Filed 12/19/18 In re Avery P. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re AVERY P., a Person Coming Under the Juvenile Court Law.	B287025 (Los Angeles County Super. Ct. No. DK23358)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. K.R. et al., Defendants and Appellants.	

APPEALS from an order of the Superior Court of Los Angeles County, Natalie P. Stone, Judge. Reversed with directions.

Paul A. Swiller, under appointment by the Court of Appeal, for Defendant and Appellant K.R.

Melissa A. Chaitin, under appointment by the Court of Appeal, for Defendant and Appellant Thomas P.

Mary C. Wickham, County Counsel, Kristine P. Miles, Acting Assistant County Counsel, and Jeanette Cauble, Principal Deputy County Counsel, for Plaintiff and Respondent.

K.R. (Mother) and Thomas P. (Father) appeal from a jurisdiction/disposition order pursuant to Welfare and Institutions Code section 300, subdivision (b),[1] declaring their two-year-old daughter, Avery P., to be a dependent child of the court and removing her from their custody. They contend there is no substantial evidence to support the trial court's order. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

I. Detention

On June 14, 2017, police executed search warrants at Father's and Mother's separate homes as part of a drug investigation. Police found what appeared to be a methamphetamine extraction lab at Father's home. They found a

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[1] All further statutory references are to the Welfare and Institutions Code.

suspicious liquid at Mother's home.[2] They placed Father and Mother under arrest.

The Department of Children and Family Services (DCFS) sent a children's social worker (CSW) to Mother's home, where she lived with the maternal grandmother and Avery. The CSW spoke to the maternal grandmother (Grandmother), who said that Father used to live with her and Mother, but she asked him to move out about a year earlier because she did not approve of his lifestyle; he visited and on occasion slept over, however. Grandmother reported that Mother had a history of mental health issues, including depression and anxiety, for which she was taking medication. Mother also had a history of heroin, marijuana and methadone use, but the maternal grandmother did not believe she was currently using drugs. The CSW noted that Avery appeared to be clean and appropriately dressed. She had no marks or bruises on her.

The CSW spoke to Mother at the jail. She said she did not know why she had been arrested. She acknowledged seeing tubes and chemicals at Father's home but explained that he liked chemistry and she did not believe he was operating a drug lab. Mother stated that she and Avery visited Father's home and sometimes slept over. Mother acknowledged past heroin use, for which she obtained treatment and was on methadone. She had relapsed and used heroin two weeks earlier then returned to the methadone clinic to get back on methadone. Mother had not used methamphetamine for about four years; she used medical marijuana periodically. She also indicated she had been diagnosed with depression and anxiety and "was going to be ruled

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[2] Testing revealed the liquid was not related to drugs.

out for bipolar" disorder.[3] She took psychotropic medication for her mental health issues.

The CSW also spoke to Father, who said that he used the equipment found at his home to extract precious metals from computer equipment. He explained that he had a lot of ephedrine pills at his home because that was the only medication that worked for his symptoms. Father acknowledged using methadone and marijuana. He said he had not used heroin or methamphetamine in a year. He admitted an arrest for narcotics sales six years earlier and prior arrests for theft.

The CSW also interviewed the maternal grandfather (Grandfather) and examined his house, which had a bedroom for Avery. DCFS detained Avery and placed her with Grandfather.

Mother, Father, Grandmother and Grandfather attended the detention hearing on June 19, 2017. The juvenile court found a prima facie case for detention and ordered Avery detained with Grandfather, with monitored visitation for Mother and Father.[4]

II. Adjudication

DCFS filed a section 300 petition alleging four counts under subdivision (b)(1), that Avery was at substantial risk of suffering serious physical harm or illness as a result of her parents' failure or inability to supervise or protect her adequately. Specifically, it alleged Mother had a history of

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[3] We assume this meant her doctor was going to rule out a diagnosis of bipolar disorder.

[4] Although in several places the record merely states that Avery was detained in shelter care or was in a suitable placement, at the time of the jurisdiction/disposition hearing, she remained placed with Grandfather.

substance abuse, including methamphetamine, was a current abuser of heroin, marijuana and methadone, rendering her unable to provide Avery with regular care and supervision. The petition also alleged that "[o]n prior occasions in 2016 and 2017, the mother was under the influence of drugs, while the child was in the mother's care and supervision." (Count b-1.)

Similarly, as to Father, the petition alleged a history of illicit drug use, including methamphetamine and heroin, and that he currently used marijuana and methadone, which rendered him unable to provide Avery with regular care and supervision. It also alleged that in 2016 and 2017, Avery was in his care and supervision while he was under the influence of drugs. (Count b-2.)

