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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re ERICA C., A Person Coming Under
the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

TAMMY B.,

Defendant and Appellant.

B237868

(Los Angeles County
Super. Ct. No. CK88668)

APPEAL from a judgment and order of the Superior Court of Los Angeles
County, Margaret S. Henry, Judge. Affirmed.

Suzanne Davidson, under appointment by the Court of Appeal, for Defendant
and Appellant.

Office of the County Counsel, John F. Krattli, Acting County Counsel,
James M. Owens, Assistant County Counsel, and Kim Nemoy, Deputy County Counsel,
for Plaintiff and Respondent.

Tammy B. (mother) appeals from (1) a judgment declaring her daughter, Erica C.,¹ to be a dependent of the court pursuant to Welfare and Institutions Code² section 300, subdivision (b),³ and (2) a subsequent dispositional order removing Erica from mother's custody pursuant to section 361, subdivision (c)(1).⁴ She contends that the evidence was insufficient to support a finding of jurisdiction or to support the trial court's removal order. We disagree and will affirm both.

¹ The child's name is spelled "Erika" throughout the record. However, the correct spelling is "Erica."

² All section references are to the Welfare and Institutions Code unless otherwise noted.

³ Section 300, subdivision (b) states, in relevant part, "Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court: [¶] . . . 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 by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse."

⁴ Section 361, subdivision (c)(1) states, in relevant part, "A dependent child may not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence [¶] (1) There 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. . . . "

FACTUAL AND PROCEDURAL BACKGROUND⁵

Mother has four children: Darrell S., an adult who was not involved in these dependency proceedings; Davonte G., born in September of 1995; C. W., born in October of 2000; and Erica, born in October of 2005.⁶ At the time the Department of Children and Family Services (DCFS) became involved, Erica lived with the maternal grandmother, Henrietta B. The maternal grandmother stated that both Erica and mother moved in with her after mother was evicted from her Lancaster home in March of 2010. Davonte⁷ at some point lived with mother and then with the maternal grandmother, but

⁵ The factual and procedural background is drawn from the record, which includes a one-volume Clerk's Transcript and a one-volume Reporter's Transcript.

⁶ DCFS has previously been involved with mother with respect to her four children. In 2002, DCFS opened an investigation after receiving allegations that mother was neglecting Davonte and C. and forcing her oldest child, Darrell, to care for them. Mother was not cooperative with DCFS and the investigation was closed as inconclusive. In 2003, another allegation arose that mother was neglecting and emotionally abusing C. and smoking marijuana in her presence. C.'s father obtained a restraining order against mother to protect C., effective from July 3, 2003 through July 8, 2006. Although mother's home was found filthy and without sufficient food, the investigation was deemed inconclusive. In 2004, an allegation was made against the maternal grandmother that she was neglecting Davonte but the investigation was closed as unfounded. Finally, in 2006, it was alleged that mother was transient, was not taking care of her children, was using drugs around her children and was working as a prostitute. DCFS did not observe mother under the influence and closed the investigation as unfounded.

⁷ Although it is not entirely clear from the record, Davonte saw his father frequently and would spend his summers at his father's house. The petition from which this appeal arises was filed on June 22, 2011 and the allegations therein against mother are only with respect to Erica. We assume that Davonte was residing with his father for the summer when the petition was filed. In a later interview with DCFS, mother stated Davonte went to live with his father because the maternal grandmother called mother offensive names relating to mother's sexuality in front of Davonte, placing Davonte under significant stress.

left to live with his father, David G., before DCFS became involved. C. lived with her father, Roderick W. DCFS opened an investigation due to allegations on June 17, 2011 that mother was emotionally abusing and neglecting Erica.

As part of its investigation, DCFS interviewed the maternal grandmother who reported that, beginning in March of 2011, mother “began showing signs of substance abuse.” She explained that mother would leave town for several days at a time without explanation. By April, it appears that mother was no longer residing at the maternal grandmother’s home. The maternal grandmother reported an incident in mid-April of 2011, as an example of one of mother’s unexplained absences, when mother arrived at her home for a visit with Erica. Mother told the maternal grandmother that she was taking Erica to a beauty salon but she did not return with the child for four days. The maternal grandmother stated that Erica told her mother locked herself in a room with another adult woman during much of that time and would not allow Erica to come in. Erica was also reported to have said that she had to sleep by herself on the couch while an adult male by the name of “Big Sexy” slept on the floor. Erica denied any sexual abuse, but was upset that her mother was neglecting her. In a later interview with DCFS, mother denied leaving Erica unattended and explained that her car broke down and she was unable to return Erica so had her sleep on the couch of her apartment.

