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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re Jon R. et al., Persons Coming
Under the Juvenile Court Law.

B234412
(Los Angeles County
Super. Ct. No. CK70498)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.R.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County.
Jacqueline H. Lewis, Juvenile Court Referee. Affirmed in part, reversed in part.

Darlene Azevedo Kelly, under appointment by the Court of Appeal, for
Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant
County Counsel and Peter Ferrera, Senior Deputy County Counsel, for Plaintiff
and Respondent.

Appellant J.R. (Father) appeals the juvenile court's jurisdictional order asserting jurisdiction over his three young children and its dispositional order, removing the children from his custody and requiring him to participate in a 52-week domestic violence program for batterers. Finding no evidence to support a finding that domestic violence occurred or posed a threat to the well-being of the children, we reverse the portion of the dispositional order requiring appellant's participation in a domestic violence program; we otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant is the father of two young girls, Kayla born in 2008 and Harmony, born in 2009, and Jon R., a boy born in 2011. The children's mother, M.M. (Mother) has an older child, Sammy, detained in 2009.¹ On December 12, 2010, while Sammy's case was pending, the police received a call concerning the two younger girls, then one and two. When law enforcement personnel arrived at Mother's home, two witnesses stated that the girls had been seen playing in a busy street while Mother slept. The officers observed the children to be dirty and wearing dirty clothing. Mother admitted they had been in that condition since the day before. Trash, paper and clothing were scattered throughout the home.

¹ Sammy was detained due to Mother's failure to provide the necessities of life, including food, clothing, shelter and medical treatment. Her court-ordered reunification with respect to Sammy was terminated in September 2010. A petition filed with respect to Sammy in 2007 asserted that he and Mother were residing with Father when both Mother and Father were arrested for possession of a controlled substance. Father was observed smoking methamphetamine at the time. The 2007 petition further alleged that "Mother's male companion [referring to Father] . . . is a current abuser of illicit drugs" and "abused illicit drugs in the child's presence." The home environment in which Sammy was found included "feces, dirty dishes, . . . rotten food[,] beer cans . . . on the floor[,] . . . dirty clothes[,] . . . [and] [a] cockroach infestation."

Mother was detained on suspicion of child endangerment and subsequently arrested, after a pre-detention search, for being in possession of burglary tools.

While the officers were investigating the witnesses' allegations and before they could place the girls in protective custody, Kayla and Harmony were taken by their maternal step-grandfather to his home. Father picked them up a few days later and informed the Department of Children and Family Services (DCFS) personnel that the girls were with him and that they were all living with his parents. The caseworker attempted to schedule a visit, but Father was not cooperative, expressing concern that the children would be detained. He claimed that the girls rarely visited Mother and promised the caseworker they would not be allowed to return to Mother's home.²

On January 28, 2011, the caseworker arrived unannounced at the paternal grandmother's home, accompanied by law enforcement personnel.³ Finding the children well groomed and healthy, the home clean and tidy, and evidence that Father had child care assistance from his mother and her housekeeper, the caseworker left the girls in Father's care after obtaining his agreement to participate in a team decision meeting to work out a safety plan for them. A few days later, however, Father informed the caseworker he was "afraid to cooperate" and wanted an attorney before meeting with DCFS. The caseworker subsequently learned from the paternal grandmother that after the visit, Father "freaked out" and took the girls to a new unknown location.

² The paternal grandmother later informed the caseworker that the girls lived with her "on and off" and that "[Mother] left [the girls] with [Father] on and off."

³ The caseworker asked Father why he had not contacted the caseworker. Father replied: "I was told to just leave it alone and it would go away."

On February 9, 2011, DCFS filed a section 300 petition seeking assertion of dependency jurisdiction over Kayla and Harmony.⁴ At the detention hearing on February 9, the court detained the children from Mother and placed custody with Father at DCFS's recommendation. It ordered monitored visitation only for Mother. Because neither parent appeared at the hearing, it was trailed to the next day. Neither Father nor Mother appeared. The court placed legal custody with DCFS and physical custody with Father. The next hearing took place on March 7, 2011. The court found that DCFS had failed to establish proper notice to the parents. However, after learning that the whereabouts of the girls was still unknown, it issued protective custody warrants for them.

