Filed 1/19/16 In re F.T. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re F.T., a Person Coming Under the Juvenile Court Law.	
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MICHELLE W., Defendant and Appellant.	B262560 (Los Angeles County Super. Ct. No. DK09159)

APPEAL from an order of the Superior Court of Los Angeles County, Philip Soto, Judge. Reversed in part and affirmed as modified.

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

Office of the County Counsel, Mary C. Wickham, Interim County Counsel, Dawyn R. Harrison, Assistant County Counsel and David Nakhjavani, Deputy County Counsel, for Plaintiff and Respondent

Appellant Michelle W. (Mother) appeals the juvenile court's order asserting jurisdiction over her daughter "F.T." under Welfare and Institutions Code section 300, subdivision (b).[1] F.T. was found to have ingested prescription medication while in the care of her father, "M.T." (Father). Mother contends substantial evidence does not support the court's jurisdictional findings. We conclude the evidence did not support that Mother failed to supervise or protect F.T., or that she was negligent in permitting Father to supervise the girl. Accordingly, we reverse the jurisdictional findings as they pertain to Mother. We conclude, however, that the findings with respect to Father were supported by the evidence, and therefore affirm the jurisdictional order as it relates to him.

FACTUAL AND PROCEDURAL BACKGROUND

On January 7, 2015, personnel at F.T.'s preschool noticed that the two-year old girl's eyes were glazed and that she was unsteady on her feet. She fell, hitting her head and lip. The school notified Mother, who picked up F.T. and took her to an emergency room, where her blood tests were positive for benzodiazepine. Questioned by the hospital social worker, both Mother and Father denied having any of that type of medication in their homes.[2]

The next day, a Department of Children and Family Services (DCFS) caseworker visited the apartment where Mother and F.T. lived. Mother said she had not noticed anything unusual about F.T.'s behavior, either in the morning before dropping her off at preschool or the night before, except that she seemed tired. Mother denied that she or Father was using medication containing

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

[2] Mother and Father were separated at the time and shared custody of F.T. They had not lived together since 2012.

benzodiazepine. Mother showed the caseworker that her dangerous chemicals and medications were kept in a high cabinet, but the caseworker noticed some cold medicine on a counter, and chemicals and fish food on the lower shelf of a fish tank. Mother put those items away, explaining that the day before F.T. was found to have benzodiazepine in her system, Father and a couple of other men had brought the tank to her home because Father was in the process of moving and needed a place to leave it. Mother later clarified that she was there when the fish tank was delivered, but left for work before the men finished setting it up. Father had picked F.T. up from preschool and cared for her while Mother was at work, until 10:00 or 10:30 p.m.[3]

When initially interviewed, Father said that one of men who helped move the fish tank took Xanax, and might have dropped one of his pills.[4] Father said he and the other men saw a crushed pill on the floor while setting up the fish tank at Mother's house. Father surmised F.T. had put the pill in her mouth and spit it out. Father said he recognized Xanax because he had taken it until 2012 for anxiety. He denied any current use of that or any other drug. The next day, when the caseworker followed up with Father to ask about his criminal record, Father admitted using marijuana.[5] He also said he might have brought some Xanax when moving the fish tank, but was vague about whether he was currently using the

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[3] Whether Father cared for F.T. at his home or Mother's is unclear from the record.

[4] Father said he knew the man's first name -- "Daniel" -- but did not have a phone number or know where he lived. Father described Daniel as a "transient" who "stays around the building with various people."

[5] An examination of California criminal records indicated that Father had two drug-related arrests in 2008 and another arrest in 2011 for possessing a forged prescription. None of these arrests led to convictions. However, Father was on probation for an out-of-state conviction for possession of narcotics with intent to sell. His probation officer believed the drug involved was marijuana.

medication or had a current prescription for it. On January 13, 2015, he refused the caseworker's request to drug test.[6] Father's probation officer said Father had tested positive for marijuana in December 2014, but that because it was the first time, he was not required to obtain treatment.

A pharmacist explained to the caseworker that medications containing benzodiazepine generally reach their peak in the body about one or two hours after ingestion, but that it was possible for a child to feel the effects the next day, as the body processed the drug.

