Filed 1/10/13 In re D.B. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re D.B. et al, Persons Coming Under the Juvenile Court Law. _____ LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.B., Defendant and Appellant.	B239382 (Los Angeles County Super. Ct. No. CK89748)

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

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

M.B. (mother) appeals jurisdictional findings and dispositional orders made with respect to her children, 11-year-old D.B. and infant Da.B. The juvenile court sustained a non-detained petition alleging mother's marijuana use placed her children at risk of harm within the meaning of Welfare and Institutions Code section 300, subdivision (b).[1] Mother contends the evidence was insufficient to show the children were at substantial risk of harm. Thus, the jurisdictional findings and dispositional orders must be set aside. We reject mother's claims and affirm the orders under review.

FACTS AND PROCEDURAL BACKGROUND

1. *Referral; pre-adjudication proceedings.*

On August 31, 2011, the Department of Children and Family Services (the Department) received an Immediate Response Referral which indicated mother and her newborn daughter had tested positive for marijuana. At the hospital, mother told a social worker she obtained a medical marijuana license eight months earlier to improve her appetite. Mother stated she last smoked marijuana in June of 2011. Further, mother's prenatal caregiver, Dr. Robinson, knew mother was smoking marijuana and advised her against it but gave mother medical records to take to the hospital to show mother would have marijuana in her system when she gave birth.

An R.N. advised the social worker mother's baby had no medical issues or withdrawal symptoms and the only concern was that mother had failed to inform the hospital staff she had a medical marijuana license. Mother signed a safety plan in which she agreed to comply with the Department, complete an on-demand drug test, obtain medical records and show proof of a medical marijuana license.

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[1] Subsequent unspecified statutory references are to the Welfare and Institutions Code.

The next day, mother showed the social worker a medical marijuana license dated that same date. Mother stated she had been told a copy of her previous license could not be released for confidentiality reasons. However, the provider of mother's medical marijuana license advised the social worker mother could obtain a copy of her license by presenting photo identification. Mother agreed to a drug test on September 2, 2011, to determine the level of marijuana in her system but failed to appear.[2] Thereafter, mother agreed to test on September 9, 2011, but again failed to appear.

Mother's prenatal caregiver, Dr. Robinson, told the social worker she was aware mother used marijuana in her second trimester and she advised mother to stop using marijuana. Robinson gave mother medical records which indicated mother had tested positive for marijuana on August 17, 2011.

Mother's 11-year-old son, D.B., denied any abuse or neglect. He had never seen anyone smoke in the home and he felt he was well cared for by mother. Mother advised the social worker D.B.'s father is deceased.

The detention report indicated mother had a prior referral for neglect in December of 2010. The referral indicated mother lived with maternal grandmother and smoked marijuana in front of D.B. who slept on the floor, attended school in dirty clothes and made statements indicating he was unhappy. Mother admitted marijuana use but declined to submit to a drug test, asserting her admission rendered testing unnecessary. The referral was closed as inconclusive.

At a team decision meeting on September 15, 2011, Da.B.'s father (father) stated he has been using marijuana for almost 10 years but currently uses it only occasionally and does not smoke in the presence of the children. Mother stated she has been using marijuana for five to six years and has had a medical marijuana

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[2] One social report indicated mother appeared six days later but was not permitted to test. Another report indicated mother was not able to urinate with a monitor watching her.

license for the last 18 months. Mother indicated she was not willing to participate in voluntary services and would "take her chances in court."

The Department filed a non detained dependency petition which alleged the children were dependent within the meaning of section 300, subdivision (b) in that Da.B. was born suffering from a detrimental condition consisting of a positive toxicological screen for marijuana and mother's illicit drug use endangered the child's health and safety. A second count alleged father was aware of mother's illicit drug use during pregnancy and failed to protect the child.

On September 20, 2011, the juvenile court released D.B. to mother, released Da.B. to mother and father, and ordered the Department to provide family maintenance services.

In an interview conducted for the jurisdiction report, mother indicated she last used marijuana on October 1, 2011, and she uses it three to four times a week. Mother stated father was aware mother smoked marijuana during her pregnancy for appetite assistance. Mother smokes only at night when the children are either asleep or being supervised by a relative or father. Mother stated she was unwilling to participate in voluntary services and asserted she did not have a substance abuse problem. Mother works full time as a fitness trainer.

Father stated he was aware of mother's marijuana use for medical purposes. However, father denied he was aware mother used marijuana while pregnant. Father stated he works 60 to 70 hours a week and does not have time to participate in services, drug testing or programs.

