

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re D.M., a Person Coming Under the
Juvenile Court Law.

SOLANO COUNTY DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,

Plaintiff and Respondent,

v.

TAMMY D.,

Defendant and Appellant.

A147229

(Solano County
Super. Ct. No. J43102)

I.

INTRODUCTION

Appellant Tammy D. (Mother) appeals the juvenile court's dispositional order under Welfare and Institutions Code section 360.¹ Mother argues the juvenile court erred in removing her son, eight-year-old D.M., from her physical custody because there was not a substantial risk to D.M.'s physical health, safety, or well-being if he was returned home. She further argues the court erred in finding reasonable efforts had been made to prevent removal. Finally, Mother contends the court should have ordered increased visitation.

¹ All subsequent statutory references are to the Welfare and Institutions Code unless otherwise identified.

Due to Mother's substance abuse and possible mental health issues, she failed to provide D.M. with required daily medication to treat a genetic immune deficiency disorder. This ongoing problem created a substantial danger to D.M.'s health that required his removal from the home. The juvenile court did not err in its dispositional order, and Mother has forfeited any claim of error in not increasing her visitation. We affirm.

II.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2015, the Solano County Department of Health and Social Services (the Department) filed a juvenile dependency petition under section 300, subdivisions (b) and (g) for eight-year-old D.M.² The petition alleged Mother had failed to provide adequate medical care and treatment for D.M.'s serious and chronic medical condition, and she left D.M. home alone and unsupervised, creating a risk of physical harm or illness.

The detention report detailed Mother's ongoing substance abuse, medical neglect of D.M., and the living conditions in the home. Both D.M. and Mother have an immune deficiency disorder and D.M. is required to take medication twice daily at the same time each day to control it. D.M.'s doctor, Dr. Ann Petru, an infectious disease specialist at Children's Hospital Oakland (Children's Hospital) stated she had ongoing "big" concerns about D.M.'s medical care since 2011. Dr. Petru explained that D.M. must consistently take his medication to suppress the virus levels in his system. With blood tests, the doctor can determine the patient's "viral load" and the medication normally reduces it to a near undetectable level. D.M.'s viral levels have gone up and down, "suggesting he is responsive to the medication," but he is not being given his dose consistently. Increased viral levels expose him to risk of death if he contracts other viruses.

Dr. Petru also explained that Mother had not picked up the regular monthly supplies of D.M.'s medication. His medication was picked up on January 9, 2015,

² The original petition contained four allegations, but it was amended to remove the third and fourth allegation regarding Mother's drug use and refusal of prior voluntary family maintenance services.

February 18, 2015, April 8, 2015, and July 10, 2015, meaning he missed an entire month of medication between February and April and another between April and July. This was evident in D.M.'s increased viral levels in April and July 2015. A social worker at Children's Hospital confirmed that Mother had a history of missed prescription refills and two recent "no show" appointments.

In addition to the medical care, there were concerns about Mother's supervision of D.M. When D.M.'s social worker made an unannounced visit to the home, she found D.M. home alone and Mother did not return for 45 minutes. D.M. stated Mother had made him a peanut butter and jelly sandwich that morning and left home, but he was unsure of the time. D.M. had a cell phone but could not remember Mother's phone number and said Mother's phone was not working. D.M.'s phone battery died while the social worker was asking D.M about the phone.

D.M. initially told the social worker that his mother gave him medication every day. Two days later, D.M. said that his medication was given "randomly" and not at the same time every day.

Lastly, the report documented Mother's substance abuse problems. When Mother returned home, she had dilated pupils, she spoke rapidly, and her hands were shaking. The Vallejo police officer present believed she was "coming down" after taking something.

Mother's ex-boyfriend, F.P., often cared for D.M. and took him to medical appointments. F.P. stated he had a history of methamphetamine use, but he had been "clean" for five years. He had been trying, unsuccessfully, to help Mother stop using methamphetamine.

The maternal grandmother confirmed that her daughter had a history of illegal drug use since age 16. However, the grandmother was estranged from Mother and had not seen her in over three years. The grandmother had custody of Mother's eldest child, a 15-year-old boy.

Both Dr. Petru and the Children's Hospital social worker suspected Mother had a substance abuse problem based upon her behavior, appearance, and responses to questions.

There were six prior child welfare referrals alleging substance abuse by Mother or failure to obtain medical care for D.M. All were ultimately dismissed. At the last referral in 2013, Mother tested positive for methamphetamine.

The Department concluded that D.M was at risk of suffering abuse and neglect given his medical condition and Mother's history of substance abuse and her failure to properly treat D.M.'s condition. Although Mother denied failing to give D.M his medication, there were lapses in his prescriptions in both California and when he previously lived in New Mexico, and missed medical appointments.

