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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re BRIANNA H. et al., Persons Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. D.P., Defendant and Appellant.	D060836 (Super. Ct. No. NJ14387)

APPEAL from an order of the Superior Court of San Diego County, Blaine K. Bowman, Judge. Affirmed.

D.P. appeals following the dispositional hearing in the dependency case of her daughter, Brianna H., and her son, Brian H. (together, the children). D.P. contends the juvenile court erred by ordering the children removed from her custody. We affirm.

BACKGROUND

D.P. and the children's father, K.H. (together, the parents), began an "on again off again" relationship in December 1999. The relationship was violent almost from the outset. Brianna was born in December 2000 and Brian was born in June 2003. The parents' history of child welfare referrals includes two substantiated reports of neglect, one in December 2004 and one in December 2010. Both reports resulted from domestic violence.[1]

On the night of December 26, 2004, D.P. left four-year-old Brianna and one-and-one-half-year-old Brian in a car outside K.H.'s home. The children were in the car unattended for two hours and 40 minutes while the parents were in the home. During that time, K.H. pushed D.P., swung her around, grabbed her hair and beat her head on the floor. He grabbed her and threw her on the bed, causing her head to hit the headboard and break the headboard. D.P. threatened to stab K.H. with a pair of scissors. After this incident, D.P. told the police about the following four unreported violent events. In 2000, when D.P. was pregnant, K.H. tried to strangle her. When Brianna was one or two years old, K.H. tried to push D.P. out of a slow-moving car. In 2002, K.H. placed a knife to

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1 The six remaining child welfare referrals were deemed unfounded. Of the six referrals, four were based on allegations of violence (violence between the parents; D.P.'s violence toward the maternal grandmother; and two incidents of violence involving the parents and the maternal grandmother). Another of the unfounded referrals was based on an allegation that D.P. had not taken the children to the doctor when they had the flu. The final unfounded referral occurred in May 2011 when D.P. took the children out of school and made them walk home three to four miles in hot weather. The reporting party stated, "I'm worried that [D.P.] could kill the [children] or [the maternal grandmother; D.P.] is very angry, she gets angry very easily and she loses sight of reality."

D.P.'s throat and his hand over her mouth, "bust[ing] up" her mouth. On another occasion in 2002, K.P. hurt D.P.'s arm.

On December 11, 2010, K.H. grabbed D.P. by the neck twice and started to strangle her. He hid her cell phone, threatened to kill her if she tried to call the police, hit her on the forehead with a flashlight and locked her out of her apartment. D.P. suffered a small bump on her forehead and pain in her wrist and neck. She said she was not sure if she wanted a restraining order against K.H. The police report cited seven prior incidents of abuse.

On December 30, 2010, D.P. spoke to a social worker with the San Diego County Health and Human Services Agency (the Agency). D.P. said K.H. did not live with her and the children, but he visited and sometimes spent the night. She wanted him to have a relationship with the children. D.P. denied that K.H. cared for the children without supervision, and then said she allowed him to watch the children without supervision for short periods. She denied the children were at home during the parents' physical conflicts. According to D.P., K.H. had "control issues and a drinking problem" and needed services. A restraining order had expired several years earlier. Brian told the social worker the parents fought, yelled and "talk[ed] mean to each other." Brian said that when K.H. pushed D.P., Brian tried to break up the fight. Brian believed it was okay for K.H. to push D.P. as long as D.P. did not cry.

D.P. cancelled three appointments with the social worker set for early January 2011, and rescheduled a team decision meeting. She was hostile at the January 21 meeting but agreed to accept voluntary services. After the meeting, the social worker

made three attempts to have D.P. sign the case plan as agreed at the meeting. D.P. refused to sign the case plan and refused to participate in services.

In February 2011 the Agency filed dependency petitions for 10-year-old Brianna and seven-and-one-half-year-old Brian (Welf. & Inst. Code, § 300, subd. (b)),[2] based on their exposure to domestic violence and D.P.'s refusal to accept voluntary services. The petitions alleged that due to the parents' long history of escalating conflicts, the children were at substantial risk of serious physical harm.

