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**IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA**

SECOND APPELLATE DISTRICT

DIVISION ONE

In re C.M., a Person Coming
Under the Juvenile Court Law.

B275581
(Los Angeles County
Super. Ct. No. DK15619)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

B.M.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Marguerite Downing, Judge. Reversed.

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

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Sarah Vesecky, Senior Deputy County Counsel, for Plaintiff and Respondent.

B.M. (mother) appeals from orders of the juvenile court finding jurisdiction over her daughter C.M., removing C.M. from her custody, and requiring monitored visitation. We reverse.

BACKGROUND

On February 17, 2016, Los Angeles County Department of Children and Family Services (DCFS) filed a petition alleging that then 23-month-old C.M. was at risk of harm under Welfare and Institutions Code section 300, subdivision (b).¹ The petition alleged that B.M. had a history of substance abuse and currently abused methamphetamine, making her incapable of caring for and supervising her daughter. C.M. required constant care and supervision, and mother's drug use interfered with her ability to provide that care. Remedial services had failed, as mother did not regularly participate in a rehabilitation program and random drug testing. C.M.'s health and safety were at risk.

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

A referral on October 21, 2015 reported no abuse, but expressed concern for C.M.'s safety. Mother was 17. She had a long history of drug use, spent a year in a treatment facility, was on juvenile probation for assault, and recently tested positive for methamphetamines. A social worker went to the home on October 23, and mother invited her in. Mother explained that she and C.M. lived with C.M.'s maternal great-grandparents, aunt, and cousin.²

Mother agreed to a private interview. C.M. cried when mother tried to leave her, so mother brought C.M.'s high chair into the room so that C.M. could sit next to her. The social worker told mother that the allegation was general neglect of C.M. based on mother's drug abuse. Mother explained that earlier in October, she "was going through something" and went to visit friends (she did not take C.M.). The friends offered her drugs, and mother used, after almost three years of being sober. She immediately regretted her lapse, knowing she would test positive, and reported her

² The petition refers to the relatives with whom mother and C.M. lived as paternal relatives. DCFS acknowledges that this is incorrect. The relatives have mother's surname, the jurisdiction/disposition report refers to them as mother's relatives, and all counsel called them maternal relatives at the disposition hearing. A Last Minute Information filed the day of the jurisdiction/disposition hearing on April 7, 2016, reported that C.M.'s paternal grandmother (PGM, sharing father's last name) stated: " 'I don't even know the girl or the baby really.' " PGM did not want to be involved unless C.M. was at risk of going into foster care.

drug use to her probation officer. Mother tested positive for methamphetamine on October 5, 2015. She had not used since that lapse and was avoiding those friends; she loved C.M. and did not know what she would do without her. She agreed with the social worker's request that she drug test on demand and enroll in a drug counseling program, so that she could keep C.M. home with her. Mother's next juvenile court hearing was on October 27, and she was hoping to be taken off probation.

Mother explained that she was on probation for assault with a weapon, because she had pulled a knife on C.M.'s father³ to defend herself when he was hitting her; both were arrested. Mother had been taken to a juvenile facility and then placed for a year. After her release, her mother (MGM) gave mother permission to live with C.M.'s maternal great-grandmother (MGGM). Mother no longer saw father.

MGGM told the social worker that mother and C.M. had been living there for almost a year. Mother was a "good mother," always making sure C.M. ate, took baths, and that her other needs were met. Mother told MGGM about her relapse, manifested remorse, and had behaved appropriately since. Mother spent her days with C.M., and attended

³ In October 2015, father was 25, eight years older than mother. He did not participate in the proceedings in the trial court and is not a party to this appeal. After due diligence, DCFS had been unable to determine his whereabouts at the time of the jurisdiction/disposition hearing.

evening school to get her high school diploma. There was love and support in the home.

Maternal cousin (MC), in a private interview, echoed that mother took care of C.M., feeding her, bathing her, and making sure she took naps on schedule. Mother went to night school to make sure C.M. would have good supervision. MC had not seen mother use drugs or be under the influence.

On October 27, mother informed the social worker that she had been placed on house arrest instead of being taken off probation.

At a child and family team meeting on November 5, mother agreed that she would enroll in a drug counseling program, submit to random drug tests, file for full custody of C.M., get a restraining order against C.M.'s father, and participate in individual therapy and Narcotics Anonymous meetings and obtain a sponsor. The social worker provided counseling referrals.

On December 4, 2015, the social worker learned from a supervisor at the Transitional Living Program that mother's probation case was about to close, as she had turned 18. No one had made arrangements for mother to receive Independent Living Program (ILP) services, although someone should have made sure those services were in place as mother had a child, and probation should never have terminated her case especially given her positive drug test. Mother's probation terminated on December 7; she received no ILP services.

