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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re M.F., a Person Coming Under the Juvenile Court Law.	B286563
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. Michael F., Defendant and Appellant.	Los Angeles County Super. Ct. No. DK03448C

APPEAL from orders of the Superior Court of Los Angeles County, Karin Borzakian, Commissioner. Affirmed in part, dismissed in part.

Daniel G. Rooney, under appointment by the Court of Appeal, for Defendant and Appellant.

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

INTRODUCTION

Michael F., the father of then three-month old M.F., challenges the juvenile court's jurisdictional findings that M.F. was at substantial risk of serious physical harm due to his ten-year history of methamphetamine use and that father failed to protect M.F. We find substantial evidence supports the juvenile court's jurisdictional findings. We thus affirm.

FACTS AND PROCEDURAL BACKGROUND

Because resolution of this appeal turns on the existence of substantial evidence supporting the juvenile court's jurisdictional findings, we state the facts in a light most favorable to the court's decision. (*In re S.O.* (2002) 103 Cal.App.4th 453, 461.) As mother is not a party to this appeal, we focus on the evidence supporting the juvenile court's findings against father and discuss the facts relevant to other findings only as context requires.

1. ***Detention of M.F.***

a. *Events leading to detention*

In late May 2017, two days after M.F.'s birth, the Los Angeles County Department of Children and Family Services (DCFS) received a report alleging general neglect of M.F. by mother and father. Mother and M.F. tested negative for illicit substances after M.F.'s birth, but the caller reported mother admitted to using methamphetamines (aka "meth") three months earlier. Mother later clarified she last used meth three months into her pregnancy. The baby's meconium test results later came back negative for drugs. Hospital staff also overheard mother and father in their hospital room talking about purchasing drugs. A nurse observed father being aggressive toward mother and heard him tell mother, "I'll fuck you up."

DCFS children's social workers (CSWs) met with the family that same day at the hospital. They first interviewed mother, who was alone in her room with baby M.F. Mother confirmed she used methamphetamines three months into her pregnancy. She told the CSWs she did not know she was pregnant and stopped using when she found out. She stated father smoked only cigarettes and denied discussing purchasing drugs with him.

Mother reported she and father had been in a relationship for over a year and had been living with the paternal grandmother since September 2016. She said there was no domestic violence in the home. Concerning father's threatening statement, mother said they "just play around like 'that.' "

Father entered the hospital room during mother's interview. He became "aggressive and argumentative" when the CSWs asked him not to record them on his phone. When asked to drug test, father told the CSWs he would not do so without a warrant. He also did not want to speak to the CSWs or allow a home visit without a warrant.

The next day, after mother and M.F. had been discharged, the family met with CSWs at a DCFS office. The CSW explained the allegations of general neglect based on substance abuse. Father reported he had used meth for years, but had been "clean" for a "few months." He said he was able to stop without intervention. He was aware of mother's past drug use and reported they were arrested together for having pipes.

At the time, father was unemployed but anticipated finding a job in construction after resolving criminal charges against him for carrying a concealed dagger. He denied any history of domestic violence with mother or making threatening statements

to her in the hospital. Father also denied talking to mother about buying drugs.

Both parents stated they were no longer around drugs, neither was currently using drugs, and they had plans for staying "clean." Mother said she had been "clean" for six months. The parents agreed to a drug test and were cooperative with the CSWs. Father's drug test was negative for all substances, but mother tested positive for alcohol at .02%.

Several days later, CSWs visited the paternal grandmother's home where the parents were living with M.F. A CSW explained that DCFS would seek a removal order because it was concerned that both parents had unresolved drug issues and had used within the past 12 months. The parents denied the need for removal.

A CSW asked father to clarify when he last used drugs as a police report from a May 8, 2017 arrest reflected he had admitted to drug use on May 7. He responded he last used drugs "two months ago." The CSW asked father if he knew mother drank alcohol; he said that she "did not have alcohol." In response to questioning about her positive test for alcohol, mother denied drinking alcohol and thought the positive result could be from mouthwash.[1] Both parents were willing to participate in a drug treatment program.

