Filed 5/22/17 In re H.J. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re H.J., et al., Persons Coming Under the Juvenile Court Law.	B276870 (Los Angeles County Super. Ct. No. DK17308)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. C.J. et al., Defendants and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County, Margaret S. Henry, Judge. Affirmed.

Robert McLaughlin, under appointment by the Court of Appeal, for Appellant C.J.

Suzanne Davidson, under appointment by the Court of Appeal, for Appellant T.B.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and David Michael Miller, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Father Christopher J. (father) and mother T.B. (mother) appeal from a finding of jurisdiction over their two children, newborn E.J. and two-year-old H.J., under Welfare and Institutions Code, section 300, subdivision (b).[1] Parents argue that their daily marijuana use did not pose a substantial risk to the children.

E.J. tested positive for marijuana at birth. Both parents admitted to marijuana use throughout each day and evening while caring for the children, who were of tender years. The court's order asserting jurisdiction over the children was supported by substantial evidence, and is therefore affirmed.[2]

FACTUAL AND PROCEDURAL BACKGROUND

A. DCFS Investigation

According to the detention report, E.J. tested positive for marijuana at birth in early April 2016, but she was otherwise healthy. Hospital workers contacted DCFS, and DCFS workers

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] The Los Angeles County Department of Children and Family Services (DCFS) requested judicial notice of a minute order from a hearing on December 14, 2016, in which the juvenile court terminated jurisdiction. We granted the request. DCFS moved to dismiss the appeal as moot because jurisdiction had been terminated. Father opposed the motion, arguing that the court's jurisdiction order could impact future dependency proceedings. We denied the motion to dismiss.

visited mother and E.J. at the hospital. Mother said she used marijuana to ease nausea during her pregnancy. DCFS workers also went to the family home the same day to investigate. Father and H.J., born in October 2013, were at home. The home was a one-bedroom back house behind another residence; it was clean, organized, and had working utilities. At that time, there were no supplies for newborn E.J.—no bed, formula, or diapers. Father said they were planning to get supplies.

About a week later, DCFS visited the home again. There were two rooms in the house, the living room and the bedroom. The living room had a marijuana odor; the bedroom, where the children were, did not. Parents had diapers and other baby supplies. Mother and father both admitted to smoking marijuana and presented their medical marijuana cards to the social worker. Father said he smoked marijuana to increase his appetite, decrease insomnia, and ease pain relating to a hand injury. Mother said marijuana helped with her morning sickness, and she also uses it to address "sleep and eating difficulties." Mother and father said they do not smoke in the children's presence and mother does not breastfeed newborn E.J. Mother and father declined to perform drug tests for DCFS. The social worker did not see any child safety concerns, and noted that parents did not appear to be under the influence of drugs at the time of the interview.

The children's pediatrician reported no concerns regarding abuse and neglect. The social worker interviewed an "anonymous collateral," who indicated that both parents smoke marijuana in the presence of the children. This source also said that "both parents smoke and sell crack as they have observed various

individuals jump over the locked gate to go to the back house and leave shortly [there]after."

DCFS noted that parents had two prior DCFS referrals. In April 2015, DCFS was notified after mother miscarried at 20 weeks' gestation and the fetus tested positive for marijuana. Mother said she smoked marijuana to calm her down due to family issues. DCFS found the allegations inconclusive. In January 2015, DCFS was contacted with a complaint that mother and father exposed H.J. to marijuana. Mother and father told a social worker that they smoke marijuana in front of H.J. and will continue to do so. Again, DCFS found the allegations inconclusive.

On May 4, 2016, E.J. and H.J. were detained from parents and placed in foster care. On May 9, 2016, DCFS filed a juvenile dependency petition against both mother and father under section 300, subdivision (b). According to count b-1 of the petition, mother's substance abuse endangered E.J., who tested positive for marijuana at birth. Count b-2 alleged that mother abused marijuana, rendering her incapable of providing both E.J. and H.J. with regular care and supervision. Count b-2 also contended that E.J. was born with marijuana in her system, and alleged that father knew of mother's substance abuse and failed to protect the children. Count b-3 alleged that father abused marijuana, rendering him incapable of providing both E.J. and H.J. with regular care and supervision.

At the detention hearing on May 9, 2016, the court found a prima facie case for detaining E.J. and H.J., and ordered them released to parents. The court ordered family maintenance services, ordered mother not to breast feed, and ordered referrals for various services.

A jurisdiction/disposition report stated that mother said she had been using marijuana since she was 15 or 16 years old. She said she currently used it throughout the day and evening, but she did not smoke in front of the children. Father said he had been using marijuana since he was about 13 years old. Father said he usually smokes seven to eight blunts throughout the day and evening. He showed the social worker a blunt that was four to five inches in length. He said that since the juvenile case had been pending, he and mother had cut back to three blunts per day. Their medical marijuana cards did not indicate any daily dosage amounts. Both parents said that they did not smoke around the children; they smoke either outside or in the living room when the children are in the bedroom. The jurisdiction/disposition report notes that H.J. also tested positive for marijuana when she was born. DCFS said its primary concern about the home involved the children's exposure to marijuana.

