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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re G.J., et al., a Person Coming Under the Juvenile Court Law.	B268536
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. K.B., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK87420)

APPEAL from orders of the Superior Court of Los Angeles County. Philip Soto, Judge. Affirmed in part, reversed in part and remanded.

Nancy E. Nager, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, Timothy M. O'Crowley, Deputy County Counsel, for Plaintiff and Respondent.

Appellant K.B. (mother) has five children. In February 2015, the youngest four –G.J., Jr., K.G.1, K.G.2 and Al.G. (collectively "the children") – were declared persons described by Welfare and Institutions Code section 300 based on domestic violence perpetrated against mother.[1] Mother appeals from the October 23, 2015, orders sustaining a section 342 subsequent petition alleging dependency jurisdiction based on a dirty home, removing the children from her custody and limiting her to monitored visits. She contends the orders were not supported by sufficient evidence. We affirm the order sustaining the petition but reverse the removal order and remand with directions to the juvenile court to reconsider the appropriate disposition.

FACTUAL AND PROCEDURAL BACKGROUND

A. Prior Dependency Proceedings

In January 2010, G.J. was eight months old when a general neglect referral brought him and his older half-brother R.P. to the attention of the Department of Children and Family Services (DCFS). That referral and several subsequent referrals were

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

G.J. Sr. is G.J.'s biological and alleged father; A.G. is K.G.1's and K.G.2's biological and presumed father, as well as Al.G.'s presumed father; Al.G.'s biological father is J.T., who is also her presumed father.

At all relevant times, mother's oldest child, half-sibling R.P., was living in a legal guardianship with maternal grandmother; maternal grandmother was also the legal guardian for her son's three children (the maternal cousins). R.P. is not a party to these dependency proceedings.

deemed unfounded or inconclusive. In February 2011, G.J. was almost two years old and K.G.1 was five months old when A.G. (biological father of K.G.1 and K.G.2) was arrested for domestic violence. In November 2011, G.J. and K.G.1 were declared dependent children based on domestic violence between mother and A.G. and G.J. Sr.'s failure to provide for G.J. In September 2012, dependency jurisdiction as to G.J. and K.G.1 was terminated with a family law order giving mother sole legal and physical custody of them. Meanwhile, K.G.2 had been born in May 2012; Al.G. was born in November 2013.

B. The Current Dependency Proceedings

In June 2014, G.J. was five years old, K.G.1 was three years old, K.G.2 was two years old and Al.G. was eight-months old. DCFS received referrals on June 10, 13, 17 and 18, 2014, all apparently lodged by A.G., alleging general neglect, substance abuse by mother and domestic violence. At the time, mother had a temporary restraining order against A.G.; she was homeless and staying with the children at various hotels, friends' homes and occasionally with maternal grandmother. DCFS's investigation established that mother had a marijuana card (mother apparently had cancer and used marijuana to help her sleep and eat); mother never smoked in the children's presence; mother agreed to drug test and subsequently tested negative for all substances except marijuana. Each time a social worker saw the children, they appeared healthy and well cared for with no marks or bruises indicative of physical abuse. There were sufficient amounts of food in maternal grandmother's home and although it was cluttered, there were no rats or roaches.

At the time of the June 18 referral, mother was living with the children in a motel. A.G. told maternal grandmother that he

called in the referral in response to mother telling the social worker that A.G. had mental problems. A.G. told the social worker that mother was using drugs, working as a prostitute and physically abusing the children. A doctor on the Suspected Child Abuse and Neglect (SCAN) team told the social worker that no forensic examination was necessary because there was "no reason to believe father's allegation is anything other than a custody dispute." DCFS concluded mother and the children demonstrated a healthy relationship; the children were bonded with mother and felt nurtured and safe in her care; mother had the "cognitive, physical, and emotional capacity to protect the children." None of these referrals resulted in the filing of a section 300 petition.

1. The Section 300 Petition

After a July 2 hearing on mother's request for a domestic violence restraining order in the Family Law court, A.G. followed mother onto a public bus and punched her in the face. A.G. sent mother threatening texts. As a result of these latest incidents, DCFS detained the children on August 7, 2014, and released them to mother. On August 12, 2014, DCFS filed a section 300 petition alleging dependency jurisdiction based on the children's exposure to domestic violence. According to the Detention Report, DCFS concluded the children were at risk of emotional abuse by A.G.; serious physical and/or emotional harm from being exposed to domestic violence; A.G. had failed to provide; and the children's safety could not be assured unless they were supervised by the court. DCFS expressly stated it had no safety concerns as to mother but sought monitored visits for A.G.