Count b-3 stemmed from Mother's history of mental and emotional problems. Count b-4 addressed Father's operation of a methamphetamine extraction lab in his home. These two counts were later dismissed.

In the July 10, 2017 jurisdiction/disposition report, DCFS reported that a CSW interviewed Father and Mother on June 27. As to count b-1, Father stated that Mother used methadone to get off heroin, but she received it through a clinic as part of her treatment program, and did not abuse it. He also stated that he and Mother never used drugs in front of Avery. Grandmother took care of Avery when they used marijuana for medicinal purposes—Mother for anxiety and Father for sinus headaches. They went outside to smoke.

Mother acknowledged her past heroin use and her relapse a few months earlier. After the relapse, she went back into the methadone treatment program. She hoped to taper off the methadone and focus on a relapse prevention program. She also

acknowledged using methamphetamine several times about four years earlier. She said she smoked marijuana for anxiety, but she could stop using it.

As to count b-2, Father acknowledged a history of drug use, including marijuana, mushrooms, oxycontin, ecstasy, and heroin. He went to prison for use, possession and sale of drugs. He had been in methadone treatment programs on and off for 10 years. He had been in a treatment program for about a year and was attempting to taper off slowly. He hoped to enter a rehabilitation program after he was off methadone. He acknowledged using marijuana on a daily basis, but stated that he could stop using it. He emphasized that he never used it in front of Avery, and he made sure there was an adult with Avery when he and Mother went outside to smoke marijuana.

As to count b-4, Father explained that he used the lab to extract gold from old electrical appliances. It was in the garage, and Avery did not enter the lab. The police found no methamphetamine in his home, and he was confident that the charges against him and Mother would be dropped.

DCFS noted the parents' desire to reunify with Avery and their willingness to receive services to assist them in addressing their drug issues. However, DCFS had "serious concerns for the safety and well being of Avery in the care of her parents, given that the parents were both arrested and have pending criminal charges [of manufacturing a] controlled substance. The parents have continued to deny that [Father] had a meth lab and was producing any illegal substances in his home." DCFS recommended that the petition be sustained as to all counts, the parents be provided with reunification services, and they continue to have monitored visitation.

In a last minute information filed with the court on September 20, 2017, DCFS reported on Father's progress in his methadone treatment program and in a parenting program in which he enrolled on July 6. DCFS also reported that Mother had completed her methadone program, and her counselor had commended her for "dedication to recovery." DCFS also noted Mother had two negative drug tests, two tests positive for cannabinoids, and two missed tests. Father had two negative tests and four missed tests.

In a September 29, last minute information, DCFS stated that it did not believe there was sufficient evidence to sustain count b-4. It therefore recommended that the count be dismissed.

At the adjudication hearing on October 4, 2017, the parents' counsel argued that the petition should be dismissed. Counsel for Father noted that "[t]he whole reason we're here is because of the methamphetamine lab that was supposedly found. However, . . . that turned out not to be the case. The criminal court dismissed that. . . . And we're left with the parents now defending themselves over their past history. Well, the law is very clear that there needs to be more than a history in order to find that this child is at substantial risk of physical harm. . . ." Mother's counsel pointed out that Avery exhibited no signs of abuse or neglect, so there was no nexus between the parents' drug use and a substantial risk of harm to the child.

The juvenile court nonetheless felt "that there is a nexus shown here because of the fact that both of the parents are addicts, particularly the father, and particularly that the mother relapses, has in the past. And it would appear that because of the age of the child, the use of these very powerful drugs would render it difficult for the parents, if they were to relapse, to take

care of the child. And I think this isn't just a one-drug thing, this is several as to both parents." The court sustained counts b-1 and b-2 and dismissed counts b-3 and b-4.[5]

III. Jurisdiction/Disposition

In a last minute information filed January 3, 2018, DCFS reported that Father had stopped attending his parenting program, because he could no longer afford it. He stated that he planned to enroll in a free, court-ordered program. The CSW had attempted to get information on Father's progress in his methadone treatment program but proved unable to do so. DCFS also reported that since October 2017, Father had three negative drug tests and two missed tests. Mother had four negative drug tests and two missed tests.

At the hearing on January 18, 2018, the juvenile court expressed skepticism regarding the dismissal of the criminal charges. It noted there was a "great amount" of ephedrine found "with an explanation that [Father] has a lot of sinus trouble. There . . . was all kind of extraction items. It is very fishy to me, whatever—whether there are criminal charges or not. I don't see evidence that would dispel any of this . . . ."

