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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re G.B. et al., Persons Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

C.P.,

Defendant and Appellant.

D070368

(Super. Ct. No. J512939B-D)

APPEAL from an order of the Superior Court of San Diego County, Laura J.

Birkmeyer, Judge. Affirmed.

Suzanne F. Evans, under appointment by the Court of Appeal, for Defendant and
Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Patrice Plattner-Grainer, Deputy County Counsel, for Plaintiff and Respondent.

C.P. (Mother) appeals an order removing her three minor children, G.B., I.P. and A.P., from her physical custody pursuant to a supplemental petition under Welfare and Institutions Code section 387,¹ arguing insufficient evidence supported the order. Mother asserts the children were not at risk while in her care because they were happy, healthy and doing well in school, despite her continued use of controlled substances and failure to follow orders of the court designed to protect the children. We conclude sufficient evidence supports the court's findings and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and I.C. (Father) have three children together, C.P.,² I.P., and A.P. Mother also has a fourth child, G.B., whom Father raised as a stepchild. Mother and Father have a long history of domestic violence dating back at least 18 years.

Over the years, the San Diego County Health and Human Services Agency (the Agency) has received numerous referrals regarding Mother, Father and the children, most of which involved domestic violence, drug abuse and neglect. Although the majority were closed as inconclusive or unfounded, two of the previous referrals were

¹ All further statutory references are to the Welfare and Institution Code unless otherwise indicated.

² C.P. is no longer a minor and thus not subject to the juvenile court's jurisdiction. We discuss C.P. only to the extent relevant to the other children.

substantiated. In 1999, before I.P. and A.P. were born, Mother was arrested for prostitution, possession, and use of cocaine and G.B. and C.P. were detained based on parental absence and severe neglect. Both were returned after Mother completed her case plan. In 2002, the Agency substantiated an allegation of neglect after Mother left G.B. with a friend and did not return to pick him up or make other arrangements for his care.

The present case began in April 2015, when G.B. was 16, I.P. was 12, and A.P. was 10. Mother and Father got into a dispute in the presence of I.P., as well as the older sibling, C.P., during which Father pulled Mother's hair, punched her and strangled her. Mother eventually got away and flagged down a police officer who was driving by. After other officers arrived, Mother told them another man had assaulted her but eventually admitted it was Father.

Mother blamed C.P. for instigating the fight and kicked C.P. and Father out of the family home but they returned later that evening to gather some belongings. After I.P. let them in, Father went into Mother's bedroom and began assaulting her. I.P. and C.P. heard Mother screaming, went into the bedroom and found Father strangling Mother. They were able to push him off but Mother sustained serious injuries, including a fractured eye socket that required surgery. The Agency received two separate referrals as a result of the incident and when the social worker spoke with Father, he stated he was on methamphetamine, had not slept in five days and had been having an out-of-body experience during the assault.

Mother left the hospital the next day against medical advice, stating she was more afraid of child protective services than Father and would go on the run with her children

if necessary. The Agency contacted Mother and, after initially asserting it was not necessary, she accepted the Agency's help in securing a restraining order against Father. The Agency offered to help her locate a shelter, as there was reason to believe Father was staying with family members in a nearby home, but she refused. She did change the locks on her home, however, and also signed a safety plan wherein she agreed not to allow Father to return to the home and to call the police if he did show up or if she became aware of his whereabouts.

Despite the safety plan, Mother allowed Father to return to the home and, a few days later, they engaged in another altercation during which A.P. saw Father punch Mother twice in the face. Mother and the three minor children went outside, Father came outside after Mother and Mother and the children got into the car and began honking the horn to draw attention to the situation. C.P. approached the car to calm Mother down, but Mother drove the car towards her and she had to jump out of the way to avoid being hit. Mother then went inside, got a large knife from the kitchen and began looking for Father, who hid in a closet until the police arrived. Mother made statements to the police indicating she intended to harm herself, and C.P. reported Mother had also made similar statements to her earlier in the day. The police arrested Father based on an outstanding warrant related to the previous incident and transported Mother to the hospital on an involuntary psychiatric hold for endangerment to herself and others. The Agency received another referral as a result of the incident and it indicated both parents were under the influence of methamphetamines.

