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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re D.H., et al., Persons Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

S.M.,
Defendant and Appellant.

B288315

(Los Angeles County
Super. Ct. No. CK50282C)

APPEAL from an order of the Superior Court of Los Angeles County. Steff Padilla, Judge. Affirmed.

Karen J. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel and Aileen Wong, Deputy County Counsel, for Defendant and Respondent.

Mother S.M.'s two teenaged children were declared dependent due to mother's unresolved substance abuse. Mother does not question the jurisdictional finding, but appeals the court's disposition order, which removed the children from her custody and placed them with their father. We conclude the removal order was supported by the evidence and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Family*

Mother and father are divorced. They separated in 2008 and have a verbal agreement to share custody of their two children, born in 2002 and 2004, respectively. Father lives in Camarillo with his mother and his new wife. Mother lives in Santa Monica, which is where the children go to school. The custody agreement between the parents is that the children live with mother, in Santa Monica, during the school year, but spend alternate weeks at their father's home during the summer. Even though father works in Camarillo, he commutes daily to his job in Santa Monica, and can bring the children to school if they are living with him during the school year.

Although father never suspected that mother was addicted to illegal drugs, there was a period of time some years prior to the dependency proceedings when mother was acting strangely, and father took custody of the children. When mother got back on her feet and was behaving normally, father let the children return to her home. Sometime later, mother became homeless, and the children again moved in with father, this time for a year or more. In April 2017, mother obtained section 8 housing in Santa Monica. Once she did, the original shared custody plan went back into effect.

2. *Mother's Drug Addiction*

It was later revealed that mother's strange behavior, and possibly her homelessness, were caused by her use of heroin and methamphetamine.

A. *Mother Started Using in 2014*

Mother began using drugs around 2014. The reason she began is not entirely clear – it might have been to ease physical pain; it might have been to dampen the emotional pain of various losses in her life; it might have been both. One thing is clear: she was introduced to drugs by her new boyfriend, a man with a drug-related criminal history who obtained drugs for free in exchange for bringing new customers to a drug dealer.

B. *Mother's Arrest in January 2016*

In January 2016, mother was arrested for possession of heroin. At the time, she was homeless and living in her car. When arrested, she was under the influence. Unconsumed heroin and methamphetamine were found in her car, as were several pieces of aluminum foil with a residue consistent with smoked heroin. She admitted to police that she used heroin for over a year and a half, and smoked it three times per day. She said she was addicted to heroin and used it to feel normal and avoid withdrawal.

C. *The Ocean Park Community Center Program*

In April 2016, long before dependency proceedings were commenced, mother enrolled in a program at Ocean Park Community Center (OPCC), which the criminal court apparently accepted as a diversion program. The services mother received from OPCC are not entirely clear, although they included residence in a shelter and substance abuse counseling. During this time, mother obtained a prescription for suboxone, which

mother calls an “inhibitor,” which she used “to medically assist her in putting an end to her drug use.” Mother also attended Narcotics Anonymous. There is no evidence that the OPCC program included drug testing.

OPCC helped mother obtain her section 8 housing voucher and her apartment in Santa Monica, which she did in April 2017, at which point she “graduated” from OPCC.

D. *The July 2017 Hospitalization*

Approximately three months after mother obtained her home, and her children returned to her, mother was hospitalized.

The event actually consisted of two hospitalizations. Late at night on July 14, 2017, mother’s boyfriend brought her to the hospital because she was suffering abdominal pain. Mother said it felt like she was going through heroin withdrawal, and claimed her last use of heroin was “last week.” The hospital found diagnosing the cause of her pain to be difficult, but stabilized her condition, prescribed medication, and discharged her the following morning.

She returned to the hospital a few hours later with additional symptoms. She had collapsed at home. This time, she was admitted and “[c]ritical care” was administered. She was diagnosed as “experiencing an episode of severe sepsis,” and had a “high probability of imminent, life threatening deterioration due to organ/metabolic failure” She had a variety of symptoms, several of which were believed to be related to “polysubstance use” – although her symptoms could have been caused by either intoxication or withdrawal. Her toxicology screen came back positive for methamphetamine, cocaine, and opiates.

