Filed 8/8/17 In re Mason C. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re MASON C. et al., Persons Coming Under the Juvenile Court Law.	B277085 (Los Angeles County Super. Ct. No. CK77299)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. HEIDI C., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Daniel Zeke Zeidler, Judge. Reversed.

Emery El Habiby, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Kimberly Roura, Deputy County Counsel, for Plaintiff and Respondent.

Heidi C. (mother) appeals from the juvenile court's jurisdictional and dispositional findings and orders regarding her children Mason C. (born May 2015) and Roman C. (born March 2016). Mother contends substantial evidence did not support the court's jurisdictional findings pursuant to Welfare and Institutions Code section 300, subdivisions (b) and (j),[1] based on her substance abuse and mental health issues, or on the children's older sibling having previously received permanent placement services. She also contends there was insubstantial evidence supporting the court's dispositional order removing the children from her custody, and the court abused its discretion in ordering her to complete a drug program.

We agree the evidence did not support the juvenile court's jurisdictional findings and order, and therefore reverse.

BACKGROUND

I. Events Leading to Juvenile Dependency Petition[2]

The family consists of mother, Maxwell C. (father),[3] and the two children, Mason and Roman. The family came to the attention of the Los Angeles County Department of Children and

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

[2] These facts are taken primarily from a detention report prepared by DCFS and filed on March 18, 2016.

[3] Father is not a party to this appeal. Our recitation of the facts therefore focuses on facts relevant to mother's appeal.

Family Services (DCFS) through a referral alleging mother had a positive toxicology screen for marijuana when she gave birth to Roman on March 13, 2016.

This was not the first time mother had come to DCFS's attention. Mother has an older child, Riley P., on whose behalf DCFS filed a petition in 2009, when he was five months old. At the time of Riley's birth, he tested positive for amphetamine and cocaine. Two months later, mother tested positive for methamphetamine, amphetamine, cocaine, and marijuana. Mother left Riley in the care of the children's maternal great-grandmother, whose home was unsanitary, with spoiled food, flies, dirty clothing, and trash, and with dog feces throughout the home that was not picked up and that the family stepped in as they walked. The juvenile court sustained a dependency petition on Riley's behalf, removed him from mother's custody, and placed him permanently with his maternal uncle through legal guardianship pursuant to section 360, subdivision (a) [providing for legal guardianship where parent does not wish to reunify with the child].

According to the referral in the present matter, when Roman was born, he tested negative for marijuana. At the hospital, a nurse said Roman was doing well, and mother was very attentive to him and seemed to bond easily with him.

Mother told a social worker at the hospital that she was "extremely bipolar" but was not on a medical regimen. Although a doctor prescribed Abilify and Prozac, she had not taken them for years. She stopped taking prescribed medications while pregnant with Riley, fearing that they would harm the unborn child.

Mother said she and father both had medical marijuana recommendations. She said both that she smoked marijuana "off and on" while pregnant with Roman and that she smoked marijuana daily during her pregnancy. She told a DCFS social worker (CSW) that she self-medicated with marijuana to help with nausea and anxiety. She admitted to an occasional "very serious outburst," and said marijuana calmed her down.

Mother did not work. She and father both had been declared disabled based on their mental health condition, and received Social Security disability benefits.

Mother told the CSW she believed she and father were good parents. She had not sought to reunify with Riley because when he was born, she was not prepared to be a parent and believed her brother could offer him a better life.

Mother and father were living with the children's maternal great-grandmother. During the initial investigation after receiving the referral, the CSW found the home "cluttered with a very repugnant smell permeating throughout the home."

After the initial investigation, the CSW concluded there was a substantial risk to the physical and emotional health of Mason and Roman. On March 15, 2016, the children were detained from the parents and placed in shelter care.

On March 17, 2016, mother and father visited a mental health urgent care center for evaluation. Mother was diagnosed with bipolar disorder, prescribed Latuda and Cogentin, and given a referral to a psychiatrist.