Father objected to the removal of the baby from his custody, but stated, if M.F. were removed, parents wanted him to

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[1] During the detention hearing, the juvenile court explained a .02% reading could not be from mouthwash. At the combined jurisdiction/disposition hearing, mother's attorney reiterated mother denied alcohol use and asserted that .02% was equivalent to about one-eighth of a beer or a "swig."

stay with the paternal grandmother. He said that, if the baby were removed from mother only, he could care for M.F. with paternal grandmother's help in her home.

Parents later reported they had intake appointments at an outpatient drug treatment center for early July. Both parents tested negative for all substances in a June 9 drug test DCFS had requested.

b. *Parents' prior history*

Mother had a prior history with the DCFS and both parents had a prior criminal history. Two of mother's older children were removed from her physical custody in 2014 based in part on her abuse of methamphetamines. Mother was arrested in 2013 and 2016 and had a 2017 misdemeanor conviction for being under the influence of a controlled substance.

Father's criminal history consisted of multiple arrests and/or convictions in 2013, 2014, 2015, 2016, and 2017 related to possession of drugs, being under the influence of a controlled substance, and/or possession of drug paraphernalia. Father's most recent arrest was on May 8, 2017, a few weeks before M.F.'s birth. He was arrested for possessing three methamphetamine pipes, a scale, and a "dirk" or dagger, and for being under the influence of drugs. Father admitted to police that he had used meth " 'one day ago.' "

Parents were arrested together on September 9, 2016, for possession of drug paraphernalia and appearing under the influence of drugs; mother admitted to police that she had taken meth.

c. *Removal and detention*

On June 15, 2017, DCFS obtained an order authorizing removal of M.F. from both parents' care. A week later, DCFS

informed the family that M.F. could remain in the paternal grandmother's care as long as the child was not left in the care of certain paternal relatives with criminal and DCFS histories. The removal warrant was executed the next day on June 23, 2017, to give parents time to move out of the home.

About two weeks later, DCFS filed a Welfare and Institutions Code[2] section 300 petition alleging parents' substance abuse endangered M.F. With respect to father, DCFS alleged in counts b-1 and j-1 to the petition that father failed to protect the child under section 300, subdivisions (b) and (j) by allowing mother "to reside in the child's home and have unlimited access to the child," despite knowing of her substance abuse. In count b-2, DCFS alleged father placed the child at substantial risk of harm under section 300, subdivision (b) because his history of drug use interfered with his ability to provide "regular care and supervision of the child."

The court held a detention hearing that same day and found DCFS had established a prima facie case that M.F. was a person described by section 300, subdivisions (b) and (j) and substantial danger to his health existed. The court detained the child from parents, placing him in the care of the paternal grandmother, granted parents monitored visits, granted DCFS discretion to permit parents to reside with the paternal grandmother and M.F. if they completed four negative drug tests and resolved any outstanding criminal warrants, and ordered DCFS to provide parents with appropriate referrals.

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[2] All subsequent unspecified statutory references are to the Welfare and Institutions Code.

2. ***Jurisdiction and disposition***

a. *Further investigation*

After the detention hearing, mother and father each met with a CSW at a DCFS office on August 2, 2017.

Father, then age 28, reported he had smoked meth since he was 18, " 'multiple times a day.' " He did not use meth at home. He confirmed he last used meth on May 7, 2017. He told the CSW, " 'Now it's different. I have a son. That's why I have to grow up. I didn't have any responsibility before but now I have. I need to leave my childhood stuff in the past. That is why I volunteer[ed] to attend [an] outpatient drug program.' " He reported he knew mother had used drugs before she was pregnant and that they had used drugs together. To his knowledge, she had not used drugs since December 2016. He did not believe she was under the influence of alcohol because there was no alcohol in his mother's house. He allowed her to stay in his mother's house because she was pregnant and not using drugs.

Mother, then age 27, reported she started to use meth when she was 18, " 'on and off.' " She smoked it daily, " 'multiple times a day,' " before she learned she was three months pregnant. She then stopped. She told the CSW she last used meth in February 2017 before the baby was born. As to her positive .02% alcohol test, she said she was "surprised" because she hadn't " 'been drinking for about two years.' " Mother confirmed the last time father used meth was May 7, 2017.

