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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ZACHARY T., et al., Persons Coming
Under the Juvenile Court Law.

STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

Plaintiff and Respondent,

v.

BOBBY T.,

Defendant and Appellant.

F065042

(Super. Ct. Nos. 515583, 515584,
515585)

OPINION

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STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

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v.

J.G.,

Defendant and Appellant.

F065115

(Super. Ct. Nos. 515583, 515584,
515585)

APPEALS from orders of the Superior Court of Stanislaus County. Ann Q. Ameral, Judge.

Jamie A. Moran, under appointment by the Court of Appeal, for Defendant and Appellant Bobby T.

Shaylah Padgett-Weibel, under appointment by the Court of Appeal, for Defendant and Appellant Judi G.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County Counsel, for Plaintiff and Respondent.

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J.G. (mother) and Bobby T. (father) separately appeal from the jurisdictional findings and consequent dispositional orders that removed their children, eight-year-old Alena G., six-year-old Zachary T., and two-year-old Bobby B.T. (collectively the children), from their legal and physical custody.¹ We have ordered the appeals be consolidated. In father's appeal, he contends the juvenile court erred in finding jurisdiction over the children pursuant to Welfare and Institutions Code section 300, subdivisions (b) and (j),² and in removing the children from his custody. He also joins in mother's arguments. In mother's appeal, she challenges the removal order. As we shall explain, we disagree with their arguments and affirm the juvenile court's findings and orders.

¹ At the outset of these proceedings, it was believed that Alena's legal father was Richard D. During the course of the proceedings, the Stanislaus County Community Services Agency learned that Richard was not Alena's biological father and he was not seeking to establish himself as Alena's presumed father. The Agency asked the court to consider Richard an alleged father and Bobby T. the presumed father, as Bobby had held Alena out as his child to the community and was the only father Alena had known. At the combined jurisdictional/dispositional hearing, the juvenile court found Bobby T. to be Alena's presumed father.

² Undesignated statutory references are to the Welfare and Institutions Code.

FACTUAL AND PROCEDURAL BACKGROUND

The Prior Dependency

Dependency jurisdiction was first taken over the children in October 2009 due to domestic violence between mother and father, mother's abuse of alcohol, and mental health concerns. Police reports showed that the couple had nine incidents of domestic violence to which police responded, some of which occurred in the children's presence. Before jurisdiction was taken, the parents agreed to participate in voluntary services. Shortly thereafter, mother was arrested for a domestic violence incident, in which father sustained a bloody nose and several bites, and for violating a restraining order. Father explained that despite being instructed to stay away from mother, he went to her apartment because she pleaded for him to do so. After going to the movies, mother wanted something to drink. After that, father said it got out of hand and got physical. Mother admitted the date and drinking beer, but she did not remember what happened. Alena told social workers her parents were always fighting and she would have to tell them to stop. Alena saw them hitting each other all the time.

Mother and father were offered reunification services. They completed a 52-week domestic violence program, a parenting program, individual counseling, and substance abuse services. Mother also completed a clinical assessment. Dependency was dismissed on March 14, 2011. The juvenile court issued exit orders giving mother and father, who were separated, joint legal and shared physical custody, with the children's primary residence with mother.

The Current Dependency

On February 17, 2012,³ the Stanislaus County Community Services Agency (Agency) received a referral alleging domestic violence between mother and father, and that they drank heavily and fought all the time. At 1:30 a.m. on February 17, father's

³ Subsequent references to dates are to the year 2012, unless otherwise stated.

cousin called the police to report a fight between mother and father that became physical. When police responded at 7:30 a.m. and interviewed mother and father, who were extremely intoxicated, they said the argument was over infidelity and claimed it was only verbal, not physical.