Mother met with the social worker on December 9 at a hotel in Downey. On the day her probation terminated, mother's legal guardian told her that she could stay at her home only until she was 18 or her probation closed. Mother went to see her eligibility worker, who gave her vouchers for the hotel room. Mother had completed paternity papers, and had called to check in but had not been summoned for drug testing. Without transportation, mother said it was difficult to get to the drug testing and counseling, individual counseling, and parenting classes; the weather was too cold and C.M. had been sick. The initial DCFS case plan, signed by DCFS and mother on December 10, 2015, stated both that mother's parenting skills were negatively affected by drug use, and that she remained free from drug dependency.

On December 14, Voluntary Family Maintenance (VFM) services were offered to mother, but she did not enroll in any, and did not drug test. An email from a social worker on February 9, 2016, reported that mother and C.M. still did not have stable housing so mother could not receive a referral to family preservation, and for the same reason a referral for child care had been denied. A social worker had informed mother that no-shows were considered positive; nevertheless, mother was not testing; she missed an appointment; mother had been at different locations; mother had failed to follow through on calling a hotline for extended foster care services; and mother did not provide proof of well-child examinations for C.M.

DCFS concluded that mother “had been given a chance with VFM services and she is not being compliant,” and mother did not have a strong support system to stabilize her housing as “she has apparently burned her bridges.” She had missed six required drug tests from December 2015 to the end of January 2016.

On February 11, 2016, the social worker told mother that she was considered a “failed VFM” and DCFS intended to detain C.M. Mother stated that was unnecessary, and gave consent for C.M. to be placed with MGGM and C.M.’s maternal great-aunt (MGA). Mother knew she had exhausted her resources, and wanted things to be as normal as possible for C.M. That same day, mother signed up for an outpatient drug program (two groups a day, five days a week, and random testing).

Mother appeared at the February 17, 2016 detention hearing. The trial court appointed counsel for mother and for C.M, and found that ICWA did not apply and that father was the presumed father. Mother denied the petition. The court detained C.M., ordering DCFS to provide family reunification services and referrals to mother, including random drug testing.

The jurisdiction/disposition report, filed March 11, 2016, stated that CM was placed with MGGM.

Mother’s child welfare history included a 2012 referral alleging general neglect by her mother and father, and a 2013 referral alleging sexual abuse of mother, then 15, by father, who was then 23, resulting in her pregnancy with

C.M. Mother missed a scheduled appointment with the dependency investigator, and then also missed a rescheduled appointment. Mother had not returned for treatment since she attended an intake appointment on February 11, 2016, one month earlier.

When interviewed in March 2016, MGGM said she knew mother had a drug problem before her pregnancy, and believed mother used marijuana. After mother moved in to MGGM's house with C.M., mother took good care of the baby and "was a perfect little mother," but she went out and came home very late. After MGGM told her to take the baby with her, mother came home earlier, but MGGM was uncomfortable with having the baby out because MGGM did not like mother's friends. Mother had been living with MGM, but "they had some words" and MGM threw mother out. MGGM then took mother in on the condition she go to school and take care of the baby, but " 'she wasn't doing it and we were getting tired of it.' " MGGM did not think mother used drugs at home or in the presence of C.M.

After the detention hearing three weeks earlier, mother had visited only twice. Mother seemed distracted the last time she visited, forgetting to dry the baby clothes she had washed and talking on the phone. MGGM did not know if she was under the influence that day. On March 7, mother called crying and MGGM agreed to bring C.M. to a park to see mother the next day. On March 8, mother called repeatedly over several hours and then said without

explanation that she would not come. Mother was staying with a girlfriend in Long Beach.

The social worker interviewed MGM. MGM did not know where mother was, although mother called occasionally, but her number was blocked. Mother never moved into MGM's home after the detention hearing, and just used the house as her mailing address. MGM believed with certainty that mother still used drugs, as she had used since she was 12 or 13 years old, with meth as her drug of choice. "As a mom, [mother]'s great," and C.M. loved her. When mother got pregnant, father had mother on drugs in the street, and they got into a lot of trouble together.

Mother's probation officer informed DCFS that she tested positive for methamphetamine on October 5, 2015. Her last drug test on November 16 was negative. Mother had progressed well and he recommended termination of her probation. In December 2015, her probation case was terminated.

On March 1, 2016, mother told the investigator she wanted to reunify with C.M., but since then mother had not made herself available. Meanwhile, C.M. was developing age appropriately, and was doing well in MGGM's home. DCFS told mother and MGGM that mother could have monitored visits if mother gave MGGM 24 hours notice.