In its Jurisdiction/Disposition Report filed August 16, 2017, the DCFS determined M.F. was at risk based on parents' "unresolved substance abuse issue[s] with recent use." The DCFS cited mother's history of substance abuse leading to the

removal of her older children and her positive test for alcohol while reportedly breastfeeding; father's extensive criminal history with drug-related charges, most recently, May 8, 2017, weeks prior to M.F.'s birth; and both parents' denial and minimization of their substance abuse issues.

On the other hand, DCFS recognized parents had "demonstrated their motivation to change and [were] actively participating in the Court ordered services," including out-patient drug treatment and parenting classes. Except for mother's .02% positive alcohol test on June 1, 2017, parents had provided clean drug tests on a weekly basis. M.F. was doing well in the home of the paternal grandmother and parents were consistently visiting the child.

DCFS recommended the court declare the child a dependent of the juvenile court, allow monitored visits by parents, and continue family reunification services to the parents.

b. *Jurisdiction and disposition hearing*

On August 29, 2017, the juvenile court held a contested, combined jurisdiction and disposition hearing. M.F. was three months old at the time. The court admitted father's exhibits into evidence. Father introduced an August 26, 2017 progress letter from a drug rehabilitation center stating he was admitted to its outpatient program on August 1 with an anticipated completion date on October 1. The letter stated father was in compliance with the program's rules, "participated in all group sessions in a positive manner and appear[ed] to be committed to living a drug-free lifestyle." Father also introduced an August 25, 2017 progress letter from a parenting program. It stated father had been "actively engaged" in the program and had completed

almost half of the sessions. The court admitted similar letters from mother into evidence. DCFS submitted its reports to date, which the court also admitted into evidence.

DCFS asked the juvenile court to sustain the petition and argued the child was still at risk of harm. The child's counsel also asked the court to sustain the petition, but believed it would be in the best interest of the child to keep him with the paternal grandmother and allow parents to live with her if parents continued to test "clean" and attend their programs.

Both parents asked the court to dismiss the petition. Father's counsel argued the court did not have jurisdiction because there was no current risk of harm to the child based on father's prior substance abuse, as father had submitted nine "clean" drug tests without a single positive test since the case had been opened; father had not used drugs or been under the influence of drugs since the child was born; father had demonstrated his commitment to sobriety; and DCFS had presented no evidence father was likely to use drugs around the child. Father's counsel also argued father did not fail to protect the child because he did not use drugs with mother after he learned she was pregnant.

As to the disposition, father's counsel asked the court to make a home of parent order and, at a minimum, place M.F. with father, if not with both parents. Alternatively, counsel asked the court to allow father to move in with the paternal grandmother and have unmonitored visits with M.F.

At the conclusion of argument, the juvenile court sustained the petition as pled. The court commended parents' participation in substance abuse programs, but, based on their long history of substance abuse and recent entry into treatment, found their

substance abuse was "not resolved." Given this history of substance abuse, parents' history of criminal convictions, and the child's tender age of three months, the juvenile court found M.F. to be a person described under section 300, subdivisions (b) and (j).[3]

The juvenile court declared M.F. a dependent of the court. The court found the child would be endangered if returned to the home of mother and father and ordered M.F. removed from their physical custody. The juvenile court ordered the child suitably placed and allowed the parents to reside with the paternal grandmother, with her agreement, on condition that: DCFS be permitted to make unannounced home visits; parents provide negative drug tests and participate in their court-ordered programs; parents not be left alone with the child and the paternal grandmother monitor their contact with the child; and only DCFS-approved individuals be permitted around the child. The court also ordered reunification services.

Father filed a timely notice of appeal from this order. After briefing concluded, we asked the parties to inform us if there had been any developments in this matter since the August 29, 2017 hearing that would affect the current appeal. The parties informed us in separate letters that on April 20, 2018, the juvenile court terminated its suitable placement order and entered a home of parents order, returning M.F. to parents' custody.[4] Father agrees with DCFS that his appeal as to the

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[3] As to mother, the court also cited her prior dependency cases.

[4] We take judicial notice of the juvenile court's April 20, 2018 minute order that DCFS provided to us.

juvenile court's dispositional order is now moot, but contends the jurisdictional issue "remains viable."