The Agency investigated the referral on February 27. The social worker spoke with mother, who stated she and father had only one argument that resulted in police being called. She explained that father and his cousin Robert had been drinking the night before, father was hung over, and when father awoke the next morning, he told Robert to call the police. Mother did not remember getting into an argument and claimed they were having normal marital issues. Mother said she did not drink and she told father he could not drink anymore. Mother stated they did not fight like they used to and had come a long way. Mother was interested in counseling services, including marriage counseling. Mother admitted feeling depressed and anxious.

The social worker interviewed Alena and Zachary separately at their school. Alena stated her parents fight often; mother would get mad because father smoked marijuana and cigarettes. Alena described an argument where father broke a mirror because he was mad and the broken pieces were not picked up. Alena also said father punched a hole in the wall and broke a door some days ago. The parents' most recent argument was about them cheating on each other. The argument caused Alena to cry and scared her and her siblings. Another argument occurred around Christmas time when a man father had gotten into an argument with kicked a window, which shattered all over her ten-year-old stepbrother, Damien, who had to go to the hospital. Alena told about another argument that occurred around Christmas time, when father was living with another woman, Kelly. Father was visiting Alena's brother at mother's house when Kelly came to the house to get her car back and chased father with a metal baseball bat, which scared Alena. Kelly sent a picture of father's clothes and Christmas toys he

bought for the children set on fire and burned. Mother and father showed the children this picture on a phone. Alena said she felt safe at the home, but not that happy.

Zachary also stated his parents always fight, recalled the incident in which glass broke on Damien, said his parents used belts to hit one another, and described the most recent incident that occurred after Valentines' Day when father was drinking and became angry. Mother stacked furniture behind the bedroom door so father would not be able to go into their room and get her. Father, however, was able to get into the room; Zachary saw him hold mother down by her arms and push her. Zachary did not feel safe at home due to their fighting.

Father has a son, Damien, with his ex-wife, Desiree W. Desiree told the social worker Damien did not go to father's home any longer due to the violence occurring there. Damien had to go to the hospital in December due to an argument that resulted in glass shattering on him. According to Desiree, mother and father had been arguing for a very long time and she was concerned for their children.

Mother also has another child, K.G., whose father is Stephen C. K. was returned to Stephen's care during the prior dependency proceeding. Stephen told the social worker there was a court custody order preventing father from being around K. due to the constant violence in the home and he refused to have K. around it. According to Stephen, father was a very violent person, and father and mother fought frequently.

A social worker spoke with father on February 28. Father explained about the argument where glass shattered on Damien. Father said mother's ex-boyfriend and the ex-boyfriend's cousin came to father's house wanting to fight him; during the fight, glass was kicked in which shattered on Damien, who needed to go to the hospital. About the fight with Kelly, father said he had borrowed her car and she wanted it back, so she came to the house and was trying to fight him. The argument ended when father gave her the keys. Father also confirmed the argument he had with mother where she piled furniture behind the bedroom door so he could not get in; he said mother climbed out the window

and onto the roof. The police came and nothing was done. Father said that a mirror broke at their house when he threw a shoe, but he claimed it was not out of anger. The social worker advised father because there were fights between the parents where the children were not safe, a possible option was removing the children from their care. Father responded that he would leave the home or file for divorce.

The Agency attempted to serve a warrant to detain the children on February 28, but no one was at the home. The Agency received reports from others that mother had packed up her things and left with the children, and the family may be headed to New Mexico, where the maternal grandmother lived. On March 1, the social worker called the children's school and was told they were not expected to return until March 12. The social worker spoke with the children's maternal aunt, Anna G., who said she had seen bruises on mother from father and she was aware police had been called to the home recently. Anna was concerned for the children's safety.

On March 20, after the family returned to their home, the children were taken into protective custody. The social worker observed that Alena was very protective and parentified, as she took care of her younger brothers as if they were her own children. The children confirmed they had been in New Mexico, but said they had returned two weeks before and their parents kept them from going back to school. The children stated the parents verbally argue after they are put to bed, and the arguments are loud and last for a long period of time. The arguments cause the children to cry and come out of their room, at which point the parents stop and apologize. The children confirmed both parents consume alcohol at a rate of about one drink per day.