At the August 12, 2014, detention hearing mother submitted on the allegations in the report. The children were

detained from A.G. and placed with mother; mother's request for a restraining order against A.G. was granted; DCFS was ordered to assist mother in finding housing and a jurisdiction hearing was set for September 2014.

According to the Jurisdiction/Disposition Report for a hearing on September 25, 2014, mother and the children were living with a female friend of mother's and that friend's two children in the friend's two-bedroom, one-bathroom home. The children appeared happy and mother was meeting their needs. DCFS was concerned that posts on mother's Facebook page suggested she may be abusing marijuana. DCFS concluded that jurisdiction was warranted because, although mother was working on providing stability for the children, they were still at significant risk of harm. Mother submitted to dependency jurisdiction but the hearing was continued as to fathers A.G. and J.T.

For the continued hearing in February 2015, DCFS reported mother and the children were doing well. The juvenile court sustained the petition alleging dependency jurisdiction under section 300, subdivisions (a) and (b) based on the following: "[Mother and A.G.] have a history of engaging in violent altercations in the children's presence. On 7/23/2014, [A.G.] threatened to kill mother. On 7/02/2014, [A.G.] struck the mother repeatedly with [his] fists. On 6/11/2014, [A.G.] grabbed the mother by the neck through a window and threatened to hurt mother in the children's presence. The child K.G.1 is a former dependent of the Juvenile Court due to the mother and [A.G.'s] domestic violence. Such violent conduct on the part of [A.G.] and the mother endangers the children's physical health and safety

and places the children at risk of physical harm, damage and danger." (Paragraphs a-1, b-1)

The disposition hearing was continued several times, eventually to July 2, 2015. During that time, DCFS concluded as unfounded a referral alleging mother was neglecting the children, using methamphetamines in the children's presence, engaging in prostitution, and being physically assaulted by her "pimp" in the children's presence. DCFS did find support for an allegation that mother was using marijuana as revealed by a positive drug test on June 8 (which the laboratory characterized as "invalid")[2] and a "no show" on June 19, 2015 (it was undisputed that the reason mother did not drug test on June 19 was because she was in court that day). The juvenile court ordered the children removed and placed home of parent-mother under DCFS supervision. It continued the matter to January 2016 for a six-month review hearing.

2. The Section 342 Subsequent Petition

Before the six-month hearing took place, on July 24, 2015, DCFS received an anonymous referral alleging mother was seen smoking marijuana while holding one of the children; when the other children did not obey mother's instructions, mother "smacked" one of them in the face; the children could be heard "screaming and hollering;" mother works as a prostitute and "Anthony" was her "pimp;" Anthony had been violent towards mother in the children's presence; there was insufficient food in

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[2] In the comments section, the laboratory states: "Invalid result [¶] Specific gravity less than or equal to 1.0010 [¶] Creatinine greater than or equal to 2 mg/dl."

the home; the interior of the home and the children were not clean.

When children's social worker (CSW) Ponail arrived for an unannounced visit on July 29, 2015, Anthony was in the bedroom. Ponail observed the children, some toys, three piles of dirty clothes and a dirty diaper on the floor in the living room. When mother threw the dirty diaper into the trash, Ponail noticed the trash receptacle was full to capacity; mother explained she was waiting for "Larry" to arrive to take her and the children to the Laundromat and she planned to take the trash out with the laundry. Mother began picking up the toys after Ponail told her they were a safety hazard. There was "limited food in the cabinets and refrigerator;" mother acknowledged she needed to go to the market but explained that traveling on a bus with four kids was difficult and she hoped that Larry would take them to the grocery store as well as the Laundromat.

G.J. and K.G.1 (the only children old enough to be interviewed) each said no one lives in the house other than mother and the children. They said they never saw anyone smoking; mother does not hit them; no one has touched them inappropriately.

Anthony told CSW Ponail he and mother were dating. Anthony said he is not a "pimp," does not belong to a gang and has no criminal record; A.G. had warned Anthony that A.G. intended to lodge another referral.

Larry arrived while Ponail was talking to Anthony; Larry said he was a family friend; he is not a "pimp," does not belong to a gang and has no criminal record. Anthony and Larry agreed to

LiveScan and mother agreed to drug test. Ponail instructed mother to go to the store and buy food for the children that day.

