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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re Patrick M., a Person Coming Under  
the Juvenile Court Law.

SOLANO COUNTY DEPARTMENT OF  
HEALTH AND SOCIAL SERVICES,

Plaintiff and Respondent,

v.

J.M. et al.,

Defendants and Appellants.

A132307

(Solano County Super. Ct.  
Nos. J39309, J39310, and J39311)

Father and mother appeal the juvenile court’s jurisdictional findings and dispositional orders on a dependency petition filed by Solano County Department of Health and Social Services (Department) in February 2011 under Welfare and Institutions Code section 300<sup>1</sup> regarding parents’ three minor children, Patrick, A.M. and P.M. We affirm the juvenile court’s jurisdictional findings and orders and reverse its dispositional findings and orders.

**FACTUAL AND PROCEDURAL BACKGROUND**

This military family has a history of dysfunction marked by domestic violence and drug abuse. The Department has assumed jurisdiction over the children twice, once in an

<sup>1</sup> Further statutory references are to the Welfare and Institutions Code unless otherwise noted.

earlier section 300 petition filed in March 2009, and again in the instant petition filed in February 2011.

**A. 2009 Petition**

In the section 300 petition filed in March 2009, the Department alleged the minors were at risk of serious physical harm (§ 300, subd. (b)) and serious emotional damage (§ 300, subd. (c)) due to parents frequently engaging in serious acts of domestic violence in front of the children, mother's drug and alcohol abuse and psychiatric disorders, and filthy housing conditions. The Department's March 2009 detention report states parents were arguing about household chores on March 20, 2009. Mother threw a telephone and a plastic cup at father and father punched mother once in the mouth, after which mother called security forces. Officers searched the home and found drug paraphernalia, including hypodermic needles, a glass pipe and a spoon, in one of mother's jackets.

The Department's June 2009 disposition report states mother previously filed for a restraining order in January 2006, alleging past domestic violence that resulted in her sustaining a dislocated jaw, cracked ribs and broken jawbone and verbal abuse leading her to attempt suicide on two occasions. Also, in 2001, while the family was based in New Mexico and father was stationed in South Korea, the children were removed from mother's care due to mother's substance abuse. The report stated the children were currently residing with father in military housing on Travis Air Force Base (TAFB). The report included a case plan for parents that involved mental health counseling, a substance abuse treatment program and drug testing for mother, counseling and anger management class for father and marriage counseling services for both parents.

By December 2009, when the Department filed a status review report, mother had moved back into the family home on TAFB, was engaged in substance abuse treatment, an individual counseling program that also monitored her psychotropic medication, and couples' counseling with father. Mother was participating in Dependency Drug Court (drug court) and had received several commendations. Father was participating in individual and marriage counseling and had completed a parenting course and an anger management class. Overall, mother was in compliance with her case plan. Father was

not in compliance, however, because he continued to respond to Patrick “in ways that are verbally abusive and demeaning to [the minor]. [Father] has scheduled the family to begin family therapy effective 1/7/2010.” Father acknowledged that “his anger is a huge problem which has negatively impacted his family.” Regarding the minors, the status review noted Patrick has anger problems resulting in behavioral issues at home. He is participating in bi-weekly therapy sessions at TAFB. Also, Patrick has been diagnosed with attention deficit disorder and takes medication for the condition. Patrick advised he would like “his father to stop calling him names and yelling at him.” The status review notes the family is still at risk due to parents’ continuing need to “address the discord in their relationship which resulted in past incidents of domestic violence” and that the children “have begun to exhibit behaviors with each other that show the family needs to learn non-violent ways of communicating with each other.” The report recommended continued family maintenance services and further review in July 2010.

Mother relapsed in early 2010. A drug court report dated February 8, 2010, notes mother tested positive for amphetamines in January 2010 after taking her son’s medication. However, a status review report filed in June 2010 states mother tested negative from February through May, 2010. The report notes mother has been in substance abuse treatment for over a year, understands the materials presented in group but does not yet have “a strong grasp on sobriety.” In regard to her mental health problems, the report states mother is over reliant on medications and has not embraced the need to treat her underlying symptoms. Regarding father, the report states it received a report on May 26, 2010, that father had been continually calling Patrick names “such as ‘bastard’ ‘little f\*\*\*er’ ‘piece of s\*\*t’ ‘a\*\*hole’ ‘dummy’ and ‘spoiled brat’ in front of his siblings and mother.” The report states that “[d]espite the father’s knowledge of the impact of his behavior towards Patrick he continues to call him derogatory names. . . . He also resists couples counseling which may be related to his unwillingness to be confronted with how his behaviors have negatively impacted the family.” Regarding the minors, the report states Patrick’s “physical safety in the home may be at risk if his father cannot control his anger. A.M. and P.M. witness their father’s verbal abuse . . . and they

each play their role in the family to help divert attention away from arguments. These children are each impacted by the chaos that is present in their home environment.”

The Department filed an addendum status review in August 2010, reporting that on July 19, 2010 mother was admitted to the hospital under section 5150.<sup>2</sup> Father took mother to the emergency room after she reported she was having a panic attack. At the hospital, mother was very combative and had to be subdued by orderlies. Father stated mother told him she had been using drugs and thought her son Patrick was trying to kill her. Father stated Patrick looked after his younger siblings while father was at the hospital. Subsequently, the Department received a call that the minors were home alone and that Patrick is a known fire-starter. The caller stated that in parents’ absence, Patrick started a fire in the back yard near a propane tank, and the younger children were throwing debris on the fire.

The Department filed a further status review report in December 2010. The report includes an evaluation of the foregoing fire incident by an emergency response worker, stating, “It is concerning that father did not allow this SW to enter the home due to the poor condition of the home. It is also concerning that mother manages her medication and her son’s medication in a somewhat haphazard fashion. The medications are left out and accessible to the children. In addition, . . . the parents have left the children unattended on several occasions. The most recent occasion resulted in Patrick setting a fire, placing he and his siblings at serious risk of harm. The minor [Patrick] has serious mental health issues of his own and is not capable of being left with his younger siblings without adult supervision. . . . [T]his SW is not convinced that the parents are capable of completely understanding the safety ramifications of their actions.”