On February 3, the court issued a protective custody warrant for the children. By February 4, the Agency had not found the children. The children's counsel asked that the hearing be continued to allow D.P. to produce the children and the social worker to interview the children. The court ordered the children detained with the maternal grandmother, who lived in the same apartment complex as D.P. The court ordered separate visits for the parents, supervised by the maternal grandmother, and ordered the parents to bring the children to the social worker by 5:00 p.m. on February 4. The court continued the detention hearing to Monday, February 7.

On February 7, the parents submitted on the reports. Pursuant to the parties' resolution, the court entered true findings on the petitions and, without declaring the children dependents, ordered them placed with D.P. under the Agency's supervision, with voluntary services (§ 360, subd. (b)). Also pursuant to the resolution, the court ordered that D.P. not attend K.H.'s visits, which were to be supervised by nonmaternal relatives or

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

family friends, and terminated dependency jurisdiction. The parties agreed that if D.P. did not follow the voluntary case plan, the Agency would file new petitions.

On February 7, D.P. entered into a voluntary services agreement with the Agency. The agreement covered parenting instruction, an anger management course and domestic violence treatment, and prohibited K.H. from living with D.P. On March 24, the Agency referred D.P. to a domestic violence program. The Agency also referred her to the Intensive Family Preservation Program (IFPP) for parenting and anger management classes. D.P. began IFPP services on April 28, but attended only half of the sessions. After two months, her IFPP case was closed due to her lack of cooperation and communication and difficulty in scheduling appointments. D.P. began a domestic violence group on May 26. On June 2, she claimed she "understood power and control, but . . . denied [K.H.] ha[d] [ever] exhibited any of these signs." D.P. later acknowledged that K.H. was violent and controlling.

K.H. lived with D.P. and did not cooperate with his own case plan. On one occasion, he walked into D.P.'s apartment while the social worker and the IFPP workers were there.[3] When K.H. saw the workers, he turned and left. D.P. followed, spoke with him and returned to the apartment. She explained K.H. had come to see the children because he had suffered a death in the family the day before. Ten minutes later, K.H. came back to the apartment and the parents embraced. When the social worker offered her condolences to K.H., he looked confused. The social worker repeated what D.P. had

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[3] This occurred some time before mid-July 2011; the record does not say exactly when.

told her. K.H. said it was not true, but that his stepfather had passed away recently. K.H. denied living with D.P., but said "I can't stay away from her." He denied any past or current domestic violence and said he did not need domestic violence classes. Testifying about these events at trial, D.P. claimed she, K.H. and the children had planned to meet at a park in the apartment complex because K.H. had suffered "a death in the family a few days before." D.P. testified the social worker had given the parents permission to "have outings with the [children]" and denied K.H. had been living with her.

All along, the children had been reluctant to give the social worker any information. For example, when the social worker asked Brianna why the parents did not live together anymore, she replied they "never lived together." On June 15, Brianna apologized to the social worker for lying and said she wanted to tell the truth. Brianna explained D.P. " 'asks me to lie about [K.H.] not living there, but that's not true, he does.' " Brianna said she visited K.H. at D.P.'s home, generally while D.P. was there. Brianna stated the children stayed at the maternal grandmother's home most of the time. The maternal grandmother said the children lived with her, but when D.P. was upset with her, D.P. made the children go to D.P.'s home. Brianna heard the parents fighting and did not want to go to D.P.'s home. Brianna said she was afraid of D.P. and concerned that D.P. might hurt her. Brianna felt safer with the maternal grandmother.

On July 13, Brianna told the social worker that recently D.P. banged on the wall; D.P. " 'had a belt and yelled [at Brianna] why are you lying, why are you lying?' " Brianna related, " 'I was crying and I couldn't talk' " and " 'I couldn't breathe.' " K.H. was present. Brianna told the social worker, "whenever [D.P.] gets mad, it seems to get

worse. She used to yell at us but now she throws tantrums like a [six] year old." When the social worker asked whether Brianna thought D.P. would hurt Brianna, Brianna replied, " 'yes . . . because . . . she pounds on walls and yells.' " Brianna repeated that K.H. was always in D.P.'s home when Brianna was there, and she heard the parents arguing in another room.

