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Court of Appeal,
Second District,
Division 8.

In re MICHELLE M. et al., Persons Coming Under the Juvenile Court Law.
Los Angeles County Department of Children and Family Services, Plaintiff and
Respondent,

v.

Shelly M. et al., Defendants and Appellants.

No. B192139.

(Los Angeles County Super. Ct. No. CK63073).

April 9, 2007.

APPEAL from orders of the Los Angeles County Superior Court. Valerie Lynn Skeba, Juvenile Court Referee. Reversed and remanded with directions.

[Nancy Rabin Brucker](#), under appointment by the Court of Appeal, for Appellant Shelly M.

[Janette Freeman Cochran](#), under appointment by the Court of Appeal, for Appellant Richard M.

[Raymond G. Fortner, Jr.](#), County Counsel, [Larry Cory](#), Assistant County Counsel, and William D. Thetford, Senior Deputy County Counsel for Respondent.

BOLAND, J.

SUMMARY

*1 Parents appeal from the juvenile court's jurisdictional and disposition orders in the matter of their two teenage children. The parents contend insufficient evidence justified the assumption of court jurisdiction over their children. The parents also contend insufficient evidence supports the disposition orders, and the court and respondent Department of Children and Family Services (DCFS) failed to comply with notice requirements of the Indian Child Welfare Act (ICWA), [25 United States Code section 1901 et seq.](#)

We agree that the evidence was insufficient to justify the court's assumption of jurisdiction over the children. The allegations of the petition do not allege a current substantial risk the children will suffer serious physical harm as a result of their parents' inability to supervise, protect or care for them. As a result, we reverse the jurisdictional order. The reversal of the order renders moot all subsequent issues and orders, including the dispositional order and the issue of compliance with the ICWA.

FACTUAL AND PROCEDURAL BACKGROUND^{FN1}

[FN1](#). Our factual recitation relates only to the limited matters at issue.

Teenagers Michelle M. (born in January 1992) and Angel M. (born in April 1993) were detained in April 2006 after a parole search of their parents' home revealed the presence of marijuana plants in the backyard, seedlings and drug paraphernalia in a backyard tool shed, and a BB gun in the house in violation of the terms of their father's parole. The children's parents, appellants Richard (father) and Shelly M. (mother), were arrested following the search.^{FN2} The children were placed in the home of a family friend, and later moved to the home of a maternal cousin.

[FN2](#). The police confiscated approximately 63 grams of dried and drying marijuana leaves and several live plants from mother. Two adult friends of the parents were living in the house at the time of the search. Marijuana was also seized from the bedroom of one of those friends. Criminal charges against mother were dismissed.

DCFS filed a petition which, in its sustained form, alleged father had a history of substance abuse, and frequently used marijuana, rendering him unable to properly care for his children. The petition also alleged father was frequently under the influence of illicit drugs while the children were in his care, the parents created a detrimental and endangering home environment by growing and cultivating marijuana in the home, and the children had access to the drugs. ([Welf. & Inst.Code, § 300, subds. \(b\)\(1\), \(2\) & \(3\).](#))^{FN3}

[FN3](#). Unless otherwise specified, all further statutory references are to the Welfare and Institutions Code.

In connection with an April 19, 2006, detention hearing, DCFS reported that during the search, mother advised a DCFS children's social worker (CSW) she did not believe she had done anything wrong. Mother had shown the police and CSW a physician's letter stating she had been prescribed medicinal marijuana for a serious medical condition. Mother suffered from [chronic headaches](#) and neck and shoulder pain. She had tried various pain medications to alleviate the headaches and pain, but did not like their side effects. Mother told the CSW her children knew she had a prescription for marijuana, but she had never smoked marijuana in their

presence or encouraged them to smoke it. Mother conceded to the CSW she and father would both test positive for marijuana if they took a drug test that day. Mother said father used marijuana for recreational purposes. The CSW was unable to interview father. He was arrested and incarcerated for having a BB gun in his possession in violation of his parole.