In the meantime, in May 2011, a third child, Jon, was born to Mother and Father. Mother and Jon tested positive for amphetamine and opiates. Mother denied she had been using drugs other than a "pain pill" someone had given her the night before. The caseworker attempted to interview Mother about domestic abuse and other issues, but she would not answer any further questions. Father, who had also refused to give the caseworker any information, had insisted on remaining in Mother's room during her questioning.⁵ Mother denied knowing where the girls were. Father claimed to not know the address of the babysitter he had left them

⁴ The original petition sought jurisdiction under subdivision (b), failure to protect. The petition alleged that Mother "created a detrimental and endangering situation for the children" by failing to supervise them; that her "history of substance abuse" rendered her incapable of providing regular care for the children; that the children were unkempt and unclean; and that the home was "filthy [and] unsanitary." The sole allegation pertaining to Father stated that he had "a history of illicit drug abuse" which rendered him incapable of providing regular care for the children.

⁵ There were indications that Father and Mother had attempted to flee the hospital with Jon before the caseworker arrived. Hospital personnel informed the caseworker that someone had taken a hospital-attached tracking device off the infant. Earlier, Mother had gotten dressed and insisted she and the baby be released. At another point, Father was seen holding Jon in one hand and a duffle bag in the other.

with. He agreed to meet the caseworker and direct him to the location, but when the meeting occurred, Father claimed the babysitter had taken the girls to an unknown location.⁶

In May 2011, DCFS filed a separate section 300 petition with regard to Jon.⁷ At the May 18, 2011 detention hearing for Jon, Father and Mother appeared, accompanied by other family members. The court questioned Father about the location of the girls and informed him of the protective custody warrants. Father stated that the girls were at a babysitter's house and that he did not know the address, although he later stated he was living in the same house. The paternal grandmother was called to the stand and testified that she had picked Father up at that location on her way to court and that Father had provided the address to her. After obtaining the address from the paternal grandmother, the caseworker and law enforcement personnel went to the location while the parents remained in the courthouse, but the children were not there.⁸ The court again asked Father and Mother where the girls were. Father's counsel stated he was asserting his "[Fif]th Amendment rights." Mother stated she had last seen the girls a few days earlier

⁶ Father was detained and questioned by police, but later released. The caseworker's report stated that officers believed Father had made a sincere attempt to take him to the girls' location and could not, therefore, be charged with child concealment.

⁷ The petition alleged that jurisdiction was appropriate under subdivision (b) (failure to protect) and subdivision (j) (abuse of sibling). It specifically alleged that Jon had been born with a positive toxicology screen, that Mother had a history of substance abuse and was a current user of amphetamine, prescription medication and opiates, and that she had failed to provide supervision for the older girls. It further alleged that Father had a history of illicit drug abuse which rendered him incapable of providing regular care for the child.

⁸ Because Father refused to provide the address and the paternal grandmother claimed she did not remember it, the court had her taken by wheelchair to her car to obtain the slip of paper on which she had written it. Father accused the court of "harassment."

and did not know their current location, although she had met Father at his residence that morning.

The court found a prima facie case for detaining all three children, that “a substantial danger exists to the[ir] physical health” and that there were “no reasonable means to protect them without removing them from the parents’ physical care and custody.” The court informed Father that if he continued to refuse to report the girls’ location, the court could consider them abducted under section 361.5, subdivision (b)(15), and that he could be held in contempt.

The court proceeded directly to a contempt hearing based on Father’s refusal to obey the court order to reveal the whereabouts of the girls.⁹ When threatened with being remanded to the sheriff, Father agreed to cooperate. He was allowed to make a phone call. Several hours later, Mother and the paternal grandmother picked up the girls and returned them to Father’s residence, where they were met by the caseworker and law enforcement personnel. The girls were extremely dirty. All three children were placed in foster care.¹⁰

Interviewed for the jurisdictional/dispositional report, Mother denied that Father used drugs. She admitted she had taken Adderall the night before Jon was born and had received no prenatal care. Father did not make himself available for an interview and did not contact DCFS to arrange visitation. The paternal grandmother said Father had had a drug problem “[y]ears ago” and had successfully gone through rehabilitation.¹¹ She also stated that Father had wanted

⁹ A different judicial officer arrived to oversee the proceedings, which continued long after regular court hours.

¹⁰ The three children were ultimately placed together in a single foster home. The foster mother reported that Kayla cried when she was bathed or her hair was groomed.

¹¹ Investigation into Father’s background revealed multiple arrests and convictions, including arrests for possession of controlled substances in 1996, 1998, 1999, 2007, 2008
(*Fn. continued on next page.*)

Mother to give birth to Jon at home, but did not know whether Father knew Mother was using drugs.