Counsel for both parents then argued that Avery should be returned to the parents. The parents were participating in

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[5] Mother and Father filed notices of appeal from this order. The adjudication order is not separately appealable. The propriety of the trial court's ruling is reviewable on appeal from the disposition order. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1250; cf. *In re Z.A.* (2012) 207 Cal.App.4th 1401, 1404, fn. 2.) We therefore dismiss the purported appeals from the adjudication order.

programs predisposition, were committed to sobriety and were willing to receive any necessary support services. Safety measures could be put in place to protect the child. Counsel for Avery agreed that Avery should be returned to Mother "on the condition that she continue in her treatment program" and that she continue to live with Grandmother. Counsel also agreed that Father should have unmonitored visitation. Counsel asked "that if the court does make those orders, [DCFS] is to make unannounced visits during Father's visits, and at Mother's home."

The juvenile court, after considering all the evidence submitted, declared Avery to be a dependent child of the court under section 300, subdivision (b). It indicated it had "too many concerns, today, to make a home of parent, Mother, order. [It] need[ed] to see a greater period of sobriety. It was quite recent that the Mother relapsed. These parents are fighting very serious addictions." Additionally, the parents had not consistently tested negative for drugs. The court also had concerns about the legitimacy of Father's methadone treatment program and the fact Mother was no longer going to a methadone clinic. The court found by clear and convincing evidence that there would be a substantial danger to Avery's physical health and safety and emotional well being if she were returned home, and there were no reasonable means to protect her if she were returned to her parents' custody.

The court ordered the parents "to do a full drug and alcohol program, random weekly testing, individual counseling, and methadone treatment if needed, but decreasing." It ordered Mother to take prescribed psychotropic medication. It gave her

unmonitored visitation. The court gave Father monitored visitation, but it gave DCFS discretion to liberalize visitation.[6]

Both parents timely appealed from the jurisdiction/disposition order.

DISCUSSION

The parents contend there is no substantial evidence to support the juvenile court's jurisdictional finding that Avery was a person described by section 300, subdivision (b)(1). In determining whether the record contains sufficient evidence to support the juvenile court's jurisdictional findings, we apply the substantial evidence test. (*In re I.J.* (2013) 56 Cal.4th 766, 773; *In re D.L.* (2018) 22 Cal.App.5th 1142, 1146.) "'"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 court." [Citation.] "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

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[6] The minute order for the hearing states that the parents' "level of marijuana to decrease." Mother is to participate in methadone treatment "if needed," and "Father to continue with Methadone treatment."

the order is appropriate].'" [Citation.]" [Citation.]' [Citation.]" (*In re I.J.*, *supra*, at p. 773; accord, *In re D.L.*, *supra*, at p. 1146.)

As we explained in *In re D.L.*, *supra*, 22 Cal.App.5th 1142, "A child may be adjudged a dependent of the court under subdivision (b) of section 300 if the '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.' (§ 300, subd. (b)(1).) . . . 'The three elements for jurisdiction under section 300, subdivision (b) are: "'(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.'" [Citation.] "The third element, however, effectively requires a showing that *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).'" [Citation.] Evidence of past conduct may be probative of current conditions. [Citation.] To establish a defined risk of harm at the time of the hearing, there 'must be some reason beyond mere speculation to believe the alleged conduct will recur. [Citation.]' [Citation.]" (*Id*. at p. 1146.)

"Subdivision (b) means what it says. Before courts and agencies can exert jurisdiction under . . . subdivision (b), there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness," and that the risk exists "*at the time of the hearing*." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 823-824; accord, *In re Isabella F.* (2014) 226 Cal.App.4th 128, 140.) The substantial risk of harm required for jurisdiction under section 300, subdivision (b), is risk which

arises as the result of the conduct of the allegedly offending parent. (*In re V.M.* (2010) 191 Cal.App.4th 245, 252; *In re James R.* (2009) 176 Cal.App.4th 129, 136-137.)

A parent's drug use, in and of itself, is not sufficient to support a jurisdictional findings. Substance use is not "substance abuse." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 764.) Section 300, subdivision (b), "is clear, however, jurisdiction based on 'the inability of the parent or guardian to provide regular care for the child due to the parent's . . . substance abuse,' must necessarily include a finding that the parent at issue is a substance *abuser*. [Citation.] . . . [W]ithout more, the mere usage of drugs by a parent is not a sufficient basis on which dependency jurisdiction can be found. [Citations.]" (*Id*. at pp. 764-765; see *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1217-1219; *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003 ["a parent's use of marijuana '*without more*,' does not bring a minor within the jurisdiction of the dependency court"].)