An additional petition with respect to Davonte and C. was filed on July 13, 2011. Ultimately, jurisdiction over Davonte and C. was terminated with Family Law orders granting custody to each child’s respective father. Neither Davonte nor C. is a party to this appeal. Neither Davonte’s father nor C.’s father is a party to this appeal.

When mother returned, the maternal grandmother took Erica from her and stated that she no longer would allow mother to be alone with Erica until she was “completely sober and clean.” The maternal grandmother stated that mother suffers from drug addiction and is not certain mother can recover and care for Erica.

The maternal grandmother also reported that on June 12, 2011, mother planned to visit Erica but failed to show up. Erica was so distraught that the maternal grandmother took her to the Antelope Valley Hospital for an evaluation where she was treated by a therapist, Adrianna C. Erica was taken back there again on June 15, 2011 after speaking with mother on the phone when Erica “became hostile and physical while crying uncontrollably.” Also in June, maternal grandmother and Erica were evicted from maternal grandmother’s home because it was a Senior Living Home and the staff discovered Erica’s unauthorized presence.

Mother spoke with DCFS four days after it opened its investigation. DCFS reported in its last minute information report filed with the court that mother denied using any illegal drugs but admitted to smoking marijuana for insomnia, poor appetite and anxiety. Mother provided a copy of her medical marijuana recommendation to DCFS, which was valid between February 4, 2011 and February 3, 2012 and signed by Dr. Robert S. Charlep.

DCFS filed a petition on June 22, 2011 alleging, as amended, “b-1 [¶] The child [Erica’s] mother, . . . has a history of substance abuse and is a current user of marijuana which renders the child’s mother incapable of providing regular care for the child. The mother’s substance abuse endangers the child’s physical health and safety and creates

a detrimental home environment, placing the child at risk of physical harm and damage.” The trial court found that DCFS had made a prima facie case for detention and vested DCFS with temporary placement and custody. Erica was detained in foster care. It also found Eric C.⁸ to be Erica’s alleged father. The trial court ordered transportation funds, monitored visits, and drug testing for mother. It also ordered DCFS to evaluate mother’s home for a potential pre-trial release of Erica to her.

While in foster care, Erica was taken to the hospital for emotional issues. She was admitted on June 26, 2011 and remained hospitalized for two weeks. The foster mother reported that Erica experienced a “flashback episode” with screaming and yelling. The foster mother had to restrain Erica to prevent her from hurting herself. Erica was reported to have said, “I want to see blood in b-my body . . . I want to throw out. I have my mother I saw the boy girl pushing me out of my bed, I am always crying when she pushes me.” While hospitalized, Erica was placed on Risperdal, an anti-psychotic medication, and Prozac, an anti-depressant medication, and was determined to be a danger to herself.

⁸ Eric is not a party to this appeal. When the petition was filed, he was in custody for attempted murder, among other things, of his own mother, Erica’s paternal grandmother, Dorothy C. Eric has an extensive criminal history. After being released from prison in 2006, Eric attacked the paternal grandmother at her home while she was caring for Erica. He pointed a .45 caliber handgun at her and tried to grab her but she was able to run away. Mother was present and called the police. Mother stated that after being released on bail for selling drugs, Eric attacked her as well. Eric was later arrested with “cocaine, weed, shrooms, and guns on him.” Because of his prior criminal record, he was sentenced to life in prison under California’s three-strikes law. He was incarcerated at the Salinas Valley State Prison.

DCFS reported, in its July 1, 2011 last minute information report for the pre-release investigation hearing on that same date, that it met with mother at her alleged apartment. She indicated she was renting the apartment pursuant to a sublease and therefore had no documentation verifying her possession. The apartment was neat and clean. Erica's paternal relatives informed DCFS, however, that mother had a history of selling and using drugs for many years and that the home DCFS visited was not hers, but an apartment she was "borrowing" in an attempt to regain custody of Erica. With respect to the maternal grandmother, DCFS reported she was staying with a friend until she could find suitable housing. Both paternal grandmother and paternal aunt indicated an interest in having Erica placed with them. The trial court did not release Erica to mother.