On a more positive note, the December 2010 status review notes mother graduated from drug court in October 2010 and meets her physician on a monthly basis for

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<sup>2</sup> Section 5150 provides that “any person, [who] as a result of mental disorder, is a danger to others, or to himself or herself, . . . may, upon probable cause, . . . [be] taken . . . into custody and place[d]” in a mental health facility for 72-hour treatment and evaluation.

medication management, and father participates in individual therapy twice per month. In evaluating parents progress, the report commends mother's graduation from drug court but cautions that her history shows "an ability to have short periods of stability with her mental health and substance abuse issues" and a pattern of ebb and flow "between crisis and stability." The report states that while father has made progress in addressing Patrick appropriately and has started to see a psychiatrist, he has not demonstrated "lasting changes in his behaviors in the home." Also, the report states the Department is concerned the family is not participating in family therapy, as recommended by Patrick's therapist. The report recommended that continued family maintenance services are required to "assure the continued safety of the children in the home and to assess the family's ability to demonstrate a longer period of stability." At a subsequent status review hearing on January 31, 2011, the juvenile court rejected the Department's recommendation and terminated dependency jurisdiction over all three children.

***B. 2011 Petition***

On February 25, 2011, the Department filed the instant petition pursuant to section 300, subdivision (b), alleging on facts set forth in grounds b-1 through b-5 that the children have suffered or have a substantial risk of suffering serious physical harm or illness. The detention report describes the incident that precipitated the current intervention as follows: On February 9, 2011, mother was pulled over by a security forces officer while entering TAFB because the tags on her vehicle had expired. The three children were in the car with mother at the time. The officer noticed the smell of alcohol from the vehicle. The officer administered a Preliminary Alcohol Screening test that registered a .09 blood alcohol content. The officer contacted Fairfield Police, who placed mother under arrest for driving under the influence.

Also, the detention report states that the day after mother was arrested for DUI, Patrick was placed in a section 5150 hold by security forces and admitted to St. Helena Center for Behavioral Health. Patrick's admission status included ADHD, Intermittent Explosive Disorder, Oppositional Defiance Disorder and Post Traumatic Stress Disorder. Patrick was admitted after parents called emergency services because Patrick's behavior

deteriorated to the point where he was physically assaultive to his younger sisters and the family dog. Patrick was discharged to his parents' care on February 23, 2011.

In the detention report, the social worker notes that between March 2009 and January 2011, parents participated in family maintenance services through the Department. However, the social worker states that in recent meetings parents admitted to her they “ ‘were not on board’ during the prior Family Maintenance Dependency and did not actively engage with the Department in regard to participating in services and/or making effective changes in their family dynamic.” Also, mother admitted to the social worker she had used methamphetamine since the last dependency proceeding terminated. Father stated he suspected mother had been using, “but could not ‘prove it.’ ”

Regarding father's mental health issues, the detention report states that father's therapist, Captain Michael Valdevinos, PhD., of David Grant Medical Center Psychiatry Department, has diagnosed father with personality traits of Schizoid Personality Disorder. The report notes that while father made progress in the previous dependency in his ability to control his anger, “there is evidence . . . that . . . areas of improvement remain.” On this point, the social worker stated she interviewed the children about the possibility father may have to care for them on his own. A.M. stated she is “worried ‘about the yelling,’ ” adding that, “He does it all the time.” Nevertheless, the detention report concluded with the following recommendation: “While the Department has significant concerns regarding father's past history of domestic violence, his current mental health status and anger management issues, and his apparent inability to manage Patrick's severe emotional issues, there is insufficient evidence suggesting the children are in danger in the care of [father] if [mother] is out of the home. While the parents have made progress in addressing issues related to mental health, substance abuse and domestic violence, there is still a great deal of improvement necessary in order to mitigate the issues of risk and safety for the children. The Department believes that the least restrictive intervention is to respectfully recommend that the children, Patrick, [A.M.] and [P.M.], are allowed to remain in the home in the care of the father, . . . with Court [supervision] under a Family Maintenance services plan.”

At the detention hearing on February 28, 2011, the court heard comment from counsel before ruling as follows: “In this matter I am going to remove the children. . . . I don’t do it lightly. These parents are going to have to re-earn the trust that was given to them. I’m not willing to risk the children that they’re going to do things in the future. I want things to be put in place before the children are returned to the care. [¶] I don’t think it’s just [mother’s] fault. I think [father] has a responsibility for this. I think a number of the concerns about keeping information from the Department are attributable directly to [father], and I don’t trust either one of them at this point to accurately report what needs to be addressed and to protect the safety of the children in that regard.” The court ordered supervised visitation for parents and set the matter for a jurisdictional hearing.

The Department filed a jurisdiction/disposition report on March 30, 2011, recommending the children remain in out-of-home care and the parents receive family reunification services. The report states that following the detention hearing, the children were placed together in a licensed foster care home. The home has been appropriate for the two younger children. However, it is not a suitable placement for Patrick because his mental health needs exceed the home’s capability. In the foster home, Patrick has damaged property, is defiant, and abusive towards his sisters and “kicked the foster parents’ dog.” The Department has approved the next higher level of care for Patrick, Intensive Treatment Foster Care (ITFC), and is seeking a suitable ITFC placement for him.

