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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re EVELYN F., a Person
Coming Under the Juvenile
Court Law.

B287311
(Los Angeles County
Super. Ct. No. CK95854)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

STEPHANIE F.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles
County, Marguerite D. Downing, Judge. Reversed.

Suzanne Davidson, under appointment by the Court of
Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis,
Assistant County Counsel, and Peter Ferrera, Deputy County
Counsel, for Plaintiff and Respondent.

Stephanie F. (Mother) appeals from the juvenile court's jurisdictional findings and the dispositional order removing four-month-old Evelyn F. from her custody. She contends there was insufficient evidence to support the jurisdictional findings under Welfare and Institutions Code¹ section 300, subdivisions (b)(1) and (j), that her prior substance abuse placed Evelyn at substantial risk of serious physical harm. We agree and reverse the jurisdictional findings. However, because the dispositional order was superseded by the final juvenile custody order entered at the time the juvenile court terminated jurisdiction and Mother has not appealed from the dismissal order, Mother's appeal from the dispositional order has been rendered moot.

FACTUAL AND PROCEDURAL BACKGROUND

A. Prior Dependency Cases

On November 9, 2012 the juvenile court sustained a section 300 petition filed on behalf of Mother's three children—Precious F., Hazel F. and Isaac D. The juvenile court found true that Isaac's father, Humberto D., hit Mother during her pregnancy with Isaac. In addition, the court sustained the allegations that Mother had a history of illicit drug abuse and

¹ Further statutory references are to the Welfare and Institutions Code.

recent methamphetamine and marijuana abuse. On prior occasions, Mother was under the influence of illegal substances while caring for the children. The court also found Humberto had a history of illicit drug abuse and current abuse of methamphetamine, cocaine, and marijuana, which rendered him unable to care for Isaac. The children were removed from Mother's custody.

On November 9, 2012 the juvenile court ordered Mother to participate in a minimum six-month drug and alcohol program with aftercare, weekly random drug and alcohol testing, a 12-step program, a support group for victims, parenting classes, and individual counseling. On June 3, 2013 the juvenile court terminated Mother's family reunification services after the Los Angeles Department of Children and Family Services (Department) reported she had not cooperated with the social worker and had failed to comply with her case plan.

On December 17, 2013 Mother's fourth child, then one-month-old J.D., was detained from her and released to J.D.'s father. At the December 23, 2013 detention hearing, J.D. was released to her father and Mother on the condition that Mother remain in her current substance abuse program, enroll in aftercare upon completion of the substance abuse program, continue weekly random testing, and enroll in an individual counseling program.

On July 30, 2014 the juvenile court granted Mother's section 388 petition to modify its prior order as to Precious, Hazel and Isaac, giving Mother unmonitored visits and six months of family reunification services. On September 23, 2014 the juvenile court granted Mother overnight visits with the three children.

On October 23, 2014 the Department received a referral call, alleging domestic violence in Mother's home. Mother reported J.D.'s father, Juan D., verbally abused her and pushed her, causing her to fall to the floor. Mother tried to call the social worker, but Juan prevented her from calling by pressing his hand over her mouth. J.D. was inside the home during the incident. Juan was later arrested for domestic violence.

On November 12, 2014 J.D. was detained from Mother and Juan. At the March 11, 2015 disposition hearing, the juvenile court granted family reunification services with J.D., but terminated them as to Precious, Hazel, and Isaac because Mother's "entitled reunification services ha[d] lapsed." The court ordered Mother to participate in a domestic violence program, weekly random alcohol and drug testing, and individual counseling with a therapist "to address all case related issues including domestic violence, child protection, co-dependency, family history and dysfunction." The juvenile court informed Mother that if she tested positive or had an unexcused missed test, she would need to enroll in another substance abuse counseling program.

