother tested positive for marijuana. Although mother had previously denied any drug use, she later admitted to using medical marijuana at night, and Jonathan reported that mother smoked two or three times a day.

Jonathan tested positive for marijuana and cocaine. Jonathan admitted to smoking medical marijuana two or three times a day since he was 18 years old. He denied using cocaine, explaining that "there was cocaine in my weed." He indicated that he and mother would invite friends over in the evening, and they would both smoke marijuana.

In April 2017, Mother tested positive for codeine. Jonathan did not submit a sample for testing in April 2017, although it appears that he showed up but the testing lab would not allow him to test because his name was misspelled in their records. Jonathan tested negative for any drugs in early May 2017.

II. Procedural Background

The Department filed its initial petition in early February 2017.

After mother's and Jonathan's drug use came to light, the Department filed the operative first amended petition. In that petition, the Department asked the juvenile court to exert dependency jurisdiction over Ryan and Myles because: (1) Jonathan "physically abused" Ryan by "striking him with a belt" and that mother "knew of the physical abuse . . . and failed to protect" him, which placed Ryan at "substantial risk" of "serious physical harm" and Myles at "substantial risk" of "abuse or neglect" under Welfare and Institutions Code section 300, subdivisions (a), (b), and (j);[1] (2) Jonathan and mother each had a "history of substance abuse" and were "current abuser[s]" of marijuana (as to both) or cocaine (as to Jonathan), which placed Myles (as to Jonathan) and both children (as to mother) at "substantial risk" of "serious physical harm" under section 300,

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

subdivisions (b) and (j); and (3) mother "medically neglected" Ryan by "fail[ing] to provide [him] with the counseling services recommended by school personnel," which placed both children "at risk of serious physical harm, damage, and medical neglect" under section 300, subdivisions (b) and (j).

The juvenile court held the jurisdictional and dispositional hearing on May 10, 2017. Regarding the allegation of physical abuse, the court found no evidence that Jonathan used a belt but found that Jonathan (1) had struck both Ryan and Myles, and (2) had not done so as part of any "reasonable discipline" because Myles (who had been hit while 18 months old) was too young to discipline and because Ryan had been disciplined excessively, as evidenced by the injury he sustained while fleeing from Jonathan's "whipping" and his continued fear of future "butt whipping[s]." The court amended the physical abuse allegation by striking the language regarding the use of a belt and by replacing the term "physical abuse" with "inappropriate physical discipline." Regarding the allegation of drug use, the court found that mother and Jonathan were users of marijuana, and that their use put Myles at substantial risk of serious physical harm due to his young age and put both children at risk when mother and Jonathan would both get high together at night. The court also sustained the allegation that mother did not take Ryan to therapy. The court therefore sustained all of the allegations under subdivision (b) of section 300, but it struck the references to subdivisions (a) and (j).

The juvenile court placed Ryan and Myles with their mother, but ordered them removed from Jonathan because, in its view, he posed a "substantial danger to [their] health" by clear and convincing evidence. The court noted that the Department

was to allow Jonathan to have unmonitored visits after he had four clean drug tests.

Both mother and Jonathan filed timely appeals.

DISCUSSION

I. Propriety of Dependency Jurisdiction

Mother and Jonathan attack each of the three bases for the juvenile court's exercise of dependency jurisdiction. We review this challenge for substantial evidence, asking whether the record contains evidence that is reasonable, credible, and of solid value sufficient for a reasonable trier of fact to find jurisdiction. (*In re I.J.* (2013) 56 Cal.4th 766, 773.) In so doing, we consider the record as a whole, and resolve all conflicts and draw all reasonable inferences to support the juvenile court's findings; we may not reweigh the evidence. (*In re Lana S.* (2012) 207 Cal.App.4th 94, 103 (*Lana S.*).) A single basis for exerting jurisdiction over a child is enough to sustain the juvenile court's exercise of that jurisdiction. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 (*Alexis E.*).)

A. *Inappropriate Physical Discipline*

A juvenile court may exercise dependency jurisdiction over a child if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm . . ., as a result of the failure or inability of his or her parent . . . to adequately supervise or protect the child." (§ 300, subd. (b)(1).) A child suffers "serious physical harm" when he suffers physical harm due to excessive or inappropriate parental discipline. (*In re D.M.* (2015) 242 Cal.App.4th 634, 640-641.) Whether parental discipline is excessive or inappropriate "turns on three considerations: (1) whether the parent's conduct is genuinely disciplinary; (2) whether the punishment is 'necess[ary]' (that is,

whether the discipline was 'warranted by the circumstances'); and (3) 'whether the amount of punishment was reasonable or excessive.'" (*Id.* at p. 641.)