The Agency went to the home the next day. Two of the children, G.B. and I.P., answered the door and stated Mother was home but was sleeping and unable to speak with the social worker. They said they had stayed home from school, that they felt it was their responsibility to protect Mother from Father and they would do so in the future. The social worker also talked to C.P. and she reported seeing methamphetamine pipes in the house over the years, including just prior to the most recent incident, but indicated both Mother and Father always denied the pipes were theirs and blamed each other.

Two days later, the Agency filed petitions on behalf of G.B., I.P. and A.P. The Agency alleged the children were subject to the juvenile court's jurisdiction under section 300, subdivision (b) based on the ongoing domestic violence. On April 23, 2015, the court made a prima facie finding as to G.B., I.P. and A.P. and detained the children outside of the home with liberal supervised visitation for Mother. Thereafter, the court made true findings on the petitions and placed the children with Mother on the conditions she obey the terms of the criminal protective order against Father, follow her case plan, obey all court orders, abstain from alcohol and drug use unless she provided the Agency with a prescription for medical marijuana and, in the event she did use marijuana subject to a medical card, that she not do so around the children.

On May 26, 2015, Mother reported to drug testing at the Agency's request but claimed she had "bladder anxiety" and failed to complete the test. Between the detention of the children and the six-month review hearing, the Agency asked Mother to drug test on six occasions but Mother only tested twice and both tests were positive for marijuana. Mother told the Agency she only smoked marijuana outside of the home and under the

advice of her doctor to relieve pain from the injuries she sustained from Father. In terms of services, Mother attended some domestic violence classes but, as of the six-month review, she had stopped going and refused to continue, stating she was the victim and did not need services.

At a review hearing on November 9, 2015, Mother indicated members of Father's family were harassing her and the children. The court expressed concerns regarding the safety of the children in light of the harassment and Mother's continued substance abuse and failure to engage in services. As the court was ordering Mother to meet with the social worker directly after the hearing to provide medical information and submit to a drug test, Mother suddenly fell ill and was taken to the hospital via ambulance. The court continued the hearing to November 19, ordered Mother to submit to immediate and ongoing drug testing—noting it was imperative Mother do so given her appearance and demeanor in the courtroom—and ordered the Agency to obtain additional information regarding calls to the police from the family home, Mother's medical care, the children's attendance and performance at school and to conduct regular unannounced visits.

Mother was released from the hospital later that evening and the Agency made an unannounced home visit the next day. Mother was disoriented and said she had forgotten her discharge paperwork but remembered something about anxiety or panic attacks. Mother refused to drug test but said she would go the next day. Mother again asserted Father's brother was harassing the children, and A.P. in particular, on their way to school and disclosed he had recently punched Mother in the face. The Agency provided Mother with bus passes so the children could ride the bus to school in order to avoid Father's

family members. Mother did drug test the next day and the test was positive for marijuana.

At the continued review hearing on November 19, the children's counsel expressed concerns about Mother's continued lack of compliance with drug testing and services, as well as the continued threats and harassment from Father's family. The court also expressed concern about whether the children, particularly the two younger children, were receiving adequate care and supervision and explained it was imperative Mother's substance abuse, Mother's failure to comply with the court's orders, and the threats from Father's family be addressed immediately. The court continued the review hearing once more, ordered Mother to supply a list of all medications she was taking—prescription or otherwise—to the social worker by the following day and, again, ordered Mother comply with all drug testing and the Agency to conduct unannounced visits.

The Agency went to the home on December 7 and 10 to request drug testing but Mother was not present on either occasion. On December 11, Mother indicated she had been out of town for a few days and had left the children in the care of C.P. She submitted to a drug test that day at the Agency's request.