The Dependency Petition

The Agency filed a petition on March 22, alleging, based on the continued domestic violence between mother and father despite having received reunification

services, the children came within the provisions of section 300, subdivisions (b) and (j).⁴ With respect to subdivision (b), the petition alleged the children had suffered, or there is a substantial probability they will suffer, serious physical harm or illness as a result of (1) their parents' failure or inability to supervise or protect them adequately, and (2) their parents' inability to provide regular care for the children due to the parents' substance abuse. With respect to subdivision (j), the petition alleged, based on the prior dependency case, that the children's sibling had been abused or neglected under subdivision (b), and there was a substantial risk the children would be abused or neglected as defined in subdivision (b).

The Jurisdiction/Disposition Report

The Agency's report prepared for the jurisdiction/disposition hearing included an assessment of mother, father and the family. In a May 2010 clinical assessment from the prior dependency, mother reported being previously diagnosed with post-traumatic stress disorder following an involuntary hospitalization as a teenager. Mother also reported a history of alcohol abuse. Mother had an abusive childhood, which included sexual abuse and molestation. She had four significant relationships all characterized by violence, except her relationship with K.'s father, and her relationship with father was characterized by infidelity and domestic violence.

Mother told a social worker in March 2012 that she went to New Mexico to care for her mother, who was having health problems. Most of mother's support came from father, who she married in January 2006. Mother reported occasional alcohol usage; she claimed she would drink a couple of beers and did not drink all the time. Mother did not think she had an issue with alcohol and she had not blacked out. Mother said she saw a

⁴ The petition also alleged Alena came within the provisions of section 300, subdivision (g) (no provision for support), because the whereabouts of the man believed to be Alena's biological father were unknown. The court struck this allegation at the jurisdictional/dispositional hearing at the Agency's request.

counselor for mental health issues, who told her she suffered from depression and anxiety. Mother, however, did not think she needed individual counseling and stated she talked to father when she needed to talk to someone. Mother agreed a medication evaluation may be helpful and thought couples counseling would be good for them, as well as family counseling. Mother claimed they had learned from their prior domestic violence classes and denied there was current domestic violence. She characterized their fights as “marital disagreements.”

Father told a social worker in March 2012 that in the past he used marijuana and drank a lot, but he stopped using as a result of the prior dependency case. While father admitted he still drank alcohol, he claimed he only did so at most once a month. When he did drink, he would have four to five beers. Father agreed with mother’s recommendation of family counseling and thought he could use individual counseling due to his past issues. Father said mother was really emotional and sensitive.

A social worker interviewed Damien, who said he did not see father that often. Damien thought father and mother got along, but there had been some arguments, which included an argument in February in which father was mad and got a baseball bat when mother said she was going to leave to go to her ex-boyfriend’s house. Damien did not know what happened after that. Damien confirmed an incident occurred in which glass shattered on him due to a fight between father and mother’s ex-boyfriend’s brother. Damien stated that someone got upset and kicked the glass. A piece of glass punctured his chest and he was bleeding. The last time Damien was at father’s house, he noticed a broken mirror. Damien felt scared when father fought with mother and he did not feel safe at father’s home because of the fighting.

The Agency placed the children in two separate licensed foster family agency homes, with Alena in one home and the boys in another. The children visited each other weekly. The Agency was working on placing the children together in one home. Alena’s

foster parents reported she was a well mannered child and doing well in her placement. The boys also adjusted well to their placement.

