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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

K.R. et al.,

Petitioners,

v.

THE SUPERIOR COURT OF  
SAN BERNARDINO COUNTY,

Respondent;

SAN BERNARDINO COUNTY  
CHILDREN AND FAMILY SERVICES,

Real Party in Interest.

E054807

(Super.Ct.No. J232226 & J230415)

OPINION

ORIGINAL PROCEEDING; petition for extraordinary writ. Barbara A.

Buchholz, Judge. Petitions denied.

Valerie M. Ross for Petitioner K.R.

Allen S. Remes for Petitioner J.P.

No appearance for Respondent.

No appearance for Minors.

Jean-Rene Basle, County Counsel, Dawn M. Messer and Svetlana Kauper, Deputy County Counsel, for Real Party in Interest.

Petitioners K.R. (Mother) and J.P. (Father) filed petitions for extraordinary writ pursuant to California Rules of Court, rule 8.452. Mother challenges the juvenile court's order terminating her reunification services and setting a hearing pursuant to Welfare and Institutions Code section 366.26<sup>1</sup> as to her two daughters, D.P. (born 2007), and M.G. (born 2009). Mother argues the juvenile court abused its discretion when it determined not to return the children to her. According to Mother, substantial evidence does not support the juvenile court's finding the children would be substantially at risk if returned to Mother's custody.

On due process grounds, Father seeks writ relief from the same order as to D.P. only, who is his biological child.<sup>2</sup> Because he believes the juvenile court unconstitutionally applied the wrong evidentiary standard, he argues the section 366.26 hearing should be vacated and D.P. should be placed in his custody, because he was never properly adjudicated an unfit parent.

### **FACTUAL AND PROCEDURAL HISTORY**

Dependency proceedings involving Mother and Father began more than three years ago on August 31, 2007, when the Riverside County Department of Public Social

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

<sup>2</sup> The social worker indicated Father was named on D.P.'s birth certificate. The court acknowledged Father's biological relationship to D.P. at the November 15, 2007, jurisdiction hearing.

Services (DPSS) filed a dependency petition under subdivision (b) of section 300. The petition alleged that Mother, a 16-year-old minor ward living in a probation group home for young mothers, had neglected the health and safety of her infant daughter, D.P.<sup>3</sup> D.P. was born prematurely and needed an apnea monitor attached to her while she was sleeping. Mother became frustrated, detached D.P.'s apnea monitor, and threw it against the wall. When emergency medical services were dispatched to the home, Mother refused to allow them to evaluate D.P. It was further alleged Mother displayed a limited ability to supervise, care for, and protect the child. Mother's probation officer and staff at Mother's group home expressed concern about D.P.'s safety, because Mother was easily frustrated to the point of anger toward the baby, and lacked the maturity to properly care for an infant with special needs. The probation officer also indicated Mother was in violation of her probation because she was not attending school. The social worker concluded D.P. could not be returned to Mother's care because of her immaturity and poor choices, which put the child at risk.

An amended petition filed September 4, 2007, alleged Father was not a member of the child's household, had not provided any support for the child, had a limited ability to parent the child, and lacked knowledge necessary to care for the child's special medical needs. According to the social worker, Father was 15 years old, lived with the paternal grandmother, and was attending special education classes in the tenth grade because of developmental delays. Father did indicate a willingness to participate in services and

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<sup>3</sup> Mother told the social worker she was on probation for kicking a police officer.

assume custody and care of D.P. with the help of the paternal grandmother. He also indicated he worked side jobs and earned about \$120 to \$150 per week. However, the social worker said D.P. could not be placed with Father, because he had not been trained to care for D.P.'s medical needs. As a result, D.P. was placed in a foster home that was prepared to care for a medically fragile infant.

D.P. was formally detained on September 4, 2007. The court ordered reunification services and visitation for the parents. At the jurisdiction/disposition hearing held November 15, 2007, the juvenile court found D.P. came within subdivision (b) of section 300, and there was a substantial risk to the child's physical health and safety if returned to the parents' custody, so foster placement was necessary. The progress of the parents in alleviating or mitigating the causes necessitating placement was found to be adequate but incomplete. The court also approved a case plan, and continued reunification services and supervised visitation for the parents.