On June 8, 2011, the date scheduled for the jurisdictional hearing, the court announced its intention to (1) amend Jon's petition to state that Father knew of Mother's substance abuse and did not protect Jon; and (2) amend the petition for the girls to state that Father had allowed Mother to have unlimited contact with them despite her being under the influence. The court granted a continuance to June 24 to allow the parties and their counsel time to address the new allegations.

Father did not appear at the continued hearing. After receiving the evidence and hearing arguments of counsel, the court found true with respect to Kayla and Harmony that Mother "created a detrimental and endangering situation for the [girls]" by failing to provide adult supervision on the day they were seen playing in the street; that the children, their clothing and their home were found to be in a filthy condition on that day; and that Mother had "a history of substance abuse" which rendered her incapable of providing regular care of the girls, endangered their physical and emotional health and safety, created a detrimental home environment, and placed them at risk of physical and emotional harm. The court found true that Father had "a history of illicit drug abuse" which rendered him incapable of providing regular care of the girls, endangered their physical and emotional health and safety, and placed them at risk of physical and emotional harm, and that Father allowed Mother to have unlimited contact with the girls in violation of court orders and in spite of Mother's continued use of drugs. The court added another new allegation to the petition for Kayla and Harmony and found true that Father "willfully concealed the whereabouts of the [girls], refused

and 2009. The record indicated he had been convicted of possession of a controlled substance in 1999 and placed in diversion programs in 1997 and 2008.

to return the children to [DCFS] and refused to disclose the whereabouts of the [girls].”

With respect to Jon’s petition, the court found true that he was born with a positive toxicology screen for amphetamine and opiates, that Mother had a positive toxicology screen for amphetamines and opiates at the time of Jon’s birth, and that Mother had a history of substance abuse and was a current abuser of amphetamine, prescription medication and opiates which endangered the child’s health and safety and placed him at risk of physical harm. The court further found true that Father had a history of illicit drug abuse which rendered him incapable of providing regular care of Jon, endangered the child’s physical health and safety and placed him at risk of physical and emotional harm, and that Father “knew of [Mother’s] continued substance abuse and took no steps to protect [Jon].”

The court ordered that reunification services be provided to Mother and Father.¹² For both parents, the court ordered participation in a drug rehabilitation program with random testing and parenting classes. The court also ordered individual counseling to address “substance abuse, co-dependence, and controlling behaviors” for Father, individual counseling to address “substance abuse and her relationship with the Father” for Mother, and referral to a domestic violence support group for victims. During pronouncement of the disposition, the court stated: “I know there are no allegations of domestic violence, but I have watched this case unfold in this court and I have watched [Father’s] demeanor with [Mother] on this case. And if that is not controlling behavior, it could have been a textbook case here.” The court went on to say that it was “not holding [Mother] to

¹² DCFS had recommended no reunification services for Mother due to her failure to reunify with Sammy. After the detention of Jon and his sisters, Mother entered a residential drug treatment program.

that” and that her failure to participate in a domestic violence program was “not going to be the piece of the puzzle that keeps me from returning the kids.” The court explained that it merely “want[ed] to make those services available to her,” because the court had “the feeling she’s been a bit controlled.” The court ordered Father to participate in a 52-week domestic violence program for batterers “for the same reason that I just gave.”

Father’s counsel objected to the domestic violence program requirement based on the fact that no domestic violence allegation had been made or sustained. The court stated: “[Y]ou’re right, I didn’t sustain domestic violence counts. But the court was witnessing the controlling behavior here in court with his mother . . . where he would turn around and glare at his mother and yell at her as to what she was to say, and the same thing with [Mother]. [¶] And I do think that he needs to address those controlling behaviors, as well as his anger issues which was clear here in court as well.” Father appealed the jurisdictional and dispositional orders.

DISCUSSION

A. *Jurisdiction*

In order to assert 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 comes under the juvenile court’s jurisdiction. (*Ibid.*; *In re Shelley J.* (1998) 68 Cal.App.4th 322, 329.) “We review the juvenile court’s jurisdictional findings for sufficiency of the evidence.

[Citations.] We review the record to determine whether there is any substantial evidence to support the juvenile court’s conclusions, and we resolve all conflicts and make all reasonable inferences from the evidence to uphold the court’s orders, if possible. [Citation.]” (*In re David M.* (2005) 134 Cal.App.4th 822, 828.) A

finding is not supported by substantial evidence if it is based solely on unreasonable inferences, speculation, or conjecture. (*In re H.B.* (2008) 161 Cal.App.4th 115, 120.)