The social worker reviewed the allegations with mother and father on March 29. They both denied domestic violence was an issue in their household. Both said the broken glass incident occurred in April 2011. Father said he was not violent during the incident, which occurred when mother's sister Anna's boyfriend broke into the house and kicked in the window. Mother said Damien was scratched and was not taken to the hospital. Mother said the February incident occurred on the 16th, after she and father went out to dinner and each drank a few beers. She said they verbally argued and the argument never got physical. Mother was in her room on the ground crying when father came into the room to try to make things better by apologizing and consoling her. Mother went onto the roof, as that is where she goes to cool down and take a break from father. In the morning, father was upset and started yelling at her because he had to go to work and did not have clean socks. Mother got back together with father in December 2011. Father's girlfriend Kelly got mad when father stayed the night at mother's house because the baby was sick. Kelly came by with a baseball bat and she and father broke up. Mother said father had nowhere to go since Kelly burned all of his belongings, so he moved back in with mother and the children. Mother said they were working on things and they were just having marital issues.

Father confirmed he wanted to make his marriage work. He said he broke the mirror when he got frustrated after "accidentally" pulling his non-work shoes out from under the bed and "accidentally" throwing the shoe, which hit the mirror. Mother left the broken mirror for him to clean up, which he did after he got home from work. The February incident occurred after going out to dinner to celebrate Valentine's Day. He said they started arguing as mother's ex-boyfriend came by and tried to get father upset by making accusations. Father confronted mother about it and believed her. Father stated the argument did not get physical. Mother was crying in her room. Father wanted

to check on her. She had pushed a dresser in front of the door since it would not lock, so father pushed the door open, not out of anger but out of concern. Father noticed the window was open and assumed mother had gone onto the roof to cool down. At one point, Zachary got up to use the restroom and saw mother on the ground crying, with father over her trying to talk to her and console her.

The Jurisdiction/Disposition Hearing

A contested combined jurisdictional and dispositional hearing was held in April. Mother's sister Anna testified that she told the social worker she saw bruises on mother in February, which mother said father had inflicted. Anna had seen other bruises on mother in the 12 months before this incident. Once mother told Anna that father had made a bruise on her upper arm when they were fighting. Another time mother told her she had tried to slice her own throat; Anna saw seven or eight slices across mother's neck and one down her jugular. After mother made the marks, father told mother she should have done it a little bit deeper and she would have succeeded. The children were home at the time.

On the night the police were called to the home in February, Anna saw mother drunk to the point of not knowing what she was doing. Anna had seen mother drinking or intoxicated other times in the past year. One time, mother got violent with Anna. Anna's fiancé's brother dated mother from December 2011 until February 2012. Father did not live at the home during that time. Anna also knew father had another girlfriend, who had come to the house with a bat and took their Christmas presents.

Anna was concerned with mother's and father's treatment of the children. In January, the baby threw "a fit" while at a funeral in which he kicked mother. Mother pushed the baby to the floor; when the baby hit the floor, father picked him up and spanked him three or four times with an open hand until he was in tears. Also in January, Anna saw mother hit Zachary across part of his face and head because he was giving her

a “hard time.” Four to five months after the children were returned to their parents, Alena told Anna she had heard her parents fighting.

Desiree testified she was aware of an incident in which glass shattered on Damien when he was visiting father, but claimed Damien never went to the hospital as a result. Desiree denied telling the social worker that she would not let Damien go to father’s home and testified she did not have any concerns about Damien spending the night there. Damien visited father “a handful” of times per year. The longest he had spent with father was three weeks in March 2012.

The emergency response social worker, Amanda Hedrick, testified she spoke with Desiree on February 27. During that interview, Desiree told her father was not very consistent with his visits, she was concerned about the violence going on in the home in front of the children, and she would not allow Damien to visit after the police were called out in mid-February. Hedrick spoke with Damien on March 23, who told her about an incident where father was very angry because mother went to her ex-boyfriend’s house and got a bat. While Damien did not think father would try to hurt mother with the bat, he knew father was not going to play baseball with it. Damien told Hedrick about the glass incident and that he was cut on his chest. Damien said he could not remember if he went to the hospital. Damien did not feel safe at father’s home because of the fighting.

Social worker Sarah Hernandez, who authored the jurisdiction/disposition report, testified that the parents had completed “AOD” assessments. The assessor referred mother to an outpatient program and recommended mother receive a domestic violence assessment. Father was referred to “SRC” for “IOP” and relapse prevention. Father admitted having anger problems. Hernandez confirmed that alcohol was an issue with this family in both the prior and current dependencies. Mother told Hernandez that she used alcohol occasionally and when she does drink, she drinks a couple of beers.