In its jurisdiction and disposition report filed on July 28, 2011, DCFS included a number of statements from the children with respect to mother's marijuana usage. Davonte reported that mother smoked marijuana and had a medical marijuana recommendation but he did not know what condition she had that necessitated its use. He stated that mother "never really smoked it around us," but that maternal grandmother previously smoked marijuana "within a distance that was visible" to the children. C. stated that she has lived with her father since "birth or one I think," and denied that mother used any illicit drugs, describing mother's behavior as normal.

As DCFS began questioning Erica about mother's drug use, she said, " 'No . . . I don't want to get in trouble' " with " 'my momma.' " The child also stated, " 'Don't tell her. My momma told me not to say anything.' " After encouragement

from DCFS, Erica said, “ ‘She told me not to tell that she was sleeping with a girlboy [mother’s female companion].’ ” She then began to discuss the time when mother remained in the locked room with her female friend while Erica slept on the couch near “Big Sexy.” Although Erica’s statements appear to have been prompted by DCFS’s questioning regarding mother’s drug use, it is unclear whether she meant she was told not to discuss the drug use or mother’s relationship with her female companion.

When asked if she knew what drugs were, Erica stated, “ ‘Yeah, it’s weed and caffeine.’ ” Erica stated that mother used marijuana and described the drug by saying “ ‘weed is green.’ ” She further stated that mother placed it in a brown unidentified object to smoke it. Erica also informed DCFS that she had witnessed mother smoke marijuana on one occasion.

Erica’s foster parents reported to DCFS that she had difficulty sleeping due to experiencing nightmares about shootings. When questioned by DCFS, Erica reported an incident that occurred at the “ ‘gold apartments’ ” with the maternal grandmother in which she heard several gun shots and, later, saw two individuals with bleeding shoulder wounds. Erica also noted she had nightmares about “ ‘fighting and biting’ ” the maternal grandmother, which is the behavior that resulted in her being taken to the hospital in early June by the maternal grandmother.

DCFS interviewed mother, also reporting her statements in its jurisdiction and disposition report filed on July 28, 2011. With respect to her drug usage, mother admitted to using marijuana and to a history of abusing prescription medication. Mother admitted to smoking marijuana in her car “ ‘if the kids were home or in the

house when they were in school because I didn't want the kids to ask me questions and I don't even smoke cigarettes and don't even let other people smoke around them either.' ” She denied using any other drugs. In her testimony at the contested adjudication hearing, mother denied ever smoking around her children. Mother stated that she believes the maternal grandmother lied about the allegations because she disapproves of mother's being gay.

For the hearing on August 25, 2011, DCFS reported in its last minute information report that mother tested positive for marijuana on August 5, 2011 and August 11, 2011. Mother failed to appear for testing on August 9, 2011. She enrolled in parenting courses at Harambee and had completed two of ten. However, DCFS stated that it was unable to recommend a “301 contract”⁹ because mother stated she was unwilling to attend a drug treatment program. DCFS later reported that mother tested positive for marijuana on August 18, 2011 and August 24, 2011 and failed to appear for testing on August 22, 2011.

In its last minute information report filed on September 23, 2011, DCFS noted mother's additional positive tests for marijuana usage on September 16, 2011 and on September 19, 2011.¹⁰ DCFS again stated that a 301 contract cannot be recommended

⁹ Section 301 allows DCFS to undertake a voluntary program of supervision of a child in lieu of filing a petition.

¹⁰ DCFS noted that the drug test results have shown a decrease over time in mother's reported levels of marijuana. However, the trial court did not take such levels into consideration and treated the tests as simply positive versus negative. Its rationale was that no expert testimony or other evidence was introduced to explain the relationship between levels of marijuana reported on drug screens and usage.

because mother continued to be resistant to drug treatment despite her recent enrollment on September 19, 2011 with U-Turn, a drug treatment program. When mother visited the DCFS offices, she asked about the possibility of a 301 contract and became “very upset” when it was explained to her that none would be offered. She stated that the entire case was based on false allegations and that DCFS kept “making things up” to keep Erica from her.