When social workers told parents that the court ordered substance abuse testing and rehabilitation, father said, "No, we are not going to do any of that. We did nothing wrong. . . . This case needs to go away. You (DCFS) need to get out of our lives." He said that he and mother have medical marijuana cards and they are not criminals. Mother agreed with father's statements. DCFS recommended that parents receive substance abuse rehabilitation.

B. Jurisdiction/disposition hearing

At the jurisdiction/disposition hearing on June 6 and 8, 2016, the court admitted into evidence the detention report and jurisdiction/disposition report. Emergency response social worker Meaghan Jedrzejewski testified that she visited the family at

their home about a week after E.J.'s birth. At that point, DCFS was concerned about parents' marijuana use and the lack of supplies when DCFS first visited around the time E.J. was born. When Jedrzejewski visited, there were supplies for newborn E.J. The living room smelled of marijuana, but the bedroom did not. It was raining on the day Jedrzejewski visited, and father explained that they only smoked inside on rainy days. When asked if she was concerned about the children being exposed to marijuana, Jedrzejewski answered, "That's hard to say. I think the concern was more if parents are smoking, where are the children when they're smoking; who's supervising them when they're smoking." Jedrzejewski testified that the "collateral" source she spoke with was a neighbor who lived in the front house on the same property. The neighbor admitted he had not actually seen any drug sales, but he saw people jumping over the back fence, staying a few minutes, and leaving. Jedrzejewski said both parents refused to take drug tests.

Mother testified that her doctor did not tell her whether marijuana would affect her unborn child, so she did her own research. The doctor who did an assessment of E.J. after birth did not express any concerns about marijuana. Mother agreed that her doctor told her not to smoke cigarettes while she was pregnant, but said he did not say the same about marijuana. Mother thought this was reasonable "because I know with cigarettes there are known cases to where there's birth defects. With medical marijuana, it's not really . . . stamped in proof that medical marijuana is harmful to children. Sometimes it may or not. I have read it on the internet. I didn't feel that it was." Before DCFS became involved, mother was using two grams of marijuana per day, which she said cost $20 per day. At the time

of the hearing, mother was using one gram a day, $10 worth. When asked about father's statement that he smoked seven to eight blunts a day, mother said he did not use seven times a day every day, but on some days it might be seven times. Mother said she and father do not smoke at the same time during the day, to ensure someone will be responsible for the children at all times. They do sometimes smoke together at night, but mother said even though they are under the influence they are still able to take care of the children if they wake up. They have cut back their marijuana use based on the court's recommendations.

Mother said she smokes when she wakes up around 3:00 to 5:00 a.m., and then before bed, at 9:00 to 10:00 p.m. Parents spend part of the day recycling for money, and they do not use marijuana when they do that because it requires them to drive. In the afternoons, mother smokes another blunt while the children nap. Mother also takes online classes in the afternoons. If mother over-medicates and gets lightheaded, she asks father to watch the children while she lies down. Mother said they do not smoke in the house.

Father testified that he wakes up between 3:30 and 4:30 a.m. He smokes marijuana first thing in the morning, as he drinks coffee. Father said his use of marijuana does not interfere with his ability to work, care for his children, or keep an orderly home. Father said he had decreased his marijuana use significantly since the dependency case began. He does not smoke around the children.

Parents' counsel asked the court to dismiss count b-1, saying that E.J. needed no special care after birth relating to testing positive for marijuana. Mother's counsel asked that count b-2 be dismissed because although mother used marijuana for

medical purposes, she was not a substance abuser. Father's counsel also asked that the petition be dismissed, stating that the parents' marijuana use was legal and posed no risk to the children. DCFS argued that the petition should be sustained, because E.J. tested positive at birth and parents admitted to smoking marijuana in the home when the children were home. Counsel for the children argued that the petition should be dismissed, because a positive marijuana test at birth, without more, is not necessarily a showing of detriment to E.J., and parents' marijuana use presented only a slight risk, not a substantial risk.

The court sustained the petition as alleged. The court noted that parents were inconsistent in saying how much father smoked. The court also said that mother's plan to lie down if she smoked too much showed that "she does not know in advance how strong it's going to be," which poses a substantial danger. The court expressed concern that if DCFS no longer had oversight, parents would go back to using the higher levels they had been using before the juvenile case. Under section 360, subdivision (b),[3] the court ordered parents to participate in parenting and drug awareness classes, and to complete drug testing.

Mother and father timely appealed.