On October 20, 2016 the juvenile court granted Mother unmonitored day visits with J.D. on the condition she continue to submit to weekly drug tests. On November 22, 2016 the Department recommended J.D. be placed with Mother. But the Department later retracted its recommendation on December 8, 2016 because Mother had not followed through with the case plan and had not provided an update of her circumstances. On February 15, 2017 the juvenile court modified Mother's visits with J.D. and terminated her family reunification services. The

court set a section 366.26 permanency planning hearing for June 14, 2017.

B. *Current Petition and Detention*

On June 19, 2017 the Department received a referral alleging Mother neglected her fifth child, then one-month-old Evelyn. The caller stated Mother had a history of methamphetamine use. In addition, Mother had a history of prior domestic violence, and the maternal grandmother reported that Manuel N. (Father) hit and choked Mother in October or November 2016, while she was pregnant with Evelyn.

According to the July 24, 2017 detention report, on June 20, 2017 social worker Karla Mayans spoke with Father's former friend Niko. Niko stated he had not seen Father or Mother in at least six months. Niko said the parents had a history of domestic violence with both being the aggressors. He reported seeing Father with scratches on his face, made by Mother. Niko also indicated Mother used marijuana, although he did not say when.

Mayans also spoke with Sandra Paredes, the social worker for Mother's four other children. Paredes stated Mother had been inconsistent with contact with the Department for her dependency cases. However, she had been consistently visiting her children two times per week. In February 2017 Paredes asked Mother whether she was pregnant; Mother denied it. Paredes knew Mother had given birth to Evelyn because Hazel told her that Mother brought the baby to a visit. Paredes reported Mother continued to test negative for drugs. Drug test reports attached to the detention report showed Mother had 25 negative tests from January 5 to July 7, 2017.

Mayans interviewed the maternal grandmother about the domestic violence incident. The maternal grandmother stated Mother called her and told her that she and Father had an argument. When the maternal grandmother saw Mother later that evening, Mother “appeared scared and shook up.” The maternal grandmother did not see any marks, bruises, or scratches on Mother that day. The maternal grandmother observed Mother had a good bond with Evelyn and provided the baby with all her basic needs.

Mayans interviewed Mother about the allegations. Mother told Mayans she had completed parenting classes, individual counseling, two outpatient substance abuse programs, random weekly drug testing, two domestic violence programs, and Alcohol Anonymous and Narcotics Anonymous programs. Mother stated she and Father had separated when she was only a few weeks pregnant. She did not have contact with him during her pregnancy or after she gave birth to Evelyn. Mother said her last drug use was when she found out she was pregnant with J.D. She admitted she had a history of domestic violence with the two fathers of her other four children, but denied any domestic violence with Father.

Mother’s roommate, Z.G., reported Mother moved in about four months earlier. Z.G. said her own three children had been detained because of her substance use, but they were now back in her custody. Because of her own dependency case, Z.G. did not allow any visitors to the home. Z.G. stated Mother met all of Evelyn’s needs and the baby was attached to Mother. Z.G. was not aware of any domestic violence or substance abuse by Mother.

Father denied any domestic violence between himself and Mother. He noted the maternal grandmother may have alleged

domestic violence because she disliked him. He suspected his former friend Niko alleged domestic violence because Niko owed him money. Father said Niko had never seen him and Mother together. The last time Father saw Mother was when she told him she was pregnant. Father did not contact Mother during her pregnancy, her delivery, or after Evelyn was born. Father indicated he wanted custody of Evelyn if the baby was removed from Mother's care. Father consented to an on-demand drug test; the test came back negative.

Paternal great-aunt Cecilia L. said she had never witnessed any verbal or physical altercations between Father and Mother. She also did not see any scratches on Father's face. Likewise, paternal aunt Maria N. did not observe any fighting between Mother and Father. She also denied seeing scratches on Father's face.

