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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re L.G., a Person Coming Under  
the Juvenile Court Law.

B277641

(Los Angeles County  
Super. Ct. No. DK16459)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

E.L. and La.G.,

Defendants and Appellants.

APPEAL from orders of the Superior Court of Los Angeles  
County, Emma Castro, Judge. Reversed.

Christine E. Johnson, under appointment by the Court of  
Appeal, for Defendant and Appellant La.G.

Annie Greenleaf, under appointment by the Court of Appeal,  
for Defendant and Appellant E.L.

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

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La.G. (Mother) and E.L. (Father) appeal from the juvenile court's jurisdictional order made after the juvenile court adjudged their son L.G. (born in 2015) a dependent under Welfare and Institutions Code<sup>1</sup> section 300. The parents contend that the evidence did not support the jurisdictional findings. We agree and therefore reverse.

### **FACTUAL AND PROCEDURAL HISTORY**

On March 27, 2016, at approximately 10:30 a.m. Father called the police because Mother had locked him out of the family home after he and Mother had a dispute. He reported that he and Mother had argued because he had failed to change L.G.'s diaper and that Mother had thrown a remote control at Father, shoved him, scratched his neck and tore his shirt. When he stepped outside to smoke a cigarette, she locked the door. He told the police that because Mother was intoxicated he was concerned for the baby. When officers gained access to the residence Mother was uncooperative and showed signs of intoxication. The police arrested Mother for domestic violence and child endangerment. She was released from jail later that day. L.G. was not harmed in the incident and the police released him to Father.

The Department of Children and Family Services (DCFS) received a referral concerning the incident and interviewed the

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<sup>1</sup> All statutory references shall be to the Welfare and Institutions Code unless otherwise indicated.

family the next day. The parents had been in a relationship for 11 years and were engaged to be married. With respect to the incident on March 27, Mother conceded that she and Father had an argument and admitted that she tore his shirt. She also admitted that she had consumed wine but denied being intoxicated or that she regularly abused alcohol. When the social worker told Mother that she smelled of alcohol during the interview, Mother denied drinking that day and said she smelled of alcohol because she had not showered or brushed her teeth since her release from custody. Mother agreed to test for drugs and alcohol the following morning.<sup>2</sup> The social worker also interviewed Father who reported that he had called the police to diffuse the situation.

The couple had no prior reports of domestic violence or child abuse, and DCFS had never previously been involved with the parents. Mother's criminal record disclosed a 2001 arrest for disorderly conduct/public intoxication, a 2004 arrest for a DUI, which the court dismissed after Mother pleaded guilty to reckless driving, and a 2007 conviction for contempt—possession of a firearm in violation of a court order.

On April 12, 2016, DCFS filed a section 300 petition pursuant to subdivisions (a) and (b) alleging L.G. was at risk due to Mother and Father engaging in a physical altercation in the child's presence and because Mother had a substance abuse history that included using marijuana and abusing alcohol, and that Father failed to protect the child. At the detention hearing, the court detained L.G. from Mother and released him to Father on the condition that Mother not reside with the family until the maternal grandmother moved in with them and Mother had enrolled in an

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<sup>2</sup> Although Mother had not previously disclosed marijuana use, on March 29, she tested positive for a minor amount of cannabis.

alcohol program and had attended an Alcoholics Anonymous (AA) meeting.

The social worker re-interviewed the parents for the jurisdiction/disposition report. Mother admitted her criminal record, and admitted that she had a couple of glasses of wine before the incident, but she otherwise denied that she was intoxicated at the time. Mother said she only drank two to four times a month, and maintained she never had more than two glasses of wine. Mother acknowledged smoking marijuana during high school and college, but reported that she had not used marijuana since 2000. Both parents characterized the incident that it was a one-time disagreement and Mother claimed that L.G. was in his playpen 40 to 50 feet away during the argument. As to the allegation of Mother's substance abuse, Father said Mother was "not a pot smoker," and did not know why mother tested positive for marijuana. Father reported that he did not expect Mother to have consumed alcohol on the morning of the incident and that Mother drank alcohol on occasion in his presence.

In early May 2016, Mother enrolled in and began participating in a chemical dependency program, a support group and AA meetings. She also submitted to drug and alcohol testing and the test results were negative.<sup>3</sup> On May 10, DCFS allowed Mother to move back into the family home, without the monitoring by the grandmother. In early June, Mother enrolled in parenting classes and began individual counseling.

On June 22, 2016, the juvenile court conducted the combined jurisdiction and disposition hearing. DCFS and the minor's counsel urged the court to sustain the petition as pleaded; DCFS argued

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<sup>3</sup> Mother had one positive test result for a drug that her doctor had prescribed to her.

that the parents were minimizing the incident. The parents asked the court to dismiss the petition based on insufficient evidence.

The court dismissed the domestic violence count pled under section 300, subdivision (a), in its entirety,<sup>4</sup> but amended and sustained the allegations under subdivision (b).<sup>5</sup> The court

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<sup>4</sup> The court said it dismissed count a-1 because it believed that the domestic violence was more likely than not an isolated incident and it did “not believe that . . . this one incident of domestic violence, absent any substance abuse by the mother, would have been sufficient for the court to find, by a preponderance of the evidence, that the child would have been at serious physical harm.”

<sup>5</sup> As sustained the petition provides: “b-1 [¶] On 03/27/16, the child [L.G.]’s mother . . . and the father . . . engaged in [a] violent altercation in the presence of the child while mo[ther] was under the influence of alcohol in the morn[ing]. The mother threw a remote control at the father and the mother pushed and shoved the father. The father grabbed the mother. The mother grabbed the father’s neck and ripped the father’s shirt. The father sustained multiple lacerations to the father’s neck. On 03/27/16, the mother was arrested for Inflict Corporal Inj Spouse/Cohab and Cruelty to Child: Possible Inj/Death. The mother has a criminal history that includes a conviction for Prohib Own Etc Firearm: Court Ordered and a conviction for Contempt: Disobey Court Order/Etc. The violent conduct by the mother while under the influence of alcohol endangers the child’s physical health and safety, and places the child at risk of serious physical harm, damage, [and] danger.”

“b-2 [¶] The child [L.G.]’s mother . . . has a substance abuse history and is a recent user of marijuana and is an abuser of alcohol, which renders the mother incapable of providing regular care and supervision of the child. On 03/29/16, the mother tested positive for marijuana. On prior occasions, the mother was under the influence of alcohol and marijuana while the child was in the mother’s care and supervision. The child is of such a young age requiring constant care and supervision and the mother’s substance abuse interferes with providing regular care and supervision of the

stated “drinking alcohol excessively to the point of intoxication when there is a child of age [one] in the home is a serious safety concern.” The court acknowledged the dispute between the parents appeared to be an isolated incident, but nonetheless, found “a failure to protect the child by the parent’s substance abuse.” The juvenile court proceeded to the disposition and declared the child a dependent of the court, maintained the child in the parents’ custody, and directed DCFS to provide the parents with family maintenance services and ordered the parents to participate in programs.

Mother and Father timely appealed.<sup>6</sup>

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child. The child’s father . . . knew of the mother’s substance abuse, or reasonably should have known, and failed to protect the child in that the father allowed the mother to reside in the child’s home and have unlimited access to the child. The mother’s substance abuse and the father’s failure to protect the child, endangers the child’s physical health and safety and places the child at risk of serious physical harm, damage, danger, and failure to protect.”