The court held a detention hearing and ordered D.M. detained. The court ordered Mother to submit to drug testing, a mental health assessment, and substance abuse treatment.

In its jurisdiction report, the Department recommended the court set a disposition hearing and ordered a psychological evaluation of Mother. The Department's court officer reported that Mother appeared disoriented at the detention hearing and was nonresponsive and incoherent when questioned. She stammered and spoke haltingly and could not clearly answer questions. Social worker Lauren Magana provided a similar report of Mother's behavior.

In an addendum to the jurisdiction and disposition report, social worker Tara Grubb conducted a review of D.M.'s medical records. The medical records show that in 2012, despite Mother's statements that she had provided the medication as instructed, D.M.'s "virus [was] poorly suppressed." From January 2012 through August 2015, there were multiple rescheduled doctor's appointments, late appointments, and difficulty contacting Mother by phone. D.M.'s viral load continued to go up and down throughout 2013 and 2014. Mother missed an appointment in November 2014 and D.M. did not see a doctor until January 2015. In January 2015, Dr. Petru stated that Mother was "evasive" and never provided clear answers about adherence to her son's medication schedule and

that D.M.'s viral load was up again. Based on his prescription refills, it appeared he only took his medication about 60 percent of the time.

The addendum stated that Mother was supposed to submit to drug testing in early August 2015, but did not complete the test until September 21, 2015. The September test was negative.

The court scheduled a contested jurisdiction and disposition hearing on October 6, 2015. Mother failed to appear, and due to a recent disclosure of possible Native American ancestry, the parties requested a continuance of the hearing.

At the contested hearing on October 27, 2015, Mother again failed to appear. Mother's counsel requested a continuance, which was denied by the court because there was no explanation for Mother's absence as she had been notified by the Department and her counsel about the hearing. All parties submitted to the amended petition. Relying on the reports filed by the Department, the court found there "is clear and convincing evidence" under section 361, subdivision (c)(1). The court found reasonable efforts were made to prevent or eliminate the need to remove the child from the home. The court found based on the evidence presented that "continuance in the home is contrary to the child's welfare."

The court ordered reunification services for Mother. The court found that to date, Mother had made "minimal progress towards alleviating or mitigating the causes necessitating placement."

The court ordered supervised visitation of "a minimum of one time per week . . . for a total minimum of one hour per week." The social worker had the discretion to expand visitation to include overnight visitation and eliminate supervision or to further restrict visitation. There was no objection by Mother's counsel.

III. DISCUSSION

A. Substantial Evidence Supported the Juvenile Court's Removal Order

Mother argues that the court erred in removing D.M. from her custody and in finding reasonable efforts had been made to prevent removal.

Section 361, subdivision (c)(1) provides: "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 . . . [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 or guardian's physical custody."

A court can properly order removal based on proof of parental inability to provide proper care for the minor and proof of a potential detriment to the minor if he or she remains with the parent. (*In re Miguel C.* (2011) 198 Cal.App.4th 965, 969 (*Miguel C.*))

"We review an order removing a child from parental custody for substantial evidence in a light most favorable to the juvenile court findings. [Citations.]" (*Miguel C.*, *supra*, 198 Cal.App.4th at p. 969.) "The clear and convincing standard was adopted to guide the trial court; it is not a standard for appellate review. (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750) The substantial evidence rule applies no matter what the standard of proof at trial. "Thus, on appeal from a judgment required to be based upon clear and convincing evidence, "the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong." [Citation.]. [Citation.]" (*In re E.B.* (2010) 184 Cal.App.4th 568, 578 (*E.B.*))

1. D.M.'s Physical Health and Safety

Mother contends that there was not clear and convincing evidence that D.M.'s physical health or safety was in substantial danger in her care. Mother argues no medical

records were presented to the juvenile court so there was insufficient evidence supporting D.M.'s medical condition and health risks. Mother, however, disregards the extensive evidence presented in the dispositional and jurisdictional reports. "[S]ocial service reports [are] to be admitted as competent evidence in dependency hearings." (*In re Keyonie R.* (1996) 42 Cal.App.4th 1569, 1573, fn. omitted.) Section 355 allows the introduction of hearsay evidence at a jurisdictional hearing unless a timely objection is made requiring the evidence to be corroborated. (*In re R.R.* (2010) 187 Cal.App.4th 1264, 1280.)

The Department interviewed Dr. Petru, the hospital social worker, Mother's ex-boyfriend who cared for D.M., the maternal grandmother, and D.M. The social worker also summarized D.M.'s medical records for the court.

