Filed 3/16/17 In re R.C. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re R.C., a Person Coming Under the Juvenile Court Law. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RA. C., Defendant and Appellant.	B272199 (Los Angeles County Super. Ct. No. DK15180)

APPEAL from a judgment of the Superior Court of Los Angeles County, Natalie Stone, Judge. Reversed.

Maureen L. Keaney, under appointment by the Court of Appeal, for Defendant and Appellant.

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

INTRODUCTION

Mother appeals from a judgment declaring her two-year-old son, R.C., a dependent of the juvenile court pursuant to Welfare and Institutions Code section 300, subdivision (b).[1] In asserting jurisdiction, the court found mother was a habitual user of marijuana, and that her marijuana use placed R.C. at risk due to the child's very young age. However, the undisputed evidence showed that R.C. was healthy and well cared for, and that the maternal grandparents, who lived with mother and child, always cared for the child whenever mother used marijuana. In view of this undisputed evidence, the court's complete reliance on R.C.'s tender years to assert jurisdiction was erroneous. We reverse.

FACTS AND PROCEDURAL BACKGROUND

R.C. was born in November 2013. Mother and R.C. first came to the attention of the Los Angeles County Department of Children and Family Services (the Department) shortly after R.C.'s birth, when the Department received a referral alleging mother tested positive for marijuana when she delivered R.C. R.C. tested negative for the drug. Mother admitted using marijuana to address "her anxiety and some pain." She did not want to discontinue her use, but did assent to a safety plan that required her to leave R.C. with the maternal grandmother when she used or was under the influence. As the maternal grandmother resided in the home and supported mother, the Department determined the child was safe and closed the referral.

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[1] Statutory references are to the Welfare and Institutions Code unless otherwise indicated.

In March 2015, the Department received a new referral alleging mother was suicidal and had been placed on a section 5150 hold.[2] Mother did not attempt suicide, but had expressed suicidal thoughts. During the hospital hold, a psychiatrist diagnosed mother with schizophrenia, for which she was prescribed the medications Zoloft, Abilify and Sertraline to stabilize her mental health. Mother claimed she had never experienced mental health issues prior to the incident. After her release, mother was connected to a Department-approved clinic to receive mental health services.

During the Department's investigation, mother tested positive for marijuana. She admitted she continued to use, even though her medical marijuana card expired in January 2015. The Department requested that mother submit to ongoing drug tests. Having admitted she continued to use and seeing no reason to quit, mother refused the request. She said she used marijuana to address her pain, anxiety, moodiness, and depression.

The Department opened a Voluntary Family Maintenance plan to connect mother with mental health services and help her

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[2] Section 5150 provides, in pertinent part, "When a person, as a result of a mental health disorder, is a danger to others, or to himself or herself, . . . a peace officer, professional person in charge of a facility designated by the county for evaluation and treatment, . . . or professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody for a period of up to 72 hours for assessment, evaluation, and crisis intervention, or placement for evaluation and treatment in a facility designated by the county for evaluation and treatment and approved by the State Department of Health Care Services."

address her mental health issues without involving the court. The Department wanted mother to stabilize her mental health issues by seeing a therapist and taking prescribed medication in lieu of self medicating with marijuana. However, the Department reported that mother had "poor follow through" and failed to enroll in the services. The social worker noted that mother had "a lot of mistrust" concerning the Department. The social worker also observed that "mother appears to need hand holding in helping her to stay on track, get connected to services, and needs support and encouragement to stay on track." She stressed there had been "no progress made towards addressing mother's mental health issues" over the past eight months working with the family.

The Department reported mother's mood "frequently varied," and she could be "hostile at times." During some visits the social worker described mother as "very kind, sweet, cooperative, and talkative," while during other visits she was "very moody" and "difficult to speak with." At times mother agreed she needed to stop self-medicating with marijuana and seek professional mental health therapy. At other times she claimed the psychiatrists did not know what they were doing and were experimenting on her with the prescribed medications. Sometimes mother acknowledged the prescribed medications helped and she understood the importance of taking them. Other times she insisted the medications did not help, but rather made her tired and had additional side effects.

Mother admitted she could not control her mood and stated she used marijuana to regulate it. She believed she suffered from bipolar disorder, but not schizophrenia. She maintained the psychiatrist misdiagnosed her. Although the Department encouraged mother to seek a professional mental health assessment, mother failed to do so.

Mother and R.C. lived with the maternal grandparents.[3] She also had recently started full-time work as a receptionist. The Department reported the grandparents were "very supportive" and "do their part to ensure that [R.C.] is safe in the home." Among other things, the maternal grandmother watched R.C. whenever mother used marijuana or needed extra support. Both grandparents encouraged mother to stop smoking marijuana and to address her mental health issues. Due to the grandparents' support, the Department determined it was safe to keep R.C. in mother's care.

On January 15, 2016, after its efforts to encourage mother to seek mental health treatment had stalled, the Department filed a petition to adjudicate R.C. a dependent child as described by section 300, subdivision (b). The petition alleged mother's ongoing marijuana abuse and failure to participate in recommended mental health treatment placed R.C. at risk of serious physical harm. After an initial hearing on the petition, the juvenile court ordered R.C. released to mother on the condition she and the child remain in the maternal grandparents' home. The court also ordered mother to be evaluated for

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[3] R.C.'s alleged father denied paternity and refused to participate in the underlying dependency proceedings.

psychotropic medications and to take any medications prescribed. It then set the matter for a contested jurisdiction hearing.

In advance of the contested hearing, the Department interviewed mother again concerning the petition's allegations. Mother reported she was not participating in mental health services, and asserted the services were not necessary. With respect to her marijuana use, mother explained, "Since I don't take any medication, I know if I smoke weed it will keep me calm." She said she used marijuana approximately once per day and stressed that the maternal grandmother always cared for R.C. when she used the drug.

In an updated information statement, filed on March 2, 2016, the Department reported that mother recently commenced mental health services at an approved clinic, through which she would receive "medication support." Mother had also participated in three in-home meetings with services workers. Though mother was reportedly cooperative and "eager to receive help" during the meetings, the Department noted she had missed one of the meetings without notice and appeared under the influence of marijuana during another. The statement nevertheless acknowledged that mother "appears to have a bond with her son [R.C.] and seems to be [exhibiting] appropriate parenting skills for his age." The Department stated its "only concern [was] her daily use of marijuana," which it hoped could be corrected through drug counseling.

After receiving the Department's updated information statement, the court held a contested hearing on the dependency petition. The Department argued the court should sustain both jurisdictional counts, citing mother's failure to comply with the

Voluntary Family Maintenance plan and mother's admission that she self-medicated with marijuana.

R.C.'s appointed counsel joined mother's request to dismiss the dependency petition. Echoing mother's argument, minor's counsel maintained there was "really no evidence to show that this child is at risk." Minor's counsel emphasized the reports that the maternal grandmother cared for R.C. when mother used marijuana or needed additional support, observing, "This is why we have family, to support people, support parents in their times of need." Minor's counsel also noted that the Department was aware of mother's marijuana use before it sought court intervention, and that the Department accepted mother could safely care for R.C. so long as she left the child with his grandmother when she used marijuana.

The court sustained jurisdiction on the substance abuse count and dismissed the allegation concerning mother's mental health and failure to obtain treatment. With respect to the sustained count, the court explained: "[T]he big factor here for me is the young age of this child. Yes, there are cases out there saying mere use of marijuana is not enough to declare jurisdiction if there's no showing of neglect or abuse. [But,] [t]hat's never been a holding when you have a child this young. [¶] When a child is this young, to me, jurisdiction is warranted where a parent has a marijuana habit, a very serious marijuana habit. I do find that this child is at risk because of this child's young age. And it appears to me that mother, as she has admitted at times, is using marijuana to medicate herself, because she is struggling with mental health problems." The court ordered R.C. to remain in mother's custody, and ordered mother to complete a drug program with random drug testing, to

undergo a mental health assessment and psychiatric evaluation, and to take all prescribed psychotropic medications.

DISCUSSION

Mother contends the evidence was insufficient to support the juvenile court's finding that her ongoing use of marijuana, as alleged in the dependency petition, caused R.C. to suffer, or be at substantial risk of suffering, serious physical harm or illness. We agree.

"We review the juvenile court's jurisdictional findings for sufficiency of the evidence. [Citations.] We review the record to determine whether there is any substantial evidence to support the juvenile court's conclusions, and we resolve all conflicts and make all reasonable inferences from the evidence to uphold the court's orders, if possible. [Citation.] 'However, substantial evidence is not synonymous with *any* evidence. [Citations.] A decision supported by a mere scintilla of evidence need not be affirmed on appeal.' " (*In re David M.* (2005) 134 Cal.App.4th 822, 828; *In re Drake M.* (2012) 211 Cal.App.4th 754, 763 (*Drake M.*).) Furthermore, where application of the statute authorizing juvenile court jurisdiction turns on undisputed facts, we independently review the matter as a question of law without deference to the lower court's determination. (*In re R.C.* (2011) 196 Cal.App.4th 741, 748.)

Section 300, subdivision (b), creates juvenile court jurisdiction where it is shown that 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 . . . to adequately supervise or protect the child, . . . or by the inability of the parent . . . to provide regular care for the child due to the parent's . . . substance abuse." (§ 300, subd. (b).)

Consistent with this definition, the petition in this case alleged mother was "a current abuser of marijuana," R.C. was of "such young age requiring constant care and supervision," and mother's substance abuse interfered with her ability to provide regular care and supervision thereby placing R.C. "at risk of serious physical harm, damage and danger."

As this court has previously stated, "without more, the mere usage of drugs by a parent is not a sufficient basis on which dependency jurisdiction can be found." (*Drake M., supra,* 211 Cal.App.4th at p. 764; see also, *In re Alexis E.* (2009) 171 Cal.App.4th 438, 453 ["[W]e have no quarrel with Father's assertion that his use of medical marijuana, *without more*, cannot support a jurisdiction finding that such use brings the minors within the jurisdiction of the dependency court, not any more than his use of the medications prescribed for him by his psychiatrist brings the children within the jurisdiction of the court."]; *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003 [same].) In most cases, this something more is " 'an *identified, specific hazar*d' " arising from the substance abuse. (*Drake M.,* at pp. 766-767.) However, where the child is of " 'such tender years that the absence of adequate supervision and care poses an inherent risk to their physical health and safety,' " 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." (*Ibid.*; accord, *In re Rocco M.* (1991) 1 Cal.App.4th 814, 824; *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1216, 1219 (*Christopher R.*).) But, as with any prima facie showing, this "tender years" presumption can be rebutted by evidence indicating a lack of risk. (Cf. *Christopher R.,* at p. 1220.)

There is no doubt on this record that the juvenile court's jurisdictional finding rested solely on the tender years presumption.[4] In rendering its decision, the court made clear

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[4] The tender years presumption can be invoked only if the evidence supports a predicate finding that the parent is a current substance abuser. (See *Drake M., supra,* 211 Cal.App.4th at pp. 766-767.) In *Drake M.*, this court held "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 [American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders]." (*Id.* at p. 766.) According to the Department's reports, mother had not exhibited any of the clinically significant symptoms listed in the DSM-IV-TR; on the contrary, she maintained full time employment, she had no criminal history, and there were no other indications of dysfunction to suggest instability in the home. (See *Ibid.* [listing "clinically significant" symptoms supporting a substance abuse diagnosis under the DSM-IV-TR].)

Since *Drake M.* was decided, other appellate courts have acknowledged "the *Drake M.* formulation [is] a generally useful and workable definition of substance abuse for purposes of section 300, subdivision (b)," but have cautioned "it is not a comprehensive, exclusive definition mandated by either the Legislature or the Supreme Court." (*Christopher R., supra,* 225 Cal.App.4th at p. 1218; see also *In re Rebecca C.* (2014) 228 Cal.App.4th 720, 726 ["the rule to be taken from . . . *Drake M.* is that the absence of a medical diagnosis of substance abuse, and a lack of evidence of life-impacting effects of drug use, will not support a finding that a parent has a substance abuse problem justifying the intervention of the dependency court"].) We need not decide whether *Drake M.* is too restrictive in its formulation of what constitutes substance abuse for purposes of section 300,

that the "big factor" for it was "the young age of this child." More or less paraphrasing the tender years presumption, the court went on to observe that, "[w]hen a child is this young, to me, jurisdiction is warranted where a parent has a marijuana habit, a very serious marijuana habit."[5] Thus, while the court tacitly recognized the Department had made "no showing of neglect or abuse" by mother, it concluded that R.C. was nevertheless "at risk because of the child's young age."