*2 At the detention hearing, the children's attorney asserted no nexus existed between the allegations of the petition and any risk to the children, and urged the court to release the children to mother's care. Mother had informed DCFS she would quit smoking marijuana if the children were returned to her care. In addition, the children knew mother had used marijuana for medicinal purposes, but she had never used it in their presence. Rather, she had always used marijuana in the tool shed, which was kept locked and was not attached to the house. Mother's attorney agreed with the children's attorney, stressing that the marijuana plants had been confiscated as a result of the search. In addition, mother provided the financial support for her family with a full-time job she had held for about 13 years, and had purchased the family's home herself in 2004. Mother made dinner for her children every night, made certain they went to school every day, and provided for all their needs.

DCFS objected to the release of the children to mother's care. The court expressed concern about releasing the children to mother, and ordered DCFS to ascertain whether mother's prescription for medicinal marijuana was legitimate. If it was legitimate, DCFS was directed to produce evidence demonstrating mother's medicinal use of marijuana impaired her ability to care for her children. Pending receipt of that information, mother was granted monitored visits for at least four hours a week. DCFS was given the discretion to liberalize mother's visitation or to release the children to her care. Father remained incarcerated and was not given any visitation.

DCFS filed its jurisdiction/disposition report on May 12, 2006. That report stated mother and father were married for nine years, separated for six years, and remarried in February 2006. They had lived together with their children for about 18 months when the children were detained.

The children told DCFS they knew their mother had a doctor's prescription to use marijuana, but had never seen her use it in their presence. Rather, she would wait until they went to bed, and then go out to the tool shed. The children told a CSW that, in January 2006, their parents told them father was using marijuana. The children also said their father often accompanied mother to the shed. They believed he smoked marijuana while there, although had never seen him do so. They also believed father's use of marijuana has increased in the months before their detention after his friends moved into the house. The children described parties involving marijuana and alcohol, in which mother, father and friends living in the home went to the tool shed and come out "high." Father did not drink. Neither child expressed concern about her father's use of marijuana; they agreed that

"marijuana is God made." The children had not known mother was growing marijuana plants in the backyard until two weeks before the parole search, when a friend told them what the plants were. Neither child ever saw any drug paraphernalia. Although Michelle had never smoked marijuana, Angel had smoked in the past. The children did not want to return home until the school year ended.

*3 Mother told DCFS she had sought out medicinal marijuana through MediCann, Inc., after trying unsatisfactory alternative methods to relieve her chronic pain. Typically, she used marijuana several evenings a week in the tool shed in her yard after her children were in bed. With father's advice, mother began growing marijuana plants for her own use, which she believed was permitted under "Proposition 215." ^{FN4} She began growing her own plants because it was expensive to obtain the drug at the dispensary. She did not distribute marijuana to father or anyone else. Mother had tried marijuana in the past for "more social" reasons. Mother told DCFS she had stopped smoking marijuana and planned to permanently discontinue using the drug.

[FN4.](#) "Proposition 215," is now known as the "Compassionate Use Act of 1996." ([Health & Saf.Code, § 11362.5.](#))

Mother told DCFS father had a long history of substance abuse, primarily heroin, but had been clean for about a year. On the day of the search, mother had told CSW father started using marijuana after he stopped using heroin. Mother said father would test positive for marijuana if tested at the time the search occurred. She later recanted those statements, claiming the CSW misunderstood her. Mother said father was drug free and should be permitted to remain in the family home, and the children should be returned to her care.

A CSW interviewed father during his incarceration. Father was agitated, made threatening facial gestures, was verbally aggressive, and had difficulty controlling his anger. He denied using marijuana, stating he had tested clean for over two years. However, father's parole officer told DCFS father's drug screens for heroin would not be able to detect the presence of marijuana. Father told DCFS no one in the house other than mother used marijuana. While stating mother's paraphernalia was locked up in the tool shed, father conceded the children had access to marijuana leaves drying in the backyard.

DCFS's report also contained information from the MediCann custodian of records. The custodian informed the CSW mother's verification letter was legitimate. Under [Health and Safety Code section 11362.5](#), mother was permitted to use marijuana for personal use. She was also permitted to cultivate medicinal marijuana, if the amounts did not exceed 8 ounces of dried medicinal marijuana, and to grow twelve or fewer immature plants or six or fewer mature plants. ([Health & Saf.Code, § 11362.77.](#)) Several letters were attached to DCFS's report attesting to mother's caring nature, thoughtful parenting, and strong bond with her children.