CONTENTIONS

Father contends the evidence of his past drug use and criminal history was insufficient to support the juvenile court's finding that M.F. was at substantial risk of harm if left in the custody of father. He also contends the court erred when it found father failed to protect M.F. from mother. Accordingly, father contends the jurisdictional findings relating to him should be stricken. Father originally contended he was entitled to custody of the child, even if we affirmed the jurisdictional findings, but that issue is now moot.

DISCUSSION

1. *We exercise our discretion to hear father's appeal*

Father contends the evidence is insufficient to support the juvenile court's jurisdictional finding as to him. Father acknowledges that because the jurisdictional findings as to mother are unchallenged, the juvenile court will retain jurisdiction over M.F. even if we reverse its order as to father. Father asks us to exercise our discretion to review the merits of his challenge to the jurisdictional finding because it could affect his ability to obtain custody of M.F. DCFS asks us to dismiss father's appeal as nonjusticiable.

As a general matter, when a juvenile court asserts jurisdiction over a minor based on multiple grounds " 'a reviewing court can affirm the [trial] court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction . . . is supported by substantial evidence.' " (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762 (*Drake M.*).) However, a reviewing court generally will exercise its discretion to reach the merits of a

challenged jurisdictional finding if the finding: (1) "serves as the basis for dispositional orders that are also challenged on appeal"; (2) "could be prejudicial to the appellant or could impact the current or any future dependency proceedings"; or (3) "could have consequences for the appellant beyond jurisdiction." (*In re A.R.* (2014) 228 Cal.App.4th 1146, 1150; accord *Drake M.,* at pp. 762−763.)

If the juvenile court's jurisdictional finding is reversed as to father, he will be a "non-offending" parent, rather than an "offending parent." (*Drake M., supra,* 211 Cal.App.4th at p. 763.) "Such a distinction may have far-reaching implications with respect to future dependency proceedings in this case and father's parental rights." (*Ibid*.) DCFS attempts to distinguish *Drake M.* on the ground the father there challenged a single jurisdictional finding where, here, father challenges two separate jurisdictional findings.

We disagree with DCFS's reading of *Drake M.* Father's challenge to both grounds on which the juvenile court based its jurisdiction over M.F. as to father does not affect our ability to consider father's appeal. Because we find reversal of these jurisdictional findings could affect father's parental rights in future dependency hearings, we exercise our discretion to consider father's appeal from the juvenile court's order.

2. ***Standard of review and applicable law***

We review the juvenile court's jurisdictional findings and disposition for substantial evidence. (*In re I.J.* (2013) 56 Cal.4th 766, 773.) "We consider the entire record, drawing all reasonable inferences in support of the juvenile court's findings and affirming the order even if other evidence supports a different finding. [Citation.] We do not consider the credibility of

witnesses or reweigh the evidence. [Citation.] Substantial evidence does not mean 'any evidence,' however, and we ultimately consider whether a reasonable trier of fact would make the challenged ruling in light of the entire record. [Citation.] The parent has the burden on appeal of showing there is insufficient evidence to support the juvenile court's order. [Citation.]" (*In re Isabella F.* (2014) 226 Cal.App.4th 128, 137–138.)

The juvenile court may determine a child is subject to its jurisdiction under section 300, subdivision (b)(1) if it finds by a preponderance of the evidence that "[t]he 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, . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's . . . substance abuse." A child also may be adjudged a dependent of the juvenile court under section 300, subdivision (j) if it finds by a preponderance of the evidence that "[t]he child's sibling has been abused or neglected . . . and there is a substantial risk that the child will be abused or neglected," similarly. (See also *In re David M.* (2005) 134 Cal.App.4th 822, 832.)

"Although section 300 generally requires proof the child is subject to the defined risk of harm at the time of the jurisdiction hearing [citations], the court need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child [citation]." (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1215–1216 (*Christopher R.*).) Thus,

the juvenile court "may consider past events in deciding whether a child presently needs the court's protection." (*Id.* at p. 1216.)

While "evidence of past conduct may be probative of current conditions, the court must determine 'whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm.' [Citations.] Evidence of past conduct, without more, is insufficient to support a jurisdictional finding under section 300. There must be some reason beyond mere speculation to believe the alleged conduct will recur. [Citation.]" (*In re James R.* (2009) 176 Cal.App.4th 129, 135–136 (*James R.*).)