On July 16, when mother was still hospitalized with very serious symptoms, her boyfriend visited her in her room, and a nurse caught them both smoking heroin. Mother admitted to taking “one hit” of heroin. The police were called, and the boyfriend was arrested.

After mother used heroin in the hospital, a hospital social worker met with her. Mother admitted to the social worker that “she has been smoking heroin[] for about a year and also sometimes uses [m]eth.” The social worker was concerned about the children and indicated that she would be calling the Department of Children and Family Services (DCFS). Mother pleaded for the social worker not to call “and stated she would drug test and stop using and stated that is why she is at [the] hospital she wants to stop” Mother indicated that she had been sober “for about 4 months last year,” when she had taken suboxone. Mother agreed that she needed to stop taking drugs.

The hospital records indicate mother told the social worker that her children had been staying with father since Friday, July 14. The social worker said that if she could confirm the children were staying with father, she would not likely have to call DCFS. Mother stated she did not know father’s telephone number by memory and her phone had died, making it impossible for the social worker to contact him. It would turn out that, although the younger child had been staying with father, the older one had gone to a party in Santa Monica that night and stayed at a friend’s house. She returned to mother’s home on July 15, to find mother missing and the house in disarray. She had her friend’s mother call around to local hospitals, eventually locating mother. She visited mother in the hospital, and then father picked her up.

On July 17, the nurse caught mother taking something by mouth from her bag. Mother told the nurse that it was only a lozenge, but mother eventually admitted that it was the last suboxone pill she had with her.

Mother was released from the hospital on July 17. A hotline referral was made to DCFS that day.

3. *The DCFS Investigation*

Over the next few days, DCFS social workers investigated mother. On July 19, the social worker paid an unannounced visit to mother's home. Mother appeared sober and told the social worker that this was a turning point for her. She stated that she had been sober while she lived at OPCC, but had never completed a formal drug detoxification program. She agreed that when you start using, it is hard to stop. However, she stated that she had used drugs only two to three times in the three months she had been in her house, claiming that this was the "tail end." She denied that she had been in the hospital for an overdose, stating that she did not take anything unusual and "you can't overdose when you smoke it."

On July 19, mother was to drug test, but failed to show up, rendering the test the legal equivalent of a positive result. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1217.) A July 20 test was positive for methamphetamine, opiates, and morphine.

At the first interview, and throughout the proceedings, mother was consistent in her claim that the children had never seen her high and did not know that she used drugs. She kept no drugs or paraphernalia in the home, and her boyfriend did not visit when the children were there. The children confirmed this, having never even suspected their mother was on drugs.

4. *The Petition*

On July 27, 2017, DCFS filed a petition to declare the children dependent. They were detained with their father. The petition alleged the children were dependent within the meaning of Welfare and Institutions Code section 300, subdivision (b)(1), because mother's substance abuse rendered her incapable of providing regular care to the children, placing them at risk of harm. The petition was ultimately sustained, and mother does not challenge that ruling. The remainder of our discussion of the factual and procedural background will therefore focus on the efforts – or lack of efforts – to resolve mother's substance abuse following the filing of the petition.

5. *From Detention (July 27) to Adjudication (November 1),
Mother Embarks on a Strategy of Denial*

At the detention hearing on July 27, the court ordered that DCFS give mother referrals for drug counseling and testing. Mother was to test on August 1, but was a no show, which is, as we have observed, presumed to be a positive result. She tested negative on August 2. DCFS did not enroll her in random drug testing.

At an interview on September 14, mother told the DCFS investigator that she is not a current user of drugs. She said she “hardly” used methamphetamine and “tried hard” to get heroin out of her life. She could not understand why she had positive test results; she believed the hospital was making false allegations against her and the test results were fabricated.

Mother enrolled in a program at The People Concern (an entity related to OPCC) which included substance abuse counseling sessions. Mother also obtained an October 24, 2017 letter of support from her prior counselor at OPCC, who reported

that mother had been successful in the program from April 2016 to April 2017.¹ He also stated his impression that mother “is not a chronic substance abuser” and that to label her as one “would only hinder her in future endeavors.”