Following the disposition hearing, it was reported that both Mother and Father completed parenting classes and medical training necessary to care for a medically fragile infant. Both parents had regular visits with D.P., and the social worker said they were making positive progress toward reunification and "have shown a great leap in maturity." The social worker reported D.P. could not be placed with Father or have unsupervised visitation in his home, because he lived with the paternal grandmother, who had a documented history of child neglect. Both parents said they would like D.P. to reside with Mother, who was living in a supportive foster home, and the social worker was in

favor of this placement. However, to reduce stress to D.P., the social worker recommended six more months of services and a careful transition to Mother's custody.

At the six-month review hearing on May 12, 2008, the juvenile court found by a preponderance of the evidence that return to the custody of the parents would create a substantial risk of detriment to the physical and emotional safety of D.P. Although the court concluded continued placement outside the home of the parents was necessary, it found a substantial probability D.P. could be returned to the custody of the parents by the next hearing. The court concluded the parents' progress toward overcoming the problems that led to removal was adequate but incomplete. Reunification services and visitation were continued.

On July 1, 2008, D.P. was placed in the same foster home as Mother. Mother was attending high school and participating in family reunification and maintenance services. Her parenting skills were steadily improving. D.P. appeared to be bonded to Mother and the foster mother. Although slightly delayed, D.P. was doing well and was no longer considered medically fragile. During this reporting period, however, there were continued concerns about Mother's maturity level, poor decision making, and lack of impulse control. She had been suspended twice from school for talking back to a teacher, and fighting with a new boyfriend on campus.

During this reporting period, Father was attending high school but made a few inappropriate calls to Mother, and was showing signs of depression and stress over his relationship with Mother and his inability to find a job. As a result, he was referred to counseling as part of his case plan. He consistently participated in supervised visitation,

and D.P. appeared to be bonded to him. However, the social worker indicated D.P. would be at risk of neglect if placed with Father for several reasons. These included his young age, maturity level, signs of stress and depression, his inappropriate telephone calls to Mother, his inability to support D.P., and his living circumstances. He was still living with the maternal grandmother, who had a documented history of child neglect.

At the 12-month review hearing on October 28, 2008, the court found Mother's progress was satisfactory and placed the matter in family maintenance status. Father's progress was found to be adequate but incomplete. Because Father's circumstances had not changed significantly, the court found returning D.P. to Father's custody would create a substantial risk of detriment to her safety and physical or emotional health. His reunification services and visitation were continued. Increased visitation was authorized for Father, including eventual overnight and weekend visitation supervised at the home of a paternal aunt.

During the next review period, the social worker reported Mother was participating in some services, but failing three classes in school, and was at risk for not graduating by age 19. The social worker continued to have concerns about Mother's maturity level, lack of impulse control, emotionally poor decision making, and her inability to provide the basics for D.P. if dependency was terminated. Father did not begin counseling as required by his case plan and told the social worker he felt he did not need counseling. Father's supervised visits with D.P. were consistent, and she appeared bonded to him. However, Father's circumstances had not changed significantly, so placement outside his home was still necessary.

The next review hearing, on March 11, 2009, was held pursuant to section 364 as to Mother, because she was in family maintenance status. As to Father, March 11, 2009, was his 18-month review hearing under section 366.22. At that time, Mother was allowed to retain custody of D.P. under a family maintenance plan in the same foster home. The dependency was not terminated, because the juvenile court concluded the conditions that justified the assumption of jurisdiction still existed or were likely to exist if supervision was withdrawn. As to Father, the court terminated his reunification services and concluded his progress was adequate but still incomplete. In addition, the court concluded custody of D.P. by Father would create a substantial risk of detriment to her safety. However, the court authorized increased visitation for Father and ordered DPSS to provide counseling for Mother and Father.

After the review hearing on March 11, 2009, Mother and D.P. had to be moved to a new placement at the request of the foster parents because of ongoing problems with Mother's negative behaviors. Mother continued to display impulse control and anger management issues and failed to take responsibility for her actions. The foster parents reported Mother had tantrums, was "rough" with D.P. when she tossed her into her crib while upset, and did not consistently administer D.P.'s prescribed daily nebulizer treatments to prevent asthma attacks. Mother was also pregnant again but no longer had contact with the alleged father. Although Mother was attending high school, she had not passed the exit examination and would be unable to graduate by age 19, so she would need adult education classes to obtain a diploma. During this time, the social worker developed an emancipation plan because Mother turned 18. However, the social worker

had serious concerns about emancipation, because Mother had over two years of services, and there was still no way to ensure D.P.'s safety while in Mother's care without DPSS supervision. In addition, it was clear Mother would need a great deal of assistance to transition into independent living. Father continued regular visitation with D.P., including overnight visits under the supervision of the paternal aunt. However, he failed to follow through with counseling services. Because his circumstances had not changed significantly, he was still not a placement option for D.P.

At the section 364 review hearing on September 9, 2009, the court made a finding that the conditions that justified an initial assumption of jurisdiction under section 300 still existed or were likely to exist if supervision was withdrawn. Mother was once again allowed to maintain custody of D.P. under a family maintenance plan, with family counseling for the parents provided through DPSS.

Mother's second daughter, M.G., was born in October 2009. On December 17, 2009, San Bernardino County's Department of Children and Family Services (CFS) filed a new petition as to M.G. pursuant to subdivisions (b) and (g) of section 300. As to D.P., a subsequent petition was filed by DPSS in Riverside County alleging new facts as a basis for jurisdiction under section 300. Although the record does not include a copy of the subsequent petition filed by DPSS in Riverside County, it is apparent that both new petitions alleged Mother was arrested on December 15, 2009, for unlawful corporal punishment of D.P. CFS alleged that on December 14, 2009, Mother struck D.P. with the back of her hand resulting in bruising, swelling, and redness in and around D.P.'s left

eye. The record also indicates the petition filed by DPSS included allegations against Father.

On December 17, 2009, the juvenile court in San Bernardino found there was a prima facie case to detain M.G. due to a substantial danger to her physical and emotional health. Reunification services and supervised visitation were ordered for Mother. On December 21, 2009, the juvenile court in Riverside found there was a prima facie case for detention of D.P. from the parents. The court also concluded custody by the parents would create a substantial danger to the physical and emotional health of D.P. Reunification services and supervised visitation were ordered for both Mother and Father. The children were placed together in a foster home.

During an investigation of the child abuse allegations, the social worker for CFS learned Mother had been emancipated as a dependent, but she and the two children, D.P. and M.G., were still living in the home with Mother's former foster family. The foster mother told the social worker she had been using her computer, which was near Mother's bedroom, when she heard Mother yell at D.P. Immediately thereafter, she heard a thump and then D.P. began to cry. D.P.'s cheek was red, and Mother admitted she hit her. Mother told the social worker a different story, but the social worker called police because she did not believe Mother's explanation for the bruising to D.P.'s face. The responding officer took D.P. aside and asked her how the injury occurred, and she whispered, "my mommy did it." The officer decided to arrest Mother and took her to the police station, where she admitted she hit D.P. Later, the social worker went to the police station to speak with Mother, and Mother once again admitted hitting D.P.

After Mother's arrest, CFS determined M.G.'s father was unable or unwilling to care for her.<sup>4</sup> Although Father told CFS he was willing to take custody of D.P., she was not placed with him because of the same concerns expressed by the social worker in prior reports. The children were placed with foster parents who knew D.P. from prior placement.

On December 29, 2009, Mother pled guilty to willfully injuring D.P. On January 6, 2010, the children were placed with D.P.'s paternal aunt. On February 2, 2010, Mother was granted supervised probation for a period of 36 months subject to various terms and conditions, including 120 days in jail, participation in a counseling program, and completion of parenting classes and a child abuse prevention program. Mother violated her probation twice when she did not appear to serve her jail time and when she was not attending her child abuse class. However, her probation was reinstated.

On February 23, 2010, the juvenile court in San Bernardino found true some of the allegations in the amended petition as to M.G. Other allegations were stricken or dismissed. M.G. was declared a dependent of the court. Reunification services were ordered for the parents, but the court found Mother had not participated in the initial services ordered and made insufficient progress toward alleviating or mitigating the causes necessitating placement. The juvenile court in Riverside made similar findings as to D.P., and then transferred the case to San Bernardino. The court in San Bernardino accepted the transfer on April 19, 2010. As of an order signed March 23, 2010, Mother's

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<sup>4</sup> Our summary includes only minimal information about M.G.'s father, because he is not involved in the current appeal.

case plan was updated to include parenting education, anger management, and individual counseling. The updated case plan also said Mother was required to follow all of the conditions of her probation.

In November 2010, the social worker reported Mother completed a parenting program, reenrolled in an anger management program, and was participating in counseling with unsatisfactory results. In counseling, Mother denied hitting D.P. and was unable to accept responsibility for losing custody of her children. Mother and Father did obtain housing for themselves, but it was questionable whether they had the income to support the children. In addition, the statutory time for reunification with D.P. had expired. The social worker also continued to have concerns about reunification because of Mother's history and Father's failure to complete counseling services that were previously required as part of his case plan. Therefore, the social worker recommended that the court terminate services and set a section 366.26 hearing.

After several continuances, the court held a review hearing as to both children on November 29, 2010.<sup>5</sup> Once again, the juvenile court found returning the children to the parents would create a substantial risk of detriment to their physical and emotional well-being. However, the court found there was a probability the children could be returned to Mother. Mother's progress toward alleviating or mitigating the causes necessitating placement was found to be moderate. Father's progress was found to be minimal. Services for Mother and visitation for both parents were continued. As to both children,

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<sup>5</sup> The hearing was considered a further continued 18-month review hearing (§ 366.22) as to D.P. and a continued further 6-month review as to M.G.(§ 366.21).

the court also made findings there was a “compelling reason not to order the parental rights terminated at this time in that reunification with Mother remains a substantial probability and is in the child’s best interest.”

On March 14, 2011, Father filed a section 388 petition seeking reinstatement of reunification services and increased visitation based on his close relationship with D.P. and his voluntary completion of counseling, which was previously required under his case plan. On April 5, 2011, the court denied Father’s petition without prejudice, finding there was not enough of a change in circumstances.

On or about May 23, 2010, a section 387 petition was filed; D.P. and M.G. had to be removed from their placement. According to the social worker’s report, the paternal aunt was observed hitting D.P. with an open hand on her back and buttocks about a dozen times while cussing at the child in the parking lot of her preschool. Both children were placed in confidential foster care. Mother and Father were allowed supervised visitation once per week for two hours.

On May 31, 2011, the social worker once again recommended termination of Mother’s services for a number of reasons indicating she had not reached the level of maturity necessary to parent D.P and M.G. First, Mother received about 45 months of services but failed to benefit. Second, Mother was convicted of willfully inflicting injury on D.P. and was granted probation, but had been arrested for violating the terms of her probation on two different occasions when she failed to report to serve her jail time and to attend child abuse classes. Third, Mother continued to deny she hit and injured D.P. Fourth, Mother was pregnant for the third time and had severe kidney problems, which

made it risky for the children to be in her care. According to the social worker, Mother and Father decided to conceive another child when they became convinced D.P. and M.G. would not be returned to Mother's custody. Fifth, Mother failed to complete the case plan or to overcome the problems necessitating placement. Finally, while Mother continued to struggle to meet her own needs, the children were doing well in their new placement. As to Father, the social worker reported he maintained contact with CFS, regularly visited both children, and represented he was gainfully employed.

On June 7, 2011, Mother's third child was born. At this time, Mother and Father were both living with the maternal grandfather. Because Mother had an open dependency case, CFS was notified of the birth, and a social worker made contact with the family. Mother appeared to be caring for the infant appropriately, and the infant had no behavioral problems. As a result, the social worker determined there was no reason to remove this child from the parents. However, following a team decision-making meeting, CFS decided to open a voluntary family maintenance case. In this voluntary case, the parents were required to participate in counseling services, and Mother was required to maintain her participation in the 52-week child abuse class ordered as a condition of her probation.

The record indicates Mother's next review hearing as to D.P. and M.G. was significantly delayed, because the paternal aunt contested the allegations in the petition filed under section 387, and the removal of the children from her home. The court held an extended evidentiary hearing on the matter in July and August 2011. On August 22,

2011, the juvenile court found removal from the former caregiver's home had been in the children's best interests.

On September 16, 2011, Father filed another section 388 petition seeking reinstatement of reunification services and increased visitation based on his close relationship with D.P. and his voluntary completion of counseling, which was previously required under the case plan, as well as other services. On October 11, 2011, the juvenile court denied Father's petition finding there was no "substantial change in circumstances" and it was not in D.P.'s best interest to grant the petition.

On October 25 and 26, 2011, the juvenile court held an evidentiary hearing on the social worker's recommendation to terminate Mother's reunification services as to D.P. and M.G. and to set a section 366.26 hearing. At the hearing, the court considered testimony by Mother, Mother's counselor, and two social workers. On October 26, 2011, the juvenile court agreed with the social worker's recommendations. As a result, the court terminated Mother's reunification services and set a section 366.26 hearing.

## **DISCUSSION**

### **A. DUE PROCESS**

Father's position appears to be that the entire proceeding involving his daughter D.P., including the court's jurisdiction, is flawed on due process grounds, because the juvenile court did not apply the "clear and convincing evidence" standard when determining it would be detrimental to place D.P. in his custody. Citing *Santosky vs. Kramer* (1982) 455 U.S. 745, 758 (*Santosky*), Father contends the juvenile court should take the section 366.26 hearing off calendar and return D.P. to his custody, because the

court applied the wrong standard of preponderance of the evidence throughout the proceeding, so there is no clear and convincing evidence proving he is an unfit parent to D.P. Father argues there is no evidence he neglected or abandoned D.P. He believes the record shows he has attempted since D.P.'s birth and from the inception of the dependency proceeding to gain custody of D.P. and to assume his parental responsibilities as fully as his circumstances allowed.

In support of his position, Father cites evidence in the social worker's jurisdiction report dated September 25, 2007, indicating he was named as D.P.'s father on the birth certificate, signed a declaration of paternity, and said he could support D.P. while attending high school and earning \$120 to \$150 per week, with his mother helping him meet the remainder of his support obligations. At that time, Father also told the social worker he had supplies to take care of D.P., had voluntarily enrolled in parenting classes, and was attempting to take classes to learn how to handle D.P.'s medically fragile condition.

“Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.” (*Santosky, supra*, 455 U.S. at pp. 747-748.) “[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.” (*Id.* at p. 760, fn. omitted.)

Citing *Santosky*, our Supreme Court has concluded that “the standard of proof for termination of parental rights under [California's] child dependency statutes comports with the requirements of due process.” (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th

242, 256.) To reach this conclusion, our Supreme Court said the constitutionality of the standard of proof for the termination of parental rights must be considered “in the context of the entire process . . . under the dependency statutes.” (*Ibid.*) Under the entire process set forth in the dependency statutes, the legitimate interests of the parents are protected as required by *Santosky*, “because the precise and demanding substantive and procedural requirements the petitioning agency must have satisfied before it can propose termination are carefully calculated to constrain judicial discretion, diminish the risk of erroneous findings of parental inadequacy and detriment to the child . . . . At this late stage in the process the evidence of detriment is already so clear and convincing that more cannot be required without prejudice to the interests of the adoptable child, with which the state must now align itself. Thus the proof by a preponderance standard is sufficient at this point.” (*Cynthia D.*, at p. 256.)

Here, our careful review of the record shows the juvenile court followed the standards of proof required in the applicable statutes, and Father received all of the process that was due. Under California dependency law, a child may be removed from a home by a peace officer or social worker when there is reasonable cause to believe the child falls within the definitions set forth in section 300 or is in immediate danger. (§§ 305, 306.) Removal must be followed by the filing of a petition to have the minor declared a dependent child. (§ 313, subd. (a).) When a child is so detained, the juvenile court must hold a detention hearing on the next judicial day. (§ 315.) At the detention hearing, the social services agency bears the burden of making a prima facie showing that the child comes within section 300, and there is a need for detention under specified

conditions. (§ 319, subd (b).) Here, based on the social worker's report, the court found that a prima facie showing was made.

At the jurisdictional hearing, the court determines whether the allegations in the petition under section 300 are true and thus bring the child within the court's jurisdiction. (§ 355, subd. (a).) "Proof by a preponderance of evidence must be adduced to support a finding that the minor is a person described by Section 300." (*Ibid.*) Jurisdictional findings are followed by a disposition hearing, where the court determines under a clear and convincing evidence standard whether the child may remain with the parents or must be removed. (§ 361, subd. (c).) Jurisdictional and dispositional findings are immediately reviewable on appeal. (§ 395.)

Here, the court held a jurisdiction/disposition hearing on November 15, 2007. At this hearing, the court found certain allegations in the petition to be true and concluded D.P. fell within section 300. The court also stated findings were made pursuant to subdivision (c)(1) of section 361, *i.e.*, the court found by clear and convincing evidence there was a substantial danger to D.P. if she were returned home. The record before us does not indicate Father challenged any of these findings in an appeal.

If the child is removed from the custody of the parents, the court must determine whether to provide reunification services. (§ 361.5) Under subdivision (a) of section 361.5, "the juvenile court may order services for the child and the biological father, if the court determines that the services will benefit the child." Subdivision (a)(1)(B) of section 361.5 states as follows: "For a child who, on the date of initial removal from the physical custody of his or her parent or guardian, was under three years of age, court-ordered

services shall be provided for a period of six months from the dispositional hearing . . . , but no longer than 12 months from the date the child entered foster care. . . .” If, as in this case, reunification services are ordered, the juvenile court must review the case every six months. (§ 366, subd. (a)(1).)

At review hearings, there is a statutory presumption the child will be returned to the parents unless the social services agency proves to the court by a preponderance of evidence that “return of the child . . . would create a substantial risk of detriment to the . . . physical or emotional well-being of the child.” (§§ 366.21, subds. (e) & (f); 366.22, subd. (a).) In this review process, the 12-month review hearing is a turning point, because the court must terminate reunification services and set the matter for a permanency hearing under section 366.26, unless the court finds there is a substantial probability of return to the parents within 18 months of the original removal order. (§ 366.21, subd. (g).) For reunification services to be terminated, the court must also determine by clear and convincing evidence that reasonable reunification services were provided or offered to the parents. (§ 366.21, subd. (g)(1).)

Here, the court acknowledged Father’s biological relationship to D.P. at the jurisdiction/disposition hearing on November 15, 2007, and ordered reunification services for Father pursuant to subdivision (a) of section 361.5. Father’s reunification services were continued at the six- and twelve-month review hearings. However, based on the evidence presented in the social worker’s reports, the court found by a preponderance of evidence that returning J.P. to Father’s custody would create a substantial risk of detriment to her physical or emotional health. Even though it did not

determine there was a substantial probability D.P. could be returned to Father's custody within 18 months of the original removal order, the court allowed Father's reunification services to be continued for another six months. In other words, Father was given extra time to complete his case plan and to change his circumstances.

The social worker's report prepared in anticipation of the 18-month review hearing indicated Father's circumstances were unchanged, and he made no progress on the court-ordered case plan. A parent's failure to make substantive progress on the court-ordered case plan is prima facie evidence that it would be detrimental to return the child to the parent's custody. (§ 366.22, subd. (a).) Therefore, at the 18-month review hearing, the court was justified in terminating Father's reunification services and in finding by a preponderance of evidence that returning D.P. to Father's custody would create a substantial risk of detriment to her physical or emotional health.

As outlined above, each of the juvenile court's findings was supported by substantial evidence in the social worker's reports. Father was represented by counsel during the dependency, and has not seriously contested the evidence presented by the social worker or the findings made by the court. To his credit, the social worker's reports show Father was devoted to D.P. based on his regular and appropriate visitation with her. However, the record does not show Father was ever able to reach the level of maturity necessary to stand in a parental role to D.P., and to provide for all of her needs for food, clothing, shelter, safety, and medical care on a full-time basis. The record does show the juvenile court made multiple findings of detriment under the applicable standards of proof and based on evidence provided to the court by the social worker. Thus, pursuant

to our Supreme Court's determination in *Cynthia D. v. Superior Court, supra*, these multiple findings of detriment are the equivalent of a finding under *Santosky, supra*, that Father is an unfit parent based on clear and convincing evidence. Thus, on the record before us, we cannot conclude that Father's right to due process was violated or that the juvenile court erroneously set a hearing pursuant to section 366.26.

B. SUFFICIENCY OF THE EVIDENCE

Referring to testimony presented at the evidentiary hearing on October 25 and 26, 2011, when the court terminated Mother's reunification services and set the section 366.26 hearing, Mother argues the record lacks substantial evidence of detriment to the well-being of D.P. and M.G. if returned to Mother's custody. Mother believes the evidence shows she had benefitted greatly from services, had turned her life around, and had coping skills she was actively applying in her daily life. According to Mother, the evidence supports a strong inference D.P. and M.G. would be safe in her care, because she was appropriately caring for her new infant, who was considered safe in her home. Mother also contends the social worker was merely speculating when she testified D.P. and M.G.'s behavior issues could push Mother over the edge and cause her to repeat prior negative patterns.

Section 366.22, subdivision (a), provides that at the 18-month hearing, "[t]he court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker

shall have the burden of establishing that detriment. . . . *The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental.* In making its determination, the court shall review and consider the social worker’s report and recommendations and[,] the efforts or progress, or both, demonstrated by the parent . . . .” (§ 366.22, subd. (a), italics added.)

After a section 366.22 ruling, we review the juvenile court’s decision for an abuse of discretion. “In the presence of substantial evidence, appellate justices are without the power to reweigh conflicting evidence and alter a dependency court determination.” (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 705.) Under the substantial evidence standard, “we examine the whole record in a light most favorable to the findings and conclusions of the juvenile court and defer to the lower court on issues of credibility of the evidence and witnesses.” (*In re Albert T.* (2006) 144 Cal.App.4th 207, 234.)

Here, substantial evidence supports the juvenile court’s finding it would create a substantial risk of detriment to the physical or emotional well-being of D.P. and M.G. to return them to Mother’s custody. While acknowledging Mother’s love for her children and her testimony about her recent efforts and progress in services required by her case plan, the court was not convinced Mother made enough progress to return D.P. and M.G. to her care. There were two main reasons for the court’s determination.

First, the court’s finding of detriment and decision to terminate Mother’s reunification services was based in part on the court’s conclusion Mother had not sufficiently benefitted from counseling services. This conclusion was, in part, a

credibility determination. At the evidentiary hearing, Mother testified D.P.'s injuries were caused by a fall down the stairs, and she only admitted she struck D.P. because she was pressured by police. The court indicated it had reviewed the reports dealing with the incident leading to Mother's arrest and conviction and did not believe Mother's version of events. The court believed Mother was guilty of the child abuse offense but had not accepted responsibility. The counselor and both social workers agreed that Mother needed to acknowledge any abuse before it could be effectively addressed. Mother's counselor and the social worker for D.P. and M.G. both expressed concern that Mother's inability to accept responsibility for hurting D.P. was an impediment to Mother truly benefitting from her services. In addition, the court noted the counselor recommended continued counseling sessions. Thus, the record includes substantial evidence Mother had not fully benefitted from counseling services, because she continued to deny she struck and hurt D.P., and this put her children at risk. As noted above, we defer to the trier of fact in determining the weight and credibility of the evidence.