Father was released from custody on May 6, 2006. His attorney requested he be permitted to visit the children at their caregiver's home. The children's attorney objected to visitation, stating the children feared their father and did not wish to visit with him. The children told DCFS they did not want to return home if father were there. Mother understood the children's position, but refused to exclude father from the home, based on her belief that father's parole required his presence in the home. Moreover, mother did not believe father's exclusion from the home was in the children's best interest or the children should dictate where their father resided. She wanted the children to visit with father and to remain open to returning home. The children requested visits occur at DCFS offices. Their request was granted.

*4 The adjudication hearing was conducted on June 14, 2006. Mother testified that, after father stopped using heroin he started using methamphetamine and marijuana before he entered, and eventually completed, a drug treatment program in 2003. Mother and father had smoked marijuana together in 2003, before she started smoking it for medical purposes. She claimed father had not smoked marijuana in the past year, did not recall telling the CSW he had, and believed her children were confused when they told DCFS their father smoked marijuana. Father periodically accompanied mother into the tool shed, but did not smoke marijuana on those occasions. The children's speculation that parties at the house involve alcohol and marijuana were wrong. In fact, no parties occurred.

Mother sought a marijuana prescription in December 2005 after unsuccessfully trying various prescription drugs, therapy and exercise to ease her chronic pain. Marijuana was preferable to prescription muscle relaxers because it did not make her feel tired or lazy. She used to smoke marijuana five or six days a week in the late evening after the children had gone to bed. She always smoked in the tool shed, either alone or with her husband. She last smoked marijuana the day before the children were removed from her care. Mother told her children she had a physician's prescription to smoke marijuana, but did not tell them she was growing the plant on the property. She told the children she did not feel that children, whose bodies and brains were still developing, should use drugs or alcohol. She did not tell the children marijuana was good or bad, and did not share her marijuana with anyone.

Mother testified that, in addition to her drug paraphernalia which the children never saw, the locked shed contained only tools and home improvement supplies. Bicycles, skateboards and other toys were stored elsewhere. The shed was maintained in locked condition and the children never entered it. The sole key to the lock was kept on mother's keychain.

Mother said she cooked dinner for the children every evening, participated in their school activities, and provided financially for her children and husband. On several evenings a week, she and the children went to the gym together. Mother

and the children did laundry and other chores together. On weekends, they shopped, attended church, and engaged in other church and home-related activities together. Mother spent a lot of time talking with the children, and the three of them engaged in a "lot of open dialogue with each other." She understood her children's reluctance to return home because father, who had been absent for six years, had reentered their lives. Father had a temper and was strict with children, and they did not trust him. Mother did not believe smoking marijuana had negatively impacted her ability to parent. Nevertheless, by the time of trial, mother had ceased smoking marijuana and did not plan to smoke it again. Marijuana plants no longer grew at the house, drug paraphernalia was gone, and friends who had lived with the parents had moved out. Mother believed father was drug-free and should continue to live with her so long as he remained sober, and the family should work through its issues by attending counseling.

*5 At the conclusion of mother's testimony, her attorney moved for dismissal of the counts against her (b-1 and b-3), arguing insufficient evidence supported jurisdiction. (§ 350, subd. (c).) The children's attorney joined in the motion, agreeing mother's medicinal use of marijuana provided an insufficient evidentiary basis to establish the children were at risk. The court dismissed count b-1, but denied the motion as to count b-3, as amended. ^{FN5} Father rested his case.

[FN5](#). The record is unclear. At the hearing, the juvenile court first indicated it was amending count b-3 by striking the words "elicit [sic] drugs and drug paraphernalia were within access of the children." The court then contradicted that statement, and said it would "strike the words 'and drug paraphernalia,' " so that the count would read: "The illicit drugs were in-within access of the children." However, the court's interlineations on the petition itself are consistent with its initial announcement, and the amended petition alleges only that "drugs were within access of the children."