The report details the history of the family’s interaction with law enforcement and welfare services, dating back to allegations of physical neglect in New Mexico in 2001 and including allegations of domestic violence in Florida in 2006/2007. The report also includes witness statements from the children. Patrick told the social worker he did not want to talk about the circumstances surrounding his section 5150 hospitalization or his home life. He said he felt safe at home but not on the day he was hospitalized. Patrick stated he wanted to go home “a little,” adding “I miss my parents.” A.M. told the social worker things were “great” at home before she was sent to live with foster parents. A.M. said father had “gotten better with the name calling.” When asked about the name

calling, A.M. said father would call Patrick the “A,” “B” and “F” words, but would not say what those letters stood for. According to A.M., the last time father called Patrick these names was “the day Patrick went to the hospital off base.” The social worker interviewed P.M. at school in the presence of the school psychologist. P.M. stated she knew the social worker wanted to talk to her about “mom and dad fighting,” but stated she did not remember that anymore. P.M. avoided answering questions about her parents fighting by barking like a dog. At the conclusion of the interview, P.M. said, “I want to go home.”

The jurisdiction/disposition report also includes an evaluation by Edwin Crouse, a counselor and social worker at the Family Advocacy Center on TAFB, who met with the parents on a weekly basis. Crouse opined mother should participate in dual diagnosis program, one dealing with her drug dependency as well as the issues underlying such dependency, and preferably a long term program. However, he stated this might create financial problems for the family if not covered by their medical provider. Crouse stated that during his sessions with parents, they would argue periodically and one of them would walk out and then return later. According to Crouse, “it was difficult to focus on what to deal with in their relationship.”

In regard to father’s mental health issues, the report states the social worker spoke with Captain Valdevinos, who stated there is no such diagnosis as “Schizoid Effective Disorder” (as stated in the detention report). Valdevinos stated he diagnosed father with a mood disorder (depression) and had not prescribed medication for father’s condition. Valdevinos continues to work with father in dealing with depression and has been meeting with father at least twice per month since November 2010.

Regarding parents twice-weekly supervised visitation with the children, the jurisdiction/disposition report states that “visitation appears to be going well for the family with the children being happy to see their parents and share their recent activities in the foster home and in school. The parents act appropriately by trying to engage all the children in family games and by attempting to manage Patrick’s challenging behaviors.” However, the social worker opines that the risk to the children’s safety in the home

“remains ‘high’ if [the children are] prematurely returned to care of the parents,” adding, “The Department believes that the home continues to be an unsafe environment as the parents have received court ordered family maintenance services for over a year and the interventions have failed to resolve the family’s primary issues (substance abuse, anger/domestic violence), thus continuing to place the children at substantial risk of harm and or neglect.” The Department’s proposed case plan included mental health treatment and individual therapy for both parents, parenting education programs addressing the children’s developmental needs and family therapy.

The Department also filed an addendum to the jurisdiction/disposition report on April 1, 2011. In the addendum report, the social worker reported that she spoke with Patrick’s psychiatrist, Dr. Kutz, on March 28, 2011. Dr. Kutz stated parents reported Patrick’s out-of-control behavior to him before Patrick entered foster care. Dr. Kutz was concerned Patrick’s aggressive behavior “may be indicative of manic episode since mom’s diagnosis is bi-polar disorder.” Dr. Kutz said he encouraged parents to call the police while Patrick was out of control so Patrick can receive diagnosis and treatment when circumstances are exigent. Dr. Kutz opined that the family home life contributes to Patrick’s behavior. The social worker also states that on March 30, 2011, Patrick was placed in a level 10 Group Home after the foster parents asked he be removed from the home on account of his aggressive behavior.

The dependency court held a contested jurisdiction hearing on April 4, 2011. The Department called social worker Josita Camacho as a witness. Camacho testified the Department is concerned about three factors: mother’s continued substance abuse; the level of domestic violence in the home; and the parents’ “mental health ability and their ability to parent the children safely.” Camacho stated the Department wished to amend the (b-5) allegation as stated in the disposition report and the court granted the amendment without objection.<sup>3</sup> The court ruled as follows: “I went through my notes

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<sup>3</sup> In the jurisdiction/disposition report, the Department proposed to amend allegation (b-5) to “better represent the facts to read as follows: The father [] is diagnosed with a mood disorder (depression) and has anger issues, that if left untreated could impair his

and the file again and I'm going to find that the Department has met its burden of proof with respect to allegations (b-1), (b-2), (b-3), (b-4) and . . . (b-5) as amended. I'm also going to find . . . that the Department has proven an allegation (c-1) with respect to Patrick's aggression towards himself and others. I'll do the wording on this in the written order, but it would include the cycle of domestic violence, the . . . drug abuse, and the mental health issues that both parents are dealing with has placed them in a position where they're not able to provide for Patrick's needs."

In its jurisdictional findings and orders filed after the hearing, the court sustained an allegation under section 300, subdivision (c) that Patrick is suffering, or is at a substantial risk of suffering, serious emotional damage evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior toward self or others. The facts supporting the allegation state as follows: "On February 10, 2011, [Patrick] became physically assaultive towards his two sisters and the family dog. He was held by Security Forces pursuant to WIC 5150 and transported to St. Helena Center for Behavior Health. His status was changed to WIC 5250. He remained at St. Helena until discharge on February 23, 2011. St. Helena Social Worker Kathy Tejcka reported she was informed by the minor's father that Patrick's behavior regarding his anger and aggression had been declining for approximately two months. On February 10, 2011, his parents called emergency services because his behavior had become out of control."

Prior to the disposition hearing, the Department filed a second addendum to the jurisdiction/disposition report on May 23, 2011. In this addendum, the social worker reported on additional interviews she conducted with service providers. Edwin Crouse, of LCSW Family Advocacy on TAFB, stated mother is leading weekly AA meetings on the military base, and father is attending the meetings. According to the social worker, Crouse opined that "parents continue to be manipulative and that they focus on doing things to make themselves look good without really focusing on treatment." Mr. Crouse

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judgment and affect his ability to safely provide care, support, and supervision for the children [Patrick], [A.M.], and [P.M.]. Such issues place the children at significant risk of physical and/or emotional harm."

provided an example that the parents recently argued about [mother] attending in patient drug treatment and they were blaming each other for [mother] not participating in the treatment. The social worker also spoke with mother's therapist, Dr. Thomas Smith. Dr. Smith stated mother has "low self-esteem which is highly dependent on her relations with [father]," that father is reported to "to be mean and critical of [mother]," and that father's behavior "has a huge impact on [mother's] emotional health and that she in turn has a tendency to overreact."

The dependency court held a contested disposition hearing on May 16, 2011. The Department's social worker, Josita Camacho, testified she was assigned to parents' case in mid-February 2011. Camacho stated she placed calls to parents' current mental health providers to discuss parents' participation, attendance and progress in therapy but was "out on medical leave for most of last week" and had not yet spoken to them. Camacho was asked to explain her recommendation that the children continue in out-of-home placement. Camacho stated that mother has not engaged in any individual substance abuse assessment or treatment and parents had "refused to sign the case plan services." Also, Camacho stated mother has a "dual diagnosis of underlying mental health issues with an overlay of substance abuse" and that in the previous dependency proceeding her service providers recommended mother participate in inpatient treatment, and those recommendations have been incorporated into the case plan. Further, Camacho stated that even if mother received inpatient treatment, she would not recommend in-home placement with father on account of "the history of domestic violence between the parents . . . [that] has greatly impacted the children's emotional health and well-being, particularly Patrick." Camacho opined that "given the totality of the information with regard to the parents' past ability to manage Patrick's behavior, [she] believe[d] that the parents need to work and Patrick needs to work separately before [she] would consider reunifying them." In regard to the two younger children, Camacho stated "the risk to the girls would remain high" if they were returned to father's care.

On cross-examination by mother's counsel, Camacho acknowledged mother completed the Healthy Partnerships outpatient program during the last dependency, that

the children were enrolled in school prior to their removal, and that father has been employed at all times during the family's contacts with the Department. Camacho further acknowledged this petition was precipitated by mother's arrest for DUI and that she was unaware mother was about to complete a wet reckless DUI course. Camacho did not know what information mother gleaned from that class, was unaware that mother's AA classes were held twice, not once, per week and had not spoken with mother since the last court date. Camacho acknowledged that mother had tested negatively for drugs since the last court date and has almost completed a parenting class. Camacho stated she had not followed up to see how parents are doing with the parenting class. Also, Camacho testified parents behaved appropriately on supervised visitation and the children enjoy the visits. Parents talk to the children regularly by phone.

On cross-examination by father's counsel, Camacho stated father refused to sign the case plan because he did not agree mother needed inpatient treatment and because he had already completed a domestic violence course. Camacho testified father accepted her recommendation that he should take both the Parenting Project Senior and Junior classes to address the differing needs of Patrick and the younger girls. Father reported to Camacho he is enjoying the parenting class specific to Patrick's age group that he is now taking and is gaining useful information and insight from that course.

Father testified at the disposition hearing. Father stated he provided two medical releases to the Department—one in mid-February limited to treatment, progress and attendance and then on April 28 a release providing full disclosure. Father stated he and mother have been receiving joint counseling and social work from Mr. Crouch at Family Advocacy Center on TAFB since mother's DUI in February. Regarding his children, father opined that Patrick has certain disabilities that affect his behavior and he acknowledged Patrick appears to be doing well in his current placement. However, father stated A.M. and P.M. want to come home and he believes they would be safe in his care. Father states he attends AA meetings with mother as her support and this has helped him understand mother's needs better. Father also sees Dr. Valdevinos regularly.

He is currently engaged in a parenting class geared specifically to Patrick's needs and is open to taking a similar class geared to his younger children.

At the continued contested disposition hearing on May 31, 2011, no further testimony was presented and the dependency court heard argument of counsel. Regarding placement of the children, counsel for the Department argued there are "continuing significant concerns" based on social worker Camacho's contacts with service providers, as outlined in the second addendum to the disposition report. With that, counsel asked the court to continue the children on out-of-home placement and order reunification services to both parents. Counsel for mother and father asked that the court order the children returned to the parents.

The dependency court stated it was going to "follow the recommendation" and "maintain the out-of-home placement" with family reunification services to both parents. The court stated that because it was "so late in the day" it would conform the court orders after adjournment and "make some findings as an attachment that will further explain my reasoning in terms of this."

Subsequently the dependency court issued Judicial Council findings and orders after dispositional hearing for each of the minor dependent children, including a dispositional attachment (Judicial Council form JV-421) as to each of them. On the dispositional attachment for each of three children, the boxes checked show the court found that as to father and mother there is "clear and convincing evidence of the circumstances stated" in section 361, subdivision (c)(1).<sup>4</sup> Father and mother timely appealed the court's dispositional findings and orders.

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<sup>4</sup> This subsection states: "A dependent child may 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 . . . [¶] (1) There 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 . . . physical custody. . . . The court shall consider, as a reasonable means to protect the minor, the option of removing an offending parent . . . from the home. The court shall also consider,

## DISCUSSION

Father challenges the dependency court's jurisdictional and dispositional orders on the following grounds: (1) By adding and sustaining the allegation of serious emotional damage as to Patrick under section 300, subdivision (c) (subdivision (c)) at the conclusion of the jurisdictional hearing and without prior notice, the court violated parents' right to due process; (2) the subdivision (c) allegation does not allege facts sufficient to sustain jurisdiction; (3) the subdivision (c) allegation is not supported by substantial evidence; (4) the subdivision (b) allegations against father are not supported by substantial evidence, and (5) removal of children from father's custody at disposition was not supported by substantial evidence. For her part, mother's sole contention on appeal is that she was denied due process by the manner in which the dependency court sustained the jurisdictional allegation under section 300, subdivision (c).<sup>5</sup>

### A. *Jurisdiction*

Because it is pivotal to several of the other issues raised, we begin with father's challenge to jurisdiction under section 300, subdivision (b) (subdivision (b)), as alleged in the original petition. Subdivision (b) provides that a child who comes within the following description is within the jurisdiction of the juvenile court and may be adjudged a dependent child of the court: "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 adequately supervise or protect the child, or the willful or negligent failure of the child's parent [] to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent [] to provide the child with adequate food, clothing, shelter,

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as a reasonable means to protect the minor, allowing a nonoffending parent . . . to retain physical custody as long as that parent . . . presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm." (§ 361, subd. (c)(1).)