The report also included a discussion of mother’s criminal history. She was charged and convicted of felonies for possessing a driver’s license with the intent to commit forgery (1993) and assault with a deadly weapon (2000). She was also charged and convicted for misdemeanors for nonsufficient funds (1991), receiving stolen property (year unknown), giving false identification to a police officer (1992), and battery (1994).

The adjudication and disposition hearings were held over two days, September 23, 2011 and October 7, 2011.¹¹ There were no objections to the evidence presented. The trial court found Erica to be a person described in section 300, subdivision (b), and sustained the petition as amended. The trial court ordered Erica

¹¹ In its interim review report filed on October 7, 2011, DCFS reported on mother’s history of being a victim of domestic violence with respect to the fathers of her children. The domestic violence was limited to the fathers’ interaction with mother and there was no evidence that the children were ever involved. DCFS also mentioned concerns regarding mother’s mental status. Davonte briefly mentioned that mother used marijuana to treat her bi-polar disorder. However, he later denied that mother had ever been diagnosed with bi-polar disorder and that he had only heard the maternal grandmother say that mother was bi-polar. He described mother as generally acting normal. As the sustained allegations in the petition do not include any mention of domestic violence or mental illness, this information appears irrelevant.

removed from mother's custody and continued Erica's placement with her paternal grandmother. The removal order was based on, among other things, mother's "becoming irresponsible" during periods of drug use. The trial court ordered reunification services, participation in a drug and alcohol program, drug testing, parenting classes, individual counseling and a voluntary mental health evaluation for mother. Mother filed a notice of appeal on November 29, 2011.

ISSUES ON APPEAL

Mother first contends that the evidence did not support the trial court's finding of jurisdiction pursuant to section 300, subdivision (b) because DCFS failed to show that Erica suffered or was at risk of suffering severe physical harm or illness as a result of mother's usage of medical marijuana. Mother next contends that the trial court's removal order was not supported by the evidence because DCFS failed to show that there was a substantial danger to Erica's physical health, safety, protection or physical or emotional well-being if she were returned to mother's custody. As a result, mother asserts that the judgment should be reversed and the petition dismissed. In the alternative, should we determine that the trial court's jurisdictional findings were supported by substantial evidence and affirm the judgment, she asserts that the dispositional order should be reversed and the case remanded with instructions to place Erica with mother.

DISCUSSION

1. *Standard of Review*

“In a challenge to the sufficiency of the evidence to support a jurisdictional finding, the issue is whether there is evidence, contradicted or uncontradicted, to support the finding. In making that determination, the reviewing court reviews the record in the light most favorable to the challenged order, resolving all conflicts in the evidence in favor of that order, and giving the evidence reasonable inferences. Weighing evidence, assessing credibility, and resolving conflicts in evidence and in the inferences to be drawn from evidence are the domain of the trial court, not the reviewing court. Evidence from a single witness, even a party, can be sufficient to support the trial court’s findings. [Citations.]” (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 450-451.)

“ [I]n dependency proceedings the burden of proof is substantially greater at the dispositional phase than it is at the jurisdictional phase if the minor is to be removed from his or her home. [Citation.] . . . [¶] This heightened burden of proof is appropriate in light of the constitutionally protected rights of parents to the care, custody and management of the children. [Citations.]’ [Citations.] [¶] ‘Of course, on appeal, the substantial evidence test is the appropriate standard of review. Thus, in assessing this assignment of error, “the substantial evidence test applies to determine the existence of the clear and convincing standard of proof” [Citation.]’ [Citation.]” (*In re Henry V.* (2004) 119 Cal.App.4th 522, 528-529.)

2. *Substantial Evidence Supports the Trial Court’s Jurisdictional Findings*

Mother contends that there was insufficient evidence to find that her use of medical marijuana caused Erica serious physical harm or illness or placed her at risk of suffering severe physical harm or illness. We disagree.

Section 300, subdivision (b), states that the following will cause a child to fall under the jurisdiction of the court and be adjudged a dependent of such court: “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 by the inability of the parent or guardian to provide regular care for the child due to the parent’s . . . substance abuse.”

In supporting her contention, mother relies on *In re David M.* (2005) 134 Cal.App.4th 822. In *In re David M.*, the trial court asserted jurisdiction over two minor children¹² pursuant to section 300, subdivision (b).¹³ (*In re David M.*, *supra*, 134 Cal.App.4th at p. 825.) The appellate court reversed because there was no evidence showing that the older of the two minors (the younger one was detained at birth and was never in the mother’s care) was ever neglected or exposed to drugs, drug paraphernalia or secondhand marijuana smoke. (*Id.*, at p. 831.) To the contrary, the evidence in that record showed the child was healthy, well cared for, and loved and was being raised in

¹² The mother in *In re David M.* had previously been involved with DCFS. Her oldest child, the half-sibling of the two children in *In re David M.*, was declared a dependent of the court in 2001, four years before *In re David M.* was decided.

¹³ Although the findings were pursuant to both subdivision (b) and (j) of section 300, we limit our discussion of this case to its analysis under subdivision (b), as it is the only provision that applies here.

a clean and tidy home. (*Id.*, at p. 830.) In *In re David M.*, there was no nexus between the mother's very limited usage of marijuana and any actual or risk of severe physical harm or illness to her children. The facts of this case differ dramatically.

First, unlike in *In re David M.*, Erica actually suffered severe physical illness as a result of mother's drug use. Mother's behavior began to change in March of 2011, which the maternal grandmother stated was a result of mother's marijuana use. Mother routinely disappeared for days on end without informing the maternal grandmother of her whereabouts or calling Erica. On one occasion in April of 2011, mother appeared for a visit with Erica allegedly to take her to a beauty salon but instead disappeared with the child for four days. During this time, mother locked herself in a room with her female companion and Erica had to sleep on the couch with Big Sexy on the floor. Erica felt neglected and this experience was so disturbing to her that she had intense "flashbacks" and nightmares where she screamed and yelled about being pushed out of her bed by the "boy girl," mother's female companion. Erica required hospitalization for two weeks, was placed on anti-psychotic medication, and was diagnosed as being a danger to herself. These facts are evidence of a physical manifestation of a severe emotional disturbance. Clearly Erica suffered severe physical illness. But the record not only supports this conclusion, it also supports the conclusion that Erica remained at risk of suffering severe physical harm or illness in the future.

Mother's behavior subsequent to Erica's hospitalization showed that Erica remained at risk of severe physical harm or illness. As noted above, mother's marijuana abuse led to Erica's hospitalization and to her desire to harm herself. Mother, however,

failed to take responsibility for this and instead claimed that Erica was not suicidal and merely had a tantrum. Further, mother refused to acknowledge that she had a substance abuse problem and only enrolled in a substance abuse program four days before the jurisdiction hearing was held. Also, mother's living situation was not stable yet. She failed to provide any evidence that the apartment she showed DCFS was actually hers pursuant to a valid sublease and not one "borrowed" in an attempt to convince the court to return her daughter to her care. Lastly, when DCFS informed mother no "301 contract" would be offered, she became upset and accused DCFS of "making things up" to keep Erica from her.

Additionally, there was evidence showing that, on at least one occasion, mother smoked marijuana while Erica was close enough to see what mother was doing, creating a real risk of her exposure to secondhand marijuana smoke. (*In re Alexis E.*, *supra*, 171 Cal.App.4th at p. 452.) The trial court could also reasonably conclude Erica was at risk of severe physical harm or illness as a result of mother's failure to provide adequate supervision due to her usage of marijuana on this basis as well.

3. *Substantial Evidence Supports the Trial Court's Removal Order*

Mother has challenged the trial court's finding of substantial danger to Erica and claims Erica can safely be returned to her custody with wraparound services. We disagree.

"A dependent child may not be taken from the physical custody of his or her parents or guardian or guardians 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 or guardian's physical custody.” (§ 361, subd. (c)(1).) This provision has been construed to allow removal for substantial risk of either physical or emotional harm. (*In re H.E.* (2008) 169 Cal.App.4th 710, 721.)

The record supports the conclusion that returning Erica to mother's care would be dangerous to both her physical and emotional health. Mother failed to acknowledge that her marijuana usage led to her daughter's physical illness and hospitalization, or that she had a substance abuse problem. She also continued to blame DCFS for such failures. All of these facts together form a sufficient basis on which the trial court could determine that returning Erica to mother's care would be dangerous to Erica's physical and emotional health and that no reasonable means other than removal could protect her.

DISPOSITION

The judgment and subsequent dispositional order are affirmed.

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CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.