II. Petition and Detention Hearing

DCFS filed a petition against mother and father on March 18, 2016, alleging juvenile court jurisdiction pursuant to section 300. The petition alleged two counts against each parent under

subdivision (b) related to substance abuse and untreated mental and emotional conditions, and a count against mother under subdivision (j) related to substance abuse, noting Riley had received permanent placement services for that reason.

A detention hearing was held on March 18, 2016. The court found a prima facie showing that the children were described by section 300, subdivision (b) and ordered them released to the parents under DCFS supervision. The court ordered the parents to comply with several conditions, including that they take prescribed psychotropic medications and submit to drug testing. It ordered them not to use marijuana unless on written recommendation of a psychiatrist, nor to be caretakers while under the influence of marijuana. It ordered mother not to breastfeed.

III. Events Between the Detention and Jurisdiction/ Disposition Hearings

DCFS prepared a jurisdiction/disposition report in advance of the jurisdiction/disposition hearing.

In an interview for that report, mother said her mental issues did not render her incapable to care for the children. She also said that smoking marijuana did not render her incapable of taking care of Mason, who was 10 months old at the time. She said she "didn't smoke right before" caring for him, and said that now, her children were well cared for and she did not abuse marijuana. She said she began using marijuana at the age of 12 and using crack cocaine and methamphetamine at the age of 13. She had mental health issues while growing up, and as a result of failing to cooperate when her family sought help, she had "a few psychiatric hospitalizations."

Mother reported she was waiting for clearance from her primary doctor and a psychiatrist to begin taking prescribed psychotropic medications, because of a heart condition. DCFS reported both parents tested positive for cannabinoids on three dates in April and one in early May. They tested negative for all other substances. The family continued to reside with the great-grandmother, and were saving money to move out. Mother was refraining from breastfeeding, as ordered.

In April 2016, the family was referred to Family Preservation Services, which reported that during weekly scheduled home visits, the children were clean, and the parents were preparing breakfast or formula for the infant. The home environment was clean. During weekly home visits, the children appeared to be "safe, clean, fed and cared for."

In an unannounced visit on May 6, 2016, the social worker observed the children to be "free of visible marks and bruises." The parents were making breakfast, and father was holding one child and giving him a bottle of milk. The living space was messy, and "there was evidence of dog feces that were not picked up."

Some tension existed regarding the family continuing to live with the great-grandmother, who had threatened to ask them to leave. The family was given referrals to family shelters and housing assistance programs, but had not followed through on those referrals.

Family Preservation Services provided additional information about the parents' efforts to obtain therapy and psychiatric care. Mother had been unable to complete an intake appointment. Both parents had appointments with a psychiatrist on May 26, the date of the jurisdiction/disposition hearing.

DCFS reported it was concerned about the parents' history of substance abuse, unresolved mental health history, and choice to self-medicate with marijuana, and the fact that they were caring for young children. It believed there was sufficient evidence to sustain the allegations in the petition. It recommended that the children be removed from the parents and suitably placed.

On May 26, 2016, the date of the jurisdiction/disposition hearing, DCFS filed an ex parte application seeking removal of the children from the parents' custody, based on the fact that they were still testing positive for marijuana and continued to self-medicate. (See § 385 [modification of orders].) In the application, DCFS reported, "It is unknown if the parents are caring for the children while they are under the influence."

IV. Jurisdiction/Disposition Hearing

At the jurisdiction/disposition hearing, the court noted the parents displayed long-term mental health issues that were untreated even after the parents were told what psychotropic medications to take, and self-medicated with marijuana instead of taking the prescribed medications.

The court combined the petition's two counts against mother under section 300, subdivision (b) into a single count, and sustained it as amended, to read: "The [children's] mother, Heidi [C.], has a history of substance abuse including methamphetamine, amphetamine, cocaine and marijuana, and is a current user of marijuana which renders the mother unable to provide regular care of the children. Although the mother stopped taking her bipolar medication because of the pregnancy, the mother used marijuana during the mother's pregnancy with the child Roman and had a positive toxicology screen for

marijuana on 03/12/2016. The mother has failed to resume psychiatric care. The children are of such a young age and require constant care and supervision and the mother's substance abuse and untreated mental health issues interfere with providing regular care of the children. The children's sibling, Riley [P.], was removed [from] the mother due to substance abuse. The mother's substance abuse and untreated mental health issues endanger the children's physical health and safety, create a detrimental home environment and place the children at risk of serious physical harm, damage and danger."

The court made identical amendments to a count against mother under subdivision (j) and sustained that count as well. The court dismissed the two counts against father.

Proceeding to disposition, the court declared the children dependent children under section 300, subdivisions (b) and (j) and removed them from mother's custody, placing them in the home of father under DCFS supervision and ordering father to make arrangements for them to stay in the home of the paternal grandmother, if appropriate.

The court ordered family maintenance services for father and enhancement services for mother. Mother's services included a full drug and alcohol program with aftercare. The court ordered mother to take all prescribed psychotropic medication, and ordered monitored visits with the children.

Mother timely appealed the juvenile court's orders.

DISCUSSION

I. Standard of Review

We review juvenile court orders for substantial evidence, viewing the record as a whole in the light most favorable to the juvenile court's order and indulging every inference and resolving

all conflicts in favor of the court's decision. (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1649.) "The term 'substantial evidence' means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion; it is evidence which is reasonable in nature, credible, and of solid value." (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1433.) In making this determination, """we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court."""" (*In re I.J.* (2013) 56 Cal.4th 766, 773.)

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."'" (*In re David M.* (2005) 134 Cal.App.4th 822, 828 (*David M.*).)

II. Substantial Evidence Does Not Support the Jurisdictional Findings and Order

Mother contends insufficient evidence supported the juvenile court's finding that it had jurisdiction over the children based on substance abuse and mental health issues. We agree.

A. Jurisdiction based on section 300, subdivision (b)

A child comes within the jurisdiction of the juvenile court under section 300, subdivision (b)(1) if the child "has suffered, or

there is a substantial risk that the child will suffer, serious physical harm or illness." There are three elements for jurisdiction under subdivision (b)(1): "(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) 'serious physical harm or illness' to the minor, or a 'substantial risk' of such harm or illness." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) The specified forms of neglectful conduct include, as pertinent here, "the failure or inability of [the child's] parent or guardian to adequately supervise or protect the child, or . . . the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse." (§ 300, subd. (b)(1).)

Here, no evidence shows the children suffered any prior serious physical harm. Accordingly, the issue is whether the evidence supports the juvenile court's finding that the children were at substantial risk of serious future injury at mother's hands.

Where jurisdiction is to be based on a substantial risk that the child will suffer serious physical harm or neglect, although "evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm." (*In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 824.)

DCFS asserted the children were at risk of serious physical harm because of mother's substance abuse history, her continuing use of marijuana, her choice to self-medicate rather than take prescribed medications for her mental health condition, and the children's young ages. The evidence in fact showed mother used marijuana during her pregnancy and afterward,

including after the court ordered her to refrain from marijuana until she obtained a psychiatrist's recommendation; she abused other drugs in the past; she had a history of mental illness; and she avoided taking psychotropic medications prescribed for her mental health condition even when ordered to do so. And, the children were infants.[4] But, although DCFS and the juvenile court appeared to assume that those circumstances in and of themselves created a substantial risk of serious physical harm, that is not what the dependency law provides.

"[W]ithout more, the mere usage of drugs by a parent is not a sufficient basis on which dependency jurisdiction can be found." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 764; accord, *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003 [marijuana].) Similarly, harm "'to the child cannot be presumed from the mere fact of mental illness of the parent.'" (*In re Heather P.* (1988) 203 Cal.App.3d 1214, 1228.) There must be evidence showing a link between a parent's conduct and a specific risk that the parent is unable to adequately supervise or care for the child and thus expose the child to a substantial risk of physical harm or illness. (*In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 824.) This is true even with children so young that "the absence of adequate supervision and care poses an inherent risk to their physical health and safety." (*Ibid.*)[5]

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[4] At the time of the jurisdiction/disposition hearing, Mason was one year old, and Roman was two months old.

[5] We do not take *In re Rocco M.* to mean that when a child is very young, DCFS need not submit evidence to establish such inadequate supervision and care. To relieve DCFS of that burden would "excise[] out of the dependency statutes the elements of

Thus, DCFS was required to present evidence of a "specific, nonspeculative and substantial risk" of serious physical harm to the children. (*In re Destiny S., supra*, at p. 1003; accord, *In re Heather P.*, *supra*, at pp. 1228-1229 [agency must show with specificity how the parent's mental illness poses a substantial risk of harm to the child].) DCFS failed to meet its burden.

David M., *supra*, 134 Cal.App.4th 822, is instructive. In that case, the juvenile court asserted jurisdiction over two minors under section 300, subdivisions (b) and (j). The children were detained when the mother tested positive for marijuana at the time of the younger child's birth, when the older child was two years old. (*Id.* at p. 825.) The mother used marijuana during her pregnancy, had a history of mental illness (a delusional disorder), and had an older son who had been declared a dependent child because the mother had used marijuana while pregnant with him and was incarcerated when he was born. (*Id.* at pp. 825-826.)

The Court of Appeal noted that the mother's use of marijuana during pregnancy was neglectful, but that the baby was born healthy, testing negative for drugs at birth and showing no signs of withdrawal. (*David M.*, *supra*, 134 Cal.App.4th at p. 829.) Accepting as true that the mother had a continuing problem with abuse of marijuana and had mental health issues, the court said the social service agency had "offered no evidence that these problems caused, or created a substantial risk of causing, serious harm to" the children. (*Id.* at p. 830.) The court noted that although it was "possible to identify many possible harms that *could* come to pass . . . without more evidence than was presented in this case, such harms are merely speculative."

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causation and harm." (*In re Rebecca C.* (2014) 228 Cal.App.4th 720, 728.)

(*Ibid.*) The court noted uncontradicted evidence existed that the two-year-old was "healthy, well cared for, and loved" and was being raised "in a clean, tidy home." (*Ibid.*)

Similarly here, there was a lack of evidence that mother's marijuana use and unresolved mental health issues posed a substantial risk of causing serious physical harm or illness to Mason or Roman. To the contrary, the evidence showed the children were well cared for.

First, although mother admittedly used marijuana during her pregnancy, the evidence showed Roman was "doing well" at the hospital, and tested negative for marijuana. There was no evidence of him suffering any ill health effects as a result of her prenatal marijuana use.[6] Moreover, at the hospital, she was very attentive and bonded easily with him.

Additionally, during home visits in the weeks before the jurisdiction/disposition hearing, Family Preservation Services found the home environment clean, and the children "safe, clean, fed and cared for." They were free of marks and bruises, and the parents prepared food and formula for them. Mother refrained from breastfeeding.

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[6] The cases cited by DCFS for the proposition that prenatal use of drugs is probative of future child neglect are thus distinguishable: Both involved actual past harm suffered by the children at birth. (*In re Stephen W.* (1990) 221 Cal.App.3d 629, 639, 642 [baby whose mother used heroin while pregnant born with opiates in his urine, low birth weight, and symptoms of drug withdrawal requiring medical treatment]; *In re Troy D.* (1989) 215 Cal.App.3d 889, 895, 904 [mother and baby tested positive for amphetamine and opiates at birth; baby was born prematurely and had low birth weight, symptoms of methamphetamine withdrawal, poor feeding, lethargy, and weight loss].)

The only negative indications about the children's home life leading up to the hearing were observations that during an unscheduled home visit, the living space was messy and there was evidence of dog feces, and that there was some tension about the family continuing to live with the great-grandmother. Viewed in the context of the whole record, neither dog feces and a messy home on one occasion, nor "tension" about the home situation—which had not led to the family being asked to move out—constituted substantial evidence of a serious risk of physical injury or illness. (*David M.*, *supra*, 134 Cal.App.4th at p. 828 ["mere scintilla of evidence" insufficient].)

Further, there was no evidence mother used marijuana while she cared for the children. She said she did not use marijuana "right before" caring for them, and DCFS reported it did not know whether the parents were caring for the children while under the influence. To show a person is under the influence of marijuana, there must be "specific evidence showing actual impairment." (*In re Drake M.*, *supra*, 211 Cal.App.4th at p. 768.) No such evidence exists here. Indeed, the juvenile court declined to make such a finding, striking from the petition a sentence asserting mother had been under the influence of marijuana while Mason was in her care.