Mother relies on *Patricia W. v. Superior Court* (2016) 244 Cal.App.4th 397 (*Patricia W.*). The focus of *Patricia W.* was on the termination of reunification services and permanent placement of the child. (*Id.* at pp. 420-421.) Division Two of this court detailed the necessary steps social services must make in providing reunification services for a mentally ill parent. (*Id.* at p. 420.) In *Patricia W.*, the mother suffered from schizophrenia and heard voices directing her to kill her child. (*Id.* at pp. 403, 405.) Division Two concluded that the agency was required to provide services to help mother obtain medication and treatment as part of her reunification plan. (*Id.* at p. 423.) The record was deficient in documenting the mother's mental illness because the agency's report did not adequately summarize the mother's condition, treatment options, or medication requirements. (*Ibid.*) The agency could not provide services tailored to the family without a clear diagnosis and treatment plan for the mother's mental illness. (*Id.* at pp. 423-424.)

Mother contends that, like *Patricia W.*, the medical evidence was insufficient to support removal of D.M. She argues additional medical testimony was necessary to further identify D.M.'s illness and explain the medical terminology. This information, however, was explained in the reports by Dr. Petru and the social worker's detailed summary of D.M.'s medical records. Additional testimony from Dr. Petru or another

physician would not have impacted the juvenile court's findings. D.M. had a hereditary immune disorder that required consistent twice-daily medication. If he did not receive his daily medication, his viral load increased as was documented by his medical records, and he was at increased risk for serious illness, or even death. The evidence before the court was uncontroverted that Mother failed to pick up D.M.'s medication in both March and June 2015, and D.M.'s viral levels concomitantly increased in the following months of April and July 2015. D.M.'s medical records showed his viral load also went up and down in 2013 and 2014, demonstrating inconsistent medication administration. The Children's Hospital social worker also stated Mother had a history of missed prescription refills and missed medical appointments for D.M.

Mother similarly argues that there was not substantial evidence of her use of illegal drugs, but the Department's reports provided evidence of Mother's substance abuse problem. Mother's ex-boyfriend and her own mother both reported a long history of substance abuse. She tested positive for methamphetamine in 2013 and reported to a Sonoma County social worker at that time that she struggled with the use of marijuana and methamphetamine. Mother failed to report for drug testing in early August 2015 and waited until September 21, 2015 to be tested, at which time the test was negative.

Additionally, two social workers and the Department's court officer reported mother's strange and concerning behavior during her court appearances which evidenced either substance abuse or mental illness. Mother argues that this was a normal reaction to a parent undergoing severe emotional stress. The evidence before the court, however, went beyond a "normal reaction." Mother appeared disoriented at the detention hearing and was nonresponsive and incoherent when questioned. She stammered and spoke haltingly and could not clearly answer questions, including her name.

Mother argues that her drug use alone is insufficient to remove D.M. from the home. The Department must demonstrate a "defined risk of harm" to D.M. caused by substance abuse or mental illness. (*In re David M.* (2005) 134 Cal.App.4th 822, 830.) Mother's multi-year failure to attend to D.M.'s medical needs demonstrates a risk of harm to D.M. caused by Mother's substance abuse and/or mental health issues. "The

provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child.” (§ 300.2.)

Lastly, the evidence before the court showed that eight-year-old D.M. was left unsupervised at home without an emergency plan or ability to contact Mother while she was gone. When the social worker made an unannounced visit she found D.M. alone, and he was unable to say how long he had been by himself until Mother returned 45 minutes later.

Considering all the evidence, the juvenile court had substantial evidence to conclude that Mother was not capable of providing regular care and supervision for D.M. (See *E.B.*, *supra*, 184 Cal.App.4th at p. 575.)

2. Reasonable Efforts to Prevent Removal

Mother contends the juvenile court failed to consider less drastic measures than removing D.M. from Mother’s custody. Mother cites to *In re Henry V.* (2004) 119 Cal.App.4th 522 (*Henry V.*) to support her position. *Henry V.* involved a child who was removed from his parents because he had three burns likely caused by a curling iron. (*Id.* at p. 527.) The juvenile court removed Henry from the home, and Division Three of this court held that this was in error because there were reasonable means to protect Henry without depriving his parents of custody. (*Id.* at pp. 525, 528.) The physical abuse was a single occurrence that was not found to be an obstacle to reunification. (*Id.* at p. 529.) Appropriate services could be provided to the mother and Henry in the family home including in-home bonding services, public health nursing services and unannounced visits. (*Ibid.*) “Because we so abhor the involuntary separation of parent and child, the state may disturb an existing parent-child relationship only for strong reasons and subject to careful procedures.” (*Id.* at pp. 530–531.) Finally, the court reversed because it was unclear whether the juvenile court applied the clear and convincing standard in making its dispositional findings. (*Id.* at pp. 529-530.)

