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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re ANGEL O., a Person Coming
Under the Juvenile Court Law.

B278319

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. DK18336)

Plaintiff and Respondent,

v.

GUADALUPE B.,

Defendant and Appellant.

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

Darlene Azevedo Kelly, 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.

Angel O., born in March 2003, is the child of Guadalupe B. (mother) and Lauro O. (father). In September 2016, the juvenile court declared Angel a dependent child pursuant to Welfare and Institutions Code¹ section 300, subdivision (b), and ordered him removed from mother and placed with father. Mother has appealed from the jurisdictional and dispositional findings and orders.

As we now discuss, although there is evidence that mother uses methamphetamines, there is no substantial evidence that Angel “has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness” as result of mother’s drug use. (§ 300, subd. (b).) We therefore reverse the jurisdictional and dispositional findings and orders.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Detention

In May 2016, the Los Angeles County Department of Children and Family Services (DCFS) received a report that there had been a drive-by shooting outside the home where mother, father, and Angel were living. The home was owned by mother’s sister, Susan R.; also living in the home were Susan, her adult daughter (Mary C.), and Mary’s four children. Police investigating the shooting discovered Mary’s boyfriend, Michael Sr., hiding in Mary’s bedroom, and found a loaded shotgun under Mary’s mattress. Subsequently, DCFS received an anonymous report to the child abuse hotline that mother and Mary were selling drugs from the home.

¹ All subsequent statutory references are to the Welfare and Institutions Code.

Maternal aunt Susan said she had lived at the same address for 22 years. She reported several gangs in the area, including the gang allegedly responsible for the shooting. Susan denied that anyone living in the home was selling drugs, and she said Mary obtained a restraining order against Michael Sr. immediately after the shooting.

Mother told the investigating children's social worker (CSW) that she had used methamphetamines in the past, but was not currently using or selling drugs. Mother agreed to drug test, but was a no-show for a test scheduled for June 9, 2016. On June 14, 2016, mother tested positive for amphetamines and methamphetamines. Mother continued to deny using illegal drugs, blaming the positive test on an energy drink.

Father told the CSW that he was blind and very ill due to diabetes, congenital heart failure, prostate problems, and kidney failure. He said mother helped him with everyday tasks and took him to doctors' appointments. Father said his memory was poor because of his medical conditions and the medication he was taking.

The CSW who interviewed Angel reported that he was clean and appropriately dressed. Angel said there was always food in the home, and he denied seeing anyone use drugs or alcohol. His school records indicated that he regularly attended eighth grade, although he had several disciplinary violations. Angel said his parents encouraged his participation in sports, including baseball and football, to keep him on "the 'right track.'"

DCFS obtained a removal order, and mother and father agreed to move out of the maternal aunt's home so Angel could remain in his aunt's care.

II.

Petition

A juvenile dependency petition, filed July 15, 2016, alleged: (b-1) mother was a current user of amphetamine and methamphetamine, which rendered her unable to provide regular care and supervision of Angel, and father had failed to protect Angel from mother's drug use; and (b-2) mother and father allowed an adult cousin and her male companion, who were current users of illicit drugs, to reside in the home and have unlimited access to Angel.

On July 15, 2016, the juvenile court found a *prima facie* case for detaining Angel.

III.

Jurisdiction and Disposition

A. Reports

A multidisciplinary assessment team report, dated September 2016, said Angel was happy in his current placement. The assessor described him as a "well-mannered and respectful young man," who "enjoys spending quality time with his family." Mother told the assessor she was proud of Angel and loved him. She said she and father regularly visited Angel, spoke to him on the phone, and attended all his extracurricular activities.

Maternal aunt Susan said Angel was close to his cousins and had tremendous support from them and other extended family members. She believed he had adjusted well to the separation from his parents, and that being in school and playing football were outlets for him. She had not noted any changes in mother's behavior, stating that mother cooked and interacted with the family. Susan did not believe mother was using drugs.

Angel's June 2016 report card showed that Angel had earned D's and F's in his academic subjects, and A's and B's in music and physical education.