The Agency did not have the results of Mother's December 11 drug test by the next review hearing on December 15, but did provide a list of recent "calls for service" from the home to the police. The court was concerned by the number of calls and the social worker explained that her impression was that the children were relying on the police for assistance in resolving disputes because Mother was failing to parent. However, the social worker also stated the children appeared to be safe, adequately cared

for and doing well in school. The court explained it did not want to remove the children, but Mother was essentially thumbing her nose at the Agency and conditions remained that put the children at risk, including substance abuse, threats of violence and an obvious lack of supervision, particularly with respect to 10-year-old A.P. The court also noted Mother's demeanor in the courtroom was concerning. The court ordered Mother to comply with all drug testing, including testing that day, and not to leave the children in the care of C.P., and ordered the Agency to make weekly unannounced visits and to inform the court immediately if the children were not properly supervised, at which point the court indicated it would remove the children.

The Agency made an unannounced visit the next day, and Mother failed to answer the door despite multiple attempts. The social worker looked through a window and observed all four burners on the stove were lit, continued to knock on the door over the course of the next several hours and also called the police and fire department. The police and fire department arrived and yelled "SDPD" through a back bedroom window but Mother still did not respond. Eventually, I.P., who had been out, returned, let the police and fire department in and woke Mother and A.P., who claimed to have been sleeping in the back bedroom. The following day, the Agency received Mother's test results from the December 11 test and learned she had tested positive for amphetamine and methamphetamine in addition to marijuana.

On December 18, 2015, the Agency filed supplemental petitions for G.B., I.P. and A.P. under section 387 alleging the prior disposition had not been effective. The petitions alleged Mother stopped attending services, tested positive for marijuana,

methamphetamine and amphetamine and was uncooperative with the Agency's attempts to ensure the children were safe. On December 21, 2015, the court found the Agency had made a prima facie showing on the petitions and detained the children. Upon intake on December 22, 2015, the Agency drug tested A.P. and the results were positive for marijuana.

As of the Agency's February 18, 2016 report, Mother had not made any attempts to arrange visitation with any of the children despite their continual requests to see her.³ Also in February, the Agency observed a post on Mother's public Facebook page advertising she had an abundance of marijuana and alcohol in her home and a reply post listing her home address. Mother continued to refuse to participate in services, changed her phone number and refused to provide the new number to the Agency.

After holding a two-day trial on March 9 and March 14, 2016, the court found, by clear and convincing evidence, the prior disposition was not effective for the reasons stated in the petitions, there would be a substantial danger to the health, safety, protection or well-being of the children if they were returned to Mother's care and there was no reasonable means by which the court could protect the children absent removal. The court explained its reasoning was not based on Mother's lifestyle choices with respect to marijuana but rather on the substantial risk of harm to the children due to the unaddressed issues with substance abuse and domestic violence and Mother's demonstrated and

³ The record does indicate G.B. was visiting the family home, where Mother resided, on a regular basis in violation of the court's orders. However, his contact with Mother during such visits was limited as he went to the home primarily in order to stay in the neighborhood where his friends lived.

continued unwillingness to comply with orders of the court designed to protect the children. The court thus removed the children from Mother's custody pursuant to section 361, subdivision (c), placed the children outside of the home and awarded Mother supervised visitation and limited educational rights.

DISCUSSION

On appeal, Mother challenges the sufficiency of the evidence supporting the court's removal order.

A. *Underlying Legal Principles and Standard of Review*

The Agency may file a section 387 "supplemental" petition when the juvenile court has already assumed jurisdiction over a minor but the previous disposition has not been effective in protecting the child. (§ 387.) The standard for removal of a child from the physical custody of parent or guardian pursuant to a supplemental petition under section 387 is set forth in section 361, subdivision (c) and is the same as an original petition pursuant to section 300. (*Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1077.) The agency must show by clear and convincing evidence there "would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor" and there are no other "reasonable means by which the minor's physical health can be protected" absent removal. (§ 361, subd. (c)(1); *Kimberly R.*, at p. 1077.) As the focus of the statute is on averting harm to the child or children, the Agency is not required to show actual harm in order to establish removal is appropriate. (*In re F.S.* (2016) 243 Cal.App.4th 799, 813 (*F.S.*.)

We review challenges to the sufficiency of evidence supporting the court's findings on a supplemental petition pursuant to section 387 for substantial evidence. (*F.S., supra*, 243 Cal.App.4th at p. 811.) We affirm the orders so long as there is substantial evidence, when viewing the record as a whole, from which a reasonable trier of fact could make the findings in question. (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022; *In re Drake M.* (2012) 211 Cal.App.4th 754, 763 (*Drake M.*)) We do not reweigh the evidence or consider whether the court could have drawn a different conclusion. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) The appellant bears the burden on demonstrating a lack of sufficiently substantial evidence. (*Ibid.*; *F.S.*, at p. 812.)

B. Substantial Evidence Supports the Finding the Previous Disposition Had Not Been Effective

We first address the evidence supporting the court's finding the previous disposition had not been effective based on the allegations in the supplemental petitions.

The supplemental petitions were the same for all three children and alleged Mother had: (1) stopped attending court mandated services; (2) refused to drug test on several occasions despite the court ordering random drug testing at the Agency's discretion; (3) tested positive for marijuana, amphetamine and methamphetamine when she did drug test; (4) failed to respond to numerous attempts by the Agency and law enforcement officers over the course of several hours while all four gas burners on the stove in the home were lit; and (5) been uncooperative with court orders and the Agency instructions such that the Agency was unable to adequately supervise the children's placement with her. Sufficient evidence supports each of these allegations.

First, with respect to services, Mother had attended some domestic violence classes but had also missed several and had subsequently refused to continue. She had not substantially participated in any other services. Mother initially complained the Agency had not provided her with adequate bus passes to get to services, but the court noted Mother's credibility was questionable and she continued to refuse services even after the Agency ensured she had bus passes. At the trial on March 14, the court noted Mother shook her head and mouthed "no" whenever the court discussed services indicating her refusal continued even despite the real possibility the children would be removed as a result. Thus, the court correctly concluded Mother had failed to follow her case plan, had failed to complete services and refused to engage in services going forward.

Next, with respect to drug testing, the record is replete with instances in which Mother refused to test or simply neglected to show up for a test. When Mother did drug test, she was consistently positive for marijuana. Mother admitted using marijuana but claimed it was for medicinal purposes; yet she failed to provide a medical marijuana card or medical records indicating prescribed use, and was thereby in direct violation of the court's orders. Further, the evidence indicated her use was, at least in part, recreational. In addition, there were also consistent allegations Mother and Father used methamphetamine and, in December 2015, after leaving the children in the care of C.P. for several days, Mother also tested positive for amphetamine and methamphetamine.

Finally, as the court noted in March, Mother remained insolent throughout her dealings with the Agency and the court and consistently refused to abide by the court's

orders aimed at protecting the children. In particular, the court had ordered Mother to make the children available to the Agency at any time and Mother consistently refused to answer the door, instructed the children not to answer the door, and at one point left town for several days without making the Agency aware of her whereabouts or the children's. Further, on the court-mandated unannounced visit precipitating the supplemental petitions, Mother refused to answer the door even after the police arrived. This was particularly problematic as the court had previously expressed concerns over the placement of the children with Mother and had only allowed the placement to continue based on close supervision by the social worker via regular unannounced visits.

Based on the foregoing, we conclude sufficient evidence supported the court sustaining the allegations in the section 387 supplemental petitions and finding the previous disposition had not been effective.

C. Substantial Evidence Supports the Findings the Children Were at Risk and Removal Was the Only Reasonable Means to Protect Them

We next address whether the evidence supports the court's findings supporting the removal order, that there would be substantial danger to the children absent removal and that there were no reasonable means to protect them other than removal.

A home 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." (§ 300.2.) Here, Mother had a long history of substance abuse, as well as domestic violence that often occurred in conjunction with the substance abuse. As discussed, *ante*, she was unable to provide evidence her use of marijuana was for medicinal as opposed to

recreational purposes and, more recently, she tested positive for methamphetamine and amphetamine as well. Although she acknowledged methamphetamine made Father act violently, she offers no justification for her own use.⁴

Mother asserts the children were happy, healthy and unaffected by her drug use, but the evidence indicates otherwise. A.P., 10 years old at the time, tested positive for marijuana immediately after being taken into protective custody, indicating she had been exposed to marijuana while in Mother's care, and G.B. also admitted to using marijuana on a regular basis. Mother asserts the court could have precluded further exposure by ordering Mother to smoke marijuana only outside of the home but fails to acknowledge the court had ordered her not to use marijuana, or any other drugs, around the children long before A.P. tested positive. In addition, C.P. reported seeing a methamphetamine pipe in the home on several occasions, and Mother admits the use of methamphetamine contributed to violence in the home. Finally, Mother's continued use of substances despite numerous court orders precluding the same indicates she was either unwilling or unable to refrain from use even when faced with the possibility of losing custody of her children.

In addition to the substance abuse issues, Mother also had a long history of domestic violence, a serious concern also placing the children at risk of harm. (See, e.g., *Guardianship of Simpson* (1998) 67 Cal.App.4th 914, 938 [domestic violence is a serious

⁴ Mother originally asserted this court could not consider the December 11, 2015, drug test results indicating amphetamine and methamphetamine use but now concedes they are properly part of the record on appeal.

concern relevant to children's welfare]; *In re Benjamin D.* (1991) 227 Cal.App.3d 1464, 1470, fn. 5 [spousal abuse is detrimental to children].) Mother asserts Father was in jail and she had no interest continuing a relationship with him such that there was no ongoing risk of domestic violence. However, the court did not find Mother credible, Father was scheduled to be released in the coming months and there was evidence Mother had previously allowed him back into the home despite agreeing not to do so in the safety plan. Further, members of Father's family living nearby also continued to put the children at risk. While we recognize Mother was primarily the victim here with respect to the violence inflicted by Father and, to a lesser extent, his family, she also placed the children at risk by allowing Father back into the home, chasing him with a knife in their presence and failing to adequately supervise them in light of the ongoing threats.

Despite these very serious concerns, the court initially allowed the children to remain in Mother's care, attempting to address the risks through services and Agency oversight. Unfortunately, Mother failed to comply with court orders, frequently failed to drug test and consistently tested positive when she did, failed to participate in services, and precluded the Agency, and ultimately the police as well, from conducting welfare checks. Mother's refusal to permit the Agency to conduct court-ordered unannounced visits was particularly problematic, and appears to be the final impetus for the supplemental petitions, as it precluded the Agency from ensuring the children were safe and properly supervised while in Mother's custody. Further, once the children were placed in protective custody in December, Mother did not attempt to arrange visitation, despite their requests and, instead, continued abusing at least alcohol and marijuana.

Finally, at trial, Mother continued to demonstrate her unwillingness to follow the court's orders by making inappropriate gestures and shaking her head "no" when the court made its ruling.

While there is no requirement Mother agree with the court or the process, her demonstrated refusal to follow court orders, along with her continued substance abuse and refusal to visit the children, indicated she was not willing or able to take the steps necessary to protect them from the risks identified by the court. As such, the court properly concluded the children were at risk and removal was the only reasonable means to protect them.