Substantial evidence supports the juvenile court's finding that Jonathan used excessive or inappropriate physical discipline and that mother did not protect the children from that discipline. Ryan's initial report that he had been "whipp[ed]" several times, that the last time he was so afraid that he blindly ran his face into a metal chair, and that he continued to fear a "really bad butt whipping" when he got home from school constitutes substantial evidence that the physical punishment meted out by Jonathan went beyond what was necessary for any of Ryan's transgressions, and was excessive. And striking a child who is 18 months or younger as a method of discipline is also reasonably viewed as unnecessary and excessive in light of the cognitive abilities of children of that very young age.

Mother and Jonathan assail the juvenile court's finding on five grounds. First, they assert that Jonathan denied striking either child, that Ryan's paternal grandfather denied seeing any physical discipline, and that Ryan had no marks or bruises. But Ryan provided conflicting evidence, and, in engaging in substantial evidence review, we resolve all conflicts in support of the juvenile court's ruling. (*Lana S.*, *supra*, 207 Cal.App.4th at p. 103.) Second, mother and Jonathan assert that the Department did not initially recommend that the children be detained from mother and Jonathan. But the Department's recommendation is, at best, contrary evidence that we must disregard in evaluating the substantiality of the evidence. Third, they assert that the juvenile court misunderstood the record when it stated that Ryan feared a "butt whipping" from *mother*,

when Ryan did not specify who would administer the whipping. But the juvenile court cited this evidence as proof that the discipline being administered was excessive; this is true regardless of which parent is the disciplinarian. Fourth, mother asserts that she cannot be held responsible for failing to protect Ryan and Myles from Jonathan's inappropriate discipline because she was not *present* when he hit them. But this ignores that a parent's failure to protect turns on the whether the parent *knows* of the other parent's misconduct (a fact undisputed here)—not on whether she is *physically present* when that misconduct occurs. Finally, both parents assert that the risk of serious physical injury to a child under section 300 must exist at the time of the jurisdictional hearing (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1396), and that the risk that Ryan or Myles will be physically harmed due to inappropriate discipline is now nil because Jonathan is no longer living with the children. But this ignores that mother and Jonathan are still in a relationship, and that Jonathan will be entitled to unmonitored visitation once he has four clean drug tests. The opportunity for further discipline—and thus future risk of physical harm—is not absolved by Jonathan's temporary removal from the household. (Accord, *In re John M.* (2013) 217 Cal.App.4th 410, 419 [fact that mother's whereabouts are unknown does not eliminate risk of future injury due to domestic violence between mother and father].)

B. *Drug Use*

A juvenile court may also exercise dependency jurisdiction over a child if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm . . . by the inability of the parent . . . to provide regular care for the child due

to the parent's . . . substance abuse." (§ 300, subd. (b)(1).) Risk to a child from substance abuse can be established either by (1) proof of "'an identified, specific hazard in the child's environment,'" or (2) proof that the child is of "'tender years,'" in which case "the finding of substance abuse is prima facie evidence of the inability of a parent . . . to provide regular care resulting in a substantial risk of physical harm." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 766-767 (*Drake M.*), italics omitted.)

Substantial evidence supports the juvenile court's finding that Myles is at substantial risk of serious physical harm due to mother's and Jonathan's long-standing use of marijuana. To begin, Myles is still under three years of age, which means he is a child of tender years, and thus risk to him is rebuttably presumed. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1219 [children six years old or younger are considered children of "'tender years'"].) Further, and as the juvenile court noted, mother and Jonathan both use marijuana together at night, leaving no sober adult to tend to Myles—or for that matter, to Ryan.

Mother and Jonathan raise six arguments in response.

First, Jonathan argues that his marijuana use cannot constitute "substance abuse" because it is lawful due to his medical marijuana card. He is wrong. (*Alexis E.*, *supra*, 171 Cal.App.4th at p. 452 ["even legal use of marijuana can be abuse if it presents a risk of harm to minors"].)