By July 13, D.P. had attended five sessions of a domestic violence program. She had not responded to the social worker's numerous efforts to make contact over the previous several weeks. This lack of communication recurred for the rest of the case.

On July 15, the Agency filed new dependency petitions. The new petitions included the allegations of the original petitions, and added that the parents had not cooperated with voluntary services, and the section 360, subdivision (b), disposition had been unsuccessful in ameliorating the risk to the children. The court ordered the children detained with the maternal grandmother and voluntary services for D.P. The court ordered separate visits for the parents, supervised by someone other than the maternal grandmother, and ordered D.P. to stay away from the maternal grandmother's apartment. After the July 15 detention hearing, Brianna told Brian, " 'we don't have to lie anymore.' " Brian said " 'o.k.' "

On July 21, the social worker met D.P. at her apartment complex. D.P. said they could not meet in her apartment because the front door was being painted that day. She also said the locks had been changed. Later that day, the social worker learned from the apartment manager that the door was not being painted that day but had been painted two to three days earlier, and the locks had not been changed.

On August 3, D.P.'s domestic violence group leader reported D.P. was "highly 'codependent' and marked with 'high resistance' " but was meeting expectations, working on her anger with the maternal grandmother and "working through her obstina[cy] and resistance." D.P. saw no need for the Agency's involvement with the family and believed the maternal grandmother exaggerated problems.

On August 4, K.H. drank alcohol while in D.P.'s apartment and started an argument. She told him to leave and locked the door after him. K.H. tried to get back in the apartment to retrieve his pants, which contained his wallet and keys, and his other possessions. When K.H. began to kick in the door, D.P. called the police. K.H. left, but returned the next day. He tried to break into the apartment again and a neighbor called the police.

On August 11, the social worker asked D.P. if she had had any contact with K.H. D.P. said she had seen him in passing because his friends lived in the apartment complex. After the social worker mentioned a police report, D.P. acknowledged the events of August 4. D.P. said K.H. had been in her apartment because they were "trying to get along" and claimed she was "in the process" of obtaining a restraining order. On August 11, the court issued a temporary restraining order protecting D.P. and the children from K.H. K.H. could not be located and was never served.

On September 14, the children began psychotherapy with Susan Swartz. One month later, Swartz terminated therapy. She reported the children "seem[ed] to be really scared of [D.P.] due to her behavior." Brianna said she was frightened by D.P.'s anger and fearful that D.P. might kidnap her from the maternal grandmother's home. The

children said they did not want to go home. Swartz noted the children had "not expressed that they have experienced a lot of trauma due to [d]omestic violence." In Brianna's discharge summary, Swartz reported that Brianna had no memory of witnessing domestic violence and was unwilling to talk about it.[4] Swartz concluded Brianna "might be better served by a different therapist, who perhaps will have better luck at getting [her] to open up."

On September 14, the Agency filed amended petitions with additional counts. The amended petitions alleged the Agency gave D.P. referrals to domestic violence group sessions, but she was slow to begin the sessions. She was terminated from IFPP after failed attempts to engage her and failed home visits. K.H. failed to enroll in a domestic violence program.

By October 18, D.P. had completed 20 of the 26 sessions of her domestic violence program. She was "making good progress" and meeting her goals. In late October she began a parenting course. By the October 27 trial date, she had five more parenting sessions to complete. At trial, D.P. testified K.H. had not lived in her apartment at any time since February 11.

On October 27, the court entered true findings on the amended petitions (§§ 300, subd. (b), 360, subd. (c)). The court declared the children dependents (§ 360, subd. (d)) and, applying the clear and convincing evidence standard, ordered them removed from the parents' custody (§ 361, subd. (c)(1)) and placed with a relative. The court ordered

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4 Brian's discharge summary is not in the record.

reunification services and supervised visits for the parents, and gave the social worker discretion to expand visitation with the concurrence of the children's counsel.