The general rule is that a trial court's written order controls over its oral pronouncements, where the two differ. ([In re Jennifer G. \(1990\) 221 Cal.App.3d 752, 756, fn. 1](#); Civ.Code, § 1003.) Although the amended petition is not a formal, signed order, when considered in combination with the juvenile court's initial oral pronouncement and the facts of this case, it is the most reliable indicator of the court's intentions.

The parties submitted written argument on the issues of jurisdiction and disposition. The submissions were considered on June 19, 2006. Counts b-2 and b-3 were found true and sustained. In sustaining b-3, the juvenile court expressed its "belie[f] that having the marijuana growing ... at the children's residence is detrimental and endangering to children even of this age." The children were ordered suitably placed with family reunification services. Father was directed to

attend parenting classes, and participate in individual and substance abuse counseling with random testing. He was granted monitored visitation and conjoint counseling with the children, after a therapist deemed it appropriate. Mother was given unmonitored day visits, and ordered to attend individual counseling to address parenting issues. The children were to be included in counseling once a therapist deemed their inclusion appropriate. The parents appeal.

DISCUSSION

At issue is whether Michelle and Angel were properly deemed dependent children within the jurisdiction of the juvenile court. The parents insist the evidence is insufficient to sustain the petition. Father also insists the petition fails to allege facts showing the requisite degree of risk to the children at the time of the jurisdictional hearing.^{FN6}

[FN6](#). We reject DCFS's argument that father forfeited the right to challenge the sufficiency of the petition by not raising the argument below. The jurisdictional issue of a pleading's failure to state a cause of action may be raised for the first time on appeal. In dependency proceedings, “ [a] facially sufficient petition is necessary’ ” and “ ‘a pleading is not merely “a ticket to the courtroom which may be discarded after admission.” [Citation.]’ ” ([In re Nicholas B. \(2001\) 88 Cal.App.4th 1126, 1136-1137.](#)) In the end, the dispute may be academic. If jurisdictional findings are supported by substantial evidence, any failure of the petition to state a cause of action becomes harmless error. (See [In re Athena P. \(2002\) 103 Cal.App.4th 617, 627-628.](#)) Thus, the only real issue to be determined is the sufficiency of the evidence at the jurisdictional hearing. (*Ibid.*)

As sustained, the petition alleged: “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 ... to supervise or protect the child adequately [¶] by the inability of the parent ... to provide regular care for the child due to the parent's ... substance abuse.” These facts were offered in support of the allegations: “b-2 [¶] The children[']s father, ... has a history of substance abuse and is a frequent user of marijuana which renders the children's father incapable of providing regular care for the children. Further, the father is frequently under the influence of illicit drugs while the children are in the father's care, custody and control. Further, the children's father's use of illicit drugs endangers the children's physical and emotional health and safety and creates a detrimental home environment, placing the children at risk of physical and emotional harm and damage. [¶] b-3 [¶] The children[']s mother ... and father ... created a detrimental and endangering home environment for the children in that the parents grew and cultivated marijuana in the children's home. [D]rugs were within access of the children. Said detrimental and endangering home environment for the children created by the children's parents endangers the children's physical and emotional

health and safety and places the children at risk of physical and emotional harm and damage.”

*6 As pertains here, [section 300](#) authorizes dependency jurisdiction 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 [her parent’s] failure or inability ... to adequately supervise or protect [her, or] by the inability of the parent ... to provide [her] ... regular care ... due to the parent’s ... substance abuse.” ([§ 300, subd. \(b\).](#)) The facts necessary to show neglect within the meaning of subdivision (b) are: (1) a parent’s neglectful conduct; (2) causation; and (3) “serious physical harm or illness” to the child, or a “substantial risk” of such harm or illness. ([In re Rocco M. \(1991\) 1 Cal.App.4th 814, 820.](#)) “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.” ([Id. at p. 823.](#))

