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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re MARIAH C., a Person Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

MICHELLE K.,

Defendant and Appellant.

B254465

(Los Angeles County
Super. Ct. No. CK29088)

APPEAL from orders of the Superior Court of Los Angeles County, Tony L. Richardson, Judge. Affirmed.

Lori A. Fields, under appointment by the Court of Appeal, for Defendant and Appellant.

Mark J. Saladino, Office of the County Counsel, Dawyn R. Harrison, Assistant County Counsel and Jacklyn K. Louie, Deputy County Counsel, for Plaintiff and Respondent.

Michelle K. (Mother) appeals the order of the juvenile court asserting jurisdiction over her daughter Mariah C. under Welfare and Institutions Code section 300, subdivision (b), based on Mother’s lengthy history of drug abuse, her current abuse of prescription drugs and illegal narcotics, and her bad judgment in allowing her seven-year-old daughter to be cared for by a mentally unstable former gang member, which led to the child’s being involved in a shootout.¹ Mother also appeals the court’s dispositional order removing Mariah from her care. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Detention

Mariah came to the attention of the Department of Children and Family Services (DCFS) on November 5, 2013 when she was seven.² Mother’s male companion, David C., was walking the girl to school. When stopped for questioning by sheriff’s deputies, David drew a gun, engaged in a gun battle with the deputies, and then shot himself in the head, all in the presence of Mariah. A caseworker investigated the family home and interviewed Mother, who agreed to participate in voluntary family maintenance services. A team decision meeting (TDM) was held November 21, and Mother submitted to an on-demand drug test. In December, Mother reported she was seeing a therapist, but would have

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

² There had been a prior dependency proceeding involving Mother and Mariah’s three older siblings. In 1997, the court had made a jurisdictional finding that Mother “has a history of drug abuse and failed to comply with DCFS[’s] voluntary family maintenance plan,” and that on at least one occasion Mother and Richard C. (the father of one of the older children) and Mariah’s father (Father) had exposed the children to a “violent confrontation . . . when Father stabbed Mother” Mother also had a history of drug-related arrests and convictions between 1985 and 2000.

difficulty participating in other services, such as random drug testing, because she was “overwhelmed” from losing her job and being in danger of eviction. Mariah was interviewed and reported feeling happy and safe residing with Mother.

In January 2014, the caseworker received the results of Mother’s November drug test. It was positive for methamphetamine, opiates, hydrocodone and marijuana. Mother said she had used methamphetamine once because she was “stressed out” as a result of the shootout and losing her job. She stated that she regularly used Norco or Vicodin and marijuana, for which she had prescriptions, to treat chronic back pain.³ She also stated she was “addicted” to Vicodin, and took more than her prescribed dosage. She had not enrolled in any of the drug treatment programs recommended by the caseworker, allegedly because she had not identified one that treated Vicodin addiction. Asked about David and the shooting incident, Mother stated she was aware David had mental problems and that he ““didn’t like the police.””

Mother was drug tested again on January 6, 2014, and continued to be positive for marijuana and opiates/hydrocodone. She missed a test on January 8, 2014. The caseworker inquired about Mother’s mental health because her conversation appeared “scattered.” Mother reported having been seen by mental health professionals for depression in 2010. At a second TDM on January 14, Mother agreed to enter a substance abuse treatment program to address substance abuse issues, to undergo a psychological evaluation, and to test monthly for substance abuse. On January 16, the caseworker completed a risk assessment for

³ Mother did not obtain the medical marijuana prescription until November 14, 2013, after DCFS’s involvement. Hydrocodone is an opiate. Vicodin is a combination of acetaminophen and hydrocodone. Norco has a similar composition, but contains less acetaminophen.

Mariah, which yielded a neglect score of “[h]igh” and an abuse score of “[m]oderate.”