<sup>5</sup> Pursuant to California Rules of Court, rule 8.200(a)(5), mother joins in father's brief "to the extent it inures to [her] benefit."

or medical treatment, or by the inability of the parent [] to provide regular care for the child due to the parent's [] mental illness, developmental disability, or substance abuse. . . . The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness.” (§ 300, subd. (b) [italics added].)

The Department has the burden to “ ‘ “prove by a preponderance of the evidence that the child . . . comes under the juvenile court’s jurisdiction.” ’ ” (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 185.) “On appeal from an order making jurisdictional findings, we must uphold the court’s findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings. [Citation.] Substantial evidence is evidence that is reasonable, credible, and of solid value.” (*Veronica G., supra*, 157 Cal.App.4th at p. 185.) Issues of fact and credibility are questions for the trier of fact, and we may not reweigh the evidence. (*In re Jasmine C.* (1999) 70 Cal.App.4th 71, 75.) “ ‘If there is any substantial evidence, contradicted or uncontradicted, which will support the judgment, we must affirm.’ (Citation.)” (*D.M. v. Superior Court* (2009) 173 Cal.App.4th 1117, 1128.)

As amended, the petition asserts the following subdivision (b) allegations:  
“(b-1) Between March 24, 2009, and January 31, 2011, the parents . . . participated in court supervised Family Maintenance services through Solano County Child Welfare Services to address issues of domestic violence, substance abuse, mental health and the condition of the family’s home. The parents made progress and, in some instances, completed case plan requirements. However, the completion of services has not mitigated the continued significant risk of physical and emotional harm or well being to the children;

“(b-2) The mother . . . has unaddressed substance abuse issues that include the abuse of alcohol and methamphetamine. Such abuse periodically impairs her judgment and ability to provide constant care, support, and supervision of her children, . . . in that the mother has been arrested for being under the influence of controlled substances and being in

possession of paraphernalia. Further, on or about February 9, 2011, the mother . . . was arrested for driving under the influence of alcohol while the children were in the vehicle. [Mother's] continued substance abuse places the children . . . at significant risk of physical and/or emotional harm;

“(b-3) The mother . . . has mental health issues, including but not limited to diagnosis of Bipolar Disorder, Post Traumatic Stress Disorder, Borderline Personality Disorder and Methamphetamine Dependency which periodically impair her ability to provide regular care, support and supervision for her children, . . . thereby placing the children at significant risk of physical and/or emotional harm;

“(b-4) On or about February 17, 2011, the father . . . admitted he was aware that on February 9, 2011, the mental health stability of the mother . . . was decompensating. Rather than make alternate arrangements for child care, the father . . . left the children . . . in the care of the mother, during which time [mother] was arrested for driving under the influence of alcohol with the children in the vehicle, thus placing them at significant risk of physical and/or emotional harm;

“(b-5) The father [] is diagnosed with a mood disorder (depression) and has anger issues, that if left untreated could impair his judgment and affect his ability to safely provide care, support, and supervision for the children [Patrick], [A.M.], and [P.M.]. Such issues place the children at significant risk of physical and/or emotional harm.”

Father contends that the subdivision (b) allegations implicating him, namely, (b1), (b-4) and (b-5) are not supported by substantial evidence.<sup>6</sup> We disagree. The record

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<sup>6</sup> To the extent father challenges the facial sufficiency of the subdivision (b) allegations as alleged in the petition, he forfeited any facial challenge by failing to raise it below. (See *In re David H.* (2008) 165 Cal.App.4th 1626, 1637 (*David H.*)) As Division Five of this court explained persuasively in *David H., supra*: “Code of Civil Procedure section 430.80—which provides that challenges to the facial sufficiency of a petition are not forfeited by the party’s failure to raise the issue in the trial court—does not apply to juvenile dependency proceedings” because (1) “section 430.80 appears in part 2 of the Code of Civil Procedure, which applies to civil actions, not in part 3, which applies to special proceedings . . . [and] [t]hus . . . does not even apply to juvenile dependency proceedings by its own terms[;]” (2) “the Welfare and Institutions Code

demonstrates that, as alleged in (b-1), the parents received court supervised Family Maintenance services from March 2009 through January 2011, and these services were designed to address issues of domestic violence, substance abuse, mental health and the condition of the family's home. The record also demonstrates, as further alleged in (b-1), that the completion of services on the 2009 petition did not entirely resolve the problems that placed the children at significant risk of physical harm. In this regard, parents admitted to the Department social worker in February 2011 that they had not been "on board" during the prior dependency and "did not actively engage . . . in services and/or making effective changes in their family dynamic." Moreover, viewing the record in the light most favorable to the juvenile court's order, as we must (see *In re Giovanni F.* (2010) 184 Cal.App.4th 594, 598), there is substantial record evidence that after the completion of services in January 2011, the children remained under a substantial risk of suffering serious physical harm due to parents' failure or inability to adequately supervise or protect the children. Indeed, on February 9, 2011, less than two weeks after the completion of services on the 2009 petition, mother was arrested for DUI of alcohol and the children were in the vehicle at the time. In addition, after completion of services on the 2009 petition, mother began using methamphetamine again. Father admitted he knew mother stopped taking medications for her mental health problems around Christmas 2010 and knew mother started using methamphetamine again, although he averred he could not "prove it." Despite his knowledge of mother's drug use, he left the children in mother's care. Moreover, on the day of the DUI incident, father knew mother's

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expressly incorporates one chapter of part 2 of the Code of Civil Procedure (ch. 8 of tit. 6 of pt. 2) and does not expressly incorporate Code of Civil Procedure section 430.80 or the chapter in which it appears, chapter 3 of title 6 of part 2. (Citations.);]" and, (3) Code of Civil Procedure section 430.80 "is inconsistent with the purposes of juvenile dependency law [because] [a]llowing parties to challenge the facial sufficiency of a petition for the first time on appeal conflicts with the emphasis on expeditious processing of these cases so that children can achieve permanence and stability without unnecessary delay if reunification efforts fail. (Citation.) Enforcing the forfeiture rule requires parties to raise such issues in the juvenile court where they can be promptly remedied without undue prejudice to the interests of any of the parties involved. (Citations.)" (*Id.* at pp. 1639-1640.)

emotional health was “decompensating” and would only get worse as the day wore on, but he failed to make alternative arrangements for the children’s care.