<sup>6</sup> On January 6, 2017, DCFS filed a request for judicial notice of a December 21, 2016 order dismissing the dependency case and allowing the child to remain with the parents. We grant the request for judicial notice. DCFS also filed a motion to dismiss the appeal arguing that the dismissal of the dependency case rendered the parents’ appeals moot. On February 3, 2017, we denied the motion to dismiss; the sustained jurisdictional allegations against the parents may have adverse consequences in future proceedings. (See *In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763 [“we generally will exercise our discretion and reach the merits of a challenge to any jurisdictional finding when the finding . . . could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings [citations]; or . . . ‘could have other consequences for [the appellant], beyond jurisdiction.’”].) Accordingly, even though the court dismissed the petition, we will

## DISCUSSION

Welfare and Institutions Code section 300, subdivision (b), requires proof of three elements: “(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 third element “effectively requires a showing that at the time of the jurisdiction hearing the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur ). [Citations.]” ’ ” (*In re J.O.* (2009) 178 Cal.App.4th 139, 152.) “Section 300, ‘subdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a substantial risk of serious physical harm or illness. [Citation.]” ’ ” (*In re David M.* (2005) 134 Cal.App.4th 822, 829; accord *In re John M.* (2013) 217 Cal.App.4th 410, 418.)

DCFS had the burden to present evidence of a specific, non-speculative and substantial risk to the minor of serious physical harm based on the parents’ conduct. (*In re David M., supra*, 134 Cal.App.4th at p. 830.) It failed to make that showing. (*In re S. O.* (2002) 103 Cal.App.4th 453, 461 [the standard of proof at a jurisdictional hearing is a preponderance of the evidence; this court reviews the court’s findings under the substantial evidence standard].)

With respect to the b-1 finding, the record lacks sufficient evidence that L.G suffered, or was at substantial risk of, suffering serious physical harm as a result of Mother’s violent conduct while she was under the influence of alcohol. “Physical violence between

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decide the parents’ claims that sufficient evidence did not support the section 300, subdivision (b) allegations against them.

a child's parents may support the exercise of jurisdiction under section 300, subdivision (b) but only if there is evidence that the violence is ongoing or likely to continue and that it directly harmed the child physically or placed the child at risk of physical harm.” (*In re Daisy H.* (2011) 192 Cal.App.4th 713, 717; see also *In re J.N.* (2010) 181 Cal.App.4th 1010, 1023 [a showing of past harm is insufficient to establish dependency jurisdiction; the statute requires a substantial risk of future harm].)

Both Mother and Father reported their fight and Mother's intoxication as an isolated incident, and there were no other reports of similar drunken or violent incidents between the parents during their 11-year relationship. Even the court recognized the situation as a one-time event. And although the baby was in the home during the incident, he was 40-50 feet away in his playpen and unharmed. The parents appeared committed to their relationship and to caring for the child as a family. Mother also promptly enrolled in support groups, individual counseling, chemical dependency programs and parenting classes. As a result, no evidence shows ongoing violence or a likelihood of continuation of violence between Mother and Father that would create a substantial risk of serious physical harm or illness to the child. (See *In re Daisy H.*, *supra*, 192 Cal.App.4th at p. 717 [jurisdictional findings under section 300, subdivision (b), reversed when there was no “evidence that the violence is ongoing or likely to continue and that it directly harmed the child physically or placed the child at risk of physical harm”].)

Substantial evidence is also lacking to support the court's finding pursuant to b-2 that Mother has a substance abuse history and is a recent user of marijuana or an abuser of alcohol that placed the child at risk of harm. The mere use of alcohol or drugs is not sufficient to sustain a finding of jurisdiction under section 300, subdivision (b). (*In re Drake M.*, *supra*, 211 Cal.App.4th at p. 764



[“without more, the mere usage of drugs by a parent is not a sufficient basis on which dependency jurisdiction can be found”]; *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003; see also *In re Alexis E.* (2009) 171 Cal.App.4th 438, 453.)