Father testified he and mother split up in May 2011 and reconciled in December 2011. During the time they were separated, father moved out of the home. He had a

girlfriend, Kelly, and mother had a boyfriend. Father said the broken window incident occurred when Anna's boyfriend got upset and kicked the glass next to the door to the house. As he kicked it, glass flew back past father and hit Damien in the chest. Father called the police, but they did not respond. Father did not have to take Damien to the hospital.

Father explained the December 2011 incident involving Kelly. He borrowed Kelly's car to take his son to the hospital, since mother did not have a car. He and mother got back from the hospital early in the morning. Kelly came to the house holding a baseball bat to her side; she was screaming and demanding her keys back. Father immediately went outside and handed Kelly the keys. The police were called so father could get his personal belongings, which were at Kelly's house, but they never responded.

Father testified he and mother had a "disagreement" on the night of February 16. After going on a date, they had a few beers. Mother blocked the bedroom door with a nightstand. Father slid the nightstand over and got into the bedroom, but mother was not there. Father got his keys and left the house. He returned about a half hour later and went to sleep. In the morning, he and mother argued again. He broke a mirror that was hanging over the bed when he pulled a shoe out from under the bed and threw it in the air out of frustration. When the shoe came down, it hit the mirror and knocked it down. The mirror broke when it hit the bed frame. Father did not break the mirror on purpose. Father claimed there was not a lot of yelling the night before; the argument occurred in the morning.

Father said they went to New Mexico on February 29 to see his mother-in-law and stayed there nearly two weeks. They notified the children's school that there was a family emergency and they needed to keep the children out of school. Father said they asked the school to send the children's schoolwork with them. The children were out of school two and half or maybe three weeks. The children did not immediately return to

school when the family returned to California as they needed to complete the schoolwork they took with them to New Mexico. Damien did not go to New Mexico with them. Father denied they were trying to evade CPS.

Father said he and mother drink alcohol maybe once a month or every three weeks. He completed a drug treatment program in the prior dependency. When asked if it was his understanding after completing the program that he could drink alcohol, father responded he understood his life could return to “normal.” Father was attending weekly drug and alcohol relapse prevention meetings at SRC, and was scheduled to have a domestic violence assessment and family counseling. Father was willing to do everything needed to have the children returned, including to stop arguing in the children’s presence. He and mother had been visiting the children every chance they got.

Father admitted that domestic violence was an issue in the first dependency case and he went through various programs to address the issue. Father knew that domestic violence can scare children. When asked why he continued to subject the children to domestic violence, father responded that he did not “feel an argument is subjecting them to domestic violence.” Father considered arguing to be domestic violence “[t]o a certain extent, depending on how you handle the situation.” Father denied bruising mother during the past year.

Mother testified that the February incident involved a verbal, not physical argument. She pushed a piece of furniture in front of the bedroom door as a way to lock the door, since it did not have a lock, and went onto the roof to take a break. Mother denied ever trying to cut herself through her jugular. In the past year, she and father had not had any physical fights. Mother said there was no time within the last year that her sister had seen bruises on her arms. Mother dated Anna’s fiancé’s brother from November 2010 to February 2011, and then from June 2011 to November 2011.

Mother said they went to New Mexico because her mother was sick and needed help. They took the children out of school for the trip, starting on the afternoon of

February 28, and let the school know ahead of time. The children did not return to school before they were placed in temporary foster care. They were excused from school until March 25. Mother denied keeping the children out of school to hide them.