Mother tested positive for marijuana on August 15, 2015. When CSWs Ponail and Allen arrived for an unannounced visit at about 7:00 p.m. on August 20, 2015, Larry left by a side door because, mother explained, he was afraid of the social workers. Asked why it took so long for her to open the front door, mother said, "I was looking for my mother." The social workers suspected mother was under the influence because her eyes "appeared to be glossy." Upon entering the home, the social workers noted bleach splattered on the kitchen floor and that the home "reeked of marijuana and bleach;" the social workers deduced that mother was using the bleach to dilute the marijuana odor. Seeing that the children were slipping in the bleach as they ran around the kitchen, CSW Allen brought them into the living room while CSW Ponail interviewed mother in the kitchen as she mopped up the bleach. Regarding the marijuana smell, mother said she did not smoke in the children's presence but the neighbors smoked and the odor came in through the open windows; mother did not respond when asked whether Larry smoked in the children's presence. Mother said she had just washed the children's hair and put lotion on it.

Meanwhile, in the living room with the children, CSW Allen noticed the children's feet were "very dirty as if they had not been bathed in days." Twenty-one-month-old Al.G.'s diaper needed changing. In response to Allen asking what the children ate that day, five-year-old K.G.1 "immediately told CSW Allen 'cheese,' while [almost six-year-old G.J.] responded with, 'No, she did eat.' CSW Allen asked [G.J.], 'how do you know if your sister ate if you were at school?' [G.J.] did not respond to CSW Allen.

CSW Allen asked the children if they had dinner yet. [G.J.] said, 'no.' "[3]

As far as we can tell, the social workers took no photographs on August 20 (or any prior visit) to document the condition of the family home or the children. The report states there were "piles" of empty bottles and cans on the kitchen floor, as well as dirty dishes on the kitchen counter, floor and in the sink. There was a dirty diaper on the floor by the front door; toys, dirty clothes and trash were on the floor in the living room and dining room. The children's rooms were in "disarray with clothes all over the floor." There was sufficient food in the refrigerator but very little food in the cabinets.

After interviewing the children, CSW Allen was waiting for CSW Ponail outside when Allen noticed a man apparently trying to hide behind a car; the man reluctantly identified himself as Larry; the social workers suspected Larry was under the influence because his eyes were red and glossy; Larry did not respond when Allen asked if he had been smoking marijuana; Larry said he had taken mother and the children to the GAIN office earlier that day in his truck; Larry did not respond when CSW Allen commented that the truck had just one car seat.[4]

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[3] According to the report, Allen noticed a "very vulgar adult movie" playing on television and mother took no action when K.G.1 used curse words. Neither of these observations were alleged as the basis of dependency jurisdiction.

[4] Presumably, GAIN is a reference to "Greater Avenues for Independence," a CalWORKs welfare-to-work program. (See § 11320.)

The children were detained that evening. G.J. and K.G.1were placed in foster care; K.G.2 and Al.G. were placed with maternal grandmother. When G.J. was examined at the Los Angeles County/USC Medical Center, a "fading loop mark" was observed on his upper right arm; CSW Ponail told the examiner that there was a history of physical abuse by mother, which was apparently based on statements by G.J. that mother "scares him with 'Bloody Mary' and thumps him," and K.G.1's statement that mother "whoops" her. Mother denied any physical abuse or drug use, but conceded the bleach on the kitchen floor presented a hazard. Mother tested positive for marijuana on August 22, 2015.

On August 25, 2015, DCFS filed a section 342 Subsequent Petition which alleged section 300, subdivision (b) dependency jurisdiction based on the condition of mother's home on August 20, 2015. The juvenile court found DCFS had established a prima facie case of dependency jurisdiction and that removal was the only means to protect the children. Hearing on the section 342 petition was set for October 2015.

According to the report for that hearing, mother had been visiting the children every day. She had negative drug tests on September 23, October 1 and 14, 2015.[5] She was enrolled in domestic violence and parenting classes. Mother wanted to move with the children to Victorville; if the children could not be returned to mother, mother wanted them all placed with maternal grandmother, where some of them were already living.

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[5] DCFS was suspicious of the negative drug tests because Antwuan said mother was using "detox drinks" to confuse the test results.

The hearing was continued for DCFS to investigate and report on releasing the children to mother on the condition that mother live in a safe environment such as maternal grandmother's home and terminating jurisdiction with a family law order.