On January 20, 2015, DCFS filed a section 300 petition and a non-detention report, alleging that Mother and Father "created a detrimental and endangering situation for [F.T.] in that on 1/7/15, [F.T.] was medically examined and found to have ingested Benzodiazepine, causing [her] to display symptoms of being under the influence," that "[Father] gave several conflicting explanations regarding the manner in which [F.T.] ingested Benzodiazepine," that "[Father] possessed prescription medication including Xanax which contains Benzodiazepine in the child's home, within access of the child," and that F.T.'s condition "would not ordinarily occur except as the result of deliberate, unreasonable and neglectful acts by the child's parents who had care, custody and control of the child." In a separate allegation, the petition further contended: "[Father] has a history of substance abuse and is a current abuser of marijuana which renders [him] incapable of providing regular care for the child. On prior occasions, [Father] was under the influence of marijuana, while the child was in [his] care and supervision. The child is of such a young age requiring constant care and supervision and

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[6] Father submitted to a drug tests ten days later, on January 23, and also on February 4 and 9. The January test was positive for marijuana, the other two were negative. Father had a prescription for marijuana.

[Father's] illicit drug use interferes with providing regular care and supervision of the child." The petition alleged that "neglect on the part of the parents" and "[Father's] . . . substance abuse" endangered F.T.'s "physical health, safety and well-being," created "a detrimental home environment," and placed her "at risk of physical harm, damage and danger." Both allegations were made under section 300, subdivision (b) (failure to protect).

Prior to the jurisdictional hearing, Mother was reinterviewed and continued to deny taking any medication containing benzodiazepine. She denied knowing whether Father took medication of any type. With respect to whether Father had a history of substance abuse, she stated: "I don't know about [his] history of substance abuse. I know he's on probation, but I don't get involved in all that stuff." In his third interview, Father again contended that "Daniel" was the likely source of the Xanax ingested by F.T.[7] However, Father admitted he had a prescription for Xanax, last filled in 2013, and that he kept a bottle of the medication in his bathroom. Father stated that when he returned F.T. to Mother's care on the evening before her emergency room examination at around 10:30 p.m., the girl seemed "fine." Father told the caseworker he was not willing to participate in counseling or a parenting class.

DCFS initially recommended that the court assert jurisdiction and issue a family law order giving Mother sole custody and Father monitored visits. In a last minute information, DCFS recommended instead that the court assert jurisdiction under section 360, subdivision (b), so that Father could be provided counseling and a parenting class.[8]

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[7] In this interview, Father claimed someone else found the crushed Xanax pill at Mother's home, and that he knew nothing about it.

[8] Section 360, subdivision (b) provides: "If the court finds that the child is a person described by Section 300, it may, without adjudicating the child a dependent child of the
(Fn. continued on next page.)

At the hearing, Father's counsel asked the court to dismiss the petition, asserting that the child's injury was the result of a one-time accident and that the child would be safe with Father in the future. Mother's counsel contended that there was "no evidence to indicate that Mother has done anything wrong," and that from all indications, Mother was at work when either Father or Daniel left Xanax where F.T. was able to find and ingest it. Counsel for F.T. stated that she had no objection to striking all allegations pertaining to Mother from the petition. DCFS's counsel urged the court to sustain the petition in its entirety. He argued that Father "ha[d] the Xanax," but had not been forthcoming about how F.T. was able to get hold of it. With respect to Mother, counsel acknowledged the undisputed evidence that she was at work when the girl ingested the benzodiazepine, but contended she should not be stricken from the petition because she had been "willful[ly] blind[]" to the risk of leaving the child with Father, pointing to her statement that she knew Father was on probation, but "she 'didn't get . . . involved with all of that stuff[.']"

The court sustained the petition as written, and placed F.T. under DCFS supervision in accordance with section 360, subdivision (b). At the hearing, the court explained: "Everybody knows little kids this age. They put stuff on the floor in their mouth all the time. And it's incumbent upon parents, even if they are separated, to make sure that things don't land on the floor that they will put in their mouth. . . . [¶] So . . . I realize that Dad can't go in and tell the mom how to run her house, and Mom can't really tell Dad how to run his house. But you've got to at least communicate that, . . . '[m]ake sure that your drugs . . . are safely put away so

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court, order that services be provided to keep the family together and place the child and the child's parent or guardian under the supervision of the social worker for a time period consistent with Section 301 [essentially six months (see §§ 301, subd. (a), 16506)]." Unless the agency files a new petition under subdivision (c) of section 360 "alleging . . . that disposition pursuant to subdivision (b) has been ineffective in ameliorating the situation" and seeking a different disposition, there are no further court proceedings.