The court found true that Father had a history of drug abuse and had allowed Mother unlimited contact with the children in violation of court orders and in spite of Mother's continued use of drugs. Based on these factual findings, it found jurisdiction appropriate under section 300, subdivision (b). This provision permits the court to adjudge a child a dependent of the juvenile court where: "The 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) 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 . . . 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.) "[T]he consensus of the courts . . . has been that a court cannot exercise dependency jurisdiction under this subdivision where the evidence shows a lack of current risk." (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1023.)

Father contends that none of the allegations sustained by the court supported a finding of current risk to the children. He asserts that the evidence established only that he used drugs in the past. He further contends there was no evidence that

he had knowledge of Mother's current use of drugs or that he allowed contact between Mother and girls. For the reasons discussed, we conclude that substantial evidence supported the court's finding of current risk to support jurisdiction.

That Mother had a serious ongoing drug abuse problem cannot be disputed. In 2007, while residing with Father and Sammy, she was arrested for possession of drugs. She lost custody of Sammy in 2009 and lost parental rights over him in 2010. In 2011, she tested positive for amphetamine and opiates after giving birth to Jon. After the children's detention, she entered a residential drug treatment program. As Father was living with Mother in 2007, he cannot seriously contend he did not observe her drug use -- as well as her resulting inability to maintain a home in a condition suitable for a young child. With respect to Mother's more recent drug use, the court could reasonably conclude that Father was aware of it from the fact that he encouraged Mother to give birth to Jon at home and was observed making efforts to slip out of the hospital with the infant before the family was confronted by the caseworker with the results of the hospital drug tests.

There was also substantial evidence that Father failed to limit Mother's access to the girls and failed to adequately supervise and protect them when they were with her.¹³ When DCFS first interviewed Father, he claimed that the girls went to Mother's residence for "visits." However, the paternal grandmother reported that the girls stayed with her or Father "on and off," and were otherwise

¹³ The court also found that Father allowed Mother to have access to the girls in violation of court orders. The court's order that Mother's visitation be monitored was issued at the detention hearing in February 2011 -- a hearing that neither Father nor Mother attended. Father contends he was unaware of any such order until his first appearance in May 2011, when the girls were located and removed from his custody. In view of the evidentiary support for the alternative finding -- that Father permitted Mother to have unlimited access to the girls despite her drug abuse -- we need not consider Father's knowledge of the court's orders in order to resolve the case.

with Mother. Kayla and Harmony appeared to be living with Mother at the time they were observed playing unsupervised in a busy street.¹⁴ The girls and their clothing were dirty, and the house was in complete disarray. Although Father cannot be blamed for Mother's decision to consume drugs, the fact that Father (1) made no effort to limit the girls' contact with Mother despite her clear inability to properly care for them, (2) encouraged Mother to undergo a risky home birth, and (3) attempted to take Jon from the hospital while the baby was still suffering the effects of Mother's prenatal drug ingestion supported the court's finding that the children would be at risk due to Father's inability or refusal to protect them from Mother. The court was under no obligation to accept Father's promise to keep Mother from unsupervised contact in the future, given his repeated deceptions about multiple matters and his refusal to cooperate with DCFS's efforts to protect the children.¹⁵

The court's alternative finding, that Jon and the girls were at current risk due to Father's history of drug usage, was also supported. Between 1996 and 2009, Father was arrested nearly a dozen times for possession of controlled substances. Although the record reflected only a single conviction, he was twice placed in diversion programs, most recently in 2008. In 2007, he was found smoking methamphetamine while he, Mother and Mother's young son Sammy were living together in squalor. Given his history of drug use, his failure to establish successful participation in drug treatment, and his erratic behavior after being

¹⁴ The police interview with Mother in December 2010 established that the girls had been with her at least overnight on that occasion.

¹⁵ We note that at the hearing on May 18, 2011, Mother stated she had visited the girls a few days earlier. Whether this was a supervised visit is unclear.

contacted by DCFS, the court could reasonably conclude that his drug problem was ongoing and presented a current risk to the children.¹⁶

B. *Disposition*

1. *Removal From Father's Custody*

After finding that a child is a person described in one of the subdivisions of section 300 and therefore the proper subject of dependency jurisdiction, the court must determine “the proper disposition to be made of the child.” (§ 358.) “A dependent child may not be taken from the physical custody of his or her parents . . . with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence . . . [¶] [that] [t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be protected without removing the minor from the minor’s parent’s . . . physical custody.” (§ 361, subd. (c)(1).) To support its dispositional order removing custody from a parent, “the court may consider the parent’s past conduct as well as present