Neither does a parent's past drug abuse support a jurisdictional finding. If the parent's current drug use is not causing the parent to neglect or endanger the child, there is no substantial evidence to support a jurisdictional finding. (*In re Destiny S.*, *supra*, 210 Cal.App.4th at p. 1004.)

In *In re Drake M.*, *supra*, 211 Cal.App.4th 754, the father smoked medical marijuana for pain. He smoked outside, out of the child's presence, and did not care for the child while he was under the influence. He kept the marijuana where the child could not get it. (*Id*. at pp. 760-761.) The record showed the child was healthy and well cared for, and the father was able to provide for the child's basic needs. (*Id*. at p. 768.) There was no evidence the father had failed or was unable to provide the child

with adequate supervision or protection. (*Id.* at p. 769.) The court found no substantial evidence to support a jurisdictional finding based on substance abuse. (*Ibid.*)

By contrast, in *In re A.F.* (2016) 3 Cal.App.5th 283, the mother was a heroin addict who had been in a methadone replacement program for a number of years. She was also consuming alcohol, although she knew the combination of alcohol and methadone was dangerous and could affect her judgment. She had been intoxicated and shown poor judgment when the child was in her care, and she stored the methadone in a place where the child could get it. On these facts, the court found substantial evidence to support a jurisdictional finding under section 300, subdivision (b). (*Id.* at pp. 290-291.)

Here, the evidence showed both parents had histories of drug abuse. Both were currently on methadone to treat heroin addiction and used marijuana. Mother had recently relapsed, but she recognized she had a problem and returned to a methadone treatment program. Unlike *In re A.F.*, however, there was no evidence either parent's methadone or marijuana use had at any time placed Avery in danger. As in *In re Drake M.*, the parents did not use marijuana in Avery's presence, and they had an adult care for her when they went outside to smoke.[7] There was no evidence they left drugs where Avery could get to them.

Additionally, there was no evidence the parents neglected Avery or failed to supervise or protect her. To the contrary, when Avery was detained, she was clean, appropriately dressed, with no marks or bruises, and being cared for by Grandmother.

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[7] Both parents had strong family support systems.

DCFS points to the fact that Avery was exposed to methadone in utero. However, Mother stated that she went into a methadone treatment program as soon as she found out she was pregnant. Her doctor told her she could harm the baby or even suffer a miscarriage if she tried to get off methadone during her pregnancy. She was monitored through her treatment program during her pregnancy and after giving birth to Avery. A report by the Multidisciplinary Assessment Team indicated Avery's development was within normal range, and she had no health issues. Thus, there is no evidence in the record to support a finding Mother's methadone use during pregnancy harmed or endangered Avery.

Even if the parents' histories of substance abuse, relapses, and drug-related involvement with the criminal system were sufficient to support a finding of current substance abuse (see *In re Rebecca C.* (2014) 228 Cal.App.4th 720, 726-727), there still had to be evidence of a current risk of harm to support the jurisdictional finding under section 300, subdivision (b).

DCFS also argues that, based on Mother's missed drug tests, "[t]he court would have been justified in assuming [M]other was hiding her ongoing marijuana use by failing to appear for the tests." *In re E.A.* (2018) 24 Cal.App.5th 648, on which they rely, states that "[c]ommon sense suggests that a parent who consistently refuses to drug test without an adequate explanation does so because he or she knows the results will show substance abuse. [Citations.]" (*Id.* at p. 657, fn. 6.) Here, however Mother admitted she smoked marijuana, and she had not consistently refused to drug test; she missed four out of 12 tests. The tests she did take were consistently negative for drugs other than marijuana and methadone.

Father missed six out of 11 drug tests. However, the four he did take were negative. He also presented evidence he had been participating in a methadone treatment program since 2014. He began decreasing his dosage in July 2017, but after he began experiencing withdrawal symptoms, his doctor recommended that he decrease his dosage at a slower pace. There was no evidence that, at the time of the jurisdiction/disposition hearing, Father was abusing drugs.

In sum, there is no substantial evidence that, at the time of the jurisdictional hearing, Avery was at substantial risk of serious physical harm due to the parents' drug use. (*In re D.L.*, *supra*, 22 Cal.App.5th at p. 1146.) The jurisdiction/disposition order must be reversed.[8]

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[8] In light of the our conclusion that the juvenile court erred in asserting jurisdiction over Avery, any challenge as to disposition is moot. (See *In re Destiny S.*, *supra*, 210 Cal.App.4th at p. 1005.)

DISPOSITION

The January 8, 2018 jurisdiction/disposition order is reversed. The trial court is directed to vacate the October 4, 2017 adjudication order.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CURREY, 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.