In sum, substantial evidence, as set forth above, supports jurisdictional allegation (b-1) of the petition. Because allegation (b-1) brought the children within section 300, subdivision (b), the court properly assumed dependency jurisdiction over the children and personal jurisdiction over father and mother, which allowed the court “to enter binding orders” adjudicating parents’ relationship to their children. (See *In re I.A.* (2011) 201 Cal.App.4th 1484, 1491.) Furthermore, “once a single finding has been found to be supported by the evidence,” an appellate court need not address evidentiary support for any remaining jurisdictional findings. (*In re I.A.*, *supra*, 201 Cal.App.4th at p. 1492; see also *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 [same].) Accordingly, we decline to address jurisdictional allegations (b-4) and (b-5) because jurisdiction has been established under (b-1).<sup>7</sup> (*Ibid.*)

Similarly, jurisdiction under (b-1) obviates parents’ challenge to the jurisdictional allegation under subdivision (c). The dependency court added the subdivision (c) allegation as an amendment to conform to proof. “ ‘[A]mendments to conform to proof are favored’ and . . . [o]nly if the variance between the petition and the proof offered at the jurisdictional hearing is so great that the parent is denied constitutionally adequate notice of the allegations against him or her should a juvenile court properly refuse to

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<sup>7</sup> We also note father does not challenge jurisdictional allegations (b-2) and (b-3), which pertain to mother’s conduct. “ ‘[A] jurisdictional finding good against one parent is good against both. More accurately, the minor is a dependent if the actions of either parent bring her within one of the statutory definitions of a dependent. [Citation.]’ ” (*In re Alexis H.* (2005) 132 Cal.App.4th 11, 16, [noting this “accords with the purpose of a dependency proceeding, which is to protect the child, rather than prosecute the parent. [Citation.]”].) Thus, “[f]or jurisdictional purposes, it is irrelevant which parent created the[] circumstances” triggering section 300. (*In re I.A.*, *supra*, 201 Cal.App.4th at p. 1492 [noting also that “[a] jurisdictional finding involving the conduct of a particular parent is not necessary for the court to enter orders binding on that parent,” once dependency jurisdiction has been established].) Accordingly, allegations (b-2) and (b-3) also provide grounds for section 300 jurisdiction over the children and personal jurisdiction over father.

allow an amendment to conform to proof or should a reviewing court entertain a challenge to the sufficiency of the petition that was not raised below. (Citations.)” (*In re David H.*, *supra*, 165 Cal.App.4th at p. 1640; see also *In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1041-1042 [stating that amendment is improper “[i]f a variance between pleading and proof . . . is so wide that it would . . . violate due process”].)

Parents contend that the variance here between the original petition and the subdivision (c) allegation crafted by the court was so great as to deny them constitutionally adequate notice of the allegations against them. However, even if the amendment to add a subdivision (c) allegation constituted an improper variance, parents have not shown how they were prejudiced by the amendment. (See *In re Athena P.* (2002) 103 Cal.App.4th 617, 627 [stating that as in civil and criminal matters, harmless error principles apply to constitutional claims in dependency proceedings].) Here, even if we struck the subdivision (c) allegation, the court’s assumption of jurisdiction under subdivision (b) remains unaffected. (See *In re I.A.*, *supra*, 201 Cal.App.4th at p. 1492 [“once a single finding has been found to be supported by the evidence,” an appellate court need not address evidentiary support for any remaining jurisdictional findings]; *In re Alexis E.*, *supra*, 171 Cal.App.4th at p. 451 [same].)

Father, however, asserts prejudice on the grounds that the subsection (c) allegation carried “adverse legal consequences for him at disposition.” In this regard, father asserts that he is a custodial presumed father; thus, “being non-offending would have made him eligible to retain custody and care of the children despite their removal from the mother, by presenting the court with a plan demonstrating his ability to protect the children from future harm from her conduct,” pursuant to section 361, subdivision (c)(1). However, because, as we have already concluded, the dependency court properly sustained jurisdictional allegation (b-1), which pertained to father and mother, father was not a “nonoffending” custodial parent within the meaning of section 361, subdivision (c)(1). (See *In re A.A.* (2012) 203 Cal.App.4th 597, 606 [stating that because “mother was the subject of a jurisdictional finding under section 300, subdivision (b) in the current dependency proceeding, . . . she was not a nonoffending parent within the meaning of

section 361, subdivision (c)”).) For her part, mother does not even challenge the dependency court’s dispositional orders. Accordingly, even if the amendment to add a subdivision (c) allegation constituted an improper variance, the error was harmless because parents fail to show prejudice.

In sum, the dependency court properly assumed jurisdiction under section 300, subdivision (b) and any error in also sustaining a jurisdictional allegation under subdivision (c) was harmless.