A last-minute information form filed November 16, 2011, indicated mother told the social worker she does not want anyone from the Department visiting her children without a court order. The next day, the juvenile court ordered mother to allow social workers to visit the children.

A last-minute information form filed January 5, 2012, indicated mother refused to allow the social worker to complete two visits in December of 2011. On December 7, 2011, mother refused to disrobe Da.B. to permit the social worker to ensure the child had no marks or bruises.

2. *Adjudication*.

Dependency investigator Jakita Williams testified the children were at risk because mother had marijuana in her system while pregnant with Da.B., mother uses marijuana while the children are in her care and the Department has not been able to assess the risk to the children because mother has not cooperated in drug testing, thereby preventing the Department from measuring her level of marijuana use. Williams indicated the children were at risk in that mother's marijuana use may adversely affect her ability to supervise the children.

After hearing argument, the juvenile court indicated it intended to sustain the petition as to mother because the Department had been unable to determine the amount of marijuana mother consumed and mother continued to smoke marijuana after her doctor told her to stop. Although Da.B. currently is healthy, the long-term effects of prenatal marijuana exposure were unknown. Further, mother was uncooperative in that she would not allow social workers to conduct visits or welfare checks on the children. Also, the juvenile court had ordered mother to drug test but she refused to comply. The juvenile court indicated children need their parents all of the time, especially when they are young, and the fact mother smoked marijuana while pregnant and continued to smoke caused the juvenile court to conclude mother required family maintenance services. Given mother's lack of cooperation, the only way to put the needed services in place was to take jurisdiction.[3]

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[3] As sustained, the petition alleged Da.B. was born suffering from a detrimental condition consisting of a positive toxicology screen for marijuana which would not exist except as the result of unreasonable acts by mother, placing the

The juvenile court ordered family maintenance services for both parents, ordered mother to participate in random drug testing, complete a parent education program and to cooperate with family maintenance services. When mother's counsel objected to a parenting class, the juvenile court indicated "someone who uses drugs when they are pregnant [has demonstrated] a lack of parental responsibility."

CONTENTIONS

Mother contends the jurisdictional finding and dispositional orders must be reversed because, at the time of the jurisdiction hearing, there was no substantial evidence her children currently were at substantial risk of suffering serious physical harm as a result of neglect. (*In re B.T.* (2011) 193 Cal.App.4th 685, 692.)

DISCUSSION

1. *The juvenile court properly sustained the non-detained dependency petition.*

At a jurisdictional hearing, a finding that a child is a person described in section 300 must be supported by a preponderance of the evidence. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248; § 355.) We review jurisdictional findings under the substantial evidence standard. (*In re E.B.* (2010) 184 Cal.App.4th 568, 574-575.) 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 Brison C.* (2000) 81 Cal.App.4th 1373,

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child at risk of physical harm and damage. Mother's illicit drug use endangers the child's physical health and safety places the child at risk of physical harm and damage.

A second count alleged mother has a history of illicit drug use and is a current user of marijuana which renders mother incapable of providing regular care for the children. Mother used illicit drugs during her pregnancy with Da.B., had a positive toxicology screen for marijuana at the time of Da.B.'s birth and had a positive toxicology screen for marijuana while pregnant with Da.B. on August 17, 2011. Father knew of mother's drug use but failed to protect the child. Mother's illicit drug use and father's failure to protect the child endangers the child's physical health and safety of places the children at risk of harm.

13781379.) "[W]e review the record in the light most favorable to the court's determinations." (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.) We do not reweigh the juvenile court's determinations of fact or credibility. (*Ibid*.)

Mother argues her case is similar to *In re David M.* (2005) 134 Cal.App.4th 822, 829-830 and *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1346, which held marijuana use, without more, does not support a finding of jurisdiction pursuant to section 300, subdivision (b). We agree with this general proposition. (See also *In re Drake M.* (2012) 211 Cal.App.4th 754.) However, mother's case is distinguishable from the cited cases.

David M. held evidence of the mother's mental and substance abuse problems and the father's mental problems was never tied to any actual harm or substantial risk of serious harm to the child, and therefore jurisdiction was unwarranted. (*In re David M., supra,* 134 Cal.App.4th at p. 829.) In *David M.*, the mother tested positive for marijuana at the time of her child's birth but the child tested negative. (*Id*. at p. 825.) The parents cooperated with services offered and, before the jurisdictional hearing, the mother tested negative for drugs approximately 18 times and all missed tests were excused. (*Id.* at p. 830.)

Jennifer A. found insufficient evidence to support a finding that return of children to the mother would create a substantial risk of detriment. (*Jennifer A. v. Superior Court, supra,* 117 Cal.App.4th at p. 1345.) The mother had not been diagnosed as having a substance abuse problem, she had completed approximately 84 drug-free tests, and there was no evidence of a drug problem that affected her parenting skills. (*Id.* at pp. 1343, 1346.) In each case, there was no evidence the parent was not providing a home " 'free from the negative effects of substance abuse' " as required by section 300.2.[4] (*Id*. at p. 1346.)

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[4] Section 300.2 states, in part: "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."

Here, mother used marijuana during her pregnancy against medical advice and mother and Da.B. tested positive for marijuana at the time of the child's birth. Mother admitted she continued to use marijuana three to four times a week but refused to drug test to permit the Department to determine the level of marijuana in her system and refused to cooperate with the Department without a court order, stating she would take her chances in court. The juvenile court reasonably could conclude mother's conduct created a substantial risk of serious physical harm to the children within the meaning of section 300, subdivision (b). The court's decision to declare the children dependent, while allowing them to remain with mother, was a reasonable and appropriate solution to the situation presented.

Mother complains the juvenile court speculated Da.B. may suffer harm in the future due to mother's conduct in exposing the child to marijuana in utero. (*In re David M., supra*, 134 Cal.App.4th at pp. 829-830.) We find the juvenile court instead assessed the risk of harm to the children based on mother's use of marijuana against her doctor's advice while she was pregnant, coupled with her refusal to cooperate with drug testing to determine the amount of marijuana mother consumed. "The state, having substantial interests in preventing the consequences caused by a perceived danger is not helpless to act until that danger has matured into certainty. Reasonable apprehension stands as an accepted basis for the exercise of state power." (*In re Eric B.* (1987) 189 Cal.App.3d 996, 1003.)

Nothing in our recent opinion in *In re Drake M.* requires a different result. In *Drake M.* the Department alleged a child was at risk of serious physical harm because the child's father "(1) continued to test positive for marijuana on drug screens throughout the dependency proceedings; (2) admitted to smoking marijuana up to four or five times per week; and (3) [transported the child] from daycare and cared for him alone four hours after smoking marijuana." (*In re Drake M., supra*, 211 Cal.App.4th at p. 764.) *Drake M.* concluded the evidence failed to show the father was a substance abuser or that he had failed or was unable to supervise or protect the child. On the latter point, *Drake M.* noted "father possessed a valid

recommendation from a physician to use marijuana for treatment of his chronic knee pain. His continuing usage and testing positive for cannabinoids on drug screens, without more, is insufficient to show [the child] was at substantial risk of serious physical harm or illness." (*In re Drake M.*, *supra*, 211 Cal.App.4th at p. 768.)

Drake M. concluded the Department had failed to show a link between father's usage of medical marijuana and risk of serious physical harm or illness to the child. Here, as has been noted, mother used marijuana while pregnant and she refused to drug test to determine the level of risk to her children.

Finally, although mother's conduct is not as egregious as the conduct of the father in *In re Alexis E.* (2009) 171 Cal.App.4th 438, another case cited by mother, nonetheless, as in *Alexis E.*, there was more than evidence of mere marijuana use by mother.

In sum, we conclude the juvenile court reasonably could find mother's lack of concern for the well being of her unborn child, combined with her ongoing refusal to submit to drug testing, warranted an order sustaining the non-detained petition as the evidence permitted the juvenile court to conclude, by a preponderance of the evidence, the children were at risk of harm due to neglect occasioned by mother's marijuana use.

2. *Dispositional orders*.

In her opening brief, mother attacks the dispositional orders based exclusively on her assertion the jurisdictional findings are not supported by substantial evidence. (See *In re R.M.* (2009) 175 Cal.App.4th 986, 991.) Because we conclude mother's jurisdictional claims fail, her assault on the dispositional orders similarly fails.

In the reply brief, mother asserts the order requiring her to participate in parenting education was inappropriate because the evidence indicated the children were safe in her care. This contention fails. At the disposition hearing, the juvenile court made an express finding mother required parenting education, citing her use of marijuana while pregnant. We find no abuse of the juvenile court's discretion. (See *In re Nolan W.* (2009) 45 Cal.4th 1217, 1229; § 362, subd. (c).)

DISPOSITION

The orders of the juvenile court are affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.