On January 22, 2014, DCFS filed a petition and a “non-detained” report, asking the court to take jurisdiction under section 300, subdivision (b) (failure to protect due to substance abuse), but leave Mariah in Mother’s care as long as Mother participated in substance abuse treatment and testing, individual counseling, and psychological testing. At the hearing, Mariah’s counsel urged the court to detain the girl based on Mother’s poor judgment in allowing David to have care of the girl, Mother’s positive drug tests, and the caseworker’s risk assessment. The court, finding no reasonable means by which the child’s physical and emotional health could be protected without removing her from her parent’s custody, detained Mariah and placed her in foster care.⁴

B. Jurisdiction and Disposition

Interviewed in February 2014 for the jurisdiction/disposition report, Mother acknowledged she had a lengthy history of marijuana and Vicodin abuse dating back to 1997, when Mariah’s older siblings were removed from her care. In addition, she had used crack cocaine. After DCFS’s intervention, she had successfully completed a substance abuse program and reunified with her children. She had also graduated from a career college and been employed as a medical biller for the past seven and a half years. She had, however, begun taking Vicodin again after falling and injuring her back while pregnant with Mariah. She was building up a tolerance to Vicodin and obtained the prescription for marijuana to help deal with the back pain. She stated she took both on a daily basis, but denied

⁴ Father appeared at the hearing and requested custody. The court granted DCFS discretion to release Mariah to Father after assessing his living situation.

smoking marijuana in front of Mariah or being addicted to it.⁵ She admitted she had smoked marijuana prior to obtaining a prescription. At the time, Mother was participating in individual counseling.⁶

With respect to David, Mother said she had met him in July 2013 and allowed him to move into her home the same day. Although she knew he had been a gang member, she believed he was not active and denied knowing that he possessed a gun. She knew he had “mental issues,” but was unaware of the extent.

At the September 5 and 6, 2014 jurisdictional/dispositional hearing, Mother testified she used methamphetamine only once while she was out with friends and Mariah was with Father. She testified that the prior DCFS proceeding had been the result of her abuse of marijuana and Vicodin, and acknowledged that she had been required to complete a substance abuse program and to stop using either drug. She began using Vicodin under prescription after an injury to her coccyx, approximately eight years earlier.⁷ She said she was “dependent” on Vicodin to alleviate pain as other forms of treatment did not work well. Contrary to her earlier statements, she now denied abusing the prescription. She acknowledged using marijuana and smoking it with David, but now denied using it on a daily basis. She said David had been walking the girl to school for a week and a half when the shooting incident occurred. Mother denied knowing David had a gun.

⁵ Mariah denied witnessing Mother smoke anything other than regular or electronic cigarettes.

⁶ In February 2014, a counselor for a drug abuse center reported that Mother was participating in weekly chemical dependency counseling sessions. Mother later admitted that was not true.

⁷ Mother presented evidence that she was under the supervision of doctors and pain specialists, but did not testify she had discussed her Vicodin abuse problem with them. Her doctors were unaware that she regularly smoked marijuana, or that she consumed methamphetamine and alcohol.

She testified she had smoked marijuana the Friday before the hearing, but had since decided not to use it any more. She had enrolled in a substance abuse program the prior week and had attended one class. She enrolled because she had been instructed to do so. She was not addressing any particular substance in the program and did not believe she currently had a drug problem. She had not drug tested since January. She was working in a temporary position and looking for a permanent position.

In closing argument, counsel for Mother argued that DCFS had failed to show a nexus between Mother's drug use and harm to Mariah, as the girl was happy and well cared for, and DCFS had failed to show that Mother had a substance abuse problem. Counsel further contended that Mother could not have anticipated the danger Mariah would be in from entrusting her to David's care. Counsel for DCFS agreed that drug use alone would be insufficient to support jurisdiction, but noted that there was "more" -- specifically, Mother's history of drug abuse, her admitted addiction to prescription medication, her acknowledgment that she took more Vicodan than her doctor prescribed, and the evident effect such drug use had had on her judgment concerning the care of her daughter. Counsel noted that Mother had taken a man she had known less than a day into her home to live with her and had entrusted her child to him, despite knowing of his gang association and that he "didn't like the police." Counsel for Mariah joined in the arguments of DCFS's counsel, noting that Mother's behavior indicated not "just one-time substance abuse" but a "pattern of poor decision making" likely resulting from her chronic use of multiple substances. Mariah's counsel further cited Mother's ignorance of the fact that the man who lived with her and walked her child to school possessed and carried a gun as evidence that her "clouded" judgment resulting from her drug use put her child at risk.

The court found jurisdiction appropriate based on the arguments of DCFS's and Mariah's counsel. The court further explained: "If this were only involving prescription medication, [Mother's counsel's] argument on behalf of her client would resonate with the court. It involves more[,] . . . a deeper history, . . . a history that has been years in the making" The court found true that Mother's "sixteen year history of substance abuse, including cocaine," and "current use[] of methamphetamine, marijuana and prescription medication" rendered her unable to provide regular care of Mariah, endangered the child's physical health and safety, created a detrimental home environment, and placed the child at risk of physical harm. The court further found that Mother placed Mariah in a "detrimental and endangering situation" by placing her in the care of David when Mother "knew [he] had mental and emotional problems."

Turning to disposition, the court released Mariah to the home of Father under the supervision of DCFS, staying the order for one week to allow DCFS to investigate his home. The court provided Mother reunification services, including a substance abuse program, drug testing, and mental health counseling. The court also ordered Mother to undergo a psychiatric evaluation. Mother appealed.

DISCUSSION

A. Jurisdictional Order

Mother contends substantial evidence does not support the court's jurisdictional order. Specifically, she contends DCFS did not prove that she abused prescription medication or any other drug, and failed to establish a nexus between her use of drugs and any harm or danger to Mariah. She further contends DCFS failed to establish she had reason to know that leaving Mariah with David

would put the child at risk of physical harm or suggest that she would expose Mariah to a risk of physical harm again. For the reasons discussed, we disagree.⁸

Section 300, subdivision (b) permits the assertion of jurisdiction where “[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 inability of the parent or guardian to provide regular care for the child due to the parent’s or guardian’s . . . substance abuse.” A finding under this provision requires ““(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, 1395-1396, quoting *In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) The third element ““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” [Citation.]” (*In re A.G.* (2013) 220 Cal.App.4th 675, 683, quoting *In*

⁸ While the appeal was pending, the juvenile court terminated jurisdiction over the minor and issued an exit order granting sole physical custody to Father, joint legal custody shared by the parents, and monitored visitation for Mother. Respondent contends the termination of jurisdiction renders the present appeal moot. Here, the sustained jurisdictional findings had an adverse effect on Mother’s custody rights and led to an exit order requiring her visitation with her child to be monitored, which order cannot be modified unless the family court finds a “significant change of circumstances.” (§ 302, subd. (d).) Accordingly, the appeal is not moot. (See, e.g., *In re J.K.* (2009) 174 Cal.App.4th 1426, 1431-1432; *In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1548.) “The fact that the dependency action has been dismissed should not preclude review of a significant basis for the assertion of jurisdiction where exercise of that jurisdiction has resulted in orders which continue to adversely affect appellant,” such as “restrictive visitation and custody orders.” (*In re Joshua C.*, *supra*, 24 Cal.App.4th at p. 1548.)

re James R. (2009) 176 Cal.App.4th 129, 135.) As with all assertions of jurisdiction under section 300, DCFS bears the burden of proof. (*In re James R.*, *supra*, 176 Cal.App.4th at pp. 135-136.)

To establish jurisdiction under this provision, DCFS must do more than prove that the parent used an illicit drug or inebriating substance -- there must be evidence of substance abuse creating a specific, nonspeculative, substantial risk of serious physical harm to the child. (*In re Rebecca C.* (2014) 228 Cal.App.4th 720, 725 (*Rebecca C.*); *In re Drake M.* (2012) 211 Cal.App.4th 754, 764-765 (*Drake M.*); *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1344-1346; *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003.) In *Drake M.*, the court held that a finding of substance abuse must be based on either a professional diagnosis or evidence that the parent has exhibited significant impairment manifested by “failure to fulfill major role obligations at work, school, or home”; “recurrent substance use in situations in which it is physically hazardous”; “recurrent substance-related legal problems”; or “continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance.” (*Drake M.*, *supra*, 211 Cal.App.4th at p. 766, quoting [American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (4th rev. ed. 2000)], p. 199 (the Manual).)⁹ To put it more concisely, as the court did in *Rebecca C.*, “a finding that a parent has a substance abuse problem justifying the intervention of the dependency court” is supported by

⁹ As explained in *In re Christopher R.* (2014) 225 Cal.App.4th 1210, the Manual was updated in 2013 to broaden the definition of “substance use disorders” to include criteria such as “cravings and urges to use the substance; spending a lot of time getting, using, or recovering from use of the substance; giving up important social, occupational or recreational activities because of substance use; and not managing to do what one should at work, home or school because of substance use.” (*Id.* at p. 1219, fn. 6.)

“a medical diagnosis of substance abuse” or “evidence of life-impacting effects of drug use.” (*Rebecca C.*, *supra*, 228 Cal.App.4th at p. 726.)¹⁰

Once substance abuse has been established, it is up to the juvenile court “to determine the degree to which a child is at risk based on an assessment of all the relevant factors in each case.” (*Drake M.*, *supra*, 211 Cal.App.4th at p. 766.) In determining risk, the age of the child involved is a significant factor. Assertion of jurisdiction under section 300, subdivision (b) for substance abuse is justified where the child is “of such tender years that the absence of adequate supervision and care poses an inherent risk to [his or her] physical health and safety.” (*In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 824; accord, *Drake M.*, *supra*, 211 Cal.App.4th at p. 767.) For such a child, “the finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of harm.” (*In re Christopher R.*, *supra*, 225 Cal.App.4th at p. 1219; accord, *Drake M.*, *supra*, at p. 767.)

On appeal from a jurisdictional order, “we must uphold the court’s findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings.” (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 185.) “[W]e do not pass on the credibility of witnesses, resolve conflicts in the evidence or weigh the evidence. Instead, we review the record in the light most favorable to the juvenile court’s order to decide

¹⁰ In *Rebecca C.*, the court found substantial evidence that the mother suffered from a substance abuse problem within the meaning of section 300, subdivision (b) from evidence showing “Mother’s use of drugs over a period of years[,] . . . her involvement in the criminal court system and dependency court system as the result of the use of drugs, her prior involvement in a drug program[,] . . . her ‘relapse,’ her lying about her use of drugs, [her] rationalization for the use of drugs, and her admission that she had a substance abuse problem.” (*Rebecca C.*, *supra*, 228 Cal.App.4th at p. 726.)

whether substantial evidence supports the order.” (*In re Hailey T.* (2012) 212 Cal.App.4th 139, 146-147.)

Here, there can be little dispute that Mother had a substance abuse problem within the meaning of section 300, subdivision (b). She had a lengthy history of arrests and convictions for possession, which led to DCFS’s intervention in 1997 and loss of custody of her older children for a period of time. She was ordered to enroll in a substance abuse program to address her addiction to all the drugs she was then using, including Vicodin and marijuana. She completed the program and regained custody of her children, but was not drug free for long. She admitted restarting Vicodin in 2005 while pregnant with Mariah, taking it continuously ever since, being “addicted” to it, and using more than was prescribed. She also admitted using marijuana, largely without a prescription, on a daily basis.¹¹ Although she denied being addicted to marijuana, she continued to use it up to the date of the jurisdictional hearing despite the risk that her continued use of the drug posed to re-obtaining custody of Mariah. She further admitted using methamphetamine to cope with “stress” and to escalating her drug usage at a time when her ability to parent her daughter was under close DCFS scrutiny. She agreed to reenroll in a substance abuse program and submit to drug testing on multiple occasions following DCFS’s intervention in November 2013, but failed to follow up.¹² Throughout the pendency of the case, she rationalized her continued use of the drugs for which she had expended great effort to free her herself from in

¹¹ Although at the hearing, Mother denied being addicted to Vicodin, denied using more than was prescribed, and denied using marijuana daily, the court, as trier of fact, could disregard her testimony and credit her earlier statements to the caseworker. (See *In re Daniel G.* (2004) 120 Cal.App.4th 824, 830 [“On appeal, we must accept that part of the testimony which supports the judgment.”].)

¹² Indeed, her failure to drug test casts doubt on her claim that she used methamphetamine only once.

1997, and after her initial admission of Vicodin addiction to the caseworker, denied she had any current substance abuse problem requiring treatment. On this record, ample evidence supported a finding that Mother suffered from a substance problem within the meaning of section 300, subdivision (b).

With respect to risk of harm, the fact that Mariah was a young child in need of constant supervision was sufficient to establish that Mother's drug abuse posed a danger to the child. (See *Drake M.*, *supra*, 211 Cal.App.4th at p. 767; *In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 824.) Moreover, Mother's lack of judgment was established by her decision to bring a mentally unstable former gang member whom she barely knew into her home and to allow him to care for her seven-year old. Her poor decision making -- which the court could reasonably attribute to her drug dependency -- resulted in her daughter being placed in the midst of a gun fight, subjecting her to an extraordinary risk of serious physical harm.