**B. Disposition**

After the juvenile court finds a child to be within its jurisdiction, the court must conduct a dispositional hearing. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248.) At the dispositional hearing, the court must decide where the child will live while under the court’s supervision. (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1082.) At this juncture, the standards for removing a child from home are elevated from those for taking jurisdiction over the child: Whereas the standard of proof for jurisdictional findings is a preponderance of the evidence (Welf. & Inst. Code, §§ 300, 355, subd. (a)), a child declared a dependent of the juvenile court may not be removed from home unless there is *clear and convincing evidence* that there is or would be “*substantial danger* to the physical health, safety, protection, or physical or emotional well-being of the minor” if the minor remained in the home and there are “no reasonable means” by which the child can be protected without removal. (§ 361, subd. (c)(1) [italics added].)<sup>8</sup> The heightened burden of proof for removal from the home at disposition stage reflects the Legislature’s recognition of the rights of parents to the care, custody, and management of their children, and further reflects an effort to keep children in their homes where it is safe to do so. (See generally *In re Jasmine G.* (2000) 82 Cal.App.4th 282, 288; see also *In re Henry V.* (2004) 119 Cal.App.4th 522, 525 [“The high standard of proof by which this

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<sup>8</sup> As noted above (see *ante*, pp. 13-14, fn. 4), the juvenile court’s dispositional finding for removal of all three children was based solely on section 361, subdivision (c)(1).

finding [of removal] must be made is an essential aspect of the presumptive constitutional right of parents to care for their children”].)

Under section 361, subdivision (c)(1), the juvenile court may order removal only if it finds both of the following two elements by clear and convincing evidence: (a) that there is substantial risk of harm to the child if returned home and (b) that there are no reasonable means for protecting the child’s physical welfare without removal. (§ 361, subd. (c); see, e.g., *In re Isayah C.* (2004) 118 Cal.App.4th 684, 695; *In re Henry V.*, *supra*, 119 Cal.App.4th at p. 525; *In re Jasmine G.*, *supra*, 82 Cal.App.4th at p. 288.) As its language suggests, “the bias of the controlling statute is on family preservation, not removal.” (*In re Jasmine G.*, *supra*, 82 Cal.App.4th at p. 290.) Removal “is a last resort, to be considered only when the child would be in danger if allowed to reside with the parent.” (*In re Henry V.*, *supra*, 119 Cal.App.4th at p. 525.)

To be sure, the standard for our review of a dispositional order on appeal is the substantial evidence test. (*In re Walter E.* (1992) 13 Cal.App.4th 125, 139.) However, because the juvenile court’s findings in support of removal require clear and convincing evidence, we apply the substantial evidence test with somewhat less deference where removal from parental custody is at issue. (See *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654 [“On review, we employ the substantial evidence test, however bearing in mind the heightened burden of proof”]; *In re Isayah C.*, *supra*, 118 Cal.App.4th at pp. 694-695; [stating appellate court reviews the juvenile court’s order to determine “whether there is substantial evidence from which a reasonable trier of fact could make the necessary findings *based on the clear and convincing evidence standard*” and noting “[c]lear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt”].)

Father contends the juvenile court’s dispositional order removing the children from the home was not supported by substantial evidence. We agree. Having reviewed the evidence presented in this case, we conclude the record does not support findings that there was a substantial danger to the children if returned home or that there were no less drastic alternatives than removal for protecting them.

In regard to the issue of substantial danger to the children, whereas “[t]he parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate” (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136 [disapproved on another point by *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, at p. 748, fn. 6]), section 361, subdivision (c)(1) requires that there be “a threat to physical safety, not merely emotional well-being, in order to justify removal.” (*In re Isayah C.*, *supra*, 118 Cal.App.4th at p. 698 [citing cases] [also concluding its interpretation “is bolstered by the existence of a separate provision within section 361(c) governing removal based on emotional harm,” and stating that “[i]f we interpreted paragraph (1) to permit removal based on a danger only to the minor’s ‘emotional well-being,’ this would violate the rule that a statute should not be construed to render any of its provisions superfluous (citation)”].)

Here, there is no substantial evidence the children’s physical safety or well-being was threatened by a return home after the disposition hearing. There was no evidence of ongoing physical domestic violence between the parents; indeed there was no evidence of *any* physical domestic violence between the parents since the incident in March 2009 that led to the earlier dependency proceeding. Respondent justifies removal on the grounds that “[t]he family was subject to juvenile court supervision, with services placed in the home, for eighteen months” and that shortly thereafter mother placed the children in danger by having them in the car while driving under the influence. We agree mother placed the children in danger in the DUI incident, and we have acknowledged that as a basis for jurisdiction, but that does not mean the Department can just throw up its hands and decide it has had enough of attempting to keep the children in the home—instead, to justify removal at the disposition stage, it must provide clear and convincing evidence that the children face a substantial danger to their physical safety if they return home. Indeed, as we observed in *In re Henry V.*, *supra*, “out-of-home placement is not a proper means of hedging against the possibility of failed reunification efforts, or of securing parental cooperation with those efforts. [Rather], [i]t is a last resort, to be considered

only when the child would be in danger if allowed to reside with the parent.” (*In re Henry V., supra*, 119 Cal.App.4th at p. 525.)

Furthermore, whereas the March 2011 disposition report is long on describing a dysfunctional family history, it is short on specifics of how the children would be endangered by a return home. Neither the March 2011 disposition report nor the May 2011 addendum contain any substantial evidence in the form of opinion from doctors or other service providers that father’s or mother’s mental condition posed a danger to the safety of the children. There is a similar lack of evidence that mother’s substance abuse issues posed a substantial danger to the physical safety of the children at disposition. For example, the jurisdiction report states that “[d]espite not testing positive for methamphetamines or other illegal substances, [mother] placed the children at substantial risk of physical harm by driving under the influence of alcohol. [Mother’s] substance abuse continues to be a risk to the children, *particularly if she is not engaged in any substance abuse treatment or support services.*” However, the evidence shows mother was heavily engaged with AA and attended meetings both on and off TAFB several times a week. Also, the May addendum report states mother has been engaged in psychiatric therapy with Dr. Smith since mid-March 2011. Dr. Smith stated he is experienced in working with the substance abuse population, includes substance abuse counseling and recovery therapy in his sessions and recommended mother continue in individual therapy with him and maintain attendance at AA meetings.

