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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re TAYLOR S., et al., Persons Coming
Under the Juvenile Court Law.

B267968

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. DK13023)

Plaintiff and Respondent,

v.

MICHAEL S.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County. Philip L. Soto, Judge. Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Tyson B. Nelson, Deputy County Counsel, for Plaintiff and Respondent.

Michael S. (father) appeals from the October 1, 2015 orders declaring his two children persons described by Welfare and Institutions Code section 300, subdivisions (a) and (b), and placing them with paternal grandparents.¹ He contends the jurisdiction and disposition orders are not supported by sufficient evidence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Because father does not challenge jurisdiction or disposition based on mother Cherie S.'s conduct, we recount only the evidence of father's conduct. Father and mother married in about 1999 and had three children: Kayla S., Taylor S. and Gavin S. They separated in about 2012, but never formally divorced. In 2014, the Los Angeles County Department of Children and Family Services (DCFS) concluded as unfounded one referral for general neglect (August 2014) and a second for emotional abuse and general neglect (October 2014).

The children lived with mother in an apartment in Northridge and until January 2015, visited father regularly at his Northridge home. But it was decided that the circumstances surrounding a home invasion robbery at father's home on January 7, 2015, made it unsafe for the children to be there. By July 2015, all three children still lived with mother but only Taylor (15 years old) and Gavin (eight years old) were still minors. Also living in mother's apartment was Christophe L., with whom mother had been in an intermittent intimate relationship for about two years.

Mother and Christophe engaged in frequent domestic violence, usually when they were intoxicated. On July 25, 2015, Gavin witnessed a particularly violent altercation in the apartment. On July 28, mother and Christophe engaged in another violent altercation, this time near the apartment complex's swimming pool while Taylor and Gavin were in the apartment. On July 29, DCFS received a referral about the family. Following interviews and a Child Family Team (CFT) meeting attended by mother, maternal grandmother and paternal grandmother L.S., but not father, mother agreed that Taylor

¹ All future undesignated statutory references are to the Welfare and Institutions Code.

and Gavin would be removed from mother's custody and placed with paternal grandparents. Taylor and Gavin were detained on August 19 and placed with paternal grandparents.

The section 300 petition filed a few days later alleged dependency jurisdiction under subdivisions (a) and (b). As to father, the petition alleged dependency jurisdiction based on: the history of violence between mother and father (paragraphs a-2, b-5); father's failure to protect the children from mother's alcohol abuse (paragraph b-2); and father's history and current substance abuse and drug-related criminal history (paragraph b-4). Following a detention hearing on August 24, 2015, the juvenile court found DCFS had made a prima facie showing of dependency jurisdiction. For father, it ordered unmonitored in-placement visits (i.e., at paternal grandparents' home) and unmonitored out-of-placement visits as long as the unmonitored visits occurred in a public place; father was to visit the children by himself. Father was ordered to drug test on demand and DCFS was ordered to provide father with referrals for domestic violence, parenting and drug/alcohol programs. The matter was continued for adjudication and disposition on October 1, 2015.

Father did not appear at the hearing on October 1, but was represented by appointed counsel. In response to an inquiry from the court, counsel said his last contact with father had been the day of the detention hearing (August 24); he did not request a continuance. There was no live testimony. Without objection, the detention report, jurisdiction/disposition report and two last minute informations were admitted into evidence. We detail only the portions of those reports relevant to the issue of dependency jurisdiction based on father's conduct.

A. The Detention Report

Mother told the social worker that father had a criminal history and anger management issues. Father was "attacked by drug people and had to be hospitalized" as the result of his injuries. Father was "into something bad and [she] is afraid to allow the children to go near him because of these bad people around him. . . . [F]ather has a gun in his waist and is very paranoid. He is still using heroin, to her knowledge."

Father said his visits with the children were “normal” until January 2015, when he was severely injured in a home invasion robbery and the children were no longer allowed to visit him.² Father explained “there was a rumor father was stealing from a dispensary and [his assailants] broke into the house because the father had stolen guns from these guys. They wanted money from father. The guys told father he had 24 hours to give them money or the gun, when he did not do that, he was attacked. The father stated he had the children stay away from him knowing he was in trouble. The house was being raided by law enforcement. The father has court issues in criminal court. Cultivation in garage was found. The father uses medical marijuana for knee injury and sleeping issues.” Father said he was not using any drugs “right now,” and agreed to drug test that day (August 19, 2015), but he never did so.