B. Hearing

Mother testified at the jurisdiction and disposition hearing, held September 21 and 27, 2016, that she had used methamphetamines in the past, but had been clean for six years prior to 2015. In 2014, however, father had experienced many serious medical conditions, including a blood clot, prostate surgery, congenital heart failure, high blood pressure, and diabetes. Mother began using methamphetamines again in 2015 to cope with father's illness. She was using methamphetamines about three times per week, twice per day, "just to keep up with my husband because he was always in and out of the hospital, and, you know, having to take care of him, taking care of my family, it took a lot out of me back then."

Mother said the family had moved into Susan's house about two years earlier when father got sick. She said she had been participating in an outpatient drug rehabilitation program since August 2016, but had drug tested only once through that program. She was willing to drug test that afternoon.

Mother said she had never used drugs in the presence of her son or her husband, and she never told her husband she was using. She said she believed father would be able to take care of Angel without her assistance, although she admitted that she currently took father to all of his doctor's appointments, took care of his medication and his daily needs, cooked dinner, and cleaned the house.

Angel testified that he felt safe living with his mother. Mother never did anything to make him feel scared and never

brought people to the house who made him feel unsafe or upset. Mother helped him with homework, came to IEP (individualized education plan) meetings at school, attended school functions, signed him up for sports, and came to his baseball and football games on the weekends. Mother cooked for Angel and took care of him. Angel never saw mother, father, or anyone else in his house use drugs, never saw drugs in the house, and never saw mother “act[] kind of funny.” Mary and Michael Sr. lived in the garage; Angel never saw them use drugs, and he was never left alone with Michael. Angel never saw guns in the house; if he had seen a gun, he would not have touched it because his parents taught him to stay away from guns.

Father testified that during the past year he had been hospitalized three or four times. He had never seen mother or anyone else in the family home use illegal drugs. Mother had been assisting father with his medical issues; however, father believed he could take care of Angel by himself if necessary.

At the conclusion of testimony, the court ordered mother to drug test immediately after the hearing. The court advised that if mother failed to appear for the on-demand drug test, it would be considered a positive test. DCFS subsequently advised the court that mother had arrived for drug testing as the court ordered, but because her identification was not current, she was not permitted to undergo a drug test. She was able to get a temporary referral from the CSW and drug tested the next day (September 22).²

² On March 16, 2017, DCFS filed a request for judicial notice of (1) a January 23, 2017 “Last Minute Information for the Court,” and (2) a January 23, 2017 minute order. Mother opposed the request for judicial notice and filed a motion to strike

C. Court's Findings

On September 27, 2016, the court sustained count b-1 of the petition, as amended,³ and dismissed count b-2. The court explained its findings as follows:

“The court is aware that at this time the adult cousin Mary and her male companion are no longer in [the] home. [Michael Sr.] is in custody, and the court does not find that there is a

references to post-judgment evidence from DCFS’s brief. We now grant the motion for judicial notice and deny the motion to strike.

The January 23 report states that mother tested positive for amphetamines and methamphetamines on September 22, 2016; failed to submit to random drug testing in October, November, and December 2016; and had not attended her substance abuse counseling program since November 15, 2016. Father and Angel were living with maternal aunt Susan, and Angel was attending school regularly and receiving satisfactory grades. Father had been hospitalized in November and December 2016 for congestive heart failure, kidney problems, and high blood pressure, and extended family members had helped with Angel’s care while father was hospitalized.

³ Count b-1 was amended as follows: “[Mother] has a lengthy history of illicit drug use and is a recent user of methamphetamine and amphetamine which renders the mother incapable of providing the child with regular care and supervision. On prior occasions the mother was under the influence of illicit drugs while the child was in the mother’s care and supervision. On 6/14/2016 the mother had a positive toxicology screen for methamphetamine and amphetamine. The mother has a prior criminal conviction for Possession of a Controlled Substance. The mother’s illicit drug use endanger[s] the child’s physical health and safety and places the child at risk of serious physical harm, damage, danger and failure to protect.”

sufficient . . . nexus with count [b-2] and the conclusion that the child based on those facts will suffer substantial risk of serious physical harm since today that situation has changed significantly.