On July 19, 2017 Mayans placed Evelyn with Maria N. On July 24, 2017 the Department filed a section 300 petition on behalf of Evelyn. Counts b-1 and j-1 of the petition alleged: "Evelyn [F.'s] mother . . . has a history of illicit drug use, including methamphetamine and marijuana, which renders the mother incapable of providing regular care for the child. The child's siblings . . . received permanent placement services due to the mother's illicit drug use. The child is of such tender age that constant care and supervision is required and the mother's substance abuse interferes with providing regular care and supervision of the child. The mother's substance abuse endangers the child's physical health and safety and places the child at risk of serious physical harm, damage and danger."

At the July 24, 2017 detention hearing, the juvenile court detained Evelyn from Mother and released the child to Father.

Mother was granted monitored visits for a minimum of three times per week for three hours each visit. Mother was allowed to continue breastfeeding Evelyn so long as she continued to test clean.

C. *Jurisdiction and Disposition Report*

According to the September 21, 2017 jurisdiction and disposition report, Father denied knowing Mother used drugs. He and Mother met three years ago. They never lived together and were in an “off/on” relationship for one-and-a-half years. He was in another relationship when he found out Mother was pregnant with Evelyn. Father stated, “I would like to have Evelyn, but I don’t want her to grow up without her mom. I’ll do what the court tells me to do.”

The maternal grandmother told dependency investigator Susan Villa,² “I thought that [Mother] was doing ok with Evelyn. She had a place to live because she’s renting a room. She seems to be doing good, but I don’t know. She tells me what she wants to.” As to the alleged domestic violence, the maternal grandmother reported, “I don’t know the father. I have seen him. It is true last year in October or November she called me for help. I did see red marks on her neck, but I don’t know what they were from. They had definitely argued when she called me but I don’t know.” Villa noted no report was made to law enforcement and the parents adamantly denied domestic violence between them.

Villa was unable to contact Mother to interview her. She reported on Mother’s substance abuse history based on a January 2015 interview. Mother reported she began using marijuana

² Villa also was the assigned dependency investigator for Evelyn’s siblings’ cases.

when she was 15 years old, and started using methamphetamine six years later. She would use methamphetamine once per week on Fridays. Mother said she last used methamphetamine in April 2013.

Mother continued to submit to weekly random drug testing. The five drug test reports attached to the jurisdiction and disposition report showed Mother tested negative from July 18 to August 24, 2017.

Villa reported Mother did not contact the Department to arrange visitation with Evelyn. However, Maria N. stated that she had been monitoring visits between Mother and the child.³ The visits were on Fridays for two hours, and Saturdays and Sundays for three hours. The visits were going well and there were no issues. In light of Mother's failure to arrange visitation through the Department, Villa expressed concern that Mother and Maria N. would collude and Mother would abscond with Evelyn. Villa recommended visitation be reduced to one-hour visits every Friday at the Department's office.

Villa recommended that no family reunification services be provided to Mother because she had failed to reunify with her other children. The jurisdiction and disposition report stated: "Although mother has continued to participate in random drug/alcohol testing and has complied with certain court orders, she has failed to maintain contact with [the Department] and has

³ Maria N. initially told Villa in a telephone conversation that Mother had not contacted her about visitation. However, Maria N. called Villa back later that day to say she had been monitoring Mother's visitation. Maria N. explained that she was in her car during the first call and, because it was noisy, she could not understand what Villa had asked her.

failed to maintain stable housing. [¶] CSW Sandra Paredes has made several attempts over the past year to meet with mother. CSW Paredes has shown up unannounced to the sibling[s'] monitored visits; however, mother has not been forthcoming as to where she is residing or about her pregnancy with Evelyn or her relationship with Evelyn's father. . . . A plan was developed for a shelter and services for mother to regain custody of her children but mother failed to follow through."

D. *Last Minute Information*

Before the September 21, 2017 jurisdiction and disposition hearing, Villa submitted a last minute information for the court. On September 7, 2017 Mother contacted Villa after receiving a letter from her. Villa interviewed Mother at her home, which had three bedrooms, two bathrooms, and a large kitchen. Mother resided with Amber S. and Z.G., who were the former girlfriends of Mother's brothers, along with Z.G.'s three children. Mother began living at the home when she was five to six months pregnant with Evelyn. Z.G. said Mother took "good care of the baby" and she had no concern about Mother's parenting ability. Z.G. had never met Father because she did not allow Mother or Amber to bring any friends to the home. She described Mother as "dedicated and someone who really loves her children." Z.G. stated, "She's really trying and that's why I opened my home to her. I wouldn't risk losing my children to let her live here."