DISCUSSION

At the dispositional hearing, the court was required to return the children to D.P. unless the Agency proved, by clear and convincing evidence, "[t]here is or would be a substantial danger to [the children's] physical health, safety, protection, or physical or emotional well-being" and there were no reasonable alternative means of protecting their physical health. (§ 361, subd. (c)(1).) " 'There must be clear and convincing evidence that removal is the only way to protect the child.' " (*In re A.S.* (2011) 202 Cal.App.4th 237, 247, quoting *In re N.M.* (2011) 197 Cal.App.4th 159, 170.) "The . . . minor need not have been actually harmed before removal is appropriate. The focus . . . is on averting harm to the child." (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, citations omitted, disapproved on another ground by *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) The court was entitled to consider D.P.'s past conduct and current situation and gauge whether she had progressed sufficiently to eliminate any risk. (*In re S.O.* (2002) 103 Cal.App.4th 453, 461; cf. *In re Jonathan R.* (1989) 211 Cal.App.3d 1214, 1221.) On appeal, D.P. has the burden of showing there is no substantial evidence justifying removal. (*In re Diamond H., supra,* at p. 1135; *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

" ' "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination

is not open to review on appeal." [Citations.]' [Citation] Thus, on appeal from a judgment required to be based upon clear and convincing evidence, 'the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.' [Citation.]" (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881, quoted in *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581.) "We do not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

D.P. contends the court erred by ordering the children removed from her custody and failing to consider whether there were reasonable alternatives that would protect the children's physical health. We conclude substantial evidence supports the court's express finding there would be a substantial danger to the children's emotional well-being if they were returned to D.P. Additionally, substantial evidence supports the conclusion that return would present a substantial danger to the children's physical health and there were no reasonable alternative means of protecting their physical health.

Because D.P. does not contest the true findings, she effectively acknowledges the following: the children were exposed to violent confrontations between the parents for years, placing the children at substantial risk of serious physical harm. D.P. refused the Agency's offer of voluntary services, but then agreed to accept the services; she then refused to sign a voluntary case plan. All the while, D.P. continued to allow K.H. to spend nights in the home. After the court ordered voluntary services, D.P. was slow to begin the domestic violence course to which the Agency had referred her, and she was

dismissed from IFPP after failed attempts to engage her and failed home visits. The court's order of voluntary services did not ameliorate the risk to the children.

D.P. relies on *In re Basilio T.* (1992) 4 Cal.App.4th 155 (*Basilio T.*), superseded by statute on another point as noted in *In re Lucero L.* (2000) 22 Cal.4th 1227, 1239-1242. In *Basilio T.*, this court reversed the removal order. (*Basilio T.*, *supra*, at p. 169.) The basis for that order was former section 361, subdivision (b)(1), which required a substantial danger to the child's physical health. (*Id.* at p. 170.) The statute at issue here, on the other hand, requires a substantial danger to the child's "physical health, safety, protection, or physical or emotional well-being." (§ 361, subd. (c)(1); but see *In re Isayah C.* (2004) 118 Cal.App.4th 684, 698.)[5] Furthermore, in *Basilio T.*, the only viable evidence comprised two incidents of domestic violence which "presumably occurred in or near the minors' presence." (*Basilio T.*, *supra*, at p. 171.) In the instant case, there are unchallenged true findings that the children were exposed to violent confrontations between the parents for years, and Brian intervened when he saw K.H. push D.P. Thus, D.P.'s contention that the children were not present during the domestic violence is incorrect. "[V]iolence in the same household where children are living . . . is a failure to

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[5] In *In re Isayah C.*, *supra*, 118 Cal.App.4th at p. 698, the court stated: "The case law, while not discussing the issue explicitly, appears to interpret paragraph (1) of section 361(c) to require a threat to physical safety, not merely emotional well-being, in order to justify removal. [Citations.] We concur in this interpretation, which is bolstered by the existence of a separate provision within section 361(c) governing removal based on emotional harm, which requires 'severe emotional damage, as indicated by extreme anxiety, depression, withdrawal, or untoward aggressive behavior . . . .' (§ 361(c)(3).) If 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.]"

protect [the children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it." (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194.) Domestic violence places children at risk of emotional injury and at substantial risk of suffering serious physical harm or illness. (*In re Guardianship of Simpson* (1998) 67 Cal.App.4th 914, 940, called into doubt on another ground in *In re Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1134, fn. 17; *In re Sylvia R.* (1997) 55 Cal.App.4th 559, 562.)