It is true that here, unlike in *David M.*, mother continued to test positive for marijuana between the detention and jurisdiction/disposition hearings. (*David M.*, *supra*, 134 Cal.App.4th at p. 830.) Mother also had not yet complied with the juvenile court's orders to take prescribed psychotropic medications. But mother's failure to completely comply is not determinative. Evidence has been found insufficient to support juvenile court jurisdiction even where a parent continued to test

positive for marijuana and failed to comply with requirements of a drug treatment plan, when there was an absence of evidence that the parent's conduct created a risk of physical harm to a child. (See *In re Rebecca C.*, *supra*, 228 Cal.App.4th at pp. 723, 728.) That is the case here.

On the record before us, insufficient evidence supported the juvenile court's finding that at the time of the jurisdiction/disposition hearing, Mason and Roman were subject to a substantial risk of physical harm or illness as a result of a failure or inability on mother's part to adequately supervise, protect, or care for them.

B. Jurisdiction based on section 300, subdivision (j)

Mother contends there was no nexus between her prior dependency court history with Riley—even viewed together with her positive toxicology for marijuana at Roman's birth and untreated mental health condition—and any current risk of substantial harm to Mason and Roman. We agree.

A juvenile court may find a child to be within the court's jurisdiction if it finds by a preponderance of the evidence that the "child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions." (§ 300, subd. (j).) "'The broad language of subdivision (j) clearly indicates that the trial court is to consider the totality of the circumstances of the child and his or her sibling in determining whether the child is at substantial risk of harm, within the meaning of *any* of the subdivisions enumerated in subdivision (j). The provision thus accords the trial court greater latitude to exercise jurisdiction as to a child whose sibling

has been found to have been abused than the court would have in the absence of that circumstance.'" (*In re I.J.*, *supra*, 56 Cal.4th at p. 774.)

Mother and Riley came to DCFS's attention in 2009, after he tested positive for amphetamine and cocaine at birth and she tested positive for methamphetamine, amphetamine, cocaine, and marijuana two months after his birth. The petition filed on behalf of Riley alleged that mother failed to make an appropriate plan for Riley's care and supervision because mother left him in the care of the great-grandmother, in a home with spoiled food, flies, dirty clothing, trash, and animal feces throughout the home. Riley was placed in a legal guardianship with mother's brother. Mother did not seek to reunify with Riley, explaining that when he was born, she was not prepared to be a parent and believed her brother could offer him a better life.

The dependency case involving Riley arose several years prior to the present matter, in different circumstances. At that time, mother used several illegal drugs, and her infant son tested positive for drugs at birth. The home environment in which the infant was being raised was extremely unsanitary. Those conditions no longer existed at the time of the jurisdiction/disposition hearing. Mother tested negative for all substances other than marijuana, and there is no evidence that she had used methamphetamine, amphetamine, or cocaine in recent years. Roman tested negative for drugs at birth. During DCFS's initial investigation of the current matter, the family home was found to be cluttered and to have a "repugnant" smell, but by the time of the jurisdiction hearing, the home environment was clean and the children appeared to be "safe, clean, fed and cared for."

For these reasons, the prior case involving Riley, combined with the events leading to DCFS's current petition and during the present proceedings, is insufficient to support a finding that there was a substantial risk Mason and Roman would be abused or neglected so as to bring them within the juvenile court's jurisdiction.

III. The Dispositional Order Must Be Reversed

Because we conclude the juvenile court erred in finding it had jurisdiction over the children based on allegations against mother, and the court dismissed the petition as to father, the court lacked jurisdiction over the children. Without proper jurisdiction, the court had no authority to issue a dispositional order, and the dispositional order removing the children from mother's custody and ordering the parents to participate in various programs and services must therefore also be reversed. (*In re Precious D.* (2010) 189 Cal.App.4th 1251, 1261.)

DISPOSITION

The juvenile court's orders entered on May 26, 2016, are reversed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J. JOHNSON, J.