The Department’s disposition report and addendum are replete with declarations that fail to establish a substantial danger to the physical welfare of the children. For example, the disposition report states: “The Department believes that [father’s] behavior impact’s Patrick’s emotional and mental health and also impacts [father’s] ability to safely parent the children. The children continue to be at risk of physical and emotional abuse if [father] does not address his underlying mental health issues, anger and depression. [¶] The Department strongly recommends that the children remain in out of home care while the parents finally address their personal mental health, domestic violence (anger), and substance abuse issues that impact their ability to provide a safe and

stable home environment for the children.” In a similar vein, and in further support of the Department’s recommendation of continued out-of-home placement after disposition, the May 2011 addendum report states: “[Mother] must continue to show her ability to remain sober and drug free. [Mother] reports attending AA meetings in the community but has not had the opportunity to submit any AA attendance records for submission. [Mother] is registered with the Healthy Partnerships “Wet and Reckless” 12 hour program however this is not considered substance abuse treatment or services. [Mother] must also continue to participate in individual therapy with Dr. Smith as recommended. It appears [mother] has a good working relationship with her therapist and continues to require support in dealing with her personal issues and self-esteem. It is also apparent that the parents continue to have issues in their marriage that continue to be a source of stress. While marital issues are common even in healthy relationships, [parents] could continue to benefit from their joint sessions with Mr. Crouse of the Family Advocacy Office. Eliminating or mitigating external stressors in the marriage could assist the parents in having more meaningful and productive visits with the children. The Department continues to be concerned about the use of control and intimidation by [father] in his communication with his family. These are exemplified by the individuals observing the way in which [father] talks to his wife and children. While this behavior is not violent, the use of control, intimidation, and force is considered a form of domestic violence. [Father] must work with his individual therapist to address these issues and learn new ways of communicating his feelings without the use of force or intimidation.”

We quote the Department’s reports at some length only to illustrate how bereft they are of any solid, credible evidence that the children would face a substantial danger to their physical well being if they returned home. Of course, it is part of the social worker’s role to identify the mental health issues, substance abuse and marital problems that led to the Department’s intervention and to recommend the steps parents should take to address those issues. However, the social worker’s personal opinions and beliefs about mother’s “personal issues and self-esteem,” “mitigating external stressors in the marriage” and how father talks to his family, do not amount to substantial evidence that

the children face a substantial danger to their physical wellbeing if returned home. (Cf. *In re Jasmine G.*, *supra*, 82 Cal.App.4th at pp. 288-289 [social worker’s belief that parents lacked understanding of their responsibility and roles in incident leading to dependency proceedings and had not sufficiently “internalized” parenting skills, as well as social worker’s perception parents “lacked cooperation” and showed “hostility” in dealing with the agency, were insufficient evidence to support removal under section 361].)

Furthermore, the second requirement under section 361 calls for consideration of alternatives to removal. “Section 361 requires that there be ‘no reasonable means’ of preventing removal.” (*In re Jasmine G.*, *supra*, 82 Cal.App.4th at p. 293; see also *In re Henry V.*, *supra*, 119 Cal.App.4th at p. 525 [“Removal on any ground not involving parental rejection, abandonment, or institutionalization requires a finding that there are no reasonable means of protecting the child without depriving the parent of custody”].) That requirement is not met here. In this regard, courts have noted a range of less drastic alternatives that may be available in a given case. For example, one possibility is a return to parental custody “under stringent conditions of supervision by the welfare department. . . .” (*In re Jeannette S.* (1979) 94 Cal.App.3d 52, 60.) In such cases, “unannounced visits and public health nursing services [are] potential methods of supervising an in-home placement.” (*In re Henry V.*, *supra*, 119 Cal.App.4th at p. 529.) Here, by contrast, there is no indication that the court considered less drastic measures before making the necessary statutory determination that “there are no reasonable means by which the minor’s physical health can be protected” short of removal. (§ 361, subd. (c); cf. *In re Henry V.*, *supra*, 119 Cal.App.4th at p. 529 [“At the hearing, the court did not mention the existence of alternatives to out-of-home placement”].) Given the dearth of evidence on this point, the juvenile court’s finding cannot stand. (Cf. *In re James T.* (1987) 190 Cal.App.3d 58, 65 [removal order cannot stand where court “failed to consider less drastic measures”].)

Hitherto, we have observed that the removal of a child from the home at disposition is “ ‘a critical firebreak in California’s dependency system’ (citation) after

which a series of findings by a preponderance of the evidence may result in termination of parental rights.” (*In re Henry V., supra*, 119 Cal.App.4th at p. 530.) Accordingly, we stressed that it is vital always to keep in mind “ ‘the balance between family preservation and child well-being struck by the Legislature’ when it drafted section 361. (Citation.)” (*Id.* at p. 530.) In this regard, we observed that “our dependency system is premised on the notion that keeping children with their parents while proceedings are pending, whenever safely possible, serves not only to protect parents’ rights but also children’s and society’s best interests. . . . Maintenance of the familial bond between children and parents — even imperfect or separated parents — comports with our highest values and usually best serves the interests of parents, children, family, and community. Because we so abhor the involuntary separation of parent and child, the state may disturb an existing parent-child relationship only for strong reasons and subject to careful procedures. [¶] . . . [¶] In all too many cases, the risks involved in returning a child to parental custody at the dispositional phase are clearly established. When they are not, as in this case, the juvenile court must recognize the legal restraints against separating parent and child.” (*Id.* at pp. 530-531.)

#### DISPOSITION

The juvenile court’s jurisdictional findings are affirmed. The dispositional order is reversed. The matter is remanded for further proceedings consistent with this opinion and with consideration of the current circumstances of the children.

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Jenkins, J.

We concur:

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McGuinness, P. J.

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Siggins, J.