Filed 8/22/17 In re O.V. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re O.V., a Person Coming Under the Juvenile Court Law.	B277136 (Los Angeles County Super. Ct. No. DK15966)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. K.M. et al., Defendants and Appellants.	

APPEAL from orders of the Superior Court of Los Angeles County, Annabelle G. Cortez, Judge. Affirmed as to K.M.; dismissed as to C.V.

Julie E. Braden, under appointment by the Court of Appeal, for Defendant and Appellant K.M.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant and Appellant C.V.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Jessica S. Mitchell, Deputy County Counsel, for Plaintiff and Respondent.

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K.M. (mother) and C.V. (father) separately appeal the juvenile court's exercise of jurisdiction over their infant daughter O.V. pursuant to Welfare and Institutions Code section 300, subdivision (b).[1] As for the allegations against mother, the evidence showed mother used marijuana regularly while pregnant; O.V. tested positive for marijuana at birth; mother breastfed O.V. despite being warned not to breastfeed with marijuana in her system; mother and father regularly use medical marijuana outside the presence of O.V.; and neither parent believed marijuana to be harmful to O.V. This constituted substantial evidence to support the juvenile court's finding that mother's drug use placed O.V. at a risk of future harm. We therefore affirm the court's order on that basis. Because the sustained allegations against mother were sufficient to support the court's orders, we dismiss father's appeal as nonjusticiable.

BACKGROUND

1. Events Leading to Petition

At the time of the petition, mother was 32 years old. At 19, she was diagnosed as bipolar and schizophrenic after she had a

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[1] All undesignated citations are to the Welfare and Institutions Code unless otherwise noted.

psychotic episode and committed herself to a hospital for a month. She was using heroin and cocaine at the time. She began taking medication for her psychiatric conditions but did not like the side effects, so at age 22 or 23 she began smoking medical marijuana, which she believed helped "tremendously" in dealing with her mental health issues. She used methamphetamine at age 25 for two years. She had not had another psychotic episode and has received psychiatric treatment "on and off" since that time. She discontinued her psychotropic medication a year before O.V.'s birth because of the side effects. She preferred to "self-medicate" with marijuana. She has a medical marijuana card for "stress."

Between 2011 and 2014, mother lived in Guam as a model while father resided in Washington state. In September 2014 while still in Guam, mother was raped by a police officer. Upon returning to California the next day, she binged on alcohol and was hospitalized for liver failure. She has not used alcohol since, although she continues to be emotionally affected by the incident.

Age 35, father served in combat in the United States Army from 2001 through 2011, and he currently receives services from the Veterans Administration. He has a medical marijuana card for posttraumatic stress disorder. He works full time from 9:00 a.m. to 8:00 p.m.

Mother and father married in 2015 and had O.V. in February 2016. They live with the maternal grandparents. The couple believes in Rastafarianism. As part of those beliefs, they use 1.5 grams of marijuana together twice a day in the morning and evening while they pray. They claim never to use it around O.V., and the maternal grandparents take care of her for two to

three hours each time. (The parents' religious beliefs are not at issue on appeal.)

The family came to the attention of the Los Angeles County Department of Children and Family Services (DCFS) the day after O.V.'s birth when it was reported mother had tested positive for marijuana and barbiturates, she had obtained no prenatal care because her insurance was not accepted in California, and she had a medical marijuana card. A nurse reported that mother told her she used marijuana every day up to when she learned she was pregnant and she had no prenatal care. The attending physician was concerned mother had minimal prenatal care and "lack of organizational capacity to seek care." He reported mother's history of schizophrenia and noted she stopped taking her medication. He observed the maternal grandparents at the hospital and noted mother appeared to have a "good support system." A doctor who performed a psychological evaluation on mother reported mother was "rational and not delusional." She appeared stable, functioned in a unit with father, and did not meet the medical criteria for a psychological hold.

A psychosocial assessment noted mother said she used marijuana several times a day while pregnant, and she had tested positive for marijuana during a January 10, 2016 prenatal examination. Mother admitted she had been counseled on the risks of using marijuana while pregnant but found it to be natural and "safer than prescription medication." She did not intend to stop using it. The assessment also noted her past cocaine, heroin, and methamphetamine use. She had been going to therapy every other week until a year prior when she stopped taking her psychotropic medications. When asked if she would consider returning to psychiatric treatment, she said, "maybe."

Mother and O.V. were discharged from the hospital on February 29, 2016. A medical report noted mother's pregnancy was complicated by the lack of prenatal care, her history of schizophrenia, anxiety, her episode of heavy drinking that resulted in liver failure, and a positive test for marijuana. An assessment noted O.V. was 8.2 percent below normal body weight and noted mother intended to continue breastfeeding O.V. Mother was prescribed Seroquel and Percocet upon discharge.

On March 1, 2016, test results for O.V. came back positive for cannabinoids and benzodiazepines at birth. It was confirmed she was 8.2 percent below normal body weight. She was otherwise healthy.

On March 3, 2016, mother went to the hospital for a wellness visit. It was noted mother smoked marijuana the day after she went home from the hospital and was taking her prescribed medication but did not drink or use any illicit drugs. She was encouraged to seek mental health care. A hospital social worker advised mother not to breastfeed while using marijuana and informed her of the harmful consequences of breastfeeding with traces of marijuana in her body. Mother was not receptive to these admonishments, and the social worker believed mother would continue breastfeeding with marijuana in her system.

On the same day, the DCFS social worker interviewed the family. In addition to recounting her history, mother told the social worker she continued to smoke marijuana while pregnant, and no one had told her not to. She denied any of the doctors and nurses at the hospital counseled her not to breastfeed with marijuana in her system. She stopped using marijuana before O.V. was born, but could not say exactly when. That morning the hospital social worker advised her that breastfeeding while she

had marijuana in her system may harm O.V. and told her to discontinue it. The DCFS social worker also advised her to stop, but mother declined, believing marijuana in her breast milk was not harmful, but natural and beneficial to O.V. She planned to stop using marijuana and start taking psychotropic medication while she breastfed, although she preferred to continue using marijuana and breastfeeding. Mother claimed the marijuana in O.V.'s system may have been the result of chemicals naturally produced in the body. She agreed to drug test for DCFS.

Father told the social worker he and mother smoked marijuana twice a day outside the home while the maternal grandparents cared for O.V. He did not believe the marijuana in mother's breast milk was harmful to O.V. because the chemical in marijuana was produced in everyone's body. He also believed their use of marijuana was constitutionally protected based on their religious beliefs. He supported mother's decision to continue breastfeeding. He agreed to drug test for DCFS.

The maternal grandparents told the social worker they believed mother and father were properly caring for O.V., and they had no concerns about mother and father's parenting skills. They were prepared and able to provide care-giving support to mother and father if necessary. The maternal grandmother was willing to care for O.V. while mother and father used marijuana.

Based on the above information, DCFS alleged four grounds for jurisdiction pursuant to section 300, subdivision (b): O.V. tested positive for marijuana and benzodiazepines at birth (b-1); mother had a history of illicit drug use, used marijuana during pregnancy, and continued to use marijuana (b-2); father had a history of illicit drug use and currently used marijuana (b-3); and mother had mental and emotional problems, including a

diagnosis of schizophrenia, and she failed to take psychotropic medications as prescribed (b-4).

Finding a prima facie case under section 300, the juvenile court ordered O.V. to remain released to her parents. Among other directives, it ordered mother not to breastfeed.

At a followup doctor's visit on March 14, 2016, mother reported she was feeding O.V. formula and stopped breastfeeding.

2. Jurisdiction/Disposition Report

In addition to recounting her history, mother reported she was upset with the hospital because "she had spoken with numerous doctors about her marijuana use" and did not know the "implications" of signing the paperwork about her history. She had informed the doctors throughout her pregnancy she was using marijuana and did not realize it was an issue until "a nurse had sat down next to her at the hospital and would not leave." She said she had not been advised by a medical professional that she should not use marijuana while pregnant. If she had been, she would have stopped and would not have breastfed. She said she tested positive for barbiturates because doctors had given her an epidural and, when that was not effective, "two other shots."

Mother confirmed she and father smoked 1.5 grams of marijuana daily in the morning and evening outside O.V.'s presence as part of prayer. During those times, the maternal grandparents took care of O.V. for two to three hours.

As for her mental health issues, she was asked if she had taken medication or gone to therapy. She responded that she had gone to a psychiatrist, but since practicing her religion, she has not had an episode. She explained some of the details of her psychotic episode when she was 19, and when asked if further

therapy would help, she responded with the many happy events in her life since then, including marriage and having a baby.

DCFS was unable to interview father or the maternal grandparents for the report.

3. Prehearing Events

Mother and father each missed two drug tests in May 2016. DCFS social workers made three visits to the parents' home to follow up with the drug testing, but mother remained resistant. DCFS conducted a full section 301 assessment[2] and concluded court involvement was necessary because mother and father "have not shown they will be compliant with the department."

4. Jurisdiction/Disposition Hearing

After hearing argument, the court found a preponderance of evidence supported exercising jurisdiction based on all four allegations in the petition. Acknowledging marijuana use alone was insufficient to show a risk to O.V., the court noted O.V. was an infant—of "tender years"—and she was prenatally exposed to marijuana. The court did not believe mother's claim that she was not aware of the risks of exposing O.V. to marijuana and credited the medical records showing she was counseled and her pregnancy was complicated by marijuana use. The court also noted mother's history of using other drugs.

The court acknowledged mother had not had a mental health episode since 19 years old, but it pointed out she had been prescribed psychotropic medication and credited DCFS's claim

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[2] Under section 301, a social worker "may, in lieu of filing a [section 300] petition or subsequent to dismissal of a petition already filed, and with consent of the child's parent or guardian, undertake a program of supervision of the child." (§ 301, subd. (a).)

she was self-medicating with marijuana. The court noted the parents smoked marijuana every day, and it seemed to credit their claim the maternal grandmother was available to care for O.V. during those times. The court found mother and father were aware of the risks of mother using marijuana while pregnant and minimized the risk from mother breastfeeding while using marijuana. The court specifically rejected mother's claim she stopped breastfeeding because she learned about the risks of nursing while using marijuana. Instead, "[t]he record completely paints a different picture of mom's view that marijuana is not harmful for her including while she was pregnant, including while she expressed her plan to intend to nurse." So even if the maternal grandmother could care for O.V., "that still doesn't address the risk of mom being of the view that marijuana doesn't have risk, a detrimental impact on her child including that she nurses the child."

Citing *In re Troy D.* (1989) 215 Cal.App.3d 889 (*Troy D.*), the court found mother's prenatal use of "dangerous drugs" was probative of future risk to O.V. The court also noted mother initially intended to breastfeed O.V. after having been counseled on the risks of doing so because she believed marijuana was natural and safer than prescription drugs. Finally, the court noted mother claimed no mental health issues but was prescribed Seroquel after O.V.'s birth and was not seeking mental health services.

For disposition, the court released O.V. to the parents with family maintenance services and a family preservation referral, and ordered no one caring for O.V. to be under the influence of drugs or alcohol. The court left intact the no-breastfeeding order since mother intended to continue using marijuana. The court

ordered random, on-demand drug testing for both parents and ordered DCFS to "walk the matter on" if there were concerns with mother's marijuana levels. It also ordered mother to submit to a psychological evaluation and individual counseling.

Mother and father separately appealed.

DISCUSSION

1. Standard of Review

Section 300, subdivision (b)(1) states if "[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 the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse." A juvenile court must make the finding a child falls within this subdivision by a preponderance of evidence. (§ 355, subd. (a).)

Three elements must be satisfied to trigger jurisdiction under section 300: " '(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) "serious physical harm or illness" to the [child], or a "substantial risk" of such harm or illness.' " (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1396.) This standard is met when the record shows "at the time of the jurisdictional 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)." (*Ibid.*) "The court may consider past events in deciding whether a child presently needs the court's protection. [Citation.] A parent's ' "[p]ast conduct may be probative of current conditions" if there is reason to believe that the conduct will continue.' " (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1216 (*Christopher R.*).) "[T]he court need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child." (*Ibid.*)

With regard to substance abuse specifically, the Legislature declared in 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." "Exercise of dependency court jurisdiction under section 300, subdivision (b), is proper when a child is 'of such tender years that the absence of adequate supervision and care poses an inherent risk to [his or her] health and safety.' " (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1384 (*Kadence P.*).)

We review the juvenile court's determination for substantial evidence, that is, evidence that " 'a reasonable mind would accept as adequate to support a conclusion; it is evidence which is reasonable in nature, credible, and of solid value.' " (*In re A.S.* (2011) 202 Cal.App.4th 237, 244.) We may not weigh the evidence or second-guess the credibility determinations of the juvenile court; instead, we must " 'accept the evidence most favorable to the order as true and discard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact.' " (*Ibid.*)

2. Substantial Evidence Supported Jurisdiction Based on Mother's Drug Use

Substantial evidence supported the juvenile court's finding that mother's past drug abuse and current marijuana usage demonstrated a future risk of harm to O.V.[3] O.V.'s prenatal exposure to marijuana was itself strong evidence of a risk of future harm.[4] (*Troy D., supra,* 215 Cal.App.3d at p. 899 ["[P]renatal use of dangerous drugs by a mother is probative of future child neglect. . . . Mother's prenatal drug use indicated that [the infant] was at risk and in need of the court's protection."]; see *Christopher R., supra,* 225 Cal.App.4th at p. 1219 [mother's cocaine use "during the last months of her pregnancy confirmed her poor judgment and willingness to endanger her children's safety due to substance abuse"].)

Further, neither mother nor father acknowledged any risk from exposing a newborn to marijuana. (See *In re Gabriel K.* (2012) 203 Cal.App.4th 188, 197 ["One cannot correct a problem one fails to acknowledge."].) Mother admitted she smoked marijuana regularly while pregnant, and she could not remember when she decided to stop before O.V.'s birth. She received no

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[3] Because mother's drug and marijuana use was sufficient to sustain jurisdiction, we need not address the allegations regarding mother's mental health as an additional ground for jurisdiction. (*Kadence P., supra,* 241 Cal.App.4th at p. 1385, fn. 6.)

[4] Mother claims O.V.'s positive test for benzodiazepines was the result of mother being administered alprazolam one day after O.V.'s birth while she was nursing. We need not resolve this issue because O.V.'s positive test for marijuana was itself strong evidence of neglect.

prenatal care. Medical records indicated mother was advised more than a month before O.V.'s birth that smoking marijuana while pregnant could be harmful to O.V., and yet she denied she was ever informed of the risks. When asked about O.V.'s positive drug test, mother dismissed it, saying the test was the result of chemicals naturally occurring in O.V.'s body. Several days after O.V.'s birth, the hospital social worker warned mother about breastfeeding with marijuana in her system, but mother was not receptive to the warning, and the social worker believed mother was going to breastfeed anyway. The DCFS social worker also advised mother not to breastfeed and use marijuana, but mother declined to stop breastfeeding, believing marijuana was natural and beneficial to O.V.

Reinforcing mother's views, father also did not believe marijuana in mother's breast milk was harmful to O.V. because the chemicals are also produced in the human body. He supported mother's decision to continue breastfeeding. Even though mother had stopped breastfeeding several weeks after O.V. was born, the parents continued to smoke marijuana twice a day with an infant in the house, claiming to do so outside O.V.'s presence.[5] While the juvenile court seemed to believe that the maternal grandparents took care of O.V. during these times, there was little assurance that would *always* be true. Because the parents did not believe marijuana was harmful to O.V., there was a substantial risk they would smoke marijuana around her if the maternal grandparents were unavailable. Mother's past

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[5] The parents each missed two drug tests in May 2016, when O.V. was approximately four months old. The juvenile court was entitled to treat missed tests as positive. (*Christopher R., supra,* 225 Cal.App.4th at p. 1217.)

struggles with drugs and alcohol further suggested she may be unable to control or moderate her marijuana use around O.V. if a caregiver were unavailable.

It is true the parents' legal use of marijuana alone is insufficient to justify the juvenile court's exercise of jurisdiction over O.V. (*Christopher R., supra,* 225 Cal.App.4th at p. 1220; *In re Drake M.* (2012) 211 Cal.App.4th 754, 764 (*Drake M.*).) But "even legal use of marijuana can be abuse if it presents a risk of harm to minors," and evidence of that risk existed here. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 452.) Although the parents had medical marijuana cards, the Legislature recognized that exposing children and others to even legal marijuana smoke can pose risks. (*Ibid.* [Health and Safety Code section 11362.79 prohibits smoking marijuana " 'within 1,000 feet of the grounds of a school, recreation center, or youth center, unless the medical use occurs within a residence,' or to use it on a school bus, or in a motor vehicle that is being operated. A reasonable inference to be drawn from this prohibition is that use of marijuana near others can have a negative effect on them."].)

Mother argues her legal use of marijuana did not meet the definition of substance "abuse" set out in *Drake M.*, so the exercise of jurisdiction under section 300, subdivision (b) was improper. (See *Drake M., supra,* 211 Cal.App.4th at pp. 766-767 [defining substance abuse in cases involving young children as either a medical diagnosis or a substance abuse problem as defined in the 2000 edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders].) Other courts, including our Division, have disagreed that substance abuse is limited to the formulation set out in *Drake M.* (See *In re Rebecca C.* (2014) 228 Cal.App.4th 720, 726

[Second District, Division Eight]; *Christopher R., supra,* 225 Cal.App.4th at p. 1218.) In any case, even in the absence of substance "abuse," jurisdiction can *also* be justified by use of marijuana "if the evidence showed that, as a result [of drug use], [the parent] failed or was unable to adequately supervise or protect" the child. (*Drake M., supra,* 211 Cal.App.4th at p. 768.) For all the reasons set forth above, mother's marijuana use rendered her unable to supervise and protect O.V., so the juvenile court did not need to also find she was a substance abuser in order to exercise jurisdiction over O.V.

Mother further points out the record contains no expert opinion that exposing O.V. to marijuana in utero or while nursing created potential harm to her. Even without expert testimony, hospital records indicated mother's pregnancy was complicated by marijuana use, and she was counseled against using marijuana during pregnancy—presumably by medical staff—and a hospital social worker warned her against breastfeeding O.V. with marijuana in her system, all of which suggested there were risks associated with exposing a newborn to marijuana. And there were other risks associated with marijuana use, such as the inability of the parents to care for an infant while under the influence.

Finally, mother cites Web sites from outside the trial court record to argue marijuana has been "little studied" and "there are insufficient data to evaluate the effects of marijuana use on infants during lactation and breastfeeding . . . ." We decline to consider this new evidence. Even if we did, it is inconclusive as to the possible harm to O.V. Indeed, according to mother, the American Congress of Obstetricians and Gynecologists Web site

discouraged breastfeeding women from using marijuana in the absence of better data on potential risks.

Based on this record, the juvenile court properly exercised jurisdiction because O.V. was born testing positive for marijuana and mother's regular marijuana use, including while breastfeeding, rendered her unable to supervise and protect her infant daughter. (See *Christopher R., supra,* 225 Cal.App.4th at p. 1220 [finding risk to infant from father's ongoing use of marijuana because child was " 'of such tender years that the absence of adequate supervision and care poses an inherent risk to their physical health and safety' "].) Mother does not challenge the juvenile court's disposition order, so we need not address it.

3. Father's Appeal Is Nonjusticiable

As noted, father separately appealed to challenge the court's finding of jurisdiction based on the allegation that he had a history of illicit drug use and currently used marijuana, which endangered O.V. If the juvenile court sustains allegations against one parent, that is sufficient to justify exercising jurisdiction over a child, regardless of the allegations against the other parent. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1492 (*I.A.*).) Thus, "an appellate court may decline to address the evidentiary support for any remaining jurisdictional findings once a single finding has been found to be supported by the evidence." (*Ibid.*)

Father contends we should adjudicate the jurisdictional finding as to him because the finding may prejudice him in future dependency proceedings. "While there is no doubt the court retains the discretion to consider alternative jurisdictional findings [citations], Father has not suggested a single specific legal or practical consequence from this finding, either within or

outside the dependency proceedings." (*I.A., supra,* 201 Cal.App.4th at p. 1493.) Any impact on future dependency proceedings is speculative because those decisions would be based on current conditions. (*Id.* at p. 1495.) Father also suggests his "fundamental interest in parenting" O.V. was impacted, but we do not see how. At disposition, O.V. was returned to the parents with family maintenance services and a family preservation referral, which enabled father to continue parenting O.V. He was also ordered to drug test, but he has not explained how that would impact his relationship with O.V.

Thus, because we have affirmed the jurisdictional order as to mother's conduct, we decline to address father's appeal.

DISPOSITION

The jurisdiction and disposition orders are affirmed. Father's appeal is dismissed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.