3. ***Substantial evidence supports the count b-2 jurisdiction finding***

A parent's history of drug use alone is insufficient to support a jurisdictional finding under section 300, subdivision (b). (*Drake M., supra*, 211 Cal.App.4th at p. 769.) When a child is of "tender years" like M.F., however, parental substance abuse is prima facie evidence of a parent's inability adequately to supervise and care for the child resulting in a substantial risk of physical harm under section 300, subdivision (b). (*Drake M.*, at p. 767 [explaining DCFS "needed only to produce sufficient evidence that father was a substance abuser in order for dependency jurisdiction to be properly found," but it failed to do so]; see also *In re Rocco M.* (1991) 1 Cal.App.4th 814, 825, criticized on other grounds by *In re R.T.* (2017) 3 Cal.5th 622.) In such cases, jurisdiction is appropriate even without proof of "an identified, specific hazard in the child's environment." (*Drake M.*, at pp. 766–767.)

The presumption exists because "the absence of adequate supervision and care poses an inherent risk to [young children's] physical health and safety." (*Christopher R., supra*, 225

Cal.App.4th at p. 1220.) For the presumption to exist, of course, the evidence must support a finding that the parent is a current substance abuser. (*Drake M.*, *supra,* 211 Cal.App.4th at pp. 766–767.) As with any prima facie case, a parent may rebut the presumption by presenting evidence that no risk of harm existed. (Cf. *Christopher R.*, at p. 1219.)

a. *The juvenile court correctly applied the tender years presumption*

At the August 29 hearing, the juvenile court found father's substance abuse had not resolved, but was resolving—in other words, that father was a current substance abuser. On finding father's substance abuse placed M.F. at substantial risk of physical harm, the court applied the tender years presumption, explaining:

> "This child is of tender age and that is, really, a very critical aspect of the case. He is now three months old. . . . After so many years of drug use, I am glad that mother and father are taking ahold of their lives and going through a substance abuse program. [¶] I will say, however, that because of the evidence of mother's and father's past history -- and it is an extensive history that includes criminal convictions as well -- and because the fact that this child is of tender years and a three-month-old child, and that mother and father's insight, at this point, is relatively recent -- based on the evidence I've seen, they have recently entered programs and their insight that they have gained is relatively recent -- and that their substance abuse at this point is not resolved but is resolving, hopefully, but all of this is fairly recent, I do find based on this and the fact that mother had open cases with respect

to . . . her other two children, all in totality, I do find that the Department has met its burden with respect [to] the counts alleged, with respect to both mother and father."

Father does not appear to contest the court's finding of substance abuse and application of the tender years presumption. He does not argue his chronic use of meth over a ten-year period does not constitute substance abuse. Nor does his opening brief mention the tender years presumption. And, although respondent's brief raised the issue, father's reply brief does not mention the presumption, much less argue it does not apply. Even if father did dispute the issue, substantial evidence supports the juvenile court's finding father was a substance abuser; [5] thus, it properly applied the tender years presumption.

In *Drake M.*, we concluded the evidence presented was insufficient to establish the father's use of marijuana to treat his chronic knee pain was substance abuse under the DSM-4 definition. There, the undisputed evidence demonstrated father used marijuana on the advice of his doctor, had been employed

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[5] This Court held a finding of substance abuse under this section must be based on evidence of a medical diagnosis, or evidence sufficient to "establish that the parent . . . at issue has a current substance abuse problem as defined in the [American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th rev. ed. 2000)] [DSM-4]." (*Drake M., supra,* 211 Cal.App.4th at p. 766.) Another division disagreed that only someone who has been diagnosed by a medical professional or who falls within one of the DSM-4 categories can be found to be a current substance abuser. (*Christopher R., supra,* 225 Cal.App.4th at p. 1218.) That court also noted the definition of substance abuse in DSM-4 had been updated in the fifth edition of that manual (DSM-5). (*Id.* at p. 1218, fn. 6.)

for many years, had no criminal history, and did not drive or care for his 14-month old child within four hours after using marijuana. (*Drake M., supra*, 211 Cal.App.4th at pp. 767–768.)