“The court distinguishes [*In re Rebecca C.* (2014) 228 Cal.App.4th 720] for the following reason. We have a 13-year-old. We don’t have an infant. We don’t have a toddler.^[4] So a 13-year-old is a teenager who is able to in many ways to take responsibility for feeding themselves, for clothing themselves, for their hygiene needs, getting up in the morning and going to school, coming home and being self-directed. So in that regard, the fact that the child goes to school and is healthy and appeared to be clean does not mean that the child will not suffer serious physical harm. The fact of the matter is that the mother has had a significant history of methamphetamine use, and I’m not sure if her relapse was a singular incident. The court did not find the mother to be very credible. And, frankly, the court did not find Angel to be very credible. I think Angel very much wants to return to live in the situation he was in, with his mother and father, and so his responses to the questions asked of him reflected that there [were] no problems in the home.

“Well, when we look at the entirety of the situation that occurred at the time the child was detained on July 15th, this was a very dysfunctional home and I am concerned about what [maternal aunt Susan] permitted to occur in that home. . . . This case came in because of allegations of selling and using drugs in

⁴ The court misspoke in its characterization of *In re Rebecca C.*; the minor at issue in *In re Rebecca C.*, like Angel, was a teenager. (See *In re Rebecca C.*, *supra*, 228 Cal.App.4th at p. 722.)

the home, not just by [mother] . . . but also by Mary^[5]. . . . There have been no allegations that [Susan] knew, but it's interesting that not – not just one person was alleged to be using drugs in the home. So it's not just [Susan's] daughter. It's also her sister. And it's also her permitting the daughter's adult boyfriend who was a known member of a gang with a drive-by shooting two months before this petition was filed into the home which could easily have resulted in the death of children who resided in that home and/or adults.

“[Michael Sr.] . . . was residing there quite frequently, although . . . by his testimony this was not his permanent residence. He had a loaded shotgun underneath his bed. A 13-year-old could easily have made contact with that loaded shotgun, and for the court to believe that he never went in that bedroom, I find that hard to believe. Even if that is true, it was within access of that 13-year-old, and it was not just the gun. It was a loaded gun ready to shoot. . . . We see on the news where children come into contact with firearms and accidentally . . . kill themselves or kill others.

“. . . I do not find this to be a home clear of drugs or firearms where this child was living in May nor do I find it to have been clear of drugs in June. And, frankly, I don't even know if mother will test negative in her recent test. [¶] So the court is very concerned that the mother continues to be involved in drug use, and there is no evidence before the court that she's not at this point.”

⁵ The only accusation that drugs were being sold from the family home is in the form of an anonymous call made to the child abuse hotline. The accusation was never substantiated.

With regard to disposition, the court ordered Angel removed from mother and placed with father, specifically noting that under the terms of the order, father and Angel (but not mother) could live with maternal aunt Susan; or, if father continued living with mother, Angel could remain placed in Susan's home. Mother was permitted unmonitored day visits so long as she tested clean; she was advised that if she missed a test or tested positive, her visits would be monitored. Further, mother was ordered to complete a drug treatment program with individual counseling to address case issues, and to participate in conjoint counseling with Angel. Father was permitted to monitor mother's visits after he completed a drug awareness program.

Mother timely appealed from the September 28, 2016 order.

DISCUSSION

Mother contends that the juvenile court erred in sustaining the petition because there was not substantial evidence that Angel had suffered, or was likely to suffer in the future, serious physical harm as a result of mother's methamphetamine use. For the reasons that follow, we agree.

A. Legal Standards

Section 300, subdivision (b) provides that a child is within the jurisdiction of the juvenile court if he or she "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 . . . substance abuse."

“The statutory definition consists 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 Savannah M.* [(2005)] 131 Cal.App.4th [1387,] 1396.) 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 Nicholas B.* (2001) 88 Cal.App.4th 1126, 1137.)” (*In re David M.* (2005) 134 Cal.App.4th 822, 829.)⁶

“In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings and disposition, we determine if substantial evidence, contradicted or uncontradicted, supports them. “In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court’s determinations; and we note that issues of fact and credibility are the province of the trial

⁶ In *In re R.T.* (2017) 3 Cal.5th 622, our Supreme Court recently cast doubt on this three-part test insofar as it requires a showing of parental fault. It reaffirmed, however, the need to demonstrate that the child “is at ‘substantial risk’ of ‘serious physical harm or illness’ ” in order to support the exercise of dependency jurisdiction. (*Id.* at p. 634.)

court.” (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.) “We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.] ‘ “[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate].” ’ [Citation.]” (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.)” (*In re I.J.* (2013) 56 Cal.4th 766, 773.)

B. A Parent’s Drug Use, Standing Alone, Does Not Bring a Child Within the Jurisdiction of the Juvenile Court

It is well established that a parent’s drug use, standing alone, does not bring a minor within the jurisdiction of the dependency court. (*In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003; *In re Drake M.* (2012) 211 Cal.App.4th 754, 764 [“We have previously stated that without more, the mere usage of drugs by a parent is not a sufficient basis on which dependency jurisdiction can be found.”].) As one court explained: “It is undisputed that a parent’s use of marijuana ‘*without more*,’ does not bring a minor within the jurisdiction of the dependency court. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 453; original italics.) The same is true with respect to the use of hard drugs. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 817, 825–826 [mother’s cocaine use standing alone was not sufficient basis of jurisdiction under section 300, subdivision (b)], abrogated on other grounds in *In re R.T.*, *supra*, 3 Cal.5th 622; see *In re Jeannette S.* (1979) 94 Cal.App.3d 52, 59, fn. 2 [father’s alcoholism alone did not support jurisdiction under section 300, subdivision (b)].)” (*In re Destiny S.*, *supra*, 210 Cal.App.4th at p. 1003.) Instead, DCFS

must present evidence “of a specific, nonspeculative and substantial risk . . . of serious physical harm.” (*Ibid.*)

Noting the absence of evidence of substantial risk of harm resulting from a parent’s drug use, the Court of Appeal reversed a finding of jurisdiction in *In re Rebecca C.*, *supra*, 228 Cal.App.4th 720. There, 13-year-old Rebecca’s mother repeatedly tested positive for methamphetamines and marijuana. However, “when the family residence was inspected by the investigating social workers, it was clean, free of hazards, stocked with food, and clear of drugs and firearms. Rebecca denied any physical or emotional abuse, did not show any signs of physical abuse, and was not fearful of Mother. Rebecca was up to date on medical and dental checkups. Mother enrolled Rebecca in special education during the fourth grade; Mother regularly attended individual education plan meetings on behalf of Rebecca.” (*Id.* at p. 727.)

The juvenile court declared Rebecca a dependent child and the mother appealed, urging there was no substantial evidence that her substance abuse had caused, or posed a substantial risk of causing, harm to Rebecca. DCFS did not point to any evidence of harm, but urged “that methamphetamine, amphetamine and marijuana are well-recognized to be substances which cause hallucinogenic or stimulant-driven behavior” and “ ‘[t]he risk to a child being cared for by a parent under the influence of such substances is not speculative.’ ” (*In re Rebecca C.*, *supra*, 228 Cal.App.4th at pp. 727–728.)

The Court of Appeal reversed, noting that DCFS’s contention “excises out of the dependency statutes the elements of causation and harm. In other words, DCFS essentially argues that, when a parent engages in substance abuse, dependency

court jurisdiction is proper. *This is not what the dependency law provides.* Further, if DCFS's position were accepted, it would essentially mean that physical harm to a child is *presumed* from a parent's substance abuse under the dependency statutes, and that it is a parent's burden to prove a negative, i.e., the *absence* of harm. Again, this is not what the dependency law provides." (*In re Rebecca C.*, *supra*, 228 Cal.App.4th at p. 728, first italics added.)

This court similarly concluded in *In re Drake M.*, *supra*, 211 Cal.App.4th 754. There, the juvenile court found it had jurisdiction over 14-month-old Drake because his father smoked marijuana on a regular basis. It was undisputed, however, that there was food in the home, the utilities were working, and Drake was healthy and showed no signs of abuse. (*Id.* at p. 768.) Accordingly, the Court of Appeal concluded that the record lacked any evidence of a specific, defined risk of harm to Drake resulting from father's usage of medical marijuana. It noted, for example, that despite DCFS's allegations, there was no evidence that father had ever been under the influence of marijuana while driving his vehicle. (*Id.* at p. 767.) The court explained: " 'Certainly, it is possible to identify many possible harms that *could* come to pass. But without more evidence than was presented in this case, such harms are merely speculative.' [Citation.] Prior case law is clear with respect to medical marijuana usage in the context of dependency. Although 'even legal use of marijuana can be abuse if it presents a risk of harm to minors' [citation], a jurisdictional finding under section 300, subdivision (b), based merely on such usage *alone* without *any* evidence that such usage has caused serious physical harm or illness or places a child at substantial risk of incurring serious

physical harm or illness is unwarranted and will be reversed.” (*Id.* at p. 769, fn. omitted; see also *In re David M.*, *supra*, 134 Cal.App.4th at p. 830 [jurisdiction under section 300, subdivision (b), reversed where mother had continuing substance abuse problem, but there was no evidence of a specific, defined risk of harm from mother’s substance abuse].)