the child doesn't accidentally take them.' [¶] It's not asking too much even for people that are separated to cooperate and make sure that the other's home is safe for the child if they are going to leave the child there for extended amounts of time which is what Mother did. And to that extent, negligence has been proven." Mother appealed.[9]

DISCUSSION

A. *Appealability and Standard of Review*

In order to assume jurisdiction over a minor, the juvenile court must find that he or she falls within one or more of the categories specified in section 300. (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 185.) DCFS bears the burden of proving by a preponderance of the evidence that the minor falls within juvenile court jurisdiction. (*Ibid.*; § 355, subd. (a).) On appeal, "'we must uphold the court's [jurisdictional] 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 J.N.* (2010) 181 Cal.App.4th 1010, 1022, (*J.N.*), quoting *In re Monique T.* (1992) 2 Cal.App.4th 1372, 1378.) "'Substantial evidence is evidence that is reasonable, credible, and of solid value.'" (*J.N.*, *supra*,

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[9] Father did not appeal. While Mother's appeal was pending, the period of DCFS supervision passed without DCFS having filed a petition under section 360, subdivision (c) alleging that further court intervention was required. Respondent moved to dismiss the appeal as moot. We denied the motion and continue to reject respondent's contention that the appeal is moot. (See *In re M.W.* (2015) 238 Cal.App.4th 1444, 1452 [although mother did not challenge all jurisdictional findings against her, case was not moot where findings she challenged were "pernicious" and "carri[ed] a particular stigma"]; *In re Marquis H.* (2013) 212 Cal.App.4th 718, 724 [dismissal does not render dependency case moot if alleged defect undermines juvenile court's initial jurisdictional finding]; *In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1547 [case is not moot if purported error may infect subsequent proceedings].)

181 Cal.App.4th at p. 1022.) The juvenile court's findings must be based on the facts before it, not suspicion, speculation or conjecture. (*People v. Reyes* (1974) 12 Cal.3d 486, 500; *Tracy J. v. Superior Court* (2012) 202 Cal.App.4th 1415, 1424.)

Here, after finding that F.T. was amenable to jurisdiction, the court decided to proceed under section 360, subdivision (b). As explained in *In re Adam D.* (2010) 183 Cal.App.4th 1250, a court may determine that even though jurisdiction exists, "'the family is cooperative and able to work with the social services department in a program of informal services without court supervision that can be successfully completed within 6 to 12 months and which does not place the child at an unacceptable level of risk.'" (*Id*. at p. 1259, quoting Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2009) § 2.124[2], pp. 2-283 to 2-384.) "'In such cases the court may order informal services and supervision by the social services department [under section 360, subdivision (b)] instead of declaring the child a dependent . . . .'" (*In re Adam D., supra*, at 183 Cal.App.4th at p. 1259.) "'If informal supervision is ordered pursuant to [that provision], the court "has no authority to take any further role in overseeing the services or the family unless the matter is brought back before the court" pursuant to [section 360, subdivision (c)].'" (*Ibid*.) An order under section 360, subdivision (b), is "tantamount to a disposition," and is, therefore, an appealable order. (*In re Adam D., supra*, at pp. 1260-1261.)

B. *Jurisdictional Finding As to Father*

The petition in this case alleged that jurisdiction was appropriate under section 300, subdivision (b), which permits the court to adjudge a child a dependent of the juvenile court 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 true finding under subdivision (b) of section 300 requires proof of: "(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) 'serious physical harm or illness' to the minor, or a 'substantial risk' of such harm or illness." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) "'The third element, however, effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future . . . .'" (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1396.)

Mother contends the court's jurisdictional finding was not supported by substantial evidence, and that there was no basis to find that F.T. was at substantial risk of serious physical harm in the future from Father's single negligent act. We disagree. F.T. is very young, at an age where she must be watched closely all times to ensure her safety. From the evidence presented, the court could reasonably conclude that Father exposed F.T. to a risk of serious harm by leaving a dangerous medication where she could gain access to it or by failing to notice when one of his helpers left such medication out, and by failing to adequately supervise her, allowing her to ingest a potentially dangerous drug. Father's negligence did not end there. He failed to take F.T. for a medical examination after seeing the crushed pill on the floor, or to inform Mother that the child might have ingested a Xanax so she could be on the lookout for symptoms. As a result, F.T. did not receive medical treatment until the next day. Father's negligence and lack of judgment supported the court's finding that F.T. would be at risk of serious harm in his care in the future and justified the court's decision to assert jurisdiction over F.T.