Conversely, the court in *Christopher R.* concluded a mother's "use of cocaine while in the final stage of her pregnancy, combined with her admitted use of the drug in the past and her failure to consistently test or enroll in a drug abuse program, justified the juvenile court's exercise of dependency jurisdiction," even if her conduct fell outside the DSM-4 definition. (*Christopher R., supra,* 225 Cal.App.4th at pp. 1218–1219.) The court also concluded a father's admitted "persistent and illegal use of marijuana," coupled with his unemployment and "repeated scrapes with the law" demonstrated his inability to care for his three-month old, whether or not those problems were "directly related" to his chronic marijuana use. (*Id.* at pp. 1219–1220.)

Father's conduct similarly satisfies the definitions of substance abuse described in *Drake M.* and *Christopher R.* And, his drug use and related behavior more closely resemble that of parents in *Christopher R.* than the father's prescribed use of marijuana for pain in *Drake M.* Father admitted to chronic, illegal methamphetamine use for ten years, and getting "hooked up" once he started. During an interview on August 2, 2017, he reported: "I have been smoking meth since I was 18, a lot, one bulb at a time, multiple times a day. Meth has been my only drug of choice." Father's statements support an inference that he craved meth and spent much of his time using it, if not also getting it and recovering from its use. (*Christopher R., supra,* 225 Cal.App.4th at p. 1218, fn. 6.) The evidence also reflects father's inability to do what he should at work and home, and/or a failure to fulfill a major life obligation: Father was unemployed

at the time of M.F.'s birth and remained unemployed at the time of the jurisdiction hearing. Father also reported that he and mother were "living here and there" and were "pretty much homeless," until they could move back in with the paternal grandmother. (*Ibid.*; *Drake M., supra,* 211 Cal.App.4th at p. 766.)

Finally, father had recurrent legal problems stemming from his meth use within a 12-month period before the jurisdictional hearing: he was arrested for being under the influence of a controlled substance, possessing a controlled substance, and/or possessing drug paraphernalia in August, September, and October 2016 and on May 8, 2017.[6] (*Drake M., supra,* 211 Cal.App.4th at p. 766.) His May 8 arrest was just weeks before M.F.'s birth and less than four months before the jurisdictional hearing. That criminal case, which also involved possession of a concealed weapon, was still pending at the time of the hearing, preventing father from applying for a job.

We conclude this evidence was sufficient to support the juvenile court's finding father's methamphetamine use rose to the level of "abuse," by any sense of the definition. Because M.F. is undisputedly of tender age—only three months old at the time of the hearing—father's substance abuse is prima facie evidence of his inability to provide regular care for the baby, placing M.F. at a substantial risk of physical harm. (*Christopher R., supra*, 225 Cal.App.4th at p. 1219.)

b. *Father failed to rebut the presumption his substance abuse put M.F. at substantial risk of physical harm*

Father does not dispute his 10-year history of methamphetamine use or his criminal history relating to his drug

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6 He also was arrested twice in July 2016.

use. Rather, father contends DCFS did not demonstrate a connection between his history of drug use and a risk of substantial harm to M.F. at the time of the jurisdictional hearing. Father asserts "DCFS was obliged to identify specific incidents of 'serious physical harm or illness' that placed [M.F.] at 'substantial risk.' " That argument, however, ignores the tender years presumption, which does not require evidence of an identified hazard in the child's environment. Rather, evidence of father's substance abuse and M.F's age of three months—prima facie evidence of father's inability adequately to care for M.F.—shifted the burden to father to present evidence that no substantial risk of harm existed. (*Christopher R., supra*, 225 Cal.App.4th at p. 1219 [finding jurisdiction proper where mother "did not adequately rebut" prima facie evidence of her inability to adequately care for infant and children due to her substance abuse, placing them at substantial risk of harm].) He failed to do so.

i. *Father's recent clean drug tests and enrollment in an outpatient substance abuse treatment center are insufficient to establish no substantial risk of harm exists*

At the jurisdictional hearing, father's counsel argued no current substantial risk of harm existed, pointing to the following evidence: father had nine clean drug tests (on-demand samples taken June 1 through August 1, 2017), "without a single missed or dirty test in th[e] entire case"; he had not used methamphetamine since the birth of M.F. or been under the influence around M.F.; and father had been participating in an outpatient drug treatment program since August 1, 2017, had attended parenting classes, and had been attending NA

meetings. In short, counsel argued the record established father had "proven his sobriety" and demonstrated his commitment not to use drugs "now that his child was born."