Similarly, in *In re Destiny S.*, *supra*, 210 Cal.App.4th 999 “[t]here [was] no evidence . . . that Mother’s drug use caused her to neglect Destiny. On the contrary, the undisputed evidence showed that at the time of th[e] petition Destiny’s home was ‘neat and clean,’ Destiny had her own bedroom ‘which was nicely decorated,’ no drug paraphernalia was observed in the home and the refrigerator and cabinets were stocked with ‘an adequate amount of food and all of the utilities were in proper working order.’ It was also undisputed that Destiny ‘has no behavioral or discipline issues and attends school regularly’ and wanted ‘to go back with [her] mom.’ ” (*Id.* at p. 1004.)

In contrast, in *In re Rocco M.*, *supra*, 1 Cal.App.4th 814, parental drug use *did* subject the minor to a substantial risk of physical harm, so as to support an order adjudging the minor a dependent child. There, an 11-year-old child “found drugs in the bathroom. He thought it was cocaine; it consisted of white powder in a baggy and there was a mirror and straw next to it.” (*Id.* at p. 817.) In affirming the lower court’s order, the *In re Rocco M.* court explained: “Our conclusion here rests not on [mother’s] apparent dependency on drugs or alcohol, but on her creation of a home environment providing Rocco with the means, the opportunity, and at least the potential motives to begin abusing drugs himself.” (*Id.* at p. 826.)

C. Substantial Evidence Does Not Support the Juvenile Court's Jurisdictional Finding

As mother concedes, she tested positive for methamphetamines and amphetamines on June 14 and September 22, 2016, and failed to submit to random drug tests in June, October, November, and December. Accordingly, there is abundant evidence of mother's substance abuse within the meaning of section 300, subdivision (b). As we have said, however, a finding of substance abuse is not sufficient to support juvenile court jurisdiction; there must also be substantial evidence that a parent's substance abuse *has caused or is causing* a substantial risk of harm to the child.

As in *In re Rebecca C.*, *In re Drake M.*, and in *In re Destiny S.*, and unlike *In re Rocco M.*, there is no evidence in the present case of harm or a substantial risk of harm to Angel as a result of mother's drug use. To the contrary, notwithstanding mother's apparent drug use, the uncontroverted evidence is that before mother was removed from the family home, she was successfully caring for both Angel and his ailing father. According to DCFS's reports, there was adequate food in the house, Angel was clean and appropriately groomed, and he was regularly attending both school and extracurricular activities. Despite the anonymous call to the child abuse hotline, there was no competent evidence that mother (or anyone in the home) was selling drugs. Although Angel's academic grades were poor, there was evidence that he had an IEP in place, and that mother met with Angel's teachers regarding the IEP. There were no reports by any of the adults with whom Angel had daily contact, including his teachers and coaches, that Angel was being abused or neglected, and Angel himself said that he felt safe and well cared for by mother.

Further, 14-year-old Angel is “‘old enough to avoid the kinds of physical dangers which make infancy an inherently hazardous period of life.’ (*In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 825.)” (*In re Destiny S.*, *supra*, 210 Cal.App.4th at p. 1004.)

We caution that nothing we have said should be construed as minimizing the seriousness of mother’s methamphetamine use. However, the law is clear that substance abuse, alone, will not support the exercise of dependency jurisdiction. Because in the present case there is no evidence that Angel has suffered, nor is there a substantial risk that Angel will suffer, serious physical harm or illness as a result of mother’s methamphetamine use, the jurisdictional finding and resulting dispositional orders must be reversed.

DISPOSITION

The juvenile court's jurisdictional and dispositional findings and orders are reversed. The request for judicial notice is granted. Appellant's motion to strike references to post-judgment evidence is denied. (See fn. 2, *ante*.)

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EDMON, P. J.

We concur:

LAVIN, J.

JOHNSON (MICHAEL), J.*

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