Mother attempts to compare her situation to that in *Rebecca C.*, where the appellate court found the evidence did not support that the mother's substance use had caused or was causing a substantial risk of harm to her child. Mother points out that like the minor in *Rebecca C.*, Mariah was in good physical and emotional health, showed no signs of abuse, was not fearful of her mother, and was attending school. Mother overlooks that the mother in *Rebecca C.* immediately acknowledged that her use of methamphetamine (for "stress") and marijuana (to treat pain from a pinched nerve) were mistakes, admitted she had a substance abuse problem, and announced she was "through getting high." (*Rebecca C.*, *supra*, 228 Cal.App.4th at pp. 722-723.) In addition, she enrolled in a substance abuse program as soon as her daughter was detained. (*Id.* at pp. 722, 727.) Here, Mother admitted her use of methamphetamine was a mistake, but insisted her use of marijuana was fully justified and her abuse of her prescription medication was not a problem. She dragged her feet about enrolling in a substance abuse program

and drug testing despite having committed to do so from the beginning of the case. She appeared to be escalating her drug usage after DCFS's intervention.

Moreover, Mariah was not otherwise being cared for in a safe home. As the court also found, Mother placed Mariah in a detrimental and endangering situation by putting her in the care of David, knowing he had mental and emotional problems. This represented not a single lapse of judgment as Mother contends, but a continuing course of misguided conduct over several months. First, she brought a person with a gang affiliation and mental problems into the small home she shared with her daughter after knowing him a single day. Next she allowed him to move in. Finally, she allowed him on multiple occasions to care for Mariah in the mornings on her way to school. While the shootout itself may not have been predictable, Mother's awareness of David's mental problems should have alerted her to the danger of regularly leaving Mariah in his custody. In view of Mother's demonstrated drug abuse and her poor judgment concerning the choice of a custodian for Mariah, the court could reasonably conclude that assertion of jurisdiction was necessary to ensure the girl's safety.

B. Dispositional Order

Mother also challenges the court's dispositional order, and in particular, its decision to remove Mariah from her care. We find the court's decision supported by the record.

Generally, "[a] dependent child may not be taken from the physical custody of his or her parents . . . with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence" that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical

health can be protected without removing the minor from the minor's parent's . . . physical custody.” (§ 361, subd. (c).) “By requiring clear and convincing evidence of the risk of substantial harm to the child if returned home and the lack of reasonable means short of removal to protect the child's safety, section 361, subdivision (c) demonstrates the ‘bias of the controlling statute is on family preservation, not removal.’” (*In re Hailey T.*, *supra*, 212 Cal.App.4th at p. 146, italics deleted.) However, “[t]he parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child.” [Citation.] The court may consider a parent's past conduct as well as present circumstances. [Citation.]” (*In re John M.* (2012) 212 Cal.App.4th 1117, 1126.) The juvenile court's jurisdictional findings represent “prima facie evidence the child cannot safely remain in the home.” (*In re Hailey T.*, *supra*, at p. 146.) Although the juvenile court's findings must be made on clear and convincing evidence, “[o]n review, we employ the substantial evidence test, however bearing in mind the heightened burden of proof.” (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.)

Here, DCFS initially permitted Mother to retain custody of Mariah and provided voluntary family maintenance services. However, Mother failed to comply with services. She failed to enroll in a substance abuse program of any kind or to undergo regular drug testing. Worse, she used methamphetamine and obtained the medical marijuana card in the month after DCFS's involvement. By the time of the jurisdictional hearing, she had just begun a substance abuse program, was still using marijuana, was still not testing, and was in denial about her need for treatment. Given her history of drug abuse leading to detention of her older children, her admitted overuse of prescription drugs, her reliance on a more dangerous drug during a period of stress, her inability to stop using marijuana, and her near fatal decision to leave her child in the care of a man with mental problems

and a loaded weapon, the court's decision to remove Mariah from her home to ensure her safety was an appropriate one.

DISPOSITION

The court jurisdictional and dispositional orders are affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.