*In re J.N.*, for example, the father drove the family minivan into a light pole while both parents were drunk, injuring two of their children. (*In re J.N.*, *supra*, 181 Cal.App.4th at pp. 1014-1015.) Both parents denied regular alcohol use, a fact echoed by their eldest child, who stated that his mother “drank a beer once in a while” and his father drank “only one or two beers a couple times per month.” (*Id.* at p. 1017.) Based on the severity of the single incident, the dependency court exercised jurisdiction over the children under section 300, subdivision (b). (*Id.* at p. 1021.) The appellate court reversed, holding that “[d]espite the profound seriousness of the parents’ endangering conduct on the one occasion in this case, there was no evidence from which to infer there is a substantial risk such behavior will recur.” (*Id.* at p. 1026.) In fact, “[t]he evidence as a whole did not even establish that mother or father consumed alcohol on a regular basis.” (*Ibid.*) As such, “[t]he evidence was not sufficient to establish that the children were at substantial risk of serious physical injury as the result of parental inability to adequately supervise or protect the children.” (*Id.* at p. 1027.) “In evaluating risk based upon a single episode of endangering conduct, a juvenile court should consider the nature of the conduct and all surrounding circumstances.” (*In re J.N.*, *supra*, 181 Cal.App.4th at p. 1025; see also *In re John M.*, *supra*, 217 Cal.App.4th at pp. 418-419 [following *In re J.N.*].)

Similarly here, although Mother’s intoxication led Father to call the police, the record contains insufficient evidence that Mother

has a recent or consistent history of *abusing* alcohol or marijuana.<sup>7</sup> DCFS did not present any evidence that Mother had engaged in similar conduct as alleged in the petition either before or after March 27, 2016 in the child's presence. Father, who shared parenting with Mother, reported that this was an isolated incident and that Mother was a good parent. DCFS confirmed that L.G. was well cared for by Mother, and Mother had no prior involvement with the dependency system. Although Mother's alcohol consumption in this case shows a lack of judgment, it does not demonstrate that she *abused* alcohol as required to support the exercise of jurisdiction. Further, Mother's circumstances at the *time of the jurisdictional hearing* fell short of substantial evidence that she poses a substantial risk to the child's safety to support the exercise of jurisdiction based on allegations of Mother's substance abuse. (*In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 824 [the basis for dependency jurisdiction must be a current situation: "[T]he question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm."].) Mother cooperated with DCFS and complied fully with the court orders, all *before* the adjudication hearing. She also enrolled in substance abuse programs and consistently tested negatively for alcohol and marijuana *before* the jurisdictional hearing. Mother took responsibility for her actions—she admitted that she had consumed alcohol, and admitted that she had a prior arrest record. Indeed, the court recognized her full compliance by allowing her to move back into the home of the child. Consequently, the court's conclusion based on this evidence, that Mother's consumption of

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<sup>7</sup> Mother did not offer any explanation for her March 29 drug test that showed a positive result for a small amount of cannabis. Nonetheless, other than that single test result, DCFS did not present any evidence that Mother had recently and regularly abused marijuana.

alcohol, and marijuana placed L.G. at a future risk of harm is speculative. (See *In re David M.*, *supra*, 134 Cal.App.4th at p. 828 [inferences must be “‘a product of logic and reason’” and “‘must rest on the evidence;’” inferences that are the result of conjecture cannot support a jurisdictional finding].)

Finally, the court’s findings that Father was aware of Mother’s substance abuse and failed to protect the child are unfounded. As discussed elsewhere here, there was not substantial evidence that Mother regularly abused alcohol or marijuana. Even the dependency court acknowledged that it did “not believe that Father could have anticipated that his wife would wake up in the morning hours on March 27th, start drinking to such an extent that she’s reported by the police officers, who are called to the home by the father, over concern of the child[’s] safety.” Rather than failing to protect his child, Father took steps to safeguard his son, by seeking the assistance of the police to diffuse the situation with Mother and to secure the child’s safety. Therefore, this court cannot affirm the jurisdictional findings concerning Father.

## **DISPOSITION**

The jurisdictional order is reversed. In light of the subsequent order terminating juvenile court jurisdiction, no remand for further proceedings is necessary.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.