The juvenile court was correct insofar as parental substance abuse may serve as prima facie evidence of neglect when a child is of tender years, even in the absence of an identified specific hazard arising from the substance abuse. (See *Drake M., supra,* 211 Cal.App.4th at p. 764.) However, the court erred in treating R.C.'s young age and mother's habitual marijuana use as *conclusive* evidence of substantial risk, rather than as *prima facie* evidence that could be rebutted by evidence establishing that no risk of harm existed. Here, there was evidence to rebut the presumption, and it was undisputed.

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subdivision (b). Even if we accept the juvenile court's implicit finding that mother is a current abuser of marijuana, we still must conclude the tender years presumption did not support the jurisdictional finding because, as we explain above, the undisputed evidence showed mother's alleged marijuana abuse never placed R.C. at risk of suffering serious physical harm.

[5] Children six years old or younger are generally considered to be of "tender years." (*Christopher R., supra,* 225 Cal.App.4th at p. 1219.) R.C. was two years old at the time of the hearing. (See also *Drake M., supra,* 211 Cal.App.4th at p. 767 [applying tender years presumption to 14-month-old child].)

The Department consistently reported that mother did not use marijuana when she cared for R.C.; and, when she did use marijuana, the Department reported R.C.'s grandparents cared for the child. In fact, when the family initially came to the Department's attention in November 2013, the Department determined it was safe to leave the child in mother's custody without juvenile court supervision, notwithstanding mother's admission that she used marijuana during her pregnancy and intended to continue using the drug after R.C.'s birth. At the time, the Department stated a voluntary safety plan was sufficient because the "maternal grandmother[,] who resided in the home[,] was a support to mother and ensure[d] that [R.C.] was safe when mother did use." This remained the case when mother came to the Department's attention in March 2015, after being placed on a section 5150 hold. And the arrangement persisted, according to the Department's reports, both before and after the Department filed the dependency petition, when the Department's efforts were principally focused on ensuring that mother obtained mental health treatment from an approved professional. Indeed, though the Department continued to report on mother's use of marijuana to self medicate and her refusal to submit to drug tests, none of those reports presented any evidence to suggest mother's marijuana use subjected R.C. to a lack of adequate care or supervision. On the contrary, the reports always acknowledged the infant was well cared for, either by mother when she was sober, or by the grandparents when mother used marijuana.

As discussed, the underlying premise for the tender years presumption is that young children are so vulnerable that " 'the absence of adequate supervision and care poses an inherent risk to their physical health and safety.' " (*Drake M., supra,* 211 Cal.App.4th at pp. 766–767.) While parental substance abuse under such circumstances may serve as prima facie evidence of the parent's inability to provide regular care (*ibid.*), that evidence is not conclusive and may be rebutted by evidence demonstrating a lack of risk. Here, the evidence was undisputed that, notwithstanding mother's habitual marijuana use, infant R.C. was never at risk because the maternal grandparents lived in the home and provided regular care for R.C. whenever mother used marijuana or needed additional support.[6] Because the evidence demonstrated that, notwithstanding R.C.'s tender years, mother's marijuana use did not put him at substantial risk of harm, the judgment declaring R.C. a dependent child must be reversed.[7]

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[6] We stress that the evidence was undisputed because it brings this case within the category of appeals that are subject to our independent de novo review. (See, e.g., *In re R.C., supra,* 196 Cal.App.4th at p. 748.) Had there been conflicting evidence about whether the grandparents consistently provided care for R.C. when mother used marijuana, the juvenile court might well have been justified in relying on the tender years presumption to assert jurisdiction.

[7] As there was no basis to assert dependency jurisdiction over R.C., the family maintenance orders are also necessarily vacated. (See *Drake M., supra,* 211 Cal.App.4th at pp. 770-771.)

DISPOSITION

The judgment declaring R.C. a dependent child is reversed.

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GOSWAMI, J.*

We concur:

EDMON, P. J.

ALDRICH, 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.