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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re SIERRA A., et al., a Person Coming  
Under the Juvenile Court Law.

CONTRA COSTA COUNTY BUREAU  
OF CHILDREN AND FAMILY  
SERVICES,

Plaintiff and Respondent,

v.

SHELLEY A.,

Defendant and Appellant.

A109847

(Contra Costa County  
Super. Ct. Nos. J0402316 & J0402317)

Shelley A. appeals from orders sustaining Welfare and Institutions Code section 300 petitions as to her daughter Sierra and son Vincent and placing the children with their father, Vincent Sr. We conclude that the Bureau of Children and Family Services failed to meet its burden of proof that there was a substantial risk of serious physical harm to Sierra and Vincent at the time of the jurisdiction hearing. Therefore, the juvenile court's findings that the children are within the court's jurisdiction are not supported by substantial evidence and we reverse the court's jurisdictional order.

## FACTUAL AND PROCEDURAL BACKGROUND

Sierra A. (born in 1994) and Vincent A. (born in 1996) are the children of appellant Shelley (Mother) and Vincent Sr. (Father). The couple separated in 1998. At the time the children came to the attention of the Contra Costa Bureau of Children and Family Services (CFS), they were living with Mother and visiting regularly with Father in accordance with a family court order from the year 2000.

On October 6, 2004, the police searched Mother's home and she was arrested for possession of methamphetamine. Six other people were arrested at the home at the same time. On December 27, 2004, petitions were filed in Contra Costa County Superior Court alleging that Sierra and Vincent came within the definition of Welfare and Institutions Code section 300, subdivision (b) and that Sierra also came within the definition of Welfare and Institutions Code section 300, subdivision (j).<sup>1</sup> CFS alleged the children were at substantial risk of suffering serious physical harm because Mother had a substance abuse problem that impaired her ability to care for them. Specifically, the petitions alleged that Mother admitted using methamphetamine on October 6, 2004; that on that date she and others were arrested from her home for possession of drugs and other charges; and that she continued to leave the children in the care of other adults arrested on that date. The petitions also alleged that Mother had failed to provide appropriate care in treating a recurring lice problem. Vincent's petition alleged that he was compelled to urinate on the floor in a corner of his room because people were in the bathroom for long periods of time. Sierra's petition alleged under section 300, subdivision (j), that Vincent's inability to access the bathroom put Sierra at risk of abuse or neglect.

The juvenile court held a jurisdictional hearing March 1, 2005. At the time, the children were living with Father. The *only* evidence presented by CFS was a February 2005 jurisdictional report. CFS did not present any live testimony. In the report, the

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

social worker represented that if called Mother would testify as follows: on October 6, 2004, she was arrested for possession of methamphetamine; six other people were arrested at the same time; methamphetamine was found in her bedroom; she told an officer that lines of “dope” were also in her bathroom “up there . . . on that tray”; her sister Robin had set the lines up for them to ingest; and Robin uses methamphetamine and marijuana and will not be allowed in Mother’s home in the future. Also according to the report, a police officer would testify that on October 6 pursuant to a warrant he searched Mother’s home and found methamphetamine and stolen property. Another officer would testify that Mother told him that Robin put the drugs in the bedroom and that Mother told him about the additional drugs on the tray. Mother’s brother’s girlfriend, Teresa, would testify that she was arrested on October 6 and watched the children on November 22, 2004. A social worker would testify that she discovered Teresa watching the children after October 6 and that Mother told her that Robin uses methamphetamine and marijuana and will not be allowed in Mother’s home in the future. Father would testify that Mother told him in January 2005 that she had not been drug tested because she had recently used marijuana.

The social worker further represented in the report that Vincent would testify as follows: Teresa watched him for one day after October 6; he urinated in his bedroom about five times when he could not get into the bathroom because Mother was in there with Loren (who lived on the property in a trailer) or because Mother had locked the door to her bedroom; and he can access the bathroom at Father’s house. Sierra would testify that Teresa watched her and her brother after October 6 and that Vincent could not get into the bathroom when Mother and Loren were in there for a long time. Mother presented stipulated testimony from the children which indicated that both are in counseling.