In a Last Minute Information For The Court filed on October 23, the day of the continued hearing, DCFS recommended against releasing the children to mother. DCFS explained that conflicts between mother and maternal grandmother had caused mother and the children to move out of maternal grandmother's home in the past. DCFS did not believe mother and maternal grandmother had resolved their relationship issues and for this reason DCFS believed living with maternal grandmother would not be a stable living situation for mother and the children.

At the hearing, the parties stipulated that mother would testify there was bleach on the floor when the social worker arrived because mother was house cleaning; mother does not use marijuana as demonstrated by her negative drug tests; at the time of the hearing, mother was a full-time student and two weeks away from completing her certified nurse's assistant program; the school would help mother find employment and child care; contrary to the report, mother and maternal grandmother had no ongoing relationship problems; mother had been living with maternal grandmother, in maternal grandmother's five-bedroom home, since losing her own housing as result of the children's detention.

Mother argued there was no evidence that the condition of the family home was unsanitary or posed a risk to the children. Even assuming the social worker's description was accurate, the conditions were not unusual for a home where four children

under the age of seven live with a single mother. The only arguably dangerous condition was the bleach on the floor which mother was in the process of mopping up when the social workers arrived. The smell of marijuana in the house was not evidence of substance abuse and there was no other evidence that mother was using, much less abusing, marijuana. Even assuming such use, there was no evidence of a nexus between such use and any risk of harm to the children.

DCFS countered that marijuana use could be inferred from the evidence that mother appeared under the influence when the social worker arrived and the social workers' statement that mother was using the bleach to mask the marijuana odor that permeated the house. According to DCFS, mother's "exercise of bad judgment as evidenced with the conundrum that was formed with respect to the paternity issues, thanks to mom, also goes to her credibility. This mother's bad judgment and her conduct is being repeated."

The juvenile court sustained the section 342 petition and found the children to be persons described by section 300, subdivision (b) based on the following: "On 8/20/15, [the children's] home was found to be in a filthy, unsanitary and hazardous condition including bleach splattered on the kitchen floor, within access of the children. There was a dirty diaper, dirty clothes, toys and trash strewn throughout the home. There were dirty dishes on the kitchen floor and kitchen counter. Further, the smell of marijuana permeated the children's home. Such a filthy, unsanitary and hazardous home environment established for the children by [mother] endangers the children's physical health and safety and creates a detrimental home

environment for the children placing the children at risk of serious physical harm, damage and danger."

There was no allegation of substance abuse by mother. Accordingly, dependency jurisdiction was based solely on the condition of the family home on August 20, 2015, not on any substance abuse by mother.

The juvenile court found by clear and convincing evidence that there was a substantial danger to the children's physical health and/or the children were suffering severe emotional damage and there was no reasonable means to protect them other than removal from parental custody. The children who were already placed with maternal grandmother were ordered to remain in that placement and the children placed in foster care were to be placed with maternal grandmother after maternal grandmother's home received ASFA approval.[6] Mother was given monitored visits with DCFS discretion to liberalize; she was ordered to participate in individual counseling to address child protection and domestic violence, parenting classes and to take five random drug tests. Mother timely appealed.

DISCUSSION

A. Standard of Review

A section 342 subsequent petition "is filed when new, independent allegations of dependency can be made after the court has initially declared a minor to be a dependent child. [Citation.]" (*In re Barbara P.* (1994) 30 Cal.App.4th 926, 933

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[6] "ASFA" is a reference to the Adoption and Safe Families Act, which establishes the federal guidelines for foster care and relative care placements.

[distinguishing § 342 subsequent petition from § 387 supplemental petition].) All procedures and hearings required for a section 300 petition are applicable to a subsequent petition filed under" section 342. (§ 342.) Thus, the two stages of dependency proceedings under section 300, also apply to proceedings under section 342.

At the first stage of section 300 dependency proceedings, the juvenile court determines whether the child is subject to juvenile court jurisdiction based on the allegations of the petition; DCFS has the burden to prove jurisdiction by a preponderance of the evidence. (§ 355, subd. (a).) At the second stage, the juvenile court must decide where the child will live while under juvenile court supervision; to support removal from parental custody, DCFS has the burden to prove by clear and convincing evidence that there is a 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. (§ 361, subd. (c); *In re Lana S.* (2012) 207 Cal.App.4th 94, 103, 105; see also *In re D.C.* (2015) 243 Cal.App.4th 41, 51, 54.)