6. *Mother is in Full Denial at the Adjudication Hearing*

The adjudication hearing was held on November 1, 2017. Mother testified as follows:

She started using drugs in 2014. She used methamphetamine 5 times and heroin about 20, and then realized she needed to stop. She enrolled in a program in 2015, where she obtained suboxone, and completed the program in a year. Too many bad things happened in her life, and she relapsed. She was arrested in January 2016, and was very upset with herself for relapsing. She stopped using and enrolled in the diversion program at OPCC. She refers to her arrest date as her “clean date.” That was the night she stopped taking drugs. The July 2017 hospitalization was due to a viral infection. She was very sick but not on drugs. The positive drug test at the hospital was a false positive. She did not tell anyone at the hospital that she had used heroin the previous week. She did not admit to the social worker that she had a hit of heroin in the hospital. She did

¹ The date of the letter (October 24, 2017) is telling for another reason. The letter states that mother “came to me to discuss the current events, and we both agreed that it be best that she disassociate with [her boyfriend] until he can show the same kind of effort that [she] has put towards her sobriety, and that he not be allowed to visit her home under any circumstances.” In other words, even after her life-threatening hospitalization in July, and the subsequent filing of the petition, mother still had not stopped seeing her boyfriend as of one week prior to the adjudication hearing.

not tell the investigator that she had used a few times since she got her apartment and that this was the “tail end.” She had two clean drug tests, and she has not used drugs since her release from the hospital.² She does not believe that she has a problem with drugs.

As we have stated, the court sustained the petition. In its ruling, the court specifically concluded that mother had a life-threatening problem with drugs – noting the lack of judgment involved in smoking heroin while in a hospital room fighting a drug overdose. The court also found that mother was “in complete denial. It’s the hospital’s fault. It’s the boyfriend’s fault. It’s the medical doctor’s fault. It’s everyone’s fault. It’s DCFS’s fault. It’s all a lie even though it’s the history that she gave the doctor.”

The court set the matter for disposition, asking mother if she was in a program. Mother said she was, at OPCC. The court said, “If that works for you, I need you to drug test, continue to drug test.” The court ordered a supplemental report, for the disposition hearing, on mother’s counseling and drug testing.

7. *From Adjudication (November 1) to Disposition (January 17), Mother’s Progress is Minimal*

The disposition hearing was initially set for December 1. The Department’s report for that hearing explained that the social worker had contacted a peer advocate at The People Concern, who explained that The People Concern is “mainly a housing resource agency,” not a court-mandated substance abuse facility. It does not require testing, meetings or therapy, but

² Her testimony did not admit using heroin in the hospital. She simply answered “No,” when her counsel asked, “Have you used since you got out of the hospital?”

supplies referrals when clients ask for resources. Mother had asked for a substance abuse counselor and was on the waiting list for one. According to the Department, mother had not been drug testing.

On December 1, mother's counsel sought a continuance, in part because mother had been drug testing and mother wanted DCFS to be able to verify her results. Mother's counsel stated that mother would submit to another test, as well. The court continued to the hearing to January 17, 2018, adding, "I hope your client by then will be off the waiting list and will be in an appropriate drug counseling and testing program, and that may take care of a lot of the issues." The Department asked that mother be required to attend DCFS-approved programs; the court responded, "Well, I already made that order."

The Department's report for the January 17 hearing indicated that mother claimed she "was being referred" to a substance abuse program, but mother had been unable to provide the name or contact information for that program. She did, however, have one negative on-demand drug test on January 9.

8. *The Disposition Hearing*

Mother did not testify at the disposition hearing; she chose to proceed on the exhibits alone. Mother introduced no evidence of the purported negative drug tests in November. Her counsel argued that the children should be released to her care because she "has been participating in counseling. She has indicated she is willing to be involved in a program approved by DCFS. She's submitted to testing and has negative tests, and she's willing to continue to submit to drug testing. It's our position that, because these children are older and they had not witnessed any substance abuse and the mother has shown that she's negative,

that they should be released to her care.” Father requested, in opposition, to close the case and award him custody. The children’s counsel wanted the case to remain open to give mother the chance to follow through with sobriety. The children wanted to return to mother, but their attorney thought this was premature. The trial court agreed with the children’s counsel, kept the case open, and did not return the children to mother. The court stated, “I don’t believe it’s any child’s responsibility, old or not old, to ensure the sobriety of a parent. That’s a parent’s responsibility, not a child’s responsibility.” Mother was awarded monitored visitation, with Department discretion to liberalize.³

Mother filed a timely notice of appeal from the disposition order.

DISCUSSION

After an adjudication of dependency, a “dependent child shall not be taken from the physical custody of his or her parents . . . with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence [¶] There is or would be a substantial danger to the physical health, safety, protection or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be protected without removing the minor from the

³ Mother asked if she could have unmonitored visits with the children after school. The court asked if she was in a program; mother said she got into “CLARE.” The court replied that upon certification that she was in the program and in compliance, the Department would have discretion to liberalize visits. This mention of CLARE, after the court had already made its disposition order, was the first time mother identified this program.

minor's parent's . . . physical custody.” (Welf. & Inst. Code, § 361, subd. (c)(1).)

We review the court's disposition finding for substantial evidence. (*In re Henry V.* (2004) 119 Cal.App.4th 522, 529.) Because the trial court's finding must itself be made on clear and convincing evidence, some appellate courts have stated that, in determining whether substantial evidence exists, we must determine if there was substantial evidence of the existence of clear and convincing proof. (E.g., *In re Basilio T.* (1992) 4 Cal.App.4th 155, 170.) Other courts disagree, on the following reasoning: “ ‘ “The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.” ’ [Citation.] Thus, on appeal from a judgment required to be based upon clear and convincing evidence, the clear and convincing test disappears and ‘the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.’ [Citation.]” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1525-1526.) We need not take a position on this dispute, because the evidence was sufficient in this case under either measure.

As explained in Welfare and Institutions Code section 300.2, “The provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child.” Here, mother could not provide such an environment. The statute goes on to provide, “Successful participation in a treatment program for substance abuse may be considered in

evaluating the home environment.” (*Ibid.*) At the time of the disposition hearing, mother had barely been accepted into a treatment program.

This much is clear: Mother started using drugs in 2014. At some point, she began behaving strangely, and father took custody of the children, for an unknown duration. At another point, prior to mother’s arrest in January 2016, mother became homeless, and father again took custody of the children. Mother did not regain custody until April 2017, only three months prior to the July 2017 hospitalization. Even this was not full custody, in that part of this time was during the summer, so mother and father were sharing custody. In other words, for the vast bulk of the time mother was using drugs, if the children were not aware of her substance abuse it was likely because the children were not living with her. When mother had finally regained her share of custody, it was only three months until she suffered a life-threatening overdose – with the result that one of her children ended up calling hospitals to look for her. Mother used heroin while in the hospital, an extremely irresponsible act, reflecting that her addiction was greater than her concern for her own health. When she was caught, she immediately expressed contrition and asked for help – a state of mind which lasted little more than a week, until she started denying first the heroin use in the hospital, then the overdose itself, then that she had ever used drugs at all after January 2016. Following her brief period of clarity in July 2017, she chose to seek help from a housing resource agency instead of a drug treatment program, and offered very little evidence that she had even begun regular counseling sessions by the time of the disposition hearing.

In short, the court concluded mother had a very serious drug addiction, which put her own life at risk, and it remained untreated. The court believed that placing the children in the situation where they would be watchdogs over their mother's sobriety would be a danger to their emotional well-being and we agree. This is particularly so given that mother's addiction remained untreated, and her claimed sobriety was fragile at best.

Mother takes the position that she was a responsible, high-functioning heroin addict, who was easily able to separate her drug abuse (and boyfriend) from her children, with no danger the two would overlap. This view is refuted by the fact that mother's oldest child returned to her home on July 15, expecting to find mother, and instead found the house in disarray and mother missing – only later to learn that mother had been hospitalized for a life-threatening heroin overdose. Mother failed to provide a “home environment free from the negative effects of substance abuse.” (Welf. & Inst. Code, § 300.2.) Without treatment for that abuse, her home was not safe for her children, and the juvenile court reasonably awarded custody to the father.

DISPOSITION

The disposition order is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

STRATTON, J.