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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re D.H. et al., Persons Coming Under the
Juvenile Court Law.

B248572
(Los Angeles County
Super. Ct. No. CK97764)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

C.F.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Terry Truong,
Juvenile Court Referee. Reversed.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Defendant and
Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and
Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

C.F. (mother) appeals from a juvenile court's order declaring her children dependents under Welfare and Institutions Code section 300, subdivision (b),¹ and placing them in the care of their previously noncustodial fathers (none of whom is a party to this appeal). Mother, a drug user, contends, among other things, that there is insufficient evidence that her children were at a current risk of serious physical harm or illness as a result of her drug use. We agree, and reverse the jurisdictional order.

PROCEDURAL AND FACTUAL BACKGROUND

Mother has three children: D.H. (born March 1998), J.B. (born March 2000), and D.F. (born July 2001). The family came to the attention of respondent Department of Children and Family Services (DCFS) in January 2012 after mother was alleged to have left the children at their grandmother's house for days "while mother got high." Mother tested positive for PCP (phencyclidine) on February 8, 2012.

Mother began participating in a voluntary family maintenance program to address her drug usage. She participated in a 90-day residential treatment program from mid-April to early June 2012. During the residential program mother took five random drug tests. The results of the first three tests (taken April 12 and 21, and May 1) were positive for PCP. The results last two tests (taken May 8 and 31) were negative. After completing the residential program, mother enrolled in an outpatient substance abuse treatment program. On December 4, 2012, mother was a no-show for a random drug test. On December 7, 2012, mother tested positive for PCP. DCFS was not informed of mother's positive drug test until early February 2013.

On February 6, 2013, when questioned by DCFS about the positive toxicology screen in December, mother at first denied using drugs. The next day, however, she admitted that she had not told DCFS about the positive drug test in December because she was "trying to have [her] case closed," and her counselor at the outpatient program told her "they weren't

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

going to say nothing,” since mother’s case was closing. Mother admitted having had a single relapse in December 2012. She explained that her father had passed away, and she had become stressed. Her father had been disabled. Mother had been his caregiver; now she was out of a job, and her father’s house had been foreclosed upon. Mother collected welfare, but had no stable housing. She and the children stayed with different friends, and their residence changed every other day. Mother acknowledged that she needed to focus on getting sober and getting “herself together.” She told DCFS she needed help, wanted to get sober, wanted a job and was trying to find housing. Mother had a “back-up plan” which was to move in with her mother, who was trying to help her get work at a check-cashing store. Mother also explained that, before using drugs in December 2012, she first made arrangements to leave the children with a friend. Mother told DCFS she never used drugs around her kids, nor had she had ever used drugs to the extent that she was unable to take care of them. DCFS requested that mother submit to a drug test. She agreed; that test was negative.

DCFS interviewed each child twice. D.H., then 14, told the social worker it was “good” living with mother. He knew what drugs and alcohol were. He denied seeing mother under the influence of those substances, denied having seen drugs in the home and had seen nothing abnormal about mother’s behavior. He thought mother took good care of him and his siblings. At first D.H. said the family lived in San Diego. But after the social worker told him mother had said the family lived in different homes, he acknowledged that they moved “from home to home.”

12-year-old J.B. also denied having seen mother engage in any abnormal behavior or use any substances, and told DCFS he wanted to stay with mother. He told the social worker mother and the children lived with different people in Los Angeles, and stayed at each house for about three days before moving to another person’s home.

11-year-old D.F. did not believe the “crazy” drug use allegation and had never seen her mother “on anything.” She told DCFS she was doing well in school, and wanted to go

home. All three children said they felt safe with and wanted to go home to mother. The children were taken into protective custody, and placed in the care of his or her father.

DCFS interviewed the children's fathers. D.H.'s father said he was never around mother. He had cared for D.H. every other weekend and during summers since the child's birth. He had never seen mother use drugs, nor had he seen her under the influence. He did not know mother had been under stress or that she lacked stable housing. D.H. was doing fine in his father's care, but he missed his mother.

J.B.'s father, who had been separated from mother for five or six years, told the social worker he had not been aware during his marriage to mother that she had a history of drug use. He had not maintained regular contact with mother, and did not know she was under stress or without stable housing. He had no complaints about mother, whom he described as a good parent. In a later interview, J.B.'s father told DCFS that, although he had never "really seen [mother] use [drugs] in [the children's] presence," he believed she used PCP a few times in 2013. He knew she used "[b]y the way she act[ed]." He knew the difference because he had known mother for more than 12 years. Still, J.B.'s father did not believe that the children were at risk with mother so long as she got herself together.

D.F.'s father told DCFS that mother was "an awesome" parent who was "always doing what it takes to take care of her children."

Mother has a criminal history ranging from 2002–2012 which includes convictions for driving without a license, or with a suspended license, and a theft conviction.

DCFS filed a petition on behalf of the children on February 13, 2013, making a single allegation under Welfare and Institutions Code section 300, subdivision (b), that remedial services had failed to resolve the family's problems, and the children were at risk of harm due to mother's unresolved history of illicit drug use, including PCP. The children were detained from mother and released to their fathers. Mother was ordered to participate in random drug testing, and given monitored visitation. The matter was set for a jurisdictional hearing.

A jurisdictional/dispositional hearing was conducted on March 27, 2013. DCFS's report for that hearing reflected that mother had a negative drug test on March 7, 2013. Mother denied having a drug history. She said she had first used PCP 11 years before, and used it only once; she did not abuse the drug. She had returned to using PCP after her father's death to help ease her pain, and because she had no job. She also denied that her drug tests were dirty; she had missed a test, so it was considered dirty. Mother submitted into evidence a letter from her drug program stating she had maintained compliance with treatment program requirements and had a negative drug test on February 5, 2013. Mother was continuing her participation in the outpatient treatment program.

DCFS noted that the children and mother all believed the children were in no danger in mother's care, and that she had not created a detrimental environment for them. However, because D.H.'s and J.B.'s fathers told DCFS that mother "needs help to get herself together," DCFS believed that at least the boys' fathers were concerned that mother needed help related to substance abuse and relapse prevention. It was unclear whether D.F.'s father—who told DCFS only that he had "no comment"—shared their concerns. DCFS recommended reunification services be provided for an additional six months, and that mother continue participating in programs to address her substance abuse and random testing, and participate in counseling.

At the conclusion of the hearing the court sustained the petition. The children were declared dependents, and removed from mother's custody. The court released each child to his or her father's care. Mother was given monitored visitation and ordered to participate in a drug rehabilitation program, testing and individual counseling. The court set the matter for a section 364 hearing.² Mother appeals.

² The reporter's transcript reflects that the court set the matter for a nonexistent ".326 hearing."

DISCUSSION

1. *Standard of review*

At the jurisdictional hearing, the court's finding that a child is a person described by section 300 must be supported by a preponderance of the evidence. (§ 355, subd. (a); *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248.) We review a juvenile court's jurisdictional findings for substantial evidence. (*In re James C.* (2002) 104 Cal.App.4th 470, 482.) "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.) We remain mindful, however, that substantial evidence is not synonymous with any evidence; it must be such that a reasonable mind would accept it as adequate to support a conclusion. (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.) "A decision supported by a mere scintilla of evidence need not be affirmed on appeal. [Citation.] Furthermore, "[w]hile substantial evidence may consist of inferences, such inferences must be 'a product of logic and reason' and 'must rest on the evidence' [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations]." [Citation.] "The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." [Citation.]" (*In re David M.*, at p. 828, italics omitted.)

2. *There is insufficient evidence to support a finding that the children were at risk of serious physical harm as a result of mother's drug use.*

The court amended and sustained the sole section 300, subdivision (b) allegation, as follows:

“The [children’s mother] has an unresolved history of illicit drug use, including the use of P.C.P., which renders the mother incapable of providing regular care and supervision of the children.”³

Mother maintains the jurisdictional findings must be reversed because DCFS made an insufficient evidentiary showing that, in March 2013, her children “require[d] protection from a current risk of ‘serious physical harm’” (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1024.) She is correct.

Under section 300, subdivision (b), the court may assert jurisdiction over a child when “[t]he child has suffered, or there is a substantial risk that the child will suffer, *serious physical harm* or illness, as a result of the failure or inability of his or her parent . . . to adequately supervise or protect the child . . . or by the inability of the parent . . . to provide regular care for the child due to the parent’s . . . substance abuse.” (Italics added.) The juvenile court did not find that the children had suffered “serious physical harm or illness.” At most, the court found that “mother’s unresolved history of illicit drug use places the children at risk of harm.” Based on the record, our decision in *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1005 (*Destiny S.*), and the reasoning of *In re Drake M.* (2012) 211 Cal.App.4th 754, 764, 769 (*Drake M.*), we conclude the court’s jurisdictional findings were erroneous. The record lacks sufficient evidence demonstrating

³ Although it does not affect our determination, we note that the juvenile court’s finding is not entirely clear. Although the court amended the allegation as stated above, it then went on to restate, as originally pleaded, the remainder of the allegations of the section 300, subdivision (b) count, to explain the basis of its true finding:

“Remedial services have failed to resolve the family problems in that mother failed to consistently test and tested positive on April 12, 2012 and December 2012. [¶] The mother’s unresolved history of illicit drug use places the children at risk of harm. If this is not a case where [mother] has a drug problem, I don’t know what is. She’s already admitted that she started using at a very young age and she appears to use every time there is some stress in her life. . . . [¶] [Mother] had a year to work the program, to have the department not file the petition, and, yes, she failed to complete . . . it successfully. [¶] I do find that there is a detriment. I do find that that usage is harmful to the children.”

that, at the time of the adjudication, the children had suffered or were at risk of suffering serious physical harm due to mother's drug use.

It is well-established in California that a parent's use of illegal drugs, standing alone, is insufficient to support jurisdiction under section 300, subdivision (b). (*Drake M.*, *supra*, 211 Cal.App.4th at p. 764 ["mere usage of drugs by a parent is not a sufficient basis on which dependency jurisdiction can be found"]; *Destiny S.*, *supra*, 210 Cal.App.4th at p. 1003 [a parent's use of illegal drugs, "'without more,' does not bring a minor within the jurisdiction of the dependency court"]; *In re Alexis E.* (2009) 171 Cal.App.4th 438, 452 ["mere use of marijuana by a parent will not support a finding of risk to minors"].) The same principle applies with regard to a parent's use of hard drugs. (*Destiny S.*, at p. 1003; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 817, 825–826 [parent's use of cocaine, on its own, was an insufficient basis for assertion of jurisdiction under § 300, subd. (b)].) In order to support a finding of dependency court jurisdiction based on parental drug use, DCFS must "present evidence of a specific, nonspeculative and substantial risk to [the child] of serious physical harm." (*Destiny S.*, at p. 1003, citing *In re David M.*, *supra*, 134 Cal.App.4th at p. 830 [jurisdiction under § 300, subd. (b), reversed where parent had substance abuse problem, but no evidentiary showing made of specific, defined risk of harm to child as a result of parent's continuing substance abuse].)

DCFS makes no attempt to argue the children were at risk of substantial physical harm. It argues only that the juvenile court's findings were proper because there is "ample evidence to support [the finding that] the children were at risk from mother's substance abuse." DCFS points to the fact that, in contrast with the father in *Drake M.*, *supra*, 211 Cal.App.4th 754, "mother was not prescribed PCP by a physician." Obviously not. Unlike marijuana or alcohol, PCP is a controlled substance with no medically or legally sanctioned use. (See Health & Saf. Code, § 11377, subd. (a).) Indeed, as this court observed almost 30 years ago, "PCP . . . is . . . one of the most potent and toxic of all street drugs." (*People v. Profit* (1986) 183 Cal.App.3d 849, 871.)

We do not condone mother's use of such a dangerous drug. Still, there must be some evidence of a parent's inability or failure to adequately supervise or protect her child as a result of the parent's substance abuse problem. (*Drake M.*, *supra*, 211 Cal.App.4th at p. 766; *In re David M.*, *supra*, 134 Cal.App.4th at p. 830.) There is no evidence that mother ever used drugs around her children. None of the children knows or believes that mother uses drugs. While the court potentially questioned the children's veracity on this point,⁴ the evidence does show that mother's drug use was discrete and well hidden from the children and their fathers. In addition, mother went to some effort to ensure that the children were away and being cared for by family or friends before she used drugs. This was as true before DCFS became involved with the family in early 2012—when mother left the children in their grandmother's care while she got high—as it was at the time of her December 2012 relapse—when she arranged for the children to stay with a friend.

DCFS also notes that, unlike the father in *Drake M.*, *supra*, 211 Cal.App.4th 754, mother has a criminal history. But, as mother notes, her “criminal history was not within one year and it was not related to substance abuse. Thus, it does not fall within the *Drake M.* requirements.”

Finally, DCFS points to the fact that mother lacked a job and housing, forcing her family to move ““from home to home in Los Angeles.”” Mother has acknowledged that she depends on the generosity of others, and that her “kids need things” she cannot provide. Yet, even in the face of her drug issues, poverty and lack of housing, the evidence shows that the children and each of their fathers perceived mother as a very good parent, that mother makes sure the children attend school regularly and that they are well cared for. Moreover, DCFS makes no effort to tie mother's joblessness or poverty to any risk of serious physical harm to her children, all of whom feel safe with mother,

⁴ At the hearing, the court observed that mother “apparently hid her usage very well. Either that or the children are just not being honest with everyone.”

believe that she takes good care of them and want to live with her notwithstanding the family's difficult financial circumstances. "[P]overty alone, even abject poverty resulting in homelessness, is not a valid basis for assertion of juvenile court jurisdiction. . . . Put differently, indigency, by itself, does not make one an unfit parent and 'judges [and] social workers . . . have an obligation to guard against the influence of class and life style biases.' [Citation.]" (*In re G.S.R.* (2008) 159 Cal.App.4th 1202, 1212.)

For the reasons discussed above, the true finding as to the sole count in the petition must be reversed. Mother raises two additional arguments in her briefing on appeal. She contends there is insufficient evidence to support the juvenile court's order removing the children from her custody. She also contends the court erred in setting the matter for a section 364 hearing (rather than a hearing under § 366.21, subd. (e)), when it placed the children in the care of their previously noncustodial fathers. Because we are reversing the juvenile court's true finding with respect to the only count alleged in the petition, there is no need for us to address these additional contentions.⁵

⁵ Mother also requests that we take judicial notice of a November 4, 2013 minute order terminating juvenile court jurisdiction in this matter. Mother's request is denied; the evidence is not relevant to matters at issue here.

DISPOSITION

Because the court lacked jurisdiction over the children, its jurisdictional order is reversed and all subsequent orders are vacated. (*In re Destiny S.* (2012) 210 Cal.App.4th 999, 1005; *In re Maria R.* (2010) 185 Cal.App.4th 48, 71.)

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

MILLER, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.