Second, mother and Jonathan argue that they are not engaged in "substance abuse" as defined in *Drake M.*, *supra*, 211 Cal.App.4th 754, and Jonathan argues that the Department also did not prove he is in the midst of a "cycle of addiction" as mentioned in *In re Stephen W.* (1990) 221 Cal.App.3d 629

(*Stephen W.*). We reject mother's and Jonathan's *Drake M.* argument. *Drake M.* holds that a parent engages in "substance abuse" only if (1) a medical professional has diagnosed the parent as having a current substance abuse problem, or (2) the parent's substance abuse meets the definition of a substance abuse problem as defined by the Diagnostic and Statistical Manual of Mental Disorders (DSM). (*Drake M.*, at p. 766.) We join several other courts in declining to follow *Drake M.* to the extent it purports to require such a showing in all cases. (*In re Rebecca C.* (2014) 228 Cal.App.4th 720, 726; *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1218.) Even if we were to follow *Drake M.*, the most recent version of the DSM defines "substance abuse" to include drug use resulting in interpersonal problems (such as physical fights) or in a failure to fulfill major role obligations (such as neglect of the household). (*In re Natalie A.* (2015) 243 Cal.App.4th 178, 185.) In this case, mother's fistfight and vandalism with Jonathan's sister, as well as Jonathan's repeated "whippings" of Ryan, constitute interpersonal problems. And *Stephen W.* simply involved an expert who provided testimony about the cycle of addiction; it did not purport to erect it as a legal standard. (*Stephen W.*, at p. 643.)

Third, Jonathan argues that his substance abuse no longer poses any risk because he returned one negative drug test. But it is well settled that a period of sobriety, let alone a solitary test, does not wipe away a long-standing history of drug use (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424; *In re Amber M.* (2002) 103 Cal.App.4th 681, 686-687)—and Jonathan's history dates back to when he was 18.

Fourth, mother argues that she had a negative drug test. This is not entirely accurate. Her April 20, 2017 test came back

negative for *marijuana*, but positive for *codeine*. Even if this test constitutes evidence of mother's abstinence from marijuana, Jonathan reported that mother was a regular user (smoking two or three times a day), such that her brief period of sobriety—while commendable—was not sufficiently lengthy to refute the evidence of her otherwise consistent use of marijuana.

Fifth, Jonathan and mother argue that they never smoked marijuana in front of the children. But the risk attendant to their marijuana use stems from its *effect* on them (in impairing their ability to protect their children), not on where it was ingested.

Sixth, mother argues that Ryan is doing well in school. But that does not rebut the tender years presumption as to Myles or the evidence that mother and Jonathan were both impaired at times when they were solely responsible for caring for the children.

C. *Failure to Take Ryan to Therapy*

A juvenile court may also exercise dependency jurisdiction over a child if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm . . . by the willful or negligent failure of the parent . . . to provide the child with adequate . . . medical treatment." (§ 300, subd. (b)(1).) Although mother's failure to take Ryan to therapy may constitute a "willful or negligent failure . . . to provide . . . adequate medical treatment," there was no evidence that Ryan was at any risk of "serious *physical* harm" as a result of that failure. (Cf. *In re Petra B.* (1989) 216 Cal.App.3d 1163, 1169-1170 [failure to seek medical attention for child's wounds; jurisdiction appropriate]; *In re Adam D.* (2010) 183 Cal.App.4th 1250, 1261-1262 [failure to seek medical attention for child's severe underweight; jurisdiction

appropriate].) However, because there are alternate grounds for jurisdiction as to each child, the absence of evidence supporting this ground is of no moment.

II. Propriety of Removal

Jonathan contends that substantial evidence does not support the juvenile court's removal decision. A juvenile court may remove a child from a parent with whom she resides only if the court finds, 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 [child] if the [child] were returned home, and there are no reasonable means by which the [child's health and safety] can be protected without removing the [child] from the . . . parent's . . . physical custody." (§ 361, subd. (c)(1); *In re Ashly F.* (2014) 225 Cal.App.4th 803, 809.) We review such a finding for substantial evidence, using the same principles described above, except that the courts are still split on whether we must account for the clear and convincing evidence standard. (Compare *In re Ashly F.*, at p. 809 [applying higher standard on appeal] with *In re J.S.* (2014) 228 Cal.App.4th 1483, 1492-1493 [disregarding higher standard on appeal].) We will sidestep the debate by using the higher standard.

Substantial evidence supports the juvenile court's finding, by clear and convincing evidence, that Ryan and Myles would face "a substantial danger to the[ir] physical health [or] safety" if left in the home with Jonathan. The juvenile court's jurisdictional findings that Jonathan's inappropriate discipline poses a substantial risk of serious physical harm to Ryan and Myles and that Jonathan's drug use poses a substantial risk of serious physical harm to Myles constitute a finding, by a

preponderance of the evidence, that the boys face "a substantial danger to the[ir] physical health [or] safety." Jonathan's sole argument that this evidence also does not meet the clear and convincing standard is that he has moved out. However, as discussed above, his absence is voluntary and, ostensibly temporary, so the risk to the children remains.

DISPOSITION

The orders are affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