On appeal, we review both the jurisdictional and dispositional orders for substantial evidence. (*In re D.C., supra*, 243 Cal.App.4th at p. 55; *In re Giovanni F.* (2010) 184 Cal.App.4th 594, 598.) In doing so, we view the record in the light most favorable to the juvenile court's determinations, drawing all reasonable inferences from the evidence to support the juvenile court's findings and orders. Issues of fact and credibility are the province of the juvenile court and we neither reweigh the evidence nor exercise our independent judgment. (*In re I.J.* (2013) 56 Cal.4th 766, 773.)

B. Jurisdiction

Mother contends there is insufficient evidence to support dependency jurisdiction based on the new allegations of the section 342 petition. She argues the description of the condition of her home on August 20, 2015, including the marijuana smell, does not constitute substantial evidence of neglectful conduct, causation or serious risk of harm. Respondent counters that the petition was supported by evidence that mother abused marijuana as well as evidence of the condition of the family home. We conclude only the evidence that the smell of marijuana permeated the family home was sufficient to support dependency jurisdiction.

As a general rule, dependency proceedings " 'should not be allowed to drift from major problem-solving circumstances to prolonged attempts to resolve shortcomings in the parental home which would not cause dependency in the first place.' [Citation.]" (*In re Kristin W.* (1990) 222 Cal.App.3d 234, 252 (*Kristin W.*) But while dependency proceedings are ongoing, if DCFS discovers "new facts or circumstances, other than those under which the original petition was sustained, sufficient to state that the minor is a person described in Section 300, [it] shall file a subsequent petition." (§ 342.)

The section 300 circumstance that support dependency jurisdiction relevant here is when "[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 [the parent] to adequately supervise or protect the child, . . . or by the inability of [the parent] to provide regular care for the child due to the parent's . . . substance abuse." (§ 300, subd. (b)(1).) The three elements to a jurisdictional finding under section 300,

subdivision (b)(1) are: (1) neglectful conduct by the parent; (2) causation; and (3) "serious physical harm or illness" or a "substantial risk" of serious physical harm or illness. The "harm" element requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future. (*In re Cole Y.* (2015) 233 Cal.App.4th 1444, 1452.)

Here, original section 300, subdivision (b)(1) dependency jurisdiction was based on domestic violence perpetrated by A.G. against mother; there was no substance abuse allegations or findings against mother or A.G. After DCFS received an anonymous referral alleging, among other things, that mother was using marijuana and methamphetamine in the presence of the children, mother agreed to drug-test. Mother did so on June 8; the laboratory characterized the positive results of that test as "invalid." The original July 2015 disposition order required mother to participate in three drug tests; if she tested positive, she had to do three more tests; the order made no allowance for the undisputed evidence that mother had a medical marijuana card. Drug tests mother took on August 14, 21 and 27, 2015, were positive for cannabinoids. Mother tested negative for all substances on September 23 (blood), October 1 (urine) and October 14 (blood). Meanwhile, although mother had twice tested positive for cannabinoids, the section 342 petition filed on August 25, 2015, did not include any substance abuse allegations against mother. It alleged dependency jurisdiction based solely on the allegation that the family home was "in a filthy, unsanitary and hazardous" condition as evidenced by: (1) the bleach on the kitchen floor; (2) dirty dishes in the kitchen, a dirty diaper, dirty clothes, toys and trash in other areas of the home;

and (3) the marijuana smell permeating the home.[7] As we shall explain, the first two types of evidence do not support dependency jurisdiction. But the marijuana smell supports dependency jurisdiction because it can reasonably be inferred from this evidence that mother was not protecting the children from exposure to second hand marijuana smoke.

1. Exposure to second hand marijuana smoke

It is well settled that marijuana use alone is insufficient to support dependency jurisdiction. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 764 [father's continued use of medical marijuana alone was insufficient to show the child was at substantial risk of serious physical harm or illness; no evidence the child was exposed to marijuana, drug paraphernalia or second hand smoke]; *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003 [use of marijuana, hard drugs, or alcohol "without more" cannot support dependency jurisdiction]; *In re Alexis E.* (2009) 171 Cal.App.4th 438, 453 [without more, medical marijuana use cannot support dependency jurisdiction any more than use of other prescribed medications]; *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1346 [mother's positive test for marijuana did not pose a danger to mother's children].)

