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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re STEPHEN T., a Person Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JEFFREY T.,

Defendant and Appellant.

D062479

(Super. Ct. No. NJ14044A)

APPEAL from a judgment of the Superior Court of San Diego County, Blaine K.

Bowman, Judge. Affirmed.

Jeffrey T. appeals following the jurisdictional and dispositional hearing in the juvenile dependency case of his son, Stephen T. Jeffrey contends the jurisdictional findings and the order removing Stephen from his custody are unsupported by substantial evidence. We affirm.

BACKGROUND

In September 2008, the San Diego County Health and Human Services Agency (the Agency) filed a dependency petition for newborn Stephen based on drug use by his mother,

Georgia T., and Jeffrey (together, the parents). Georgia had a seven-year history of methamphetamine addiction and used drugs throughout her pregnancy. Jeffrey had a history of drug use and knew Georgia used drugs. He had a lengthy criminal history, and when the petition was filed, he was serving a three-year prison sentence for marijuana cultivation.

Stephen was detained in a foster home. In October 2008, the court made a true finding on the petition and ordered Stephen placed in foster care. In September 2009, Stephen began a 60-day trial visit with Georgia in the home of the maternal great-grandparents. In November, the trial visit became a placement. In March 2010, Jeffrey was released from prison and had his first supervised visit with Stephen. That month, the court terminated dependency jurisdiction.

One month after the case closed, Georgia relapsed. The maternal great-grandparents were aware of the relapse and of Georgia's neglect of Stephen. The maternal great-grandfather described Georgia as "habitually high with meth, and the wildest driver." Georgia lived in a home owned by the maternal great-grandparents, and the maternal great-grandfather believed she was selling drugs from the home. The maternal great-grandparents contacted the police in an attempt to protect Stephen and obtain help for Georgia, and because they were concerned Georgia might damage their property, but there was no report to the Agency. The maternal great-grandparents were unwilling to become Stephens's guardians as the Agency had suggested. They took care of Stephen "on and off" and allowed Jeffrey unsupervised visits.

In February 2012, three-year-old "Stephen refused to be in [Georgia]'s care and live in her home" and Georgia "dropped Stephen off" at the maternal great-grandparents' home. The maternal great-grandmother described this as a "permanent" arrangement and the maternal

great-grandfather described it as "custody." On June 15, Georgia was arrested and jailed for possessing methamphetamine and drug paraphernalia, being under the influence of a controlled substance and felony child endangerment of Stephen's half brother, Jonathan F., born in November 2011.

On June 20, 2012, Jeffrey told the Agency he had established paternity in family court, paid child support and had unsupervised visits with Stephen every Sunday. He had not requested custody when he discovered Stephen was living with the maternal great-grandmother because she and Stephen had a good relationship and Jeffrey "didn't want to take Stephen away from her." Jeffrey said he was in the process of requesting more visitation and a family court hearing set for June 12 had been continued to July because Georgia had not appeared. Jeffrey said he had received a diagnosis of schizophrenia "many, many years ago," but he had no symptoms and did not take medication. He did not remember the details of his psychiatric and drug abuse histories. He was unemployed and was applying for Supplemental Security Income because he had back problems. Jeffrey asked that Stephen be placed with the maternal great-grandmother or the paternal grandmother, and later said he wanted Stephen to live with him when he found a home, although he acknowledged he had little experience caring for children. The Agency later learned Jeffrey had attempted suicide twice.

On June 20, 2012, the Agency filed a dependency petition (Welf. & Inst. Code, § 300, subd. (b))¹ for Stephen. The petition alleged Georgia used methamphetamine, marijuana and alcohol to excess. She admitted she had resumed drug use and needed treatment. She was

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

unable to care for Stephen as a result of her drug use. Jeffrey had failed and was unable to protect and supervise Stephen.

Stephen was detained and the court allowed Jeffrey unsupervised daytime visits. Jeffrey admitted he had lived with Georgia for a few months after his release from prison, had suspected she was using drugs and had been worried about Stephen. Jeffrey wanted Stephen to stay with the nonrelative extended family member with whom he was detained.