DCFS asked the court to find the allegation true, based on the probation officer's report that mother tested positive for methamphetamine on October 5, 2015; her long history of drug use; her failure to random drug test (although the

social worker texted her “numerous times” to tell her to show up); and her failure to enroll in treatment programs. All reports indicated that mother took good care of C.M, but she often went out late and left C.M. in her relatives’ care, and after C.M.’s detention she had not visited consistently. DCFS believed C.M. needed continued supervision and should be removed from mother’s care, with reunification services and monitored visitation for mother.

Mother did not attend the jurisdiction/disposition hearing on March 17, 2016. C.M.’s counsel argued that DCFS had not met its burden to sustain the allegation. The single positive test for methamphetamine had occurred in October 2015, and the subsequent test in November 2015 proved clean. The probation officer had recommended termination, and all the relatives reported that mother always provided appropriate care and comfort and was a “great mother” to C.M. One instance of drug use by mother was not enough to sustain the petition or find future risk without any detriment to C.M. If the court dismissed the petition, mother would most likely return home to live with C.M. in the home of her relatives. Although mother had a history of substance abuse, she did complete a program and acknowledged her one relapse.

Mother’s counsel agreed and asked the court to dismiss the allegation. No evidence indicated that mother currently used or abused any drugs or ever used drugs around C.M. Counsel argued that no-shows were not affirmative evidence of use, and there was no evidence that mother’s use had any

nexus to a risk to C.M. The most recent test in November was clean. The MGGM stated that mother took very good care of C.M., provided affection and nurture, and kept the baby immaculate and her bottles washed. “There is no evidence that her one time use ever impacted her ability to provide care for [C.M.]”

DCFS argued that mother had “a long history of substance abuse,” she had used in October 2015, and never entered a program or treatment. Counsel stated that since detention, mother had only visited C.M. three times, and once MGGM thought she might be under the influence. MGM expressed concern that mother still used drugs. Mother currently did nothing to provide for her tender age child, and she repeatedly left C.M. with MGGM. Mother seemed to acknowledge that she had a current addiction issue when she went to the intake interview for treatment, but never returned. Mother no longer responded to DCFS and if the petition were dismissed, she could take C.M. away without any supervision.

The trial court stated “I probably would have gone along with [mother’s counsel] but for [DCFS counsel’s] argument.” Although mother came in for a single use, “it appears she may be using again. Based on the fact she may be using again, the fact that I don’t have tests and I have no shows, is an issue that this child is at risk, given her young age, and the fact that [mother] is not visiting consistently and she is calling from blocked numbers and she is moving around.” So there was a risk and services needed to be in

place. “And so that would be the nexus. She has a history and there is some question whether she is currently using, but she is refusing to cooperate with the department. So that is one of the reasons we do not have test results.” The court sustained the petition, and “finds the department has made reasonable efforts to prevent removal or to eliminate the need for removal.”

Mother’s counsel objected, asking that the court make a home of parent order. “I don’t believe the department has shown clear and convincing evidence that there would be any detriment to this child were [she] to remain in the home of her mother. I think there are reasonable means to protect the child. The court ordered unannounced home visits and family preservation services to be put in place.” Counsel objected to requiring a full drug and alcohol program. “We do not have any positive tests by the mother. The positive test that is referenced is—was only spoken to the department by the probation officer. It’s not attached. We don’t have any dirty tests by the mother.” Counsel for DCFS noted that mother admitted to the single drug use in October 2015.

The court ordered 10 random tests and a full program if mother missed or tested dirty, and ordered that mother enroll and complete parenting classes and undergo individual counseling. Visitation was monitored with discretion to liberalize, three times a week for three hours.

Mother filed this timely appeal.

DISCUSSION

Mother argues that insufficient evidence supports the juvenile court's orders. We agree.

We review the juvenile court's finding of jurisdiction for substantial evidence, searching "the record to determine whether there is any substantial evidence to support the juvenile court's conclusions, and we resolve all conflicts and make all reasonable inferences from the evidence to uphold the court's orders, if possible.'" (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1384.) The allegation under section 300, subdivision (b)(1) requires proof of neglectful conduct by mother, causation, and either serious physical harm to C.M. or a substantial risk of such harm, including "by the inability of the parent or guardian to provide regular care for the child due to the parent's . . . substance abuse." Standing alone, a parent's use of drugs does not bring a minor within the dependency court's jurisdiction. (*In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003.) DCFS had the burden to present evidence of a specific and substantial risk to C.M. of serious physical harm based on mother's conduct. (*In re David M.* (2005) 134 Cal.App.4th 822, 830.)

DCFS did not carry its burden. The evidence supports only a finding that mother (as she freely admitted) used methamphetamine once in October 2015, resulting in a positive drug test. Mother's subsequent test in November 2015 was negative. At the time of the hearing in March 2016, no evidence supported a conclusion that mother had used drugs in the five months since her single positive test.

