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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re DYLAN S. et al., Persons Coming
Under the Juvenile Court Law.

B268529

(Los Angeles County
Super. Ct. No. DK12767)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

M.S.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Patricia Spear, Judge. (Retired judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, Tracey F. Dodds, Principal Deputy County Counsel, for Plaintiff and Respondent.

M.S., the father of 13-year-old Dylan S., 10-year-old Harmony S., 9-year-old Cayden S., four-year-old C.S. and one-year-old Ashton S., appeals the jurisdiction findings and disposition order declaring all five children dependent children of the juvenile court and removing them from his custody after the court sustained a petition pursuant to Welfare and Institutions Code section 300¹ alleging the children's mother, Lisa S., had a history of substance abuse and regularly abused methamphetamine, making her incapable of providing the children with regular care and supervision, and M.S. had a history of illicit drug use and was an occasional user of methamphetamine, marijuana and Ecstasy, periodically rendering him incapable of providing the children with regular care and supervision. M.S. contends evidence of his occasional drug use, without more, was insufficient to support the court's jurisdiction finding as to him and its order removing the children from his custody. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Referral

In July 2015 the Los Angeles County Department of Children and Family Services (Department) received a referral soon after Ashton was born that both Ashton and Lisa had tested positive for methamphetamine. Lisa admitted she had a history of methamphetamine abuse and regularly consumed methamphetamine during her pregnancy with Ashton. She also stated M.S. used methamphetamine and marijuana.

M.S. told the Department he knew about Lisa's history of methamphetamine abuse but believed she had ceased using years earlier and did not know Lisa had resumed using the drug during her recent pregnancy. M.S. admitted he also had a history of drug use and had used methamphetamine and Ecstasy a month earlier and marijuana two weeks earlier.

Both Lisa and M.S. resided together with their children in the family home before Ashton's and Lisa's positive drug tests brought the family to the attention of the Department. The Department interviewed Ashton's four siblings and found them well

¹ Statutory references are to this code unless otherwise stated.

cared for and in good health. The maternal grandmother and maternal aunt, who helped care for the children on occasion, told the Department Lisa and M.S. were attentive parents; neither had known about Lisa's or M.S.'s recent drug use or observed either of them under the influence of drugs.

On July 21, 2015, after a team meeting with the Department concerning family preservation services, Lisa, M.S. and the paternal grandmother agreed to a safety plan that allowed the children to reside with paternal grandmother while Lisa sought inpatient drug treatment and M.S. sought outpatient drug treatment.

On July 22, 2015 the Department received the results of M.S.'s July 20, 2015 drug test, which was positive for methamphetamine, Ecstasy and marijuana. M.S. then admitted he had actually consumed all three drugs a few days earlier to celebrate his birthday but insisted his use of methamphetamine and Ecstasy was unusual; he regularly consumed marijuana for his restless leg syndrome and had a medical marijuana card for that purpose. The Department decided to continue with the safety plan, provided M.S. submit to random drug tests on demand.

On July 23, 2015, as promised, Lisa enrolled in a residential drug treatment program that allowed her youngest children, C.S. and Ashton, to reside with her. M.S., however, failed to obtain drug treatment or appear for any on-demand drug tests.

2. The Petition and Detention Hearing

On August 5, 2015 the Department filed a section 300 petition alleging Lisa's history of substance abuse and current abuse of methamphetamine and M.S.'s history of illicit drug abuse and current use of methamphetamine, marijuana and Ecstasy rendered them incapable of providing regular care and supervision of their children. The court detained the three older children (allowing them to remain placed with their paternal grandmother) and permitted C.S. and Ashton to remain in Lisa's care on the condition she continue with her inpatient drug rehabilitation program.

3. The Jurisdiction and Disposition Hearing

Lisa pleaded no contest to the petition. M.S. contested the petition but submitted on the Department's reports. M.S. argued the allegations pertaining to him should be dismissed because there was no evidence his occasional drug use had endangered his children, who had been well cared for in his custody. The children's counsel and the Department urged the court to sustain the allegations pertaining to M.S., emphasizing M.S.'s history of illicit drug use, his positive drug test on July 20, 2015 and his failure to submit to random drug testing.

The court sustained the allegations in the petition pertaining to Lisa. As to M.S., the court sustained amended allegations that M.S. has a history of illicit drug use and is an "occasional user" of methamphetamine, marijuana and drugs that "periodically renders" him incapable of providing them with regular care and supervision.

At disposition M.S. requested custody of the three older children, agreeing the two youngest children could reside with Lisa, who was doing very well in her residential drug treatment program. The Department and the children's counsel opposed that request, again citing M.S.'s history of substance abuse, his current use of methamphetamine and Ecstasy and his recent positive drug test. To this list the court added its own concern that M.S.'s occupation as a dental hygienist gave him unfettered access to controlled substances. The court declared all five children dependent children of the court, removed them from M.S.'s custody and the three older children from Lisa's custody and left the two youngest children in Lisa's care on the condition she continue to be in compliance with her case plan. The court ordered reunification services for both parents and directed both to participate in counseling and random drug testing. In addition, the court ordered monitored visitation for M.S., with discretion to the Department to liberalize visitation to include overnight and weekend visits, and unmonitored visitation for Lisa with her three older children provided she remain in compliance with her case plan.