On June 22, 2012, Jeffrey tested positive for morphine, opiates, methamphetamine and amphetamine. He said he was taking "cold pills" and two prescribed medications, morphine and Vicodin, but had not used methamphetamine for approximately one year. The laboratory reported the prescribed medications would not cause a positive result for methamphetamine.

On July 12, 2012, the court ordered that Jeffrey's visits would be supervised pending the next hearing and issued a restraining order protecting Stephen's caregiver and the maternal great-grandmother from Georgia. On July 16, Jeffrey attended Stephen's immunization appointment. Stephen was uncooperative, and Jeffrey "attempted to work with" him, but allowed the caregiver to manage Stephen's behavior. On July 19, Jeffrey took Stephen to a "Mommy and Me class," supervised by the caregiver. On July 20, Jeffrey had a negative drug test. On July 25, Georgia was arrested for illegally possessing ammunition, possessing a stolen vehicle and possessing drug paraphernalia.

At the time of the August 9, 2012, jurisdictional and dispositional hearing, Jeffrey was living with the paternal great-grandmother, and there was a bedroom available for Stephen in the home. Jeffrey had attended two sessions of individual therapy, was enrolled in a parenting class and was in compliance with the terms of his parole. He was attending Narcotics

Anonymous (NA) meetings, but there was no evidence he had obtained a sponsor as the social worker had recommended.² Jeffrey's prescription medications barred him from drug treatment programs. Georgia had received no treatment.

The court found Georgia had allowed the maternal great-grandparents to care for Stephen, but there was no evidence it was a legal placement. There was nothing to stop Georgia from demanding Stephen's return and the maternal great-grandparents would have no recourse. This would place Stephen at risk. The court found the allegations of the petition true by clear and convincing evidence.

The court ordered Stephen removed from the parents' custody and detained with his caregiver, and gave the Agency discretion to place Stephen with a relative, including the maternal great-grandparents, upon approval of their home. The court ordered liberal supervised visits for the parents, and gave the Agency discretion to allow weekend and overnight visits with notice to Stephen's counsel, and a 60-day trial visit with the concurrence of his counsel.

THE JURISDICTIONAL FINDINGS

The purpose of section 300 "is to provide maximum safety and protection for children who are currently being physically . . . or emotionally abused [or] neglected, . . . and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." (§ 300.2.) Section 300, subdivision (b) allows a dependency when "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness,

² The social worker suggested Jeffrey attend NA meetings daily. Jeffrey agreed to attend every day but Sunday, which he wished "to keep . . . open for attending church and visiting Stephen."

as a result of . . . the inability of the parent . . . to provide regular care for the child due to the parent's . . . substance abuse." Section 300 requires proof the child is subject to the defined risk of harm at the time of the jurisdictional hearing. (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1396.) A parent's "[p]ast conduct may be probative of current conditions' if there is reason to believe that the conduct will continue." (*In re S.O.* (2002) 103 Cal.App.4th 453, 461.) The child need not have been actually harmed for the court to assume jurisdiction. (See *In re James R.* (2009) 176 Cal.App.4th 129, 135.) Jurisdiction is proper based on the neglect and abuse of one parent, even if the other parent is capable of providing appropriate care. (*In re Jeffrey P.* (1990) 218 Cal.App.3d 1548, 1553-1554.)

In the juvenile court, the Agency had the burden of proof by a preponderance of the evidence. (*In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318; § 355, subd. (a).) Jeffrey now has the burden of showing the jurisdictional findings are unsupported by substantial evidence. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1135, disapproved on another ground by *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) We view the record in the light most favorable to the juvenile court's ruling. (*In re S.A.* (2010) 182 Cal.App.4th 1128, 1140.)

Jeffrey does not challenge the evidence showing Georgia was unable to care for Stephen due to her substance abuse, but contends there is not substantial evidence Stephen had suffered or was at substantial risk of suffering serious physical harm or illness as a result of that substance abuse. Jeffrey argues that on the date of detention, Stephen had been in the maternal great-grandparents' custody for four months, and it was speculative whether Georgia would take Stephen from them. Jeffrey also argues there was no evidence he was using drugs or had mental health issues.