Mother said she drank once a month or once every two months. When asked if it was her understanding after completing the substance abuse program in the prior case that she could drink, mother responded she understood she could “go back to living life without violence, and that’s what I did.” At the outset of the prior program, mother felt like she was forced to admit she was an alcoholic. Toward the middle of the program, she started realizing “there was a problem with why I was drinking.” Mother did not think she had a current problem with drinking. Mother said she drank only twice since the children were returned to her in March 2011. Mother denied showing Alena the picture of the burned clothes, although Alena might have overheard her discussing it with father.

Mother wanted the children to come home. When asked how she could assure the court there would not be any more fighting in front of the children, mother said “[t]here won’t be.” Mother was willing to do family counseling. The baby has a lot of allergies and is very asthmatic; mother was concerned he would “flare up” while in foster care if he did not see the same doctor or get the same medications. Mother was also concerned that Alena was separated from her brothers and that Zachary was having difficulty in his new school.

After oral argument, the court found the petition’s allegations true and the children were persons described by section 300, subdivisions (b) and (j). The court adjudged the children dependents and ordered their removal from their parents’ custody. Based on the children’s statements regarding the arguments and violence occurring in the home, the court did not feel the children could safely remain in the home and that it could fashion an order for family maintenance that would keep them safe in the home. The court found

reasonable efforts had been made to prevent or eliminate the need for removal. The court gave the parents reunification services.

DISCUSSION

Standard of Review

“In reviewing the jurisdictional findings and the disposition, we look to see if substantial evidence, contradicted or uncontradicted, supports them. [Citation.] In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court’s determinations; and we note that issues of fact and credibility are the province of the trial court.” (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193 (*Heather A.*)) “The appellant has the burden of showing the finding or order is not supported by substantial evidence.” (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

Jurisdiction

Father contends insufficient evidence supported the juvenile court’s jurisdictional findings because there was not a risk of harm to the children at the time of the jurisdictional hearing. He asserts dependency jurisdiction was unnecessary because he and mother had begun to participate in services and agreed not to argue in front of the children.

To make a jurisdictional finding, the juvenile court must find by a preponderance of the evidence that the child comes within at least one of the subdivisions of section 300. (*In re Tracy Z.* (1987) 195 Cal.App.3d 107, 112; § 355, subd. (a) [standard of proof at jurisdictional stage is preponderance of the evidence].) Here, the juvenile court found jurisdiction under subdivisions (b) and (j) of section 300. Subdivision (b) provides, in pertinent part, that a minor comes within the jurisdiction of the juvenile court if: “The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child” The statutory definition consists of three

elements: (1) neglectful conduct by the parent of one of the specified forms; (2) causation; and (3) “serious physical harm or illness” to the child, or a “substantial risk” of such harm or illness. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820 (*Rocco M.*); *In re Ricardo L.* (2003) 109 Cal.App.4th 552, 566-569 (*Ricardo L.*)). “[S]ubdivision (j) has two prongs: (1) that ‘[t]he child’s sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e) or (i)’; and (2) ‘there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions.’” (*Ricardo L., supra*, 109 Cal.App.4th at p. 566.) Thus, both subdivisions require a substantial risk of harm.

“[A]ny matter or information relevant and material to the circumstances or acts which are alleged to bring him or her within the jurisdiction of the juvenile court is admissible and may be received in evidence” at the jurisdictional hearing. (*In re Sheila B.* (1993) 19 Cal.App.4th 187, 198.) “While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm.” (*Rocco M., supra*, 1 Cal.App.4th at p. 824, italics omitted.) “Thus previous acts of neglect, standing alone, do not establish a substantial risk of harm; there must be some reason beyond mere speculation to believe they will reoccur.” (*Ricardo L., supra*, 109 Cal.App.4th at p. 565.)

In this case, there was substantial evidence that, at the time of the jurisdictional hearing, the children were at a substantial risk of suffering serious physical harm due to the domestic violence between mother and father. Mother and father had a long history domestic violence. Despite receiving nearly 18 months of reunification services in the prior dependency that specifically addressed domestic violence and substance abuse, mother and father continued to engage in both. Since intensive services had not ameliorated the conditions that led to the previous dependency, the juvenile court reasonably could conