

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re JULIUS D., et al., Persons Coming
Under the Juvenile Court Law.

B238287
(Los Angeles County
Super. Ct. No. CK87410)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

EDUARDO D.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County.

Marguerite D. Downing, Judge. Reversed.

Kate M. Chandler, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel and Emery El Habiby, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for Minors.

* * * * *

Father Eduardo D. appeals the juvenile court order that he enroll in a drug treatment program. He contends the order violates a negotiated settlement of this case and that there was insufficient evidence to support the court's order. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

The children involved in this dependency case are Julius D., born April 2008, and Hazel D., born April 2010. They had been living with their mother in the home of their maternal Grandmother when they came to the attention of the Los Angeles County Department of Children and Family Services (DCFS). Mother had significant mental problems, as well as drug issues, and was hospitalized in the psychiatric unit at Harbor UCLA Medical Center on January 18, 2011 when DCFS became involved. Mother had amphetamines in her system and required substance abuse treatment. She was released from the psychiatric unit on January 21, 2011.

At the time of the hospitalization, Grandmother reported to DCFS that Mother's problems had begun after Julius's birth, and that she was also depressed after Hazel's birth. Though Grandmother had sought psychiatric treatment for Mother in the past, Mother never managed to follow through, and was aggressive and confused when not taking her medication. There was no dispute that Mother was not able to take care of the children at that time. According to Grandmother, Father visited the children on the weekends, but was irresponsible and "does not help mother at all."

The children next came to the department's attention a few months later in the middle of April, when Grandmother called the police due to Mother's refusal to take her medication and aggressive behavior. The children were taken into protective custody on April 11 and taken to a hospital emergency room because both had infections. Antibiotic treatment was necessary. Father was interviewed by the social worker on the following day. He said that Mother was mentally ill and needed help, and expressed interest in caring for his children. He indicated he had been employed since 2010 as a cable

installer. He indicated that he was willing to get a restraining order to keep Mother away from the children, if necessary. Grandmother and Mother's boyfriend had accused Father of giving Mother drugs, but Father denied having given her any drugs.

Father stated he had a prescription for medical marijuana, and provided a copy of his medical marijuana card to the social worker. He admitted having been arrested for possession and sales of narcotics and having been sentenced to jail for one year. He stated that he had completed probation, gotten a job and turned his life around. He claimed to have "stopped taking meth over a year ago." He told the social worker that he loved his children and was willing to work with DCFS. He had beds and clothing for the children and someone to help him take care of them. He agreed to undergo Live Scan¹ and on demand drug testing.

Section 300 Petition

On April 14, 2011, DCFS filed a petition pursuant to section 300, subdivisions (a) and (b)² on behalf of Julius and Hazel. The petition alleged that Mother had a history of violent altercations in the children's presence in which she struck Grandmother and threw things at her, and kicked and struck Father causing his nose to bleed (§ 300, subd. (b)(1)). The petition also alleged that Mother and Father had a history of substance abuse; Mother had positive toxicology for methamphetamines and marijuana and was a current user (§ 300, subd. (b)(3)); and Father had a history of illicit drug use and was a current abuser of ecstasy and marijuana (§ 300, subd. (b)(5)). Furthermore, the petition alleged that Mother had a history of mental and emotional problems, including a diagnosis of a psychotic disorder not otherwise specified. (§ 300, subd. (b)(4)).

¹ Live Scan is an electronic fingerprinting system that provides a vehicle for quickly checking an individual's criminal background. (See Health & Saf. Code, § 1522.04; *Los Angeles County Dept. of Children & Family Services v. Superior Court (Sencere P.)* (2005) 126 Cal.App.4th 144, 149, fn. 2.)

² All further statutory references shall be to the Welfare and Institutions Code unless otherwise noted.

Father continued to deny drug use other than medicinal marijuana and stated “I am not an abuser of that stuff. Those allegations of me using ecstasy are not true.”

In a last minute information for the court, filed April 14, 2011, DCFS reported that Mother and Grandmother appeared at the DCFS offices at 2:09 p.m. on the day of the detention hearing. Grandmother produced a photograph of Julius in a stroller with an open beer can in his hands and claimed that Father gave her grandson beer. Mother claimed to have spent the previous night with Father. DCFS was concerned that the children would be at risk with Father if he continued to allow Mother to visit.

At the detention hearing on April 14, 2011, Father asked the court to release the children to his care because the allegation regarding his drug use was not true. He had positive employment reviews, was able to provide for his children and had made daycare arrangements. He was willing to continue random drug testing. He stated that he would obtain a restraining order against Mother if the court imposed that condition. The court ordered the children detained with monitored visitation for the parents. The court set a pretrial investigation hearing and gave DCFS discretion to release the children to Father on the condition that Mother did not reside in the home with them.

An interim review report dated April 21, 2011 assessed Father’s suitability as caretaker of the children. It reported that Father’s home was safe, he had arranged for childcare while he was working, and he was willing to adhere to the DCFS case plan and obtain a restraining order against Mother to protect the children. The report reminded the court that Father had a prescription for medical marijuana. Father stated that he was born with scoliosis and he suffered a recent back injury when he fell from a roof. He did not provide any medical documentation to DCFS to corroborate the injuries. DCFS recommended that Julius and Hazel be released to Father on the condition that he randomly drug test because of their concerns regarding his history of using drugs.

At the hearing on April 21, 2011, the court released the children to Father under certain conditions. Father was required to randomly drug test. He was not to monitor

Mother's visits with the children. He was also ordered not to allow Mother to reside with him and the children.

Jurisdiction/Disposition Report

In a report filed May 6, 2011, DCFS reported that the children remained in Father's care. Father was interviewed regarding the allegations in the petition which pertained to him. He denied having a substance abuse problem. He stated that he became extremely anxious and depressed when his children were taken into protective custody. His friends tried to help by giving him a muscle relaxer which he assumed was an ecstasy pill. He stated that he had not used methamphetamines in over one and a half years. He admitted having done "stupid things" in the past, but did not want to talk about them.

DCFS noted its concerns about Father's use of medicinal marijuana. After Father fell from the roof he did not obtain X-rays or seek alternative medical treatment for pain but instead saw it as an opportunity to use marijuana. DCFS was concerned that his alcohol use combined with marijuana would impair his ability to take care of his children. DCFS recommended that Father explore alternative pain relievers, participate in parenting classes, attend AA meetings, and continue with random drug testing.

At a May 6, 2011 hearing, the parties agreed to submit the matter to mediation.

In a last minute information for the court, filed June 13, 2011, DCFS reported that the children continued to live with Father. The children were doing well and there were no safety concerns. Father had submitted to an "Upfront Assessment" and continued to test positive for cannabinoids.

Mediation Agreement

The parties participated in a successful mediation before mediator Jackie Fox, and the mediation agreement was signed by all parties and filed with the court on June 13, 2011.

Father's case plan provided: "Father is to do random drug testing as well as on demand drug testing. If he tests positive for any illicit drug other than marijuana, then he must do a DCFS approved substance abuse program with random testing."

Adjudication Hearing

At the June 13, 2011 adjudication hearing, the juvenile court noted that there had been a successful mediation and Father was stricken from the petition which had been amended. The court sustained amended allegations of the petition as to Mother (§ 300, subds. (b)(1), (b)(3) and (b)(4)) based on the reports and mediation agreement submitted. Father was found to be a nonoffending parent.

Julius and Hazel were declared dependents of the court. The court found "no risk of detriment to the children being placed with the father" and issued a home-of-parent-father order. The court stated: "The father is to be provided with family maintenance services, including random and on-demand drug testing. If there are any missed or positive tests or any drug other than marijuana, he must complete a substance abuse program." The matter was continued to December 12, 2011, for a review hearing.

Section 364 Status Review Hearing

The DCFS report prepared for the December 12, 2011 hearing stated that the children were in Father's care, and appeared to be physically, developmentally and emotionally healthy. They had adjusted well in their Father's home and Father was observed to be very caring and nurturing with the children. He continued to be employed and had a strong support system of neighbors that helped with day care and transportation for the children.

The report noted that Father had missed a random drug test on June 1, 2011.³ Social worker Santos, who began handling the case on July 6, 2011, informed Father that he was under a court order to enroll in a substance abuse program if he missed a test.

³ After disposition on June 13, 2011, Father submitted to 11 random drug tests. The tests took place on June 28, July 14, July 22, August 17, August 30, September 15, September 27, October 14, October 25, November 1, and November 23. On each occasion he tested positive for marijuana only.

Santos appeared not to be aware of the fact that the court order could only impose prospective conditions. Santos provided Father with referrals to substance abuse programs on a monthly basis but he refused to enroll. Father stated that if he enrolled in a drug program he would be in the presence of drug addicts and influenced to use drugs again. He stated he would only enroll in a program if directed to do so by the court.

The report again reminded the court that Father had a prescription for medical marijuana, and that he had not provided DCFS with any medical documentation regarding his scoliosis or the injuries he sustained falling from a roof.

DCFS recommended that the children remain with Father; that he continue to receive three more months of family services; and that he complete a substance abuse program.

At the hearing, the court stated that it had read and considered the social worker's report and ordered Father to complete a substance abuse program.

Father's counsel argued that DCFS had verified Father's prescription many times and that the only drug test he had missed was on June 1, 2011, prior to disposition and the case plan entered into on June 13, 2011. The court rejected these arguments and stated that Father's testing levels had not decreased which indicated to the court that he was using marijuana on a regular basis. Furthermore, the court stated that Father failed to provide DCFS with confirmation of the medical condition that required him to use medicinal marijuana.

Father's counsel renewed his objection and stated that there had never been a discussion regarding a decrease in Father's testing levels. In ordering the substance abuse program the court stated it was "based on the fact that he continues to test positive. The department's report indicates that he has not provided any medical documentation for his scoliosis, the injury he sustained. The department is concerned about his current drug use and supposedly he has a prescription. He has a long history of using drugs. His children are very young, and so in light of that, the court is inclined to order the program." Father timely appealed.

DISCUSSION

Father contends that the court erred in ordering him to complete a substance abuse program because (1) the order violated the terms of the negotiated settlement which was approved by the court and formed the basis for appellant's case plan; and (2) substantial evidence did not support the juvenile court's modification of the case plan. We agree.

A. Standard of Review

A juvenile court has broad discretion to fashion dispositional orders based on “what would best serve and protect the child's interest.” (*In re Neil D.* (2007) 155 Cal.App.4th 219, 225.) The department argues that the order challenged here is subject to the abuse of discretion standard of review and some courts have applied that standard in challenges to orders providing for substance abuse components in reunification plans. (See, e.g., *In re Neil D.*, *supra*, at p. 226; *In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1008.)

But other courts applied the substantial evidence standard of review as in *In re Sergio C.* (1999) 70 Cal.App.4th 957, 960. In that case, although only the mother had abused drugs, a testing order was imposed on the father. The Court of Appeal reversed, holding the mother's unsworn statement to the social worker did not constitute sufficient evidence that the father had a drug problem. Likewise, in *In re Basilio T.* (1992) 4 Cal.App.4th 155, 172, the appellate court reversed a drug condition as to both parents that was based on only vague assertions that the mother “behaved somewhat out of the usual and was obsessed with discussing a fortune-making invention”

We adopt the substantial evidence test to review the court's findings. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) “In reviewing the sufficiency of the evidence on appeal, we look to the entire record for substantial evidence to support the findings of the juvenile court. [Citations.] Evidence sufficient to support the court's finding must be reasonable in nature, credible, and of solid value; it must actually be

substantial proof of the essentials that the law requires in a particular case. [Citation.]” (*In re N. S.* (2002) 97 Cal.App.4th 167, 172.)