On appeal, father argues that, given the evidence of his "undisputed commitment to sobriety," the juvenile court erred in finding father posed a substantial risk of harm to M.F. Father contends that any risk of harm to M.F. was based on speculation, not evidence. He argues DCFS only "perceived" a risk to M.F. arising from father's drug use history, which was insufficient evidence of a connection between his past conduct and a future risk of harm.

Father relies on *James R.*, *supra*, 176 Cal.App.4th 129, where the court reversed the juvenile court's finding mother was a substantial risk of harm to her children. There, the family's young children, aged one, three, and four, came to the child welfare agency's attention when their mother was hospitalized after a negative reaction to taking ibuprofen with beer. (*Id.* at pp. 131–132, 136.) Mother also had a history of mental instability and admitted to postpartum depression and suicidal thoughts. (*Id.* at pp. 132, 136.) The agency argued the mother's " 'possible substance abuse' " and mental state posed a substantial risk of harm to her children, for example, because "she might want to hurt herself, with the possibility of exposing the minors to her suicide attempt." (*Ibid.*) The court ruled that "[a]lthough these and other potential harms could be identified, they were insufficient to support a finding the minors were at substantial risk of future harm." (*Ibid.*)

The facts here are quite different. In *James R.*, not only had there never been a determination that the mother was a danger to herself or others as a result of her mental state, but,

significantly, there was no evidence or a finding that the mother suffered from substance abuse, as there was here. (*James R., supra,* 176 Cal.App.4th at pp. 136–137.) Thus, the court did not apply the tender years presumption when assessing the evidence, as the agency had not presented evidence of mother's substance abuse. Rather, although the agency submitted evidence mother "drank beer, the record [did] not show she was regularly intoxicated, rendering her incapable of providing regular care for the minors or posing a risk to them." (*Id.* at p. 137.) Here, as we have said above, there was ample evidence in the record to support the juvenile court's finding of substance abuse.

Nor was the juvenile court's concern about father's inability to care for and supervise his three-month old baby due to his unresolved methamphetamine addiction mere perception and speculative as in *James R.* Father had been using meth for ten years and, when he used, he used "multiple times a day." There is no evidence father attempted to get "clean" prior to M.F's birth. Nor does he dispute his extensive criminal history was related to his methamphetamine use. He was initially hostile to the CSWs and did not understand why DCFS was involved. He told CSWs that he could stop using meth without intervention, despite reporting he was "hooked up." Yet, he used meth and was arrested for being under the influence of drugs, possessing drug paraphernalia (pipes and a scale), and possessing a concealed weapon (dirk/dagger), only weeks before his baby was born. Father's behavior supports an inference that he had not come to terms with his addiction despite knowing he was about to become a father. At a minimum his drug use just before the birth of his son, and resulting arrest, reflects poor judgment due to his substance abuse, placing M.F. at substantial risk of harm.

(Cf. *Christopher R., supra*, 225 Cal.App.4th at p. 1219 [mother's cocaine use late in pregnancy "confirmed her poor judgment and willingness to endanger her children's safety due to substance abuse"].)

Also, after M.F. was discharged from the hospital, father told CSWs during a meeting at the DCFS office that he had been clean for a "few months." As we said above, father in fact had used meth and had been arrested less than a month before that meeting. When confronted during the June 6 home visit with his admission to the arresting officer on May 8 of using meth the day before, father responded he had last used "two months ago." The juvenile court reasonably could infer father's exaggeration of the time he had been "meth-free" evidenced father's denial and minimization of his substance abuse issues, placing him at risk for future or continued meth use. Further, as respondent noted, this District has recognized methamphetamine is " 'an inherently dangerous drug known to cause visual and auditory hallucinations, sleep deprivation, intense anger, volatile mood swings, agitation, paranoia, impulsivity, and depression.' " (*In re Alexzander C.* (2017) 18 Cal.App.5th 438, 449.)

It was reasonable, therefore, for the court to find father's recent sobriety insufficient to demonstrate he did not pose a substantial risk of physical harm to M.F, given father's ten-year addiction to an inherently dangerous drug, including using it weeks before his first child's birth, his initial attitude toward the nature of his addiction, and the baby's very young age.

ii. *DCFS's decision to wait to remove M.F. until three weeks after he was discharged from the hospital is not evidence father does not pose a substantial risk of harm to the child*

Father also contends the juvenile court erred in sustaining count b-2 of the petition because DCFS's actions demonstrate that, during his first month of his life, M.F. "was not in harm's way from his father's past activities." Father seems to contend that because the CSWs allowed parents to take M.F. home and did not take action to detain M.F. for almost a month, they tacitly admitted father did not pose a substantial risk of harm to M.F.

Father's argument is meritless. As respondent notes, the trial court reasonably could infer that any "delay" in removing M.F. was attributable to the CSWs completing their duty to investigate and working with the family to keep M.F. in the care of a relative. (Cf. *In re David M.*, *supra*, 134 Cal.App.4th at p. 831 [reversing dependency jurisdiction based on mother's marijuana use in part because social services agency "failed to investigate or report" on the current basis for jurisdiction, including failing independently to investigate mother's drug use history].)

Substantial evidence supports this inference: M.F. was healthy at birth, and the CSWs were aware parents were living with the paternal grandmother; the CSWs interviewed the family and relatives after their discharge on May 31; they were awaiting results from tests that they received on June 5; the CSWs visited paternal grandmother's home, where parents were living, and interviewed the family and relatives on June 6; they received a second drug test on June 15; and they investigated paternal relatives and parents' criminal history. After completing their

initial investigation, a CSW sought and obtained a removal order on June 15, 2015. That the removal order was not executed for another week did not require the court to conclude DCFS admitted the child was not at substantial risk of harm. Evidence of initial disagreement about whether M.F. could be placed with the paternal grandmother exists. The juvenile court could infer the decision concerning M.F.'s placement contributed to the delay or that DCFS simply needed more time to execute the order.

In any event, when reviewing a record for substantial evidence, as we are required to do here, we do not reweigh evidence or substitute our judgment for that of the finder of fact. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 450–451.) The existence of a delay between DCFS's initial involvement in the case and removal of M.F. does not diminish the court's finding that father's substance abuse and M.F.'s tender age placed M.F. at substantial risk of physical harm under section 300, subdivision (b).

For all of the reasons discussed, substantial evidence supports the juvenile court's jurisdictional findings as to father under count b-2.

4. ***We need not determine if substantial evidence supports the allegations in counts b-1 and j-1***

Father also asks us to strike him from the allegations in count b-1 concerning mother's substance abuse and count j-1 concerning mother's neglect of M.F.'s siblings in a prior dependency case. In both counts, DCFS alleged father failed to protect M.F. by allowing "mother to reside in the child's home and have unlimited access to the child" despite his knowledge of mother's substance abuse.

Because we conclude substantial evidence supports the juvenile court's exercise of jurisdiction over M.F. as to father under count b-2, we decline to reach whether the failure to protect allegations as to father in counts b-1 and j-1 are supported by the evidence in order to affirm the juvenile court's finding of jurisdiction. (*In re Alexis E., supra*, 171 Cal.App.4th at p. 451.)

5. ***Father's appeal from the removal order is moot***

As we stated above, father concedes his appeal of the juvenile court's order removing M.F. from his custody is now moot. The juvenile court returned the child to parents' custody on April 20, 2018. We therefore cannot provide father any relief from the prior removal order that is no longer in effect and dismiss this portion of his appeal. (*In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1315−1316.)

CONCLUSION

Our conclusion to affirm the jurisdictional findings does not diminish father's progress. As the trial court did, we commend father for maintaining his sobriety after M.F's birth and enrolling in a substance abuse treatment program. And, based on the juvenile court's recent order, it appears father has maintained his sobriety enabling him to properly care for M.F. (under the supervision of DCFS). Father was not there yet, however, at the time of the jurisdiction/disposition hearing. He only had completed about half of the outpatient drug treatment program and parenting classes, and only had two-months' worth of clean drug tests after ten years of continuous methamphetamine use. The evidence in the record was sufficient to support the court's finding father's unresolved substance abuse affected his ability to

adequately care for his three-month old baby, placing M.F. in substantial risk of serious harm.

DISPOSITION

The jurisdictional order is affirmed. Father's appeal as to the dispositional order is dismissed as moot.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.