Mother contends this case represented a single instance of endangering conduct analogous to the situation in *J.N.*, *supra,* 181 Cal.App.4th at pp. 1025-1026, where the father drove under the influence with his three young children in the car and the mother failed to stop him. In concluding that the parents' single episode of misconduct was insufficient to warrant bringing the children under juvenile court jurisdiction, the Court of Appeal applied the following standard: "In evaluating risk based upon a single episode of endangering conduct, a juvenile court should consider the nature of the conduct and all surrounding circumstances. It should also consider the present circumstances, which might include, among other things, evidence of the parent's current understanding of and attitude toward the past conduct that endangered a child, or participation in educational programs, or other steps taken, by the parent to address the problematic conduct in the interim, and probationary support and supervision already being provided through the criminal courts that would help a parent avoid a recurrence of such an incident." (*Id*. at pp. 1025-1026.)

In *J.N.*, the father admitted to caseworkers that on the night of the accident, he had had multiple alcoholic drinks. (*J.N.*, *supra,* 181 Cal.App.4th at p. 1018.) The mother said she made a "'bad decision'" in allowing him to drive the children, and that "it would not happen again." (*Id*. at p. 1017.) The parents were "remorseful," and "indicated that they were willing to learn from their mistakes." (*Id*. at p. 1026.) Both parents were "cooperative and willing to change." (*Id*. at p. 1019.) Mother was participating in substance abuse and parenting programs. (*Id*. at p. 1026.) The facts here are much different. Father displayed no insight or understanding into his endangering conduct. He changed his story several times, initially lying about his use of Xanax, and attempted to place the blame on a third party before admitting he was in possession of the drug and had brought it into Mother's home. Father's claim that he had no idea how or when F.T. could have

gotten hold of the medication was either a lie -- likely, in view of the number of times Father changed his story -- or proof of his lack of supervision of his two-year old and failure to protect her from her own endangering conduct. More important, Father refused to admit fault, and rejected any suggestion that he take a parenting class or participate in counseling so he could learn to provide the necessary level of care for his child. In view of these distinguishing factors, the court was not bound to follow *J.N.*

Mother further contends that F.T. did not suffer serious physical harm as contemplated by the statute because the effects of the medication were temporary and did not lead to any long-term injury. A child's ingestion of a hazardous drug is serious physical harm for purposes of section 300. (*In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 825.) Moreover, a juvenile court need not wait until a child is seriously injured to assume jurisdiction or take steps necessary to protect the child if it appears he or she is at risk of serious harm. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1216.) Here, the court properly assumed jurisdiction based on a substantial risk of serious harm without DCFS intervention.[10]

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[10] Mother challenges the court's additional finding that Father's current use of marijuana rendered him incapable of providing regular care for F.T. and that he was under the influence of marijuana while the child was in his care. Because we sustain the jurisdictional finding on the basis of Father's actions on the day F.T. ingested benzodiazepine, we need not consider whether substantial evidence supported the court's additional finding. (See *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 ["When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence. In such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence."].)

C. *Jurisdictional Finding As to Mother*

Mother alternatively contends substantial evidence did not support her culpability for F.T.'s injury or the finding that she posed a risk to her daughter. We agree.

As relevant to Mother, section 300, subdivision (b), requires the parent either to fail to adequately supervise or protect the child, or to willfully or negligently fail to protect the child from the conduct of a custodian with whom the child has been left. Where jurisdiction is based on failure to protect from the conduct of a custodian with whom the child has been left, "there must be a showing that the parent knew or had reason to know that another person to whom the child was exposed was engaging in conduct resulting [or potentially resulting] in abuse or injury. Simply knowing that particular person had contact with the child without also knowing, or having reason to know, of the abuse, does not satisfy the statutory mandate." (*In re Roberto C.* (2012) 209 Cal.App.4th 1241, 1255; see, e.g., *In re Rocco M.*, *supra*, 1 Cal.App.4th at pp. 817-818, 825 [in finding assertion of jurisdiction appropriate on other grounds, court expressed doubt that single instance of physical abuse by a caretaker would have supported jurisdictional order]; *In re Savannah M.*, *supra*, 131 Cal.App.4th at pp. 1395-1396 [parents not negligent in failing to anticipate that family friend would sexually abuse girls briefly left in his care].)

The evidence does not support that Mother failed to adequately supervise F.T. or that she willfully or negligently failed to protect her from Father. The evidence indicated that F.T. gained access to the medication containing benzodiazepine while Father was installing his fish tank in Mother's home while

Mother was at work.[11] No evidence suggested Mother was aware Father or one of his helpers had brought Xanax with him, or that one of them had carelessly left the medication in a place accessible to the girl. The court reasoned that after the separation, each parent had an obligation to ensure that the home of the other was safe from dangerous conditions before leaving the child in that parent's care. It appears from the parties' statements to the caseworker that the incident occurred when Father was moving his fish tank into Mother's home, and either he or his helper was careless with a medication brought with them. Moreover, even assuming F.T. gained access to Xanax in Father's home, there was no evidence to suggest he had ever before left dangerous drugs in areas accessible to F.T., or that F.T. had ever been at risk of serious harm while in Father's care. Thus, there is nothing to support that Mother should have reasonably anticipated that Father would leave his Xanax in an accessible place or fail to notice when another person did so. The finding that Mother's conduct contributed in any way to F.T.'s condition was unsupported. The findings with respect to Mother must be reversed, and the allegations pertaining to Mother stricken from the sustained petition.[12]

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[11] On appeal, respondent contends Mother and Father "had no explanation as to how the child might have ingested the medication," and that Mother's contention she was not present on the single occasion when F.T. ingested benzodiazepine "is . . . perplexing, as . . . it is unclear from the record exactly how or when this 'single occasion' occurred." It is true that Father gave contradictory reports concerning how the child gained access to Xanax, but he consistently stated that either he or a helper had the drug at Mother's house while moving the fish tank. There was no evidence Mother had ever used Xanax or had ever possessed a drug containing benzodiazepine. During the hearing, DCFS's counsel did not dispute that Father was the source of the drug or that Mother was at work when the child gained access to it.

[12] DCFS's counsel contended at the hearing that Mother should have been more aware of Father's criminal record, particularly the charges for which he was on probation. That Father was on probation for transporting narcotics for sale does not support a finding that Mother should have known he would leave prescription medication within F.T.'s reach. A criminal record does not, standing alone, render one an unfit parent.

D. *Section 355.1 Presumption*

The petition alleged, and the court found true, that F.T.'s "condition would not ordinarily occur except as the result of deliberate, unreasonable and neglectful acts by the child's parents who had care, custody and control of the child." Mother challenges this apparent attempt to rely on the presumption of section 355.1, subdivision (a), which provides: "Where the court finds, based upon competent professional evidence, that an injury, injuries, or detrimental condition sustained by a minor is of a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, the guardian, or other person who has the care or custody of the minor, that finding shall be prima facie evidence that the minor is a person described by subdivision (a), (b), or (d) of Section 300." When properly invoked, section 355.1, subdivision (a), creates a rebuttable presumption affecting the burden of producing evidence, and shifts to the parents the obligation of presenting evidence as to the actual cause of the injury. (*In re A.S.* (2011) 202 Cal.App.4th 237, 242.)

DCFS makes no argument pertaining to section 355.1, subdivision (a), in its brief on appeal and, in any event, failed to properly invoke it below. (See *In re A.S.*, *supra*, 202 Cal.App.4th at p. 243 [when agency intends to rely on section 355.1, subdivision (a), to shift burden of production to parents, it must do so in a "clear-cut manner," by citing the statute in the petition and clearly raising the presumption at the jurisdictional hearing]; § 355.1, subd. (a) [presumption must be supported by "competent professional evidence"].) Accordingly, the allegation indicating that F.T.'s condition would not have occurred without the deliberate, unreasonable or neglectful act of the parents must also be stricken.

DISPOSITION

The jurisdictional finding that Mother created a detrimental and endangering situation for the child, and that Mother's neglect endangered the child's physical health, safety and well being, created a detrimental home environment and placed the child at risk of physical harm, damage and danger is reversed. The jurisdictional order is modified by striking from the first sentence of paragraph b-1 the words "The child [F.T.'s] mother, Michelle [W.]"; by striking from the fifth sentence of paragraph b-1 the word "parents" and substituting the word "father"; and by striking from paragraph b-1 the sentence "Such condition would not ordinarily occur except as the result of deliberate, unreasonable and neglectful acts by the child's parents who had care, custody and control of the child." In all other respects, the jurisdictional order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.