But even legal marijuana use can support dependency jurisdiction if it presents a risk of harm to children. (*In re Alexis E., supra,* 171 Cal.App.4th at p. 452.) In *Alexis E.*, the court found dependency jurisdiction based on the risk of harm posed by the father's failure to protect the child from second hand

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[7] DCFS apparently distinguished between the children's exposure to marijuana smoke and mother's personal substance abuse.

marijuana smoke. The *Alexis E.* court reasoned that "nothing in the statutory provisions for the state's voluntary medical marijuana program (Health & Saf. Code, § 1362.5 et seq.) authorizes a person lawfully using medical marijuana to use it '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." (*Alexis E.,* at p. 452.)

Here, mother denied she smoked marijuana in the family home while the children were present. The juvenile court reasonably could have discredited mother's testimony based on other evidence. Specifically, that mother was smoking marijuana in the family home while the children were present, or letting others do so, can be inferred from the evidence that the social workers perceived a marijuana odor permeating the home and both mother and Larry showed signs of being under the influence on August 20. Neither mother nor Larry denied that Larry was smoking marijuana. From this evidence, the juvenile court could infer that mother was not protecting the children from exposure to second hand marijuana smoke in the family home. Under *Alexis E.*, this evidence was sufficient to support dependency jurisdiction.

2. Bleach on the kitchen floor

The report states that when social workers Ponail and Allen arrived, they observed "substantial amounts of bleach splattered" on the kitchen floor; they saw the children running around, slipping in the bleach as mother was "frantically" mopping it up. To avoid the hazard, Allen took the children in

the living room while Ponail interviewed mother in the kitchen until mother finished mopping up the bleach.

Certainly it is not neglectful to clean a kitchen floor with bleach. Even assuming the children slipping in the bleach can be attributed to neglectful conduct by mother rather than to the social workers distracting mother from her task, this isolated incident is simply not enough to support dependency jurisdiction.

3. The dirty dishes, dirty diaper, toys, trash, etc.

A "filthy" home can support dependency jurisdiction. (*In re Jeannette S.* (1979) 94 Cal.App.3d 52 (*Jeannette S.*).) But "chronic messiness by itself and apart from any unsanitary conditions or resulting illness or accident, is just not clear and convincing evidence of a substantial risk of harm." (*In re Paul E.* (1995) 39 Cal.App.4th 996, 1005. (*Paul E.*).) *Jeannette S.*, *Paul E.* and *In re Kristin W., supra,* 222 Cal.App.3d 234, offer guidance on the quantum of evidence necessary to support dependency jurisdiction based on a dirty home. In *Jeannette S.*, for example, there was evidence that social workers visited the home in which the mother lived with five-year-old Jeannette multiple times between January 1976 through August 1977, in response to complaints from school authorities about Jeannette's "unclean appearance." On one occasion in February 1976, the social worker found the home "to be extremely dirty with animal feces on the floor." (*Id.* at p. 57.) For two weeks prior to January 5, 1978, a homemaker assigned by the county welfare agency transported Jeannette to daycare while the mother was at a mental health clinic, but only helped mother clean the house one time for five minutes during that time period. In response to mother's request for help with her home situation, representatives from the welfare agency visited the home on

January 5, 1978. Jeannette appeared to be in good health and good spirits, but the house, in which three dogs and two cats also lived, was "dirty and cluttered with debris. There were extensive dog feces on the kitchen floor and cat feces in the bathroom. The house smelled of urine and there was spoiled food on the stove. Jeannette had been forced to sleep on the couch in the living room because her bedroom was such a mess." (*Id.* at p. 56.) There was evidence that Jeannette was sent to school in clothes which were soiled with urine; although she did not appear unnourished, she was not always given breakfast at home; she frequently returned from school to an empty house. The appellate court found this evidence sufficient to support section 300, subdivision (b) dependency jurisdiction. (*Id.* at pp. 58-59.) But it found the evidence insufficient to support removal, reasoning that Jeannette could have been returned to mother under stringent conditions of supervision with a warning that she would lose custody if she again let the home get filthy or failed to keep Jeannette in clothes. (*Id.* at p. 60.)

The issue in *Kristin W., supra,* 222 Cal.App.3d 234, was the sufficiency of the evidence to support an order setting a section 366.26 hearing. The case involved three siblings (ten, eight and seven year olds). Original dependency jurisdiction and removal was based on allegations that "the children were without proper and effective parental care and control. Specifically, it was asserted the children were habitually tardy or absent from school and had a chronic problem with head lice and poor personal hygiene. Further, [the father] failed to clean the house after numerous warnings by child protective services and public health. The children's mother had left the family, and her whereabouts were unknown." (*Id.* at p. 241.) The father

challenged the order setting a 366.26 permanent plan hearing on the grounds that the evidence did not support the trial court's determination that there was not a substantial probability the children would be returned to the father within six months. The appellate court agreed, reasoning that there was no evidence of the condition of father's home at the time the challenged order was made.

The issue in *Paul E.* was the sufficiency of the evidence to support removal based on hazardous conditions at the family home. Paul was four years old, autistic, and lived with his parents in his grandmother's home; in September 1994, dependency jurisdiction was based on the dirty and unsanitary condition of the home, but Paul was not removed. Instead, the parents were given a service plan including a number of court ordered services. Social workers visiting the home in April 1995 found it to be messy and dirty, but not unsanitary; they identified the following specific hazards: "a propeller protruding from a boat located outside the house, a lamp socket with a short, and a small child's plastic wading pool in the backyard filled with dirty water." (*Paul E., supra,* 39 Cal.App.4th at pp. 990-1000.) The parents were given 30 days to remedy these hazards. When social workers returned eight days later, the specified hazards had been remedied but Paul was detained because "the parents' 'lack of progress in recognizing the dirty condition of the house demonstrate[d] that they were limited by their own ability.' " (*Ibid.*) The juvenile court sustained a section 387 supplemental petition seeking to remove Paul from parental custody based on the allegation that the parents had failed to comply with the case plan. (*Ibid.*) The appellate court reversed, finding the specified hazards to be "trivial to the point of being pretextual. A shorted

lamp socket could occur in the White House. Motor boats normally have propellers on them. Children's plastic wading pools do not come with filtration systems, and if they are filled with water for any amount of time the water is going to become dirty. Worse hazards than these may be found on practically every farm in America. If such conditions were sufficient for removal from the home, generations of Americans who grew up on farms and ranches would have spent their childhoods in foster care." (*Ibid.*)

This case is more similar to *Paul E.*, than it is to *Jeannette S.* or *Kristin W.* Unlike in *Jeannette S.,* there was no evidence in this case of old feces in the family home; one dirty diaper does not constitute such evidence. The house did not smell of urine and the children did not go to school smelling of urine or in urine stained clothing. There was no evidence of spoiled food anywhere in the house; dirty dishes do not constitute such evidence. And unlike in *Kristin W.*, there was no evidence the children had head lice or other manifestations of poor personal hygiene other than dirty feet. While there may not have been a lot of food in the house on August 20, the conflicting statements by the children about what they ate that day, and whether they had any dinner prior to the arrival of the social workers at 7:00 p.m., does not constitute substantial evidence that the children were not receiving regular meals. And unlike in *Jeannette S.,* there was no evidence in this case that mother ever left the children home alone.

By contrast, similar to *Paul E.*, we find the specific hazards described in the section 342 petition – spilled bleach on the kitchen floor (which mother was in the process of mopping up when the social workers arrived); dirty dishes on the kitchen

counter and floor; a single dirty diaper, dirty clothes, toys and unspecified "trash strewn throughout the home" – were "trivial to the point of being pretextual." These conditions do not exceed what can reasonably be expected in the home of a single mother with four children under the age of seven.

C. Disposition

Although under *Alexis E.* we have found substantial evidence to support dependency jurisdiction based on mother's failure to protect the children from second hand marijuana smoke, under both *Jeannette S.* and *Paul E.*, such evidence did not constitute clear and convincing evidence that (1) the children were at substantial risk of harm if returned home on October 23, 2015, the day of the disposition hearing, and (2) there was no reasonable means short of removal to protect their safety.

The evidence established that at the time of the hearing, mother had three consecutive negative drug tests. She was living in maternal grandmother's home where two of the four children were also living. On this record, return of the children to mother, upon the condition that mother continue living with them in maternal grandmother's home under strict DCFS supervision, would seem a reasonable means to protect the children.

DISPOSITION

The October 23, 2015 orders sustaining the section 342 petition is affirmed. The orders removing the children from mother's custody and limiting her to monitored visits are reversed. The matter is remanded to the juvenile court for a new disposition hearing, taking into account the limited nature of our

affirmance of jurisdiction and circumstances extant at the time of the new hearing.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.