D.P. argues the factors the court cited in this case did not justify the removal order. The court "put a lot of weight" on the statement of Swartz, the children's therapist, that the children's issues related to "basic parenting." The court also mentioned the several other factors: Swartz's statements that the children seemed frightened by D.P.'s behavior; the children's report to Swartz that D.P. was unreliable and unpredictable and did not provide structure; the occasion when D.P. took the children out of school and had them walk several miles home in the heat; Brianna's "other fears"; and the children's statements that they felt safe with the maternal grandmother and did not want to go home. Whether these particular factors constitute substantial evidence supporting the removal order is not the issue. "[W]e review the lower court's ruling, not its reasoning; we may affirm that ruling if it was correct on any ground." (*In re Natasha A.* (1996) 42 Cal.App.4th 28, 38.)

D.P. contends her difficulties scheduling meetings and cooperating with the case plan, resulting from her work schedule and transportation problems,[6] were not a ground

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6 D.P. worked at least 40 hours a week. The social worker offered her a bus pass, but D.P. said the nearest bus stop was a long way from her home. D.P. did not own a vehicle, so she tried "to arrange rides" until she could afford to buy a car.

for removal. Neither transportation issues nor D.P.'s job explains her failure to communicate with the Agency; her failure to complete a parenting course, which she could have done at home; her disobedience of the court's orders that she not supervise or attend K.H.'s visits with the children; her exposure of the children to her own out-of-control behavior; her dishonesty with the Agency; and her demands that the children lie to the social worker. D.P. eventually began attending domestic violence classes far from her home, but does not explain why her work schedule and transportation problems were no longer an obstacle.

D.P. asserts the removal order was based on suspicion and speculation that K.H. lived with her and visited the children in her home. The unchallenged February 2011 true findings included the finding that although the parents did not live together, D.P. allowed K.H. to spend nights in the home. At trial, D.P. testified that in February 2011, when she entered into the voluntary agreement, K.H. "would stop by [her apartment] every now and then." The parents had had an intermittent relationship for years; as late as August they were behaving as if they lived together; and Brianna and the maternal grandmother said they did. In any case, it was clear that D.P. allowed K.H. to visit the children both in her presence and without supervision, in contravention of the court's visitation orders.

D.P. did not complete domestic violence treatment or a parenting course. She lied about her contact with K.H. and told the children to lie. The violence in this case was accompanied by conduct on D.P.'s part that created an additional substantial danger to the children's physical health, such as leaving the children in a locked car for hours. Just a few months before trial, D.P. behaved in a verbally aggressive and physically threatening

manner toward Brianna, yelling and banging on the wall while holding a belt. This so frightened Brianna that she was unable to talk or breathe. D.P.'s fits of rage were escalating and the children's therapist reported that D.P.'s behavior scared the children.

D.P. suggests the court erred by failing to find expressly that there were no reasonable alternatives to removal. Any error was harmless because it is not reasonably probable that an express finding would have resulted in D.P's retention of custody. (See *In re Diamond H.*, *supra*, 82 Cal.App.4th at p. 1137 [failure to state factual basis for removal was harmless because it was not reasonably probable a statement would have favored continued parental custody].) D.P. also proposes several alternatives to removal: the children could talk to their teachers or go to the maternal grandmother's apartment if necessary; the social worker could make "random weekly unannounced visits;" the court could order K.H. to stay away from D.P.'s apartment and have contact with the children only when supervised by someone other than D.P. These proposals ignore the history of this case. The Agency attempted two voluntary case plans. D.P. did not complete either plan. She disobeyed visitation orders and directed the children to lie to the Agency. She took no responsibility for the Agency's involvement and placed blame on the maternal grandmother.

Substantial evidence supports the removal order.

DISPOSITION

The order is affirmed.

BENKE, Acting P. J.

WE CONCUR:

HALLER, J.

O'ROURKE, J.