The juvenile court's findings regarding current drug use were not supported by any substantial evidence. The court stated that it was convinced by DCFS counsel's argument that mother "may be using again." Counsel's argument was misleading. Although counsel for DCFS stated that MGM thought mother might have been under the influence during a visit with C.M., MGM said only that she did not know if mother was under the influence. Counsel also stated that MGM was concerned that mother used drugs, but MGM had not seen mother after the filing of the petition and gave no basis for thinking mother currently used methamphetamine. Counsel stated that mother seemed to acknowledge a drug problem when she went to the intake interview for a treatment program set up by DCFS. Mother's appearance evidenced an attempt to cooperate with DCFS, despite her lack of transportation. Her cooperation was not evidence that she currently had a drug problem; by that measure, her failure to continue in the program would be evidence that she is drug-free.

In the absence of any evidence of drug use after October 2015, the court's finding that she was likely using again at the time of the hearing in March 2016 is unsupported by the record. It follows from the lack of evidence that mother *used* drugs at the time of the hearing that no evidence supports a finding that mother *abused* drugs and was therefore unable to provide regular care for C.M. A jurisdictional finding under section 300, subdivision (b) "must necessarily include a finding that the

parent at issue is a substance *abuser*.” (*In re Drake M.* (2012) 211 Cal.App.4th 754, 764.) Absent a medical diagnosis of substance abuse or evidence of “life-impacting effects of drug use,” there should be no “finding that a parent has a substance abuse problem justifying the intervention of the dependency court.” (*In re Rebecca C.* (2014) 228 Cal.App.4th 720, 726.)

The court mentioned the absence of test results in support of its conclusion that mother was likely using. We recognize that no-shows for drug testing can be considered evidence of positive test results. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1217.) Here, however, mother lacked transportation and had trouble getting to the testing site. There was no other evidence suggesting she had begun to use drugs again. This is not a case in which mother lied about her drug use during her pregnancy (*id.* at p. 1217), or had provided diluted samples and tried to alter a test result. (*In re Kadence P., supra*, 241 Cal.App.4th at p. 1384.)

In a more factually egregious case, Division 5 of this district concluded that missing tests indicated consciousness of guilt, when mother repeatedly tested positive for methamphetamine and other drugs, missed 12 tests, again tested positive for methamphetamine, and missed 11 more tests. (*In re Noah G.* (2014) 247 Cal.App.4th 1292, 1302–1304.) The mother in that case had the burden to demonstrate that she was drug-free to establish a beneficial parental relationship exception at a section 366.26 hearing. (*Id.* at p. 1300.) Here, DCFS has the burden to show that

mother was a substance abuser at the time of the jurisdiction hearing, and the department did not meet that burden simply by pointing to missed drug tests.

Similarly, no substantial evidence supports the court's conclusion that mother did not cooperate with DCFS, or that C.M. was at risk from mother's lack of permanent housing. Mother, herself a 17-year-old minor, remained on juvenile probation at the time of her single positive drug test and the referral resulting in the petition. After she agreed to participate in drug counseling, random drug tests, individual therapy, and NA meetings, mother turned 18 and her juvenile probation terminated. She did not receive the independent living services that should have been provided, and she learned on the day her probation ended that she had to leave MGGM's home with C.M. Mother obtained vouchers for a hotel room; after that, her lack of stable housing meant she could not be referred to family preservation and she would not receive a referral for child care. She explained that her failure to show up for testing and counseling resulted from her lack of transportation and her concern for C.M., who was sick. It is no wonder that by February 11, 2016, two months after her probation ended and mother departed MGGM's home, mother had missed drug tests and exhausted her resources, and had only visited C.M. two times in the last three weeks. All reports indicated that mother took good care of C.M., and she continued to do so when she gave consent to once again place C.M. with MGGM and MGA. With C.M. safely placed, mother's itinerancy no

longer constituted a valid basis to conclude that C.M. was at risk.⁴

DCFS failed to meet its burden to show that mother abused illegal substances and that C.M. was thereby at a substantial risk of serious physical harm. Mother's single admitted use of methamphetamine resulted in one positive test five months before the jurisdiction/disposition hearing, followed by a negative test a month later. A single instance of drug use, while troubling, is not substantial evidence that mother was a substance abuser at the time of the hearing and so exposed C.M. to a substantial risk of serious harm.⁵

⁴ Even homelessness alone does not justify jurisdiction: "A child shall not be found to be a person described by this subdivision solely due to the lack of an emergency shelter for the family." (§ 300, subd. (b)(1).) As C.M.'s counsel pointed out at the hearing, mother would likely return to live with C.M. in the home of her relatives if the petition was dismissed.

⁵ As we reverse the jurisdictional order, the dispositional orders become moot. (*In re R.M.* (2009) 175 Cal.App.4th 986, 991.)

DISPOSITION

The order is reversed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.