¹⁶ Father contends that the court’s finding that he willfully concealed the whereabouts of the girls and refused to disclose their whereabouts to DCFS was unsupported and, even if true, would not support assertion of dependency jurisdiction. We need not resolve whether failure to cooperate with DCFS can support jurisdiction. “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.” (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.) In a similar vein, we need not resolve whether the court made the requisite finding of danger to the children to support issuance of the protective custody warrants. Assuming the warrants were improperly issued, we could grant Father no effective relief. Any issue concerning the warrants is, therefore, moot.

circumstances.” (*In re Cole C.* (2009) 174 Cal.App.4th 900, 917.) “The . . . child need not have been actually harmed for removal to be appropriate. The focus of the statute is on averting harm to the child.” (*Ibid.*; accord, *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1656-1658; see also *In re Y.G.* (2009) 175 Cal.App.4th 109, 116 [juvenile court may “consider a broad class of relevant evidence in deciding whether a child is at substantial risk from a parent’s failure or inability to adequately protect or supervise the child.”].) On review of the court’s dispositional findings, “we employ the substantial evidence test, however bearing in mind the heightened burden of proof.” (*In re Kristin H., supra*, 46 Cal.App.4th at p. 1654.)

Father claims that the evidence established the girls were well cared for when left with him. In fact, the girls were found to be well cared for in a clean and orderly home only for the brief period they lived with the paternal grandparents. Father abruptly removed them from that home to avoid DCFS scrutiny and took them to live with persons whose backgrounds and caregiving abilities were unknown. When, after several months, the girls were detained from Father’s custody, they showed signs of neglect, including unfamiliarity with being bathed or having their hair brushed. Prior to DCFS intervention, Father had regularly left the girls in the care of their Mother, a drug abuser whose neglect and failure to supervise literally placed their lives in jeopardy. Just prior to the detention hearing, Father undertook efforts to prevent Jon from being removed from Mother’s custody. These past actions, when combined with Father’s longstanding history of drug use, his ongoing antagonism toward DCFS and his extreme attempts to keep the children from outside scrutiny, were sufficient to support the court’s conclusion that the children would not be safe with him.

2. *Requiring Participation in Domestic Violence Program*

Finally, Father contends there was no basis for the portion of the dispositional order requiring him to attend a 52-week domestic violence program. Here, we agree. Our review of the record reveals nothing to support a finding that Father subjected Mother to abuse, verbal or physical, or to suggest the children's physical or emotional health was in danger from the presence of domestic abuse in their home.

Section 362 empowers the juvenile court to “make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support” of a dependent child, including orders directing parents or guardians to participate in counseling or education programs. (§ 362, subds. (a), (c).) “The court has broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order in accord with this discretion.” (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1006.) “Of course, the juvenile court's discretion in fashioning reunification orders is not unfettered. Its orders must be ‘reasonable’ and ‘designed to eliminate those conditions that led to the court's finding that the child is a person described by Section 300.’” (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1229, quoting § 362, subd. (c).) “‘The reunification plan “‘must be appropriate for each family and be based on the unique facts relating to that family.’” [Citation.]” (*In re Nolan W.*, *supra*, at p. 1229, quoting *In re Christopher H.*, *supra*, at p. 1006.) “The whole point of reunification is the elimination of those conditions which led to the assumption of jurisdiction by the juvenile court.” (*In re Rebekah R.* (1994) 27 Cal.App.4th 1638, 1655.)

Father was instructed to participate in a 52-week domestic violence program for batterers as a prerequisite to reunification with his children. Yet, there were no allegations that Father engaged in domestic violence, and none of the witnesses interviewed by DCFS made any reference to Father's verbal or physical abuse of

Mother. From the record, it does not appear that Father and Mother were residing together or that they had any intention of doing so. The only evidence relied upon by the court was its observation of Father's courtroom demeanor, directed primarily at his mother. Neither Father nor his counsel had notice or an opportunity to address any suggestion of domestic violence or the impact of such alleged conduct on the children. Accordingly, we conclude the court abused its discretion in requiring Father to attend a 52-week domestic violence program for batterers. (See *In re Basilio T.* (1992) 4 Cal.App.4th 155, 172 [reversing drug testing portion of dispositional order where based solely on caseworker's observation that mother sometimes behaved unusually and was obsessive about certain matters].)

DISPOSITION

The court's jurisdictional order is affirmed. The portion of the court's dispositional order requiring Father to attend a 52-week domestic violence program for batterers is reversed. In all other aspects, it is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.