Mother tried to present testimony from her sister Robin, but the testimony was stricken after Robin invoked the Fifth Amendment and refused to answer questions about

the methamphetamine found in Mother's home on October 6. Mother's testimony was stricken after she failed to appear for cross-examination by counsel for Father. The court found that she willfully absented herself from the trial on two days and failed to maintain contact with CFS or her counsel.<sup>2</sup>

The juvenile court found that it had jurisdiction over Sierra and Vincent under section 300, subdivision (b). The court sustained the allegations that Mother had a substance abuse problem that impairs her ability to care for the children in that she was arrested for possession of methamphetamine and admitted using it; that Mother failed to provide appropriate supervision for the children in that she continued to leave the children in the care of adults arrested on October 6; and that mother negligently failed to provide an acceptable environment for Vincent in that he could not access the bathroom.

At the dispositional hearing the juvenile court terminated the dependency proceeding and issued an exit order awarding sole physical custody to Father and joint legal custody to both parents. The order also specified that Mother's visitation with the children must be supervised and outside her home; the visits could be unsupervised only after Mother "substantially addressed [her] substance abuse issues."

#### DISCUSSION

Mother challenges the sufficiency of the evidence to support the juvenile court's finding of jurisdiction under section 300. On the record before us, we conclude that the

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<sup>2</sup> Although Mother does not raise the issue on appeal, striking her testimony was proper under the disentitlement doctrine. (*Adoption of Jacob C.* (1994) 25 Cal.App.4th 617, 624 ["The disentitlement doctrine has been applied to deprive a party of the right to present a defense as a result of the litigant's violation of the processes of the court . . . ."]; *In re Kamelia S.* (2000) 82 Cal.App.4th 1224, 1229 [following *Jacob C.*].)

evidence was insufficient to support the court’s finding that Sierra and Vincent came within the section 300, subdivision (b) definition of a dependent child.<sup>3</sup>

We apply a familiar standard of review. “ ‘In juvenile cases, as in other areas of the law, the power of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination as to whether or not there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact. All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the verdict, if possible.’ [Citation.] ‘ ‘If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed . . . .’ ’ [Citation.]” (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) “However, substantial evidence is not synonymous with *any* evidence. [Citations.] 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 Savannah M.* (2005) 131 Cal.App.4th 1387, 1393-1394.)

The question here is whether substantial evidence supports the finding that Sierra and Vincent Jr. were, at the time of the hearing, persons described in section 300, subdivision (b).<sup>4</sup> CFS bore the burden of showing a basis for juvenile court jurisdiction.

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<sup>3</sup> Because we find the evidence insufficient to support jurisdiction, we do not address Mother’s additional contentions that the petition failed to state a cause of action and that there was insufficient evidence to support the juvenile court’s disposition.

<sup>4</sup> Section 300 provides 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: [¶] ... [¶] (b) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a

(*In re David M.* (2005) 134 Cal.App.4th 822, 832; *In re Ricardo L.* (2003) 109 Cal.App.4th 552, 569.) The section 300, subdivision (b) definition of a dependent child consists of three elements: “(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) ‘serious physical harm or illness’ to the minor, or a ‘substantial risk’ of such harm or illness.” (*In re Rocco M., supra*, 1 Cal.App.4th at p. 820.) We will assume that the evidence was sufficient to support the juvenile court’s implied finding that Mother was neglectful in that she engaged in substance abuse which resulted in an inability to provide regular care for Sierra and Vincent. (§ 300, subd. (b).) The critical issue then becomes whether the evidence was sufficient to justify a finding that as a result of this neglect Sierra and Vincent suffered, or there was a “substantial risk” that they would suffer, serious physical harm or illness. (*Ibid.*; see also *In re Rocco M.*, at p. 820; *In re David M.*, *supra*, 134 Cal.App.4th at p. 829.)

In *In re Rocco M.*, this district concluded that the requirement of a risk of serious physical harm was added to section 300 in order to “narrow the grounds on which juvenile court jurisdiction could be invoked;” the previous version of the statute required no showing of physical harm or risk of harm. (*In re Rocco M., supra*, 1 Cal.App.4th at p. 821.) “Subdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness.” (*In re Rocco M.* at p. 823.) From its review of the cases and statutory scheme, the *Rocco M.* court identified several guiding principles and patterns. First, “[w]hile evidence of past

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result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child’s parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the wilful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, 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. . . .”

conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm. [Citations.] Thus the past infliction of physical harm by a caretaker, standing alone, does not establish a substantial risk of physical harm; ‘[t]here must be some reason to believe the acts may continue in the future.’ ” (*Id.* at p. 824; see also *In re David M.*, *supra*, 134 Cal.App.4th at p. 829.) Second, “the fact that a child has been left with other caretakers will not warrant a finding of dependency if the child receives good care.” (*In re Rocco M.*, at p. 824.) Finally, cases finding a risk of serious physical harm tend to fall into two factual patterns: (1) cases involving a specific hazard in the child’s environment, typically an adult with a proven record of abusiveness, and (2) cases involving children of such tender years that the absence of adequate supervision and care poses an inherent risk of substantial harm. (*Ibid.*)

In this case, with respect to both Sierra and Vincent, the juvenile court sustained the allegation that Mother was arrested for possession of and admitted using methamphetamines. Mother’s drug use, standing alone, is not a sufficient basis for asserting jurisdiction over the children under section 300, subdivision (b). (*In re Rocco M.*, *supra*, 1 Cal.App.4th at pp. 825-826; *In re W.O.* (1979) 88 Cal.App.3d 906, 910; see also *In re Jeannette S.* (1979) 94 Cal.App.3d 52, 59 fn. 2 & 60 [a parent’s alcoholism is not alone a basis for jurisdiction]; cf. *In re Monique T.* (1992) 2 Cal.App.4th 1372, 1374-1375, 1378-1379 [substance abuse plus actual injury to infant born with drugs in system is sufficient to support finding of dependency]; *In re Stephen W.* (1990) 221 Cal.App.3d 629, 639 [same].) Instead, CFS was required to present evidence of a specific, non-speculative, and substantial risk of serious physical harm. (*In re David M.*, *supra*, 134 Cal.App.4th at p. 830.)<sup>5</sup>

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<sup>5</sup> We recognize that section 300.2 states that “The provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child.” However, section 300,

CFS argues that Mother’s drug use created the risk that Sierra or Vincent would ingest the drugs. This can be sufficient where the evidence shows a substantial risk of such harm. In *In re Rocco M.*, the court affirmed the jurisdictional finding where the evidence showed that the mother (1) left drugs where they were available to the minor, (2) created opportunities for the minor to ingest the drugs through frequent absences, (3) generally neglected the minor’s needs, and (4) exposed the minor to her own drug use. (*In re Rocco M., supra*, 1 Cal.App.4th at p. 825.) In contrast, there is no evidence that Mother left drugs where Sierra or Vincent could access them. The evidence shows that there were drugs in Mother’s bedroom and bathroom on the night of October 6, but there is no indication that the children were awake or that the drugs were left unsupervised. Notably, the door to Mother’s bedroom can be locked. There is no evidence that Mother ever directly exposed the children to her drug use. There is no evidence of the type of generalized neglect involved in *Rocco M.* (*In re Rocco M.*, at p. 818.) There is no evidence that the children were ever left alone at the house. Finally, CFS failed to present any information regarding any criminal proceedings against Mother following the October 6 arrest, which might have provided some insight regarding the extent of her involvement in the criminal activity that led to the October 6 raid.<sup>6</sup> We conclude that there is no substantial evidence supporting a finding of a “substantial risk” of physical harm arising from the remote possibility that the children could access drugs in Mother’s home. Neither is there evidence of other physical harms likely to occur due to Mother’s drug use.

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subdivision (b) requires a showing of a risk of serious physical harm resulting from Mother’s substance abuse. Thus, the “negative effects” referenced in section 300.2 must be of the sort likely to result in serious physical harm. (See *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1086 [“[O]ur duty is to harmonize [statutes] if reasonably possible”].)

<sup>6</sup> The *dispositional* report refers to a pending “criminal case”; no details are provided.

The trial court also sustained the allegation that the children were left in the care of adults who were arrested along with Mother on October 6. The evidence relating to this allegation is that Teresa, Mother's brother's girlfriend, was arrested on October 6 and that she watched the children on at least one occasion after that date. However, there is no evidence detailing Teresa's alleged criminal conduct on October 6 or the nature of any resulting criminal proceedings. More importantly, there is no evidence that Teresa failed to provide good care or that she was engaged in any criminal activity while caring for the children. Leaving children in the care of another adult is not a basis for dependency jurisdiction. (*In re Rocco M., supra*, 1 Cal.App4th at p. 824.) It was appropriate for the juvenile court to scrutinize Mother's choice of caretakers, but jurisdiction under section 300 must be based on some evidence of actual risk of physical harm to the children. CFS failed to show a risk of harm due to Teresa's caretaking. (See *In re David M., supra*, 134 Cal.App.4th at p. 831 [agency failed to show harm from caretaker known to use marijuana].)