To determine a substantial risk of serious physical harm, evidence of a parent’s past conduct may be probative of current conditions. However, the pertinent inquiry “under [section 300](#) is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm.” ([In re Rocco M., supra, 1 Cal.App.4th at p. 824.](#)) This inquiry is pertinent because a child “shall continue to be a dependent child ... only so long as is necessary to protect the child from risk of suffering serious physical harm or illness.” ([§ 300, subd. \(b\).](#)) Thus, a parent’s past infliction of physical harm, standing alone, is insufficient to establish a substantial risk of physical harm, absent some “reason to believe the acts may continue in the future.” ([In re Jennifer P. \(1985\) 174 Cal.App.3d 322, 326.](#))

Father contends no evidence indicates he was “frequently under the influence of illicit drugs” while the children were in his care. He argues there is no evidence he engaged in neglectful conduct involving a failure or inability to supervise, protect or provide regular care for his children, and asserts no serious physical harm or illness may be attributed to him. Father relies on a statement in *Rocco M.* that, regardless of evidence of past conduct, there must be a showing that, at the time of jurisdictional hearing, the children are subject to a “substantial risk” of “serious physical harm.” ([In re Rocco M., supra, 1 Cal.App.4th at p. 823.](#)) He insists no evidence of substantial physical risk was presented.

We agree, in part, with father’s argument. Evidence of father’s marijuana use was controverted. On one hand, father denied any drug use. On the other, the record contains statements from mother-later recanted-that father smoked marijuana regularly for unlawful recreational purposes. (See e.g., [Health & Saf.Code, §§ 11357, 11358](#) [except in certain cases, possession, growth and cultivation of marijuana is a crime].) Based on their observations of his behavior, the children believed their father was using marijuana. They also told a CSW their parents approached them months before their detention to discuss father’s use of marijuana. It is wholly within the domain of the court to weigh evidence, assess

credibility, and resolve evidentiary conflicts. On review, we do not reweigh the evidence, nor do we consider matters of credibility. Those are matters for the trial court. ([In re Rocco M., supra, 1 Cal.App.4th at p. 820.](#)) In assessing the insufficiency of evidence, " '[i]n 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.' " (*Ibid.*) If substantial evidence exists, we uphold the juvenile court's rulings. ([In re Basilio T. \(1992\) 4 Cal.App.4th 155, 168.](#)) Here, the court clearly chose to believe the children and mother's initial statements to the CSW. The statements were sufficient to support findings regarding father's drug use. Evidence from a single witness, even a party, is sufficient to support a court's findings. ([In re Casey D. \(1999\) 70 Cal.App.4th 38, 52-53; In re Rocco M., supra, 1 Cal.App.4th at p. 820.](#))

*7 That conclusion, however, does not end our inquiry. The court was appropriately concerned father's substance abuse posed a detriment to his children. As one court aptly observed, by exposing one's child to his "own drug use, [a parent is] impliedly approving such conduct and even encouraging [the child] to believe that it is an appropriate or necessary means of coping with life's difficulties ." ([In re Rocco M., supra, 1 Cal.App.4th at p. 825;](#) see also § 300.2 ["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"].) Substance abuse, particularly with a history like father's, presents a serious allegation and a factual circumstance requiring immediate and diligent attention, assistance and correction. Nevertheless, it is not the equivalent of saying that, by the time of the jurisdictional hearing, father's continued drug use created a "substantial risk" his children would suffer " *serious physical harm* or illness." The purpose of dependency proceedings is to protect children, not to prosecute parents. ([In re Alysha S. \(1996\) 51 Cal.App.4th 393, 397.](#)) In this case, no evidence indicates either child suffered neglect, i.e., was left unsupervised or unprotected.^{FN7} No evidence indicates either child ever saw father smoke marijuana, or had access to any drug paraphernalia. Nor did either child have access to any marijuana in any usable form. While the children had seen plants growing in the yard, live plants are not usable. Moreover, neither child knew the specimens of the plants until approximately two weeks before the police confiscated the plants. Thus, at the jurisdictional hearing, no evidence indicated anyone in the home had access to marijuana plants. Father's use of marijuana may be detrimental to his children. Evidence also indicates he was moody, volatile and unpleasant company for his children, and his mood worsened with increased drug use. However, no facts are alleged, and no evidence in the record suggests, father's drug use subjected the children to any physical harm, injury or illness. Thus, we fail to see that these facts can support the court's order sustaining the petition under [section 300, subdivision \(b\).](#)