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[3] Section 360, subdivision (b) states, "If the court finds that the child is a person described by Section 300, it may, without adjudicating the child a dependent child of the court, order that services be provided to keep the family together and place the child and the child's parent or guardian under the supervision of the social worker for a time period consistent with Section 301."

STANDARD OF REVIEW

Mother and father argue that the court's jurisdictional findings were not supported by substantial evidence. "'In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings and disposition, we determine if substantial evidence, contradicted or uncontradicted, supports them. "In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; 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." [Citation.] "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.] "'[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate].'" [Citation.]" [Citation.]'" (*In re I.J.* (2013) 56 Cal.4th 766, 773.)

DISCUSSION

Section 300, subdivision (b) authorizes jurisdiction where a "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child." It is well settled that marijuana use alone is insufficient to support dependency jurisdiction. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 764; *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003; *In re Alexis E.* (2009) 171 Cal.App.4th 438, 453.) Nevertheless, even legal marijuana use

can support dependency jurisdiction if it presents a risk of harm to children. (*In re Alexis E., supra*, 171 Cal.App.4th at p. 452.)

Both mother and father argue that their marijuana use did not present any risk to the children. They point to the evidence that they do not smoke around the children, they do not use marijuana to the point of incapacity or heavy intoxication, the children were clean and healthy, and the house was clean and well-organized. DCFS, on the other hand, points to evidence of heavy marijuana use by father, mother's use of marijuana through three pregnancies, H.J. and E.J. testing positive for marijuana at birth, parents smoking marijuana in the house, and mother's statement that if the marijuana was too strong, she might need to lie down while father watched the children.

Here, mother's marijuana use presented a risk of harm to E.J., who tested positive for marijuana shortly after her birth. A substantial risk of harm is shown where a parent has exposed an infant—or any other child—to drugs to the extent that that a toxicology screen on the child shows a positive result.[4] "[A] child's ingestion of illegal drugs constitutes 'serious physical harm' for purposes of section 300." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 825; see also *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1217 [use of drugs while pregnant "unquestionably" endangers the health and safety of the unborn child].) Mother argues this evidence is insufficient to show a risk of harm, because unlike the child in *Christopher R.*, E.J. was not hospitalized for withdrawal or other drug-related problems after birth. The fact that E.J. did not appear to suffer immediate

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[4] The record indicates that H.J. also tested positive for marijuana at birth, but DCFS did not assert that as a basis for jurisdiction.

detriment as a result of her exposure to marijuana does not diminish the risks inherent in that exposure. A juvenile court "need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child." (*Id*. at p. 1216.)

A jurisdictional finding under section 300, subdivision (b) requires "(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*., *supra*, 1 Cal.App.4th at p. 820.) One of those "specified forms" may be "the inability of the parent . . . to provide regular care for the child due to the parent's . . . substance abuse." (§ 300, subd. (b).)

"[A] finding of substance abuse for purposes of section 300, subdivision (b), must be based on evidence sufficient to (1) show that the parent or guardian at issue had been diagnosed as having a current substance abuse problem by a medical professional; or (2) establish that the parent or guardian at issue has a current substance abuse problem as defined in the DSM–IV–TR. The full definition of 'substance abuse' found in the DSM–IV–TR describes the condition as '[a] maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by one (or more) of the following, occurring within a 12–month period: [¶] (1) recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; neglect of children or household) [; ¶] (2) recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or

operating a machine when impaired by substance use)[; ¶] (3) recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct)[; and ¶] (4) continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights).' (DSM–IV–TR, at p. 199.)" (*In re Drake M., supra*, 211 Cal.App.4th at p. 766.)

A "major role obligation" for parents is to ensure that they do not expose their children to drugs. Both E.J. and H.J. tested positive for marijuana at birth. Parents admitted daily use of marijuana before the juvenile court case began; father said he smoked seven to eight blunts per day, and mother testified that she sometimes becomes lightheaded and unable to care for the children when she smokes. Despite the responsibilities of caring for young children, parents continued their heavy use of marijuana and only limited their use once the dependency case was pending. Even as the case proceeded, parents continued daily use of marijuana, refused to participate in drug testing, and insisted that they did nothing wrong despite the legal issues arising in this case and two prior DCFS investigations involving allegations that parents exposed their children to marijuana. This evidence of substance abuse is sufficient to support the juvenile court's findings.

Moreover, E.J. and H.J. were very young—newborn and age two. In cases involving children of "tender years," "the finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm." (*In re Drake M., supra*, 211 Cal.App.4th at p. 767.) Here, parents smoked marijuana

throughout mother's pregnancies, they smoked marijuana in the house while the children were in the next room, and they exposed their newborn child to marijuana to the extent she tested positive for it at birth. Although the home was clean and parents had supplies for the children, their extensive use of marijuana and their poor judgment in exposing their children to marijuana supports the court's finding of jurisdiction.

DISPOSITION

The order sustaining the petition is affirmed.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.