DISCUSSION

1. *Dependency Jurisdiction over the Children Was Proper Based on Lisa's Substance Abuse*

M.S. challenges the jurisdiction findings pertaining to him. However, dependency jurisdiction was proper based on Lisa's substance abuse alone. (See *In re I.A.* (2011) 201 Cal.App.4th 1484, 1492 [jurisdiction finding involving one parent is good against both; ““the minor is a dependent if the actions of either parent bring [him or her] within one of the statutory definitions of a dependent””]; *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 [same].) Accordingly, M.S.'s challenge to dependency jurisdiction based on findings relating to his conduct does not raise a justiciable controversy for our consideration. (*In re Briana V.* (2015) 236 Cal.App.4th 297, 310-311; *In re I.A.*, at p. 1492.)²

2. *The Court's Disposition Order Removing the Children from M.S.'s Custody Is Supported by Substantial Evidence*

a. *Governing law and standard of review*

Before the court may order a child removed from the physical custody of a parent with whom the child was residing at the time the dependency proceedings were initiated, it must find by clear and convincing evidence that the child would be at substantial risk of physical or emotional harm if returned home and there are no reasonable means by which

² In limited circumstances courts have exercised their discretion to consider a parent's challenge to dependency jurisdiction notwithstanding the propriety of jurisdiction based on other grounds. (See *In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763 [review of challenged finding appropriate when it could be prejudicial to the parent in the current or future dependency proceedings]; *In re I.A.*, *supra*, 201 Cal.App.4th at p. 1494.) Here, however, in light of M.S.'s admission that he had a history of illicit drug use and consumed methamphetamine and Ecstasy days before the petition was filed, the court's finding he was an occasional user of illicit drugs that periodically rendered him unable to care for his children was unlikely to prejudice him in this or future proceedings. Accordingly, we do not consider his challenge to dependency jurisdiction. (See *Briana V.*, *supra*, 236 Cal.App.4th at pp. 310-311 [“father has failed to show that this case fits in to the narrow exception created by *Drake M.*” in which courts have addressed a jurisdiction finding even when the finding does not affect the child's status as a dependent].)

the child can be protected without removal. (§ 361, subd. (c); *In re T.V.* (2013) 217 Cal.App.4th 126, 135; *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) “Removal ‘is a last resort, to be considered only when the child would be in danger if allowed to reside with the parent.’” (*In re Hailey T.* (2012) 212 Cal.App.4th 139, 146.) We review the court’s disposition order for substantial evidence. (*In re T.V.*, at p. 136; *In re Lana S.* (2012) 207 Cal.App.4th 94, 105.)

b. *Substantial evidence supports the court’s order removing the children from M.S.’s custody*

M.S. concedes he had a history of using illicit drugs and had used methamphetamine and Ecstasy as recently as July 2015. However, citing affirmative evidence his children were healthy and in good condition, he argues there was no showing his occasional use of methamphetamine and Ecstasy and his regular use of medical marijuana created any danger for his children, let alone a substantial risk of serious physical harm necessary to support the court’s order removing them from his custody. (See *In re Hailey T.*, *supra*, 212 Cal.App.4th at p. 146 [“[b]y requiring clear and convincing evidence of the risk of substantial harm to the child if returned home and the lack of reasonable means short of removal to protect the child’s safety, section 361, subdivision (c), demonstrates the ‘bias of the controlling statute is on family preservation, not removal’”].)³

Contrary to M.S.’s contention, there was substantial evidence in this record to support the court’s removal order. In addition to M.S.’s history of illicit drug use and his recent positive drug tests, M.S. had become increasingly despondent over the state of his

³ On April 25, 2016 the court entered a home-of-parent-mother order as to Dylan, Harmony and Cayden, the three oldest children. As a result, all five children are now residing with Lisa. (We provided a copy of the minute order from the hearing on April 25, 2016 to appellate counsel for all parties on August 18, 2016.) In response to an inquiry from this court, counsel for M.S. argued his client continues to be prejudiced by the disposition order because M.S. is not living in the home, his visits remain monitored and the order “may stand as a finding of ‘parental unfitness’ were the case to proceed to a Welfare and Institutions Code section 366.26 hearing.” However, counsel stated M.S. “does not wish the children removed from mother.”

marriage and finances and described himself as being physically present in the home, but not “really [mentally] there.” He had not noticed that Lisa had returned to using methamphetamine even though she used the drug as frequently as “every other day.” Although M.S. insisted the children were safe in his care, Lisa told the Department she left the children with her sister when she was using drugs, thus undermining any notion that, despite his own drug use, it was M.S. who had ensured their safety and well being.

M.S. contends removal was unwarranted because, at least by the time of the jurisdiction/disposition hearing, he had acknowledged his drug problems and had agreed to drug test, evidencing a renewed insight into his drug use and the risk his behavior posed to his children. In denying M.S.’s custody request, the court complimented M.S.’s renewed motivation but remained concerned his insight was simply too new and too tenuous to safeguard his children. Indeed, M.S. had assured the Department on previous occasions he would submit to drug tests but promptly broke that promise. Moreover, although M.S. attempts to portray this case as one involving medical marijuana, the court’s concern was not M.S.’s use of marijuana, but his history and current use of methamphetamine and Ecstasy.

The court found M.S.’s history of illicit drug use, his recent use of methamphetamine and Ecstasy, his failure to drug test, his lack of insight into the consequences to his children of his own drug use, his access to controlled substances by virtue of his occupation as a dental hygienist and his emotional despondency portended a father substantially at risk of returning to a previous addiction to the detriment of his children’s care and well-being. The court was not required to wait for actual harm to materialize in order to take steps to protect the children. (See *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1215 [““juvenile court has broad discretion to determine what would best serve and protect the child’s interests and to fashion a dispositional order accordingly””]; *In re T.V., supra*, 217 Cal.App.4th at pp. 135-136 [“The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child.”]; see generally *In re P.A.* (2007) 155 Cal.App.4th 1197, 1212 [child may even be removed from

nonoffending parent if his or her conduct created risk of harm to child].) Substantial evidence supported the court's disposition order removing the children from M.S.'s custody.

DISPOSITION

The juvenile court's October 26, 2015 order is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.