Second, the court was concerned about the safety of the children if placed in Mother's care, because she had not completed the 52-week child abuse classes that were required not only as a condition of her probation but also as part of her case plan. The conditions of Mother's probation were imposed on February 2, 2010. According to the social worker and the court, Mother had not reached the halfway point in the child abuse classes a year and a half later, at the time of the evidentiary hearing held on October 25 and 26, 2011, even though she had ample time to do so. Thus, based on the evidence, the court concluded Mother failed to complete the case plan and to make substantial progress

toward alleviating or mitigating the causes necessitating placement. As noted above, Mother's failure to make substantive progress on the case plan is prima facie evidence that return of the children would be detrimental. (§ 366.22, subd. (a).) The court also noted Mother has had services made available to her since 2007, and both children deserved a permanent plan, since D.P. had been a dependent child for four years, and M.G. had been a dependent child for almost two years.

We are also unconvinced by Mother's contention the evidence shows a lack of detriment if D.P. and M.G. were returned to her custody, because she was safely and appropriately caring for her new infant. As the court noted, the infant is "a separate case." As it was entitled to do, the court took into consideration the differences between the facts involving the infant and the very different circumstances of the lengthy dependency proceedings involving the older children. We agree with the court's conclusion these cases were not comparable.

As noted above, different standards apply under different circumstances. Removal of the infant would have required the agency to prove by "clear and convincing evidence" there was "a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor . . . ." (§ 361, subd. (c)(1).) The social worker assigned to the infant's case testified she spoke to the social worker at the hospital where the infant was born; she then made six visits to the home where Mother was living with the infant, Father, and the maternal grandfather. As to each visit, the social worker said the home was clean and appropriate, and she did not observe anything indicating the baby was at risk. She therefore did not see any reason to remove the infant. The social worker

and Mother both testified the infant was a “good baby” and did not display any behavioral problems. Even so, this new child was only four months old and was in Mother’s custody under a voluntary maintenance plan. As a result, it was not yet certain whether Mother would continue to make sufficient progress under the plan and remain stable enough to maintain custody of this new child.

The issue of whether to return D.P. and M.G. to Mother’s custody involved the application of a different standard. At a hearing held pursuant to section 366.22, the issue before the court was quite different. The court was to consider under a “preponderance of evidence” standard whether return to the parent’s custody would create a substantial risk of detriment to the children. (§ 361, subd. (c)(1).)

The social worker assigned to D.P. and M.G.’s case testified they were being treated for behavioral issues. Both children were receiving therapy because their behaviors were difficult to manage. These behaviors included tantrums, screaming, yelling, defiance, and aggression. As noted above, the social worker did not believe Mother had truly benefitted from services because she was unable to acknowledge she hurt D.P. As a result, it was the social worker’s opinion Mother would not be able to handle these difficult behaviors, and this would increase the risk of additional abuse. Contrary to Mother’s contention, the social worker’s concerns were not merely speculative. They were based on Mother’s long history of poor impulse control and anger management issues as compared with the recent and limited progress she made in her services. The social worker’s concerns were reasonable under the circumstances, and

the court was entitled to take these concerns into consideration in reaching its determination on the issue of Mother's custody.

In sum, Mother's lack of progress in key areas of the case plan was sufficient evidence for the court to conclude it would be detrimental to return D.P. and M.G. to her custody. It was therefore appropriate for the court to terminate Mother's reunification services and to set a permanency hearing pursuant to section 366.26.

**DISPOSITION**

The petition is denied. The previously ordered stay is hereby lifted.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER  
J.

We concur:

HOLLENHORST  
Acting P. J.

McKINSTER  
J.