This case is distinguishable from *Henry V.*, where the single incident of physical abuse was not considered by the agency or the juvenile court as an obstacle to

reunification. (*Henry V.*, *supra*, 119 Cal.App.4th at p. 529.) Here, the record documented Mother failed to consistently provide D.M. with his medication over a period of several years—medication that was crucial to his continuing survival and well-being. In 2015 alone, she failed to pick up his medication during both March and June, causing his viral load to increase. As Dr. Petru explained, this could result in serious illness or even death. Further, unlike *Henry V.*, the court made its dispositional findings by the clear and convincing evidence standard.

The evidence in the record further demonstrated that Mother had failed to take advantage of services offered prior to the dispositional hearing. Mother declined family maintenance services in 2013. Mother failed to report to drug testing for nearly six weeks from when she was referred on August 4th to September 21 2015. By the date of the jurisdiction and disposition hearing on October 27, 2015, Mother had only made minimal progress on her case plan and she failed to appear at the hearing, with no explanation for her absence.

Mother outlines a list of reasonable efforts the Department could have made such as having a social worker call her twice a day to remind her to give D.M. his medication, or providing D.M. with an alarm so he could administer his own medication on time. While reminders to either Mother or D.M. could prove to be helpful, this would in no way guarantee D.M. actually took the medication at the appointed time. This is especially true given the evidence of Mother’s substance abuse and the fact she left D.M. alone and unsupervised.

“We recognize that removing a child from the custody of his or her parent is a ‘drastic measure,’ ([*In re*] *Steve W.* [1990] 217 Cal.App.3d [10,] 17), but that measure was appropriate here. There was ample evidence before the juvenile court that there would be a substantial danger to [D.M.]’s well-being if he was returned to [M]other’s custody. . . . Similarly, substantial evidence supports the court’s conclusion that there were no reasonable means to protect [D.M.]’s health without removing him from [M]other’s custody. (§ 361, subd. (c)(1).)” (*Miguel C.*, *supra*, 198 Cal.App.4th at

p. 973.) Mother must address her needs in terms of substance abuse and mental health treatment before she can adequately meet D.M.'s needs.

B. Mother Has Forfeited Any Argument Regarding Visitation

Mother argues the court erred in ordering the minimum visitation with D.M. “In dependency litigation, ‘[a] party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court. [Citations.]’ [Citation.]” (*In re T.G.* (2013) 215 Cal.App.4th 1, 14.) Mother did not object to the visitation order at the disposition hearing. Accordingly, she has forfeited the issue on appeal. Although we have discretion to consider Mother’s claim, we decline to do so because it does not raise an important constitutional issue or a pure question of law. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293; *In re T.G.*, *supra*, 215 Cal.App.4th at p. 14.)³

Mother argues if the claim is forfeited, then she was denied effective assistance of counsel. “[T]he burden is on [Mother] to establish both that counsel’s representation fell below prevailing professional norms and that, in the absence of counsel’s failings, a more favorable result was reasonably probable. [Citations.]” (*In re Daisy D.* (2006) 144 Cal.App.4th 287, 292–293.) Mother cannot demonstrate prejudice. The visitation order imposed at the disposition hearing was the same as that imposed in previous visitation orders in this case. The court allowed the Department the discretion to increase visitation, which it had recently done to two hours per week. There is no evidence that Mother sought increased visitation or requested her counsel advocate for it. Mother contends her September 28, 2015 email to the social worker sought increased visitation. The email, however, stated that she wished D.M. would be placed with the ex-boyfriend, F.P., rather than in a foster home, and she wished “to see and visit my son at the

³ Even if the issue was not forfeited, Mother has not demonstrated that the juvenile court abused its discretion in ordering the minimum visitation and providing the Department with the discretion to increase visitation and allow unsupervised visits. (*In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1376 [juvenile court may grant the agency discretion to increase or decrease visitation and determine frequency and length of visits].) D.M.’s counsel did not object to the court’s order, and there is no evidence the visitation schedule was not in D.M.’s best interest. (See § 362.1, subd. (a)(1).)

discretion of [F.P.'s] schedule.” This expresses Mother’s desire to visit her son, but does not request increased visitation. Similarly, D.M.’s counsel did not request increased visitation.

We reject Mother’s ineffective assistance of counsel to claim.

IV.

DISPOSITION

The dispositional order is affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.

A147229, *In re D.M.*