Mother asserts the evidence here establishes only substance use and that it must establish substance abuse in order to support removal. Mother relies on a number of cases indicating a finding of substance abuse is necessary to remove a child under section 300, subdivision (b) based on an the inability of a parent or caretaker to care for the child due to substance abuse, but that is not the finding at issue here. (See, e.g., *Drake M.*, *supra*, 211 Cal.App.4th at p. 764; *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1001; *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1218.) Instead, here, the court removed the children after finding the previous disposition was not effective, they remained at risk and removal was the only reasonable means to protect them.

Moreover, even if a finding of substance abuse were necessary, the evidence here would support such a finding. Evidence indicating the individual meets the definition set forth in the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, which includes use that leads to significant impairment

or distress as demonstrated by recurrent legal, social or interpersonal problems, supports a finding of substance abuse. (*Drake M., supra*, 211 Cal.App.4th at p. 766.) Here, methamphetamine use contributed to the domestic violence incidents between Mother and Father, Mother nevertheless used methamphetamine, and Mother's continued use of substances in the presence of at least the youngest child and in violation of the court's orders impeded her ability to resolve the court's concerns regarding the safety of the children. A professional diagnosis is not necessary (*Ibid.*) and Mother's reliance on the absence of one here is disingenuous as she failed to make herself available for a court-ordered substance abuse evaluation.

Finally, Mother's reliance on the decisions in *In re T.W.* (2013) 214 Cal.App.4th 1154, 1161 (*T.W.*) and *F.S. supra*, 243 Cal.App.4th 799, is similarly misplaced. In both cases, the reviewing courts affirmed removal orders based on fact patterns containing more similarities than differences with respect to the case at hand. (*T.W.*, at p. 1170; *F.S.*, at p. 808.) Regardless, neither decision indicates the factual scenario before the court was the only scenario under which removal would be appropriate such that any differences are not necessarily indicative of a deficiency in the evidence here. (*T.W.*, *supra*, 214 Cal.App.4th 1154; *F.S.*, *supra*, 243 Cal.App.4th 799.)

In *T.W.*, the court properly removed a child after making true findings on a supplemental petition under section 387 indicating the previous placement of T.W., a minor, with her mother was ineffective at protecting her because her mother continued to permit her father, who had sexually abused another child, into the home despite the court ordering her not to do so. (*T.W.*, *supra*, 214 Cal.App.4th at pp. 1158, 1163.) Similarly,

here, Mother permitted Father back into the home leading to a second domestic violence incident. Although the supplemental petitions for removal was not based on that incident, it is significant insofar as Mother thereafter refused to cooperate with the court or the Agency in ensuring the protection of the children, just as the mother in *T.W.* had done, leading to the need to remove the children. (*Ibid.*)

In *F.S.*, the appellate court also affirmed the trial court's orders removing a child based on a supplemental petition under section 387. (*F.S.*, *supra*, 243 Cal.App.4th at p. 813.) Although the record indicated the mother there had been meeting F.S.'s basic needs, there was also evidence indicating she placed F.S. at risk by taking him to the father's apartment, engaging in a violent confrontation with the father and then fleeing the state with F.S. (*Id.* at pp. 802-804.) The appellate court specifically noted it was not permitted to consider whether there was any evidence from which the trial court could have determined F.S. was not at risk, but rather was tasked only with determining whether there was substantial evidence to support the conclusion the court did draw. (*Id.* at p. 813.) The court then concluded sufficient evidence—including the mother's demonstrated willingness to make false statements to the agency and the police, her noncompliance with the court's orders and her failure to appear despite being aware of an outstanding warrant—supported the finding there were no reasonable means to protect F.S. absent removal. (*Id.* at p. 813.) Although Mother here has not attempted to flee with the children, she has threatened to do so in the past, and has demonstrated a similar willingness to lie and recalcitrance to follow the court's orders.

For the reasons set forth herein, we conclude substantial evidence supports the findings the children would be harmed absent removal and there was no reasonable alternative to removal and, thus, the order removing the children from Mother's custody.

DISPOSITION

The order is affirmed.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.