Father told the social worker that many things contributed to the marital breakup. The family home had been foreclosed upon, they had filed for bankruptcy and there were a lot of other legal issues. Father denied any domestic violence. He said both parents drank alcohol, “which caused a lot of fights.” Any bruises mother had were the result of father defending himself against mother’s aggression. Mother comes to his house three times a week and harasses him; they “scream and yell at each other, the police have been called several times.” Mother has assaulted father’s girlfriend. After mother assaulted father in 2012, he obtained a restraining order against her. The children were “usually not around” when mother and father were drinking and fighting. But one Father’s Day, the children “did witness spitting in the face, screaming in each other’s face, but usually no hitting.”

Speaking in a monotone, 15-year-old Taylor told the social worker she had no social life; when at home, she stays in her room and reads or listens to loud music; she uses loud music to escape from the fights between mother and Christophe. She had not seen father since he had been hurt; because father was recuperating at paternal

² According to the report, father told the social worker mother was the main breadwinner and he was the children’s main caregiver since he was self-employed. But this is inconsistent with father’s statement that he had not seen them since January.

grandparents' home, Taylor had not seen them, either. Taylor was "having issues in school and regarding anxiety: bed wetting, withdrawn, depressed, quiet and scared." She responded affirmatively when asked if she would like counseling. After she was placed with paternal grandmother, Taylor said father "needs help with drugs and criminal activity," but she would not elaborate.

Gavin said mother and father fought a lot before they broke up a few years ago. Gavin had not seen father for several months because mother said it was not safe.

Kayla, then 18 years old, said it had become her job to take care of her siblings and she was relieved that Taylor and Gavin had been removed from mother and father. Since father and mother had separated, father had "started doing his own thing and she does not really see him too much." She was aware that father was growing marijuana in the garage but the children were not allowed in the garage and father never smoked marijuana in their presence.

Paternal grandmother said the "parents do not have time money or energy" to care for the children. Their home "was foreclosed so they owe a lot of money. She stated both parents got into trouble and now they are too far down to pick themselves back up." The entire burden of caring for the children had fallen on paternal grandparents and they needed help. Paternal grandmother was enthusiastic about attending a CFT meeting the next day, and agreed to bring maternal grandmother.

B. The Jurisdiction/Disposition Report

Father's criminal history includes a 1997 conviction for possession of a controlled substance, a January 2009 conviction for "plant marijuana," an October 2009 conviction for marijuana possession, and March 2015 convictions for marijuana cultivation and transportation or sale of narcotics. Father told the social worker he wanted "to have my kids back and I want to have some normalcy back. . . . Father states he wants to co-parent."

Since separating from mother, father had not used alcohol and it had been one or two months since he used marijuana. He used marijuana to treat stress, pain from his knee injury and to help him sleep, but he never "brought it around the kids." Father was

cultivating marijuana for his personal use and did not understand why he was being charged with multiple felonies relating to cultivation. About a month after the home invasion robbery, father was arrested for possession of heroin, but that heroin belonged to his companion, who falsely told the police that it was father's heroin.

Father said mother was the aggressor in the physical altercations they had while living together and since. He also blamed mother for the home invasion robbery. He explained that mother spread a false rumor that father had robbed a medical marijuana dispensary.

Regarding a gun found by police in a search of his home the day after the robbery, father explained: "They served the warrant at my house and they found a gun. The one that was used to beat me with. My girlfriend had picked up the gun as she was running and in doing so she put the gun in her dresser drawer. . . . That's how it became a felony because they equate gangs and guns and drugs all together. I got a felony on my record but my guns are legal. My guns are only for protection. I had the gun because I thought it was my right to have a gun for protection. It's a felony because of that."

Mother said she and father used to smoke marijuana together and father grew marijuana in the home they owned together. She heard father started using heroin with his new girlfriend in 2014. That was "when his mind got really bad. He left the kids home alone at night. We were switching kids every other week from his house to my apartment. When all of this was going on we switched it instead to have the children go to his mom's house instead of his house because it wasn't safe at his house. He had weird people around his house, drug addicts around." Father had been twice arrested for possession of heroin.

Taylor said father used drugs in the past, but she did not know whether he was currently using. Father talked about selling marijuana and "was always in the garage where he kept the plants."

Eight-year-old Gavin said mother "lies" about father using drugs so that father's friends will "go after him." A long time ago, Gavin witnessed violent altercations between mother and father.

Paternal grandfather R.S. said father visited the children about once a week since they had been placed with paternal grandparents, but was having transportation problems. Regarding the domestic violence between mother and father, paternal grandfather said father told him that he was defending himself against mother's assaults. Regarding the domestic violence between mother and Christophe, paternal grandmother speculated that father did not intercede because he did not "want to call law enforcement because then the social worker would intervene and his actions would become more exposed."

C. Last Minute Informations

One last minute information filed the day of the hearing indicated that paternal grandparents' home was assessed to be safe and appropriate for the children. A second established that mother and father were provided drug testing referrals on September 10, 2015, but both were "no shows" at random drug tests on September 14, 2015. Attached to the second last minute information was a printout of a series of vitriolic Facebook and/or text messages apparently from mother to father and/or his girlfriend.

Although father was not present at the hearing and his attorney had not talked to father since the detention hearing two months prior, father's counsel asked that the allegations against father be dismissed and the children be released to father; alternatively, he asked that disposition be continued for an assessment of whether father could live with the children at the paternal grandparents' home. He argued there was no evidence of any current risk of harm to the children because the prior drug-related convictions were not evidence of a current risk of harm, eight-year-old Gavin said mother's and father's fights occurred "a long time ago" and mother lied about father's drug use, and 15-year-old Taylor did not know whether father was still using drugs and the fight she witnessed was "a while ago."

The children's counsel commented that father's "criminal activity associated as a result of the growing and selling" was more concerning than his marijuana use. DCFS argued the text messages suggest mother and father had a continuing volatile relationship; the children were aware that father was selling drugs from home; and that activity had resulted in the home invasion robbery in which father was so seriously injured. In

summary, “as it currently stands, even with the children’s age and even with the fact that this turbulent lifestyle is kind of how they grew up,” the children need to be protected from the risk of future harm.

The juvenile court concluded there was a lot of “finger pointing” but there was “no getting around the fact that there’s domestic abuse going on with children being present and drug use and alcohol use and drug sales – especially drug sales by the father – that puts the children at risk Because if we’ve got people coming over to his house who are ready to do violence, possibly armed, the children are in a zone of danger if they are in that house. There’s no way we can protect them by releasing to the father. . . . [¶] The court cannot blind itself to the evidence presented. These are serious, serious issues that have to do with the safety and well-being of these children. And the court has to address these issues.” It sustained paragraphs a-2, b-2, b-4 and b-5 of the petition and found by clear and convincing evidence that the children could not be safely returned to either parent. Father was given unmonitored visits (1) in-placement and (2) outside-of-placement so long as those visits occurred in “a public setting so long as not accompanied by anyone else.”³ He was ordered to participate in programs for domestic violence, drug/alcohol abuse with after care, 12-step, weekly random drug testing, a 52-week Batterer’s Intervention Program and individual counseling to address case issues including domestic violence for perpetrators. Father timely appealed.

DISCUSSION

A. Father’s Appeal is “Justiciable”

DCFS contends we should decline to exercise our discretion to address father’s challenge to the jurisdictional findings based on his conduct because he does not challenge the findings based on mother’s conduct. DCFS argues that, even without the jurisdictional findings, the dispositional order was supported by substantial evidence.

³ It also sustained paragraphs a-1, b-1 and b-5 based on mother’s conduct. Mother was given monitored visits outside of placement and unmonitored visits in placement; she was ordered to participate in programs for domestic violence, drug/alcohol with after care, 12-step, weekly random drug testing and individual counseling.

In *In re Christopher M.* (2014) 228 Cal.App.4th 1310, we recently explained that when “jurisdictional finding could have other consequences beyond jurisdiction—e.g., where the finding may exclude the parent as a placement option—the appellate court has discretion to consider the question.” (*Id.* at p. 1316.) In *Christopher M.*, we exercised our discretion to consider the father’s challenge to the jurisdictional findings based on his conduct, even though he did not challenge jurisdiction based on the mother’s conduct, because the challenged findings might have had consequences to consideration of the father for placement under section 361.2, subdivision (a) placement of dependent child with noncustodial parent). In this case, we exercise our discretion to consider father’s jurisdictional challenge because it may have consequences for placement decisions.

B. Standard of Review

There are two stages to dependency proceedings under section 300. At the first stage, the juvenile court determines whether the child is subject to juvenile court jurisdiction; DCFS has the burden to prove jurisdiction by a preponderance of the evidence. (§ 355, subd. (a).) At the second stage, the juvenile court must decide where the child will live while under juvenile court supervision; to support removal from parental custody, DCFS has the burden to prove by clear and convincing evidence that there is a risk of substantial harm to the child if returned home and the lack of reasonable means short of removal to protect the child’s safety. (§ 361, subd. (c); *In re Lana S.* (2012) 207 Cal.App.4th 94, 103, 105; see also *In re D.C.* (2015) 243 Cal.App.4th 41, 51, 54.)

On appeal, we review both the jurisdictional and dispositional orders for substantial evidence. (*In re D.C.*, *supra*, 243 Cal.App.4th at p. 55; *In re Giovanni F.* (2010) 184 Cal.App.4th 594, 598.) In doing so, we view the record in the light most favorable to the juvenile court’s determinations, drawing all reasonable inferences from the evidence to support the juvenile court’s findings and orders. Issues of fact and credibility are the province of the juvenile court and we neither reweigh the evidence nor exercise our independent judgment. (*In re I.J.* (2013) 56 Cal.4th 766, 773.) Although the standard of review is sufficiency of the evidence, we bear in mind the “clear and

convincing” standard in the lower court for removal. (*In re Alexis S.* (2012) 205 Cal.App.4th 48, 53.)

If a dependency jurisdictional finding can be affirmed on one of multiple statutory grounds alleged in the petition, the appellate court need not consider whether there is substantial evidence to support other alleged statutory grounds. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.)

Here, apart from whether there was sufficient evidence to support dependency jurisdiction on any other statutory grounds relating to father’s conduct, we conclude there was sufficient evidence to support dependency jurisdiction under section 300, subdivision (b)(1) based on the allegations of substance abuse in paragraph b-4.

C. Jurisdiction

Father challenges the sufficiency of the evidence to support the allegations in paragraph b-4 of the petition, which reads:

Father “has a history of substance abuse and is a current abuser of heroin and marijuana, which renders the father incapable of providing regular care of the children. The father has a criminal history of convictions of Possession of Marijuana for Sale. Such substance abuse on the part of the father endangers the children’s physical health and safety and places the children at risk of serious physical harm and damage.” (Paragraph b-4)

Father admits using marijuana, but contends there was insufficient evidence that he was a substance abuser. He argues mother’s statement was the only evidence that he was abusing drugs in October 2015; the evidence that he “cultivated marijuana and was arrested in March 2015, for charges related to that cultivation and sales of that drug and for possession of heroin” was not sufficient to show substance abuse and, in any case, there was no evidence father’s drug use affected his parenting. We disagree.

Section 300, subdivision (b)(1) describes various circumstances that may lead to dependency jurisdiction. Relevant here is 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 inability of the parent or guardian to provide regular care for the child due to the

parent’s . . . substance abuse.”⁴ There are three elements to a jurisdictional finding under section 300, subdivision (b): (1) neglectful conduct by the parent (in this case substance abuse); (2) causation; and (3) “serious physical harm or illness” or a “substantial risk” of serious physical harm or illness. The “harm” element 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 Cole Y.* (2015) 233 Cal.App.4th 1444, 1452.)

1. Sufficiency of the evidence of substance abuse

Mere drug use is not enough to support dependency jurisdiction under section 300, subdivision (b)(1); there must be a finding that the parent is a “substance abuser.” (*In re Drake M.* (2012) 211 Cal.App.4th 754, 764.) *Drake M.* proposed a definition of “substance abuse” based on the description of the condition in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (4th rev. ed. 2000) (DSM-IV-TR). *Drake M.* explained that the DSM-IV-TR described “substance abuse” as “ [a] maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by one (or more),” consequences occurring within a 12–month period. (*Drake M.*, at p. 766.) The consequences described in the DSM-IV-TR that are relevant here are: (1) recurrent substance-related legal problems; (2) continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance; and (3) recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home. In *Christopher R.*, the court recognized the *Drake M.* formulation as useful, but held it was “not a comprehensive, exclusive definition mandated by either the Legislature or the Supreme Court” (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1218 (*Christopher R.*) [repeated use of cocaine constituted substance abuse even if it fell outside the DSM-IV-TR definition].)

⁴ In addition to substance abuse, section 300, subdivision (b)(1) dependency jurisdiction may be based on a parent’s (1) failure or inability to adequately supervise or protect the child; (2) willful or negligent failure to adequately supervise or protect the child from the other parent; and (3) willful or negligent failure to provide adequate food, clothing, shelter, or medical treatment.

Here, it was undisputed that father used marijuana. That father also used heroin was evidenced by mother's statement that he did so, which was corroborated by father's March 2015 arrest for heroin possession. Notwithstanding father's statement to the social worker on September 19, 2015, that he it had been two month since he used marijuana, his missed drug test just two weeks before the hearing was evidence that father was still using both marijuana and heroin. (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1384.)

There was also substantial evidence that father's use rose to the level of substance abuse. Specifically, evidence that father displayed one or more of the manifestations of clinical substance abuse described in the DSM-IV-TR during a 12-month period. First, father had almost two decades of recurrent substance-related legal problems, including two such convictions in 2015. Second, there was evidence from which it could be inferred that father's continued marijuana and heroin use were causing him interpersonal problems in 2015; this evidence includes father's unexplained failure to maintain contact with his attorney and failure to appear at the jurisdictional hearing. Third, this same evidence – father's unexplained failure to maintain contact with his attorney and to appear at the jurisdictional hearing – also supports a finding that he was unable to fulfill major role obligations as the result of his continued marijuana and heroin use.

Under *Christopher R.*, even if father's conduct does not fall squarely within the DSM-IV-TR definition of substance abuse, the evidence that father was not just using marijuana (and heroin), but cultivating marijuana and selling it out of the house while the children were there supports the substance abuse finding. The juvenile court could reasonably conclude that father's substance use was inextricably related to the bad judgment he demonstrated by his using his home as a base for illegal drug trafficking.

2. Sufficiency of the evidence of risk of future harm

The “purpose of section 300, subdivision (b) is to protect the child from a substantial risk of future serious physical harm and that risk is determined as of the time of the jurisdictional hearing.” (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1397.) It is the risk of future harm, not actual harm, that is at issue and the juvenile court need not wait until a child is seriously injured to assume jurisdiction. (*In re N.M.* (2011) 197

Cal.App.4th 159, 165.) Past conduct is probative of current conditions if it is reasonable to believe the conduct will continue. (*Christopher R.*, *supra*, 225 Cal.App.4th at pp. 12151216.)

Here, there was substantial evidence of future risk. It is beyond serious doubt that a child exposed to ongoing illegal drug operations is at substantial risk of suffering serious physical harm. Father maintained he was cultivating marijuana for his personal use and was not selling it, but also told the social worker that he was studying “to become a massive grower and I have been on the frontline to make marijuana legal in California.” Kayla was aware father was growing marijuana in the garage; Taylor said father talked about selling marijuana, was always in the garage with the plants and she saw people coming and going; Taylor was aware that father was engaged in “criminal activities.” We need look no further than the January 2015 home invasion robbery for tangible proof that father’s activities put the children at risk of physical harm. We can only speculate as to what might have happened to the children if they had been at the house while father was being pistol whipped and beaten close to death by his former associates.

D. Disposition

Father challenges the sufficiency of the disposition order “removing” the children from his custody and placing them with paternal grandparents. Father argues he provided for the children, never physically abused them, did not “expose them to drug use or his cultivation operations,” and generally “was an effective parent and never acted ‘in a manner incompatible with parenthood.’ ” He also argues DCFS has not shown he was provided with the requisite reasonable services. We find no merit in either argument.

“A dependent child shall 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. . . . [¶] . . . [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).)

The same evidence that supports jurisdiction also supports the finding that there would be a substantial danger to the children's "physical health, safety, protection, or physical or emotional well-being" if they were returned home. The missed drug test is evidence that father was still using marijuana and heroin. Since father denied both using and selling drugs, there was no evidence that he would stop doing either. The services provided to father included referrals to domestic violence and drug programs, but father had not participated in either. On this record, there was substantial evidence that removal was the only reasonable way to protect the children.

DISPOSITION

The jurisdictional and dispositional orders are affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.