[FN7](#). DCFS tries to substantiate its assertion of neglect by pointing out that, as the children's primary caretaker, it was father's job to keep the house clean. He allegedly failed at that task because, when the house was searched at 9:00 in the morning, it was "in disarray." "There were clothes all over the place [and][t]here appeared to be no organization in the home." Such "hazards" might describe the premises of many homes as busy families scramble to prepare for a day of work and school. To paraphrase another court, "if such flimsy conditions were sufficient for removal from the home, generations of parents of teens would have lost their children to foster care." (See [In re Paul E. \(1995\) 39 Cal.App.4th 996, 1005.](#)) In any event, mother said the house looked that way because the hour was early for this family. The children said father is strict about cleaning the house, and does not like it messy.

The allegations of [section 300, subdivision \(b\)\(3\)](#) are similarly insufficient. As to mother, no evidence supports a finding of past or current conduct physically endangering her daughters. First, the minimal amount of marijuana mother grew in her backyard fell within the limit permitted by [Health and Safety Code section 11362.77](#). As the court recognized in amending the count alleging a violation of [section 300, subdivision \(b\)\(3\)](#), mother's marijuana was not "illicit drugs" at all. Second, as to both parents, while the plants were accessible to the children, they were not in a usable form and the children were ignorant of the specimens of the plants until just before the plants' permanent removal from the premises. Third, and most importantly, for purposes of the test under [section 300, subdivision \(b\)](#), when the jurisdictional hearing was conducted, no more marijuana plants remained at the house, and no evidence indicated any plans to replant any marijuana or for mother to resume using medicinal marijuana. Under [section 300, subdivision \(b\)](#), circumstances existing *at the time of the hearing* must make it likely the children will suffer serious physical harm or illness in the future. "This is so because under subdivision (b) a child may be considered dependent 'only so long as is necessary' to protect the child...." ([In re Janet T. \(2001\) 93 Cal.App.4th 377, 388.](#)) In other words, when the hearing is conducted, some reason must exist to believe the acts, which initially brought a child to the court's attention, still persist. The court's "belie[f] that having ... marijuana growing ... at the children's residence is detrimental and endangering to children even of [Michelle and Angel's] age" does not satisfy the requirement for an evidentiary showing of *current* neglectful conduct on a parent's part that place a child at substantial risk of serious physical harm. The petition lacks the necessary allegations and the record is devoid of evidence indicating either child is exposed to a substantial risk of serious physical harm now or will be in the future. (*Ibid.*)

*8 DCFS failed to meet its burden of presenting sufficient evidence of necessity to assume juvenile court jurisdiction over the children .^{FN8} ([In re Nicholas B., supra, 88 Cal.App.4th 1126, 1134-1135 .](#)) In light of our determination, the jurisdictional order must be reversed, and the dispositional order and all other orders are moot. ([Id. at p. 1137; In re Janet T., supra, 93 Cal.App.4th at p. 392.](#))

[FN8](#). It is also significant that the children's attorney joined mother in seeking dismissal of the petition at the jurisdictional hearing. In Los Angeles County, minor's counsel is also the minor's guardian ad litem under the federal Child Abuse Prevention and Treatment Act. ([42 U.S.C. § 5101 et seq.](#); [Cal. Rules of Court, rule 5.662](#).) As such, recommendations by a child's attorney are not to be lightly disregarded because he or she is under a duty "(1) [t]o obtain firsthand a clear understanding of the situation and needs of the child; and [¶] (2)[t]o make recommendations to the court concerning the best interest of the child...." ([Cal. Rules of Court, rule 5.662\(d\)](#).)

DISPOSITION

The orders of the juvenile court are reversed and the juvenile court is directed to dismiss the petition.

We concur: COOPER, P.J., and RUBIN, J.

Cal.App. 2 Dist., 2007.

In re Michelle M.

Not Reported in Cal.Rptr.3d, 2007 WL 1041372 (Cal.App. 2 Dist.)

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