Mother told Villa that she had a casual relationship with Father for two to three years. She never met his family or knew he had another girlfriend. Father stopped communicating with her when she found out she was pregnant. Mother stated, "My mom had met him a couple of times and she didn't like him. She

had told me she was going to make a report about him. I told her not to because she wouldn't be hurting him, she would be hurting me because of my history. . . . [¶] . . . Back in December everything was going good for me. I was almost going to get overnights with [J.D.] but then my mom went and made that domestic violence report to [Paredes]. It wasn't true. We never fought."

Mother admitted she should not have hidden her pregnancy from social worker Paredes. Mother stated, "I lied to [Paredes] about my pregnancy. I know I did wrong but honestly I didn't want to see her. During my pregnancy with [J.D.] every time I would see [Paredes] I would cry because she would tell me every single time that she was going to take my baby. Instead of trying to help me keep her she would tell me she was going to take her." Mother added, "I'm doing everything on my own. I admit I did not call [Paredes] until the baby was removed because I was scared. I'm sorry but look [at] what happened. I don't know why I can't have my baby."

The last minute information stated that Mother was continuing to submit to weekly random drug testing and that the results were negative.

E. *Jurisdiction and Disposition Hearing*

At the September 21, 2017 jurisdiction and disposition hearing, the juvenile court sustained the petition under section 300, subdivisions (b)(1) and (j). The juvenile court ordered Evelyn removed from Mother's custody pursuant to section 361, subdivision (c), and placed with Father under the Department's supervision. The juvenile court found: "The mother has had a long history [of] drug abuse. I note she has a series of clean drug

tests but I note that apparently she hasn't recently tested. She is not in a drug treatment program." When Mother's counsel pointed out the negative drug test results in the last minute information report, the juvenile court acknowledged receipt of the report but reasoned removal was necessary because of the child's age and Mother's substance abuse history.

Counsel for Mother and the Department confirmed Mother had completed a drug treatment program in June 2016 and had not had a positive test since then. Indeed, Mother's test records before the court showed that she had tested negative from January 5, 2017 through August 24, 2017. The juvenile court ordered Mother to continue to participate in weekly random and on-demand alcohol and drug testing. The juvenile court granted Mother unmonitored visits so long as she continued to test negative for drugs, with the Department having discretion to liberalize visitation. The court also ordered the Department to provide Mother with referrals for domestic violence and anger management counseling.

Mother filed her notice of appeal on October 20, 2017.

F. *Termination of Jurisdiction*

While the appeal was pending, the Department filed a March 15, 2018 status review report. The Department recommended termination of dependency jurisdiction over Evelyn with a family law order giving joint legal custody to the parents and sole physical custody to Father, with unmonitored visits for Mother. At the March 28, 2018 section 364 hearing, the juvenile court terminated jurisdiction and entered the custody order. The March 28, 2018 custody order granted the parents joint legal

custody and sole physical custody to Father, with unmonitored visits for Mother.⁴

DISCUSSION

A. *Mother's Appeal Is Not Moot*

We have a duty to decide actual controversies, and not to give opinions upon moot questions. (*Eye Dog Foundation v. State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 541; *In re David B.* (2017) 12 Cal.App.5th 633, 644.) A dependency appeal ““becomes moot when, through no fault of the respondent, the occurrence of an event renders it impossible for the appellate court to grant the appellant effective relief.”” (*In re J.P.* (2017) 14 Cal.App.5th 616, 623; accord, *In re David B.*, at p. 644 [appeal moot where minor was over 18 at time of appeal]; *In re N.S.* (2016) 245 Cal.App.4th 53, 60 [mother's appeal moot where juvenile court awarded her custody of minor and dismissed dependency proceedings].) Although an order terminating court jurisdiction generally renders moot the appeal from a previous order, dismissal for mootness is considered on a case-by-case basis. (*In re J.P.*, at p. 623; *In re M.C.* (2011) 199 Cal.App.4th 784, 802.)

Termination of jurisdiction will not render an appeal moot where erroneous jurisdictional findings “could have severe and unfair consequences to [a parent] in future family law or dependency proceedings.” (*In re Daisy H.* (2011) 192 Cal.App.4th 713, 716 [father's appeal not rendered moot by termination of

⁴ On our own motion, we augment the record to include the March 28, 2018 custody order filed in the trial court. (See Cal. Rules of Court, rule 8.155(a)(1)(A).)

jurisdiction where juvenile court placed children with mother].) Similarly, an appeal is not rendered moot where the juvenile court's orders "continue to adversely affect appellant." (*In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1548 [father's appeal not rendered moot by termination of jurisdiction where juvenile court awarded sole physical and legal custody to mother and restricted father's visitation]; see *In re J.P., supra*, 14 Cal.App.5th at p. 633 [father's appeal not moot where he lost legal and physical custody of his children with only monitored visitation].)

Here, the juvenile court ordered Evelyn removed from Mother's custody at the September 21, 2017 hearing after the juvenile court made jurisdictional findings as to Mother. The juvenile court later terminated jurisdiction and entered a custody order awarding the parents joint legal custody, with sole physical custody to Father and unmonitored visits for Mother. The sustained jurisdictional findings against Mother in light of the juvenile court's later award of physical custody to Father had an adverse effect on Mother's custody rights. (See *In re J.K.* (2009) 174 Cal.App.4th 1426, 1431-1432 [sustained petition impacted father's custody rights because juvenile court awarded mother full legal and physical custody of minor with monitored visits for father]; *In re Joshua C., supra*, 24 Cal.App.4th at p. 1548 [custody order following dispositional hearing awarding sole physical and legal custody of minors to mother adversely impacted father because he would be collaterally estopped from challenging errors made in the juvenile court jurisdictional hearing].) We conclude Mother's appeal from the jurisdictional findings is not moot.

However, Mother's appeal from the dispositional order, which removed Evelyn from Mother's custody, has been

superseded by the final juvenile custody order. The juvenile court issued this order at the time it terminated its jurisdiction pursuant to section 362.4. (*Heidi S. v. David H.* (2016) 1 Cal.App.5th 1150, 1165 (*Heidi S.*); *In re Cole Y.* (2015) 233 Cal.App.4th 1444, 1455.) Because Mother did not appeal from the dismissal order, we do not have jurisdiction to consider the final juvenile custody order. (*In re Michelle M.* (1992) 8 Cal.App.4th 326, 330 [“Appellant’s remedy was to attack the juvenile court’s order terminating jurisdiction in order to raise the issues he urges before us.”]; see *Heidi S.*, at p. 1165 [“[T]he exit order ‘shall be a final judgment and shall remain in effect after [the juvenile court’s] jurisdiction is terminated.’”].)

Although the final juvenile custody order is not properly before us on appeal, Mother may seek to modify that order in the family law court by showing a significant change in circumstances. (§ 302, subd. (d) [final juvenile custody order can be modified in family law court if “there has been a significant change of circumstances . . . and modification of the order is in the best interests of the child”]; *Heidi S.*, at p. 1163; *In re Marriage of David & Martha M.* (2006) 140 Cal.App.4th 96, 100-101.)

B. *Standard of Review*

We review the juvenile court’s jurisdictional findings for substantial evidence. (*In re R.T.* (2017) 3 Cal.5th 622, 633; *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.” (*In re R.T.*, at p. 633; accord, *In re D.L.*, at p. 1146.) “The evidence must be reasonable in nature, credible, and of solid value.” (*In re Travis C.* (2017) 13 Cal.App.5th 1219, 1225; accord, *In re M.R.* (2017) 7 Cal.App.5th 886, 896.) The appellant has the burden on appeal to show “there is no evidence of a sufficiently substantial nature to support the finding or order.” (*In re Travis C.*, at p. 1225.)

C. *There Is Not Substantial Evidence To Support the Juvenile Court’s Jurisdictional Findings*

The juvenile court has jurisdiction over a child if the Department establishes by a preponderance of the evidence that allegations made pursuant to section 300 are true. (§ 355, subd. (a); *In re I.J.* (2013) 56 Cal.4th 766, 773; *In re Jonathan B.* (2015) 235 Cal.App.4th 115, 118-119.) Section 300, subdivision (b)(1), provides for dependency jurisdiction when “[t]he child has suffered, or there is 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 inability of the parent . . . to provide regular care for the child due to the parent’s . . . substance abuse.”

Section 300 subdivision (b)(1), requires the Department “to demonstrate three elements by a preponderance of the evidence: (1) one or more of the statutorily specified omissions in providing care for the child (inability to protect or supervise the child, the failure of the parent to provide the child with adequate food, clothing, shelter, or medical treatment, or inability to provide regular care for the child due to mental illness, developmental

disability or substance abuse); (2) causation; and (3) ‘serious physical harm or illness’ to the minor, or a ‘substantial risk’ of such harm or illness.” (*In re Joaquin C.* (2017) 15 Cal.App.5th 537, 561; see *In re R.T.*, *supra*, 3 Cal.5th at p. 624 [juvenile court need not find “that a parent is at fault or blameworthy for her failure or inability to supervise or protect her child”].)

Section 300, subdivision (j), authorizes jurisdiction when “[t]he child’s sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is substantial risk that the child will be abused or neglected, as defined in those subdivisions.” In *In re I.J.*, the Supreme Court observed that subdivision (j) expanded the juvenile court’s jurisdiction over children whose siblings had been abused, stating: “The broad language of subdivision (j) clearly indicates that the trial court is to consider the totality of the circumstances of the child and his or her sibling in determining whether the child is at substantial risk of harm, within the meaning of *any* of the subdivisions enumerated in subdivision (j). The provision thus accords the trial court greater latitude to exercise jurisdiction as to a child whose sibling has been found to have been abused than the court would have in the absence of that circumstance.” (*In re I.J.*, *supra*, 56 Cal.4th at p. 774; accord, *In re Francisco D.* (2014) 230 Cal.App.4th 73, 81.)

The juvenile court declared Evelyn a dependent of the court under section 300, subdivisions (b)(1) and (j). The court sustained the allegations that Mother had a history of illicit drug use, including methamphetamine and marijuana, which rendered her unable to provide regular care for Evelyn; the siblings of Evelyn received permanent placement services due to Mother’s illicit drug use; Evelyn was of such tender age that constant care

and supervision was required; and Mother's substance abuse interfered with her ability to provide regular care and supervision of Evelyn, endangered the child's physical health and safety, and placed her at risk of serious physical harm, damage, and danger.

Mother contends the Department failed to prove she currently abused drugs, and that her substance abuse rendered her unable to provide regular care and supervision of Evelyn. We agree. Mother told social worker Mayans that her last drug use was when she found out she was pregnant with J.D., Evelyn's sibling. According to the jurisdiction and disposition report, Mother told Villa she last used methamphetamine in April 2013. While Niko told Mayans he was aware Mother used marijuana, he had not seen or spoken to Mother in at least six months. Thus, there is no evidence Mother's marijuana use did not occur while Evelyn was in Mother's care. Further, the record shows Mother tested negative for drugs for at least eight months, from January 5 to August 24, 2017.

Moreover, there is evidence Mother had completed a drug treatment program in June 2016 and had tested negative since that time, for a total of almost 15 months.⁵ Mother also told Mayans she had completed parenting classes, individual counseling, two outpatient substance abuse programs, random weekly drug testing, two domestic violence programs, and Alcohol Anonymous and Narcotics Anonymous support programs.

⁵ Notwithstanding the Department's contention on appeal that Mother had only tested clean for eight months, at the September 21, 2017 hearing the Department's counsel confirmed that Mother had not had a positive test since she completed her drug treatment program in June 2016.

The Department concedes Mother tested clean for eight months; however, it contends this “period of sobriety does not wipe away a long-standing history of drug use.” But Mother’s past history of substance abuse, without more, is insufficient evidence to support jurisdiction under section 300, subdivisions (b)(1) and (j). Although evidence of a parent’s past conduct may be probative of current conditions, section 300, subdivision (b)(1), requires proof of current risk to the child. (*In re Destiny S.* (2012) 210 Cal.App.4th 999, 1004 [evidence of mother’s methamphetamine use nine years prior to filing of petition was insufficient to support § 300, subd. (b)(1), jurisdiction where mother tested clean for drugs for three months and there was no evidence of current risk to child]; *In re David M.* (2005) 134 Cal.App.4th 822, 831 [insufficient evidence to support jurisdiction where there was no evidence mother’s use of marijuana at time of child’s birth and parents’ mental health issues impacted the parents’ ability to care for child]; cf. *In re A.F.* (2016) 3 Cal.App.5th 283, 289 [substantial evidence supported jurisdiction based on father’s inadequately managed mental illness and mother’s current consumption of alcohol while she was taking methadone to treat her prior heroin addiction].)

Similarly, section 300, subdivision (j), “requires a finding of a current risk of abuse [or neglect], because a child under subdivision (j) must be both a sibling of an abused [or neglected] child *and* at risk of being abused [or neglected].” (*In re Carlos T.* (2009) 174 Cal.App.4th 795, 803.) Further, courts have concluded that even a parent’s recent drug use does not bring a child within the jurisdiction of the juvenile court without a showing of risk to the child. (*In re Rebecca C.* (2014) 228 Cal.App.4th 720, 727-728 [insufficient evidence to support finding that mother’s recent

methamphetamine and marijuana use caused risk of physical harm to child]; *In re Drake M.* (2012) 211 Cal.App.4th 754, 764 [insufficient evidence to support jurisdiction based on father's use of medical marijuana]; *In re Destiny S., supra*, 210 Cal.App.4th at p. 1003 [no showing of current risk to child from parent's drug use]; *In re David M., supra*, 134 Cal.App.4th at p. 830 [same].)

The Department contends sufficient evidence supports the juvenile court's finding that Evelyn was at risk of harm notwithstanding Mother's eight months of clean drug tests, relying on *In re J.C.* (2014) 233 Cal.App.4th 1, 6-7 (*J.C.*), *In re Amber M.* (2002) 103 Cal.App.4th 681, 686-687 (*Amber M.*), and *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424 (*Clifton B.*). We disagree.

As acknowledged by the Department, *Amber M.* and *Clifton B.* involved appeals from the denial of section 388 petitions. In both cases, the parents had the burden of showing by a preponderance of the evidence that changed circumstances or new evidence and the child's best interests would be promoted by modification of an existing juvenile court order. (*Amber M., supra*, 103 Cal.App.4th at p. 686; *Clifton B., supra*, 81 Cal.App.4th at p. 423.) Further, in both cases the courts found the parents had a history of relapses following a period of sobriety. Although the mother in *Amber M.* "had been clean for 372 days, she had previously relapsed twice during the course of [the] case, once after more than 300 days of sobriety." (*Amber M.*, at p. 686.) Further, the mother was in a residential drug treatment program and was still in the early stages of recovery. (*Ibid.*) Likewise, in *Clifton B.*, the father had been sober for seven months, but it took the father six months after his children

were detained to stop using drugs, and then he relapsed after eight months of sobriety. (*Cliffton B.*, at p. 423.)

The Court of Appeal in *Amber M.* concluded in light of the mother's history and continued treatment that the juvenile court did not abuse its discretion in denying the mother's request for return of the children to her custody. (*Amber M.*, *supra*, 103 Cal.App.4th at p. 687.) The Court of Appeal in *Cliffton B.* similarly concluded the juvenile court did not abuse its discretion in denying the father's request for custody or reunification services given the possibility he would again relapse. (*Cliffton B.*, *supra*, 81 Cal.App.4th at pp. 420, 423.)

Unlike the parents in *Amber M.* and *Cliffton B.*, here there is no evidence Mother alternated between periods of substance abuse and sobriety that would cause concern she might relapse after obtaining sobriety. Further, unlike in *Amber M.* and *Cliffton B.*, here the Department had the burden of proving by a preponderance of the evidence that Mother's substance abuse four years earlier rendered her unable to care for Evelyn. (§ 355, subd. (a); *In re Jonathan B.*, *supra*, 235 Cal.App.4th at pp. 118-119.)

The Department's reliance on *J.C.* is similarly misplaced. In *J.C.*, the Court of Appeal upheld the juvenile court's jurisdiction finding as to the father because he failed to protect the child from the mother's drug use during her pregnancy. (*J.C.*, *supra*, 233 Cal.App.4th at p. 4.) The father in *J.C.* challenged the dispositional order removing his child from his care after he had tested clean for seven months and participated in an outpatient treatment program. (*Id.* at p. 6.) The Court of Appeal found substantial evidence supported the removal order because the father's participation in the drug treatment program was

“sluggish,” he missed two drug tests and was prone to relapses, the parents had a recent history of domestic violence, and the father had never received a mental health evaluation. (*Id.* at pp. 6-7.)

In this case, although Mother had a history of substance abuse, she had tested clean for 15 months and had no history of relapsing after regaining sobriety. Indeed, the record shows Mother last used drugs while pregnant with J.D. in April 2013. Father’s former friend Niko reported Mother used marijuana, but he had not seen Mother since Evelyn was born. The record is devoid of any evidence of drug use by Mother while Evelyn was in her care.

Moreover, there is no evidence to support the jurisdictional finding that Evelyn was at substantial risk of physical harm as a result of Mother’s substance abuse. We agree with the Department that where a child is below the age of six, a finding of substance abuse is *prima facie* evidence of a parent’s inability to provide regular care resulting in a substantial risk of harm. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1219; *In re Drake M., supra*, 211 Cal.App.4th at p. 767.) However, this presumption does not apply here because the substance abuse finding was not supported by substantial evidence. Moreover, physical harm to Evelyn cannot be presumed based solely on Mother’s past drug history and the siblings’ prior dependency cases. (*In re Rebecca C., supra*, 228 Cal.App.4th at p. 728 [physical harm to child cannot be presumed from parent’s substance abuse]; *In re Drake M.*, at p. 768 [father’s medical marijuana use insufficient to show child was at substantial risk of harm].)

In addition, the uncontroverted evidence shows Evelyn was well-cared for and loved by Mother. Mother's roommate Z.G. reported that Mother took "good care of the baby" and she had no concern about Mother's parenting ability. She described Mother as "dedicated and someone who really loves her children." Likewise, the maternal grandmother observed Mother had a good bond with Evelyn and provided the baby with all of her basic needs. Although Mother admitted she hid her pregnancy from social worker Paredes, there is no evidence this caused harm or substantial risk of harm to Evelyn. Further, although Mother failed to arrange her visitation through the Department, Maria N. reported that Mother's monitored visits with Evelyn went well and there were no issues to report. In sum, there is not substantial evidence to support the jurisdictional findings under section 300, subdivisions (b)(1) and (j), that Evelyn was at substantial risk of harm based on Mother's drug use.

DISPOSITION

The jurisdictional findings are reversed. The appeal from the dispositional order is dismissed as moot.

FEUER, J.

We concur:

ZELON, Acting P. J.

SEGAL, J.