Finally, the juvenile court sustained the allegation that Vincent urinated in the corner of his bedroom because he did not have access to the bathroom. The evidence is this conduct occurred about five times when Mother and Loren were in the bathroom. Even if we assume that such incidents are likely to continue in the future,<sup>7</sup> there is no evidence that such incidents may result in "serious physical harm or illness." In *In re Janet T.* (2001) 93 Cal.App.4th 377, 388-389, the Second District held that an allegation that the mother had failed to ensure her children's attendance at school could not support jurisdiction under section 300, subdivision (b). The court reasoned, "The lack of education may well cause psychic or emotional or financial or social harm. But there are no facts alleged or suggested by the supporting documentary evidence to indicate

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<sup>7</sup> In fact, the December 23 investigatory report, which was not received into evidence, indicates that Loren no longer lives at the house.

mother's failure to ensure the children's regular school attendance subjected the children to physical injury or illness, serious or otherwise. We fail to see how this factual ground can support the court's order sustaining the petition under section 300, subdivision (b).” (*Id.* at p. 389.) It is very troubling that Vincent was forced to urinate in the corner of his room because of the potential emotional and behavioral harm. But CFS failed to present any evidence that those incidents could result in serious physical harm. There was no testimony from a mental health professional to that effect, and Vincent did not testify regarding any distress caused by the incidents. The juvenile court's finding regarding Vincent's urination in his room does not support jurisdiction under section 300, subdivision (b).

This case is characterized by a striking lack of evidence of the sort which could, cumulatively or independently, support jurisdiction under section 300, subdivision (b). There is no evidence of general neglect on the part of Mother. For example, there is no evidence that Mother failed to provide for the children's basic nutritional and medical needs, that she failed to ensure their attendance at school, that the house was unclean, or that the children were physically or verbally abused.<sup>8</sup> Sierra and Vincent are not so young that a presumable lack of supervision during Mother's drug use creates an inherent risk to health and safety. (See *In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 824.) CFS did not present any testimony from mental health professionals regarding the children's mental well-being and whether they were experiencing and suffering from general neglect. There is no evidence that Mother and the children do not have a good relationship.<sup>9</sup> There is legitimate concern about Mother's drug use, her apparent

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<sup>8</sup> The juvenile court did not sustain the allegation that Mother failed to appropriately treat the children's lice.

<sup>9</sup> The dispositional report indicates that the visits between Mother and the children were happy and that Mother behaved appropriately and brought appropriate activities to do with the children.

unwillingness to pursue services to address her substance abuse,<sup>10</sup> and her failure to appear for cross-examination by Father’s counsel, which resulted in her testimony being stricken. As between Mother and Father, placement with Mother may not be in the children’s best interests. However, on the limited record before the juvenile court, we must conclude that CFS did not meet its burden of showing the substantial risk of serious physical harm necessary to establish jurisdiction under section 300. (*In re David M.*, *supra*, 134 Cal.App.4th at p. 825; *In re Ricardo L.*, *supra*, 109 Cal.App.4th at p. 569.)

The determination of what custodial arrangement is in these children’s best interests should be made by the family court, not by the juvenile court in a dependency proceeding. (See *In re John W.* (1996) 41 Cal.App.4th 961, 975.) Before initiation of dependency proceedings in this case, the children were subject to a year 2000 family court custody order. Mother and Father should obtain a new custody order from the family court that comports with the best interests of Sierra and Vincent.

DISPOSITION

The jurisdictional order declaring Sierra and Vincent dependents of the juvenile court is reversed. All subsequent orders are vacated as moot.

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GEMELLO, J.

We concur.

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JONES, P.J.

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STEVENS, J.

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<sup>10</sup> The dispositional report indicates that Mother has made “less than minimal efforts to alleviate the issues of this case, which includes addressing her substance abuse issue.” No evidence to that effect was presented to support the jurisdictional finding.