B. The Court’s Order Was Contrary to the Agreement Between the Parties

On June 13, 2011 the parties agreed to mediation and negotiated a settlement that was “intended to be a complete agreement by all parties and counsel.” Under the terms of the settlement, DCFS obtained jurisdiction over the minors based on sustained allegations over Mother but Father was found to be nonoffending. DCFS was to provide services to Father and the minors. Father was subject to random drug testing with the further condition that if he tested positive for any illicit drug other than marijuana, he would enter a DCFS approved substance abuse program. Both the Court and Father accepted the settlement agreement and its terms and adopted the case plan which included Father’s obligation to submit to random drug testing. The court added an additional requirement that Father would have to enter a substance abuse program if there were any missed tests.

Between the dates of disposition on June 13, 2011 and the review hearing on December 12, 2011, Father fully complied with the case plan. He submitted to 11 random drug tests and did not test positive for any drug other than marijuana. He did not miss any test dates during that period.

Negotiated agreements between the parties prior to adjudication have been recognized by the court. In *In re N.M.* (2011) 197 Cal.App.4th 159, after the Father and the department agreed to a mediated settlement of the case the Father sought to appeal the jurisdictional findings. The appellate court rejected father’s argument noting that there was “no reason to allow an individual to negotiate a settlement and then challenge the agreed-upon language for the first time on appeal.” (*Id.* at p. 166.) The court stated that the negotiated settlement was essentially a contract and the parties were entitled to enforcement of the terms of their agreement. (*Id.* at p. 167.)

Here, the case worker relied on a drug test Father missed before the negotiated settlement. The report she wrote was based on the mistaken belief that Father had violated his case plan. The recommendation to the court that Father complete a drug abuse program was based on that mistake. Father abided by the terms of the agreement and was in complete compliance with his case plan. The court order effectively revisited and changed the agreement to Father's detriment.

The court also based its order on the fact that Father had continued to test positive at the same levels for marijuana. But there was no outstanding order or requirement that those levels be reduced.

Although the social worker expressed concern that Father had never provided documentation of his scoliosis, there is no record that Father was ever required to provide such information as part of the case plan.

C. Substantial Evidence Does Not Support the Court's Order

Substantial evidence did not support the court's order that Father should enter a substance abuse treatment program. Father continued to be gainfully employed in a responsible position. He had the same employer since September 20, 2010, before the proceedings began, and received numerous workplace commendations which the court commented on favorably. No concern was expressed about father's ability to provide for his children. There was no evidence that he physically or emotionally abused the children. To the contrary, the reports indicated that the children were healthy, had adjusted well, and Father was described as a caring and nurturing parent. There was no evidence that Father acted inappropriately with the children and Father was cooperative with the social workers and complied with the case plan.

Father's use of medicinal marijuana was not the reason the children came to the attention of the juvenile court and there was no evidence that it caused Father any mental or physical impairment affecting his parenting skills. There was no evidence that Father used any drugs other than medicinal marijuana, or that he ever smoked marijuana around

the children. There was no medical testimony that the amount of Father's use was an abusive use of medicinal marijuana given his health conditions. (See *People v. Wright* (2006) 40 Cal.4th 81, 97 [statutory limits on the amount of marijuana that can be possessed were intended to be threshold and not ceiling; amount permissible is governed by medical evidence].)

The reasons cited by the court were not sufficient to support the order. Father's inability to provide medical documentation of his claimed injury and scoliosis was known prior to the disposition, but there was no reference to it in the negotiated agreement. No documentation was required under the terms of the case plan approved by the court. Nor was Father ordered by the court to produce any documentation prior to December 12, 2011. Similarly, the requirement that Father's testing levels should have decreased over time does not appear in the record. Father's counsel denied that the issue was previously discussed and the negotiated settlement only discussed the consequences of Father testing positive for illicit drugs other than marijuana.

In arguing that substantial evidence supports the court's ruling, the department submits a list of Father's bad acts including his criminal record, past methamphetamine use and current alleged alcohol abuse. But all of these facts were known to the department at the time they reported to the court that Father did not pose a risk to the children. The facts were also before the juvenile court when it considered the department's recommendation, placed the children with Father and ordered implementation of the mediated case plan. Future harm cannot be established by speculation without evidence of a specific defined risk of harm. (See generally *In re David M.* (2005) 134 Cal.App.4th 822, 830.)

DISPOSITION

The order of the juvenile court that Father enroll in a drug treatment program is reversed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