Substantial evidence supports the jurisdictional findings. Although the Agency's reports reflect statements by the maternal great-grandparents they had "custody" of Stephen and the arrangement was "permanent," there is no evidence they had legal custody or had made any attempt to secure legal custody. They were unwilling to seek guardianship. They were caring for Stephen only because Georgia expressly permitted them to do so, and there is no evidence she intended the arrangement to be permanent. On one occasion, after Georgia left Stephen with the maternal great-grandparents, she returned for him, the maternal great-grandparents allowed her to take him, and she later returned him. When Georgia was arrested in June 2012, she said the maternal great-grandparents had custody of Stephen, but the day the petition was filed, she said she wanted him back. Later, Georgia said the children were not at risk in her care and had been taken from her "illegally." She also said the children had been taken from the maternal great-grandparents illegally, and she wanted to "sober up and get the children back."

The maternal great-grandparents had demonstrated their inability to protect Stephen. They enabled Georgia's drug use by providing her a home, where she engaged in drug activity, and by paying to repair her car after one of her several accidents. After the first dependency case closed, the maternal great-grandparents allowed Jeffrey unsupervised contact with Stephen although they knew he used drugs. Jeffrey was also unable to protect Stephen. He was aware of Georgia's drug abuse but did nothing. He has a history of substance abuse and a lengthy criminal history including violent and drug-related offenses. He was on parole at the time of the hearing, had a positive drug test just seven weeks earlier, had not progressed beyond supervised visits and had just begun to address his protective issues.

THE DISPOSITIONAL ORDER

For Stephen to be removed from parental custody, the Agency was required to prove, by clear and convincing evidence, "[t]here is or would be a substantial danger to [his] physical health, safety, protection, or physical or emotional well-being [if he] were returned home" and removal was the only reasonable means of protecting his physical health (§ 361, subd. (c)(1)).³ "The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus . . . is on averting harm to the child." (*In re Diamond H.*, *supra*, 82 Cal.App.4th at p. 1136.) The court is entitled to consider the parents' past conduct and current situation and gauge whether they have progressed sufficiently to eliminate any risk. (*In re S.O.*, *supra*, 103 Cal.App.4th at p. 461; cf. *In re Jonathan R.* (1989) 211 Cal.App.3d 1214, 1221.)

On appeal, Jeffrey has the burden of showing there is no substantial evidence justifying removal. (*In re Diamond H.*, *supra*, 82 Cal.App.4th at p. 1135; *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.) " ' "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine" [Citations.]' [Citation.] Thus, on appeal from a judgment required to be based upon clear and convincing evidence, 'the clear and convincing test disappears . . . [and]

³ As to Jeffrey, it might have been more appropriate for the juvenile court to proceed pursuant to section 361.2. That section states: "When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody If that parent requests custody, the court shall place the child with the parent unless it finds that placement . . . would be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a).) There is substantial evidence that placement with Jeffrey would have been detrimental to Stephen.

the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.' " (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881, quoted in *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581.) "We do not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

Jeffrey contends the court failed to consider reasonable alternatives to removal; there was no evidence he presented a current risk to Stephen; and the court should have returned Stephen to his custody with family maintenance services. Although the court did not expressly state there were no reasonable alternatives, it adopted the Agency's recommendation that it find there had been reasonable efforts to eliminate the need for removal. Moreover, removal was the only reasonable means of protecting Stephen, who was not quite four years old. Even before the inception of this case, Jeffrey was aware of Georgia's drug use and worried about Stephen, yet did nothing to protect him. Jeffrey had his own substance abuse issues and a significant history of mental health problems and crime. Only seven weeks before the hearing he had a positive test for methamphetamine, yet denied recent methamphetamine use. Although, commendably, he was participating in services, he had just begun addressing his protective problems, he had little experience caring for children and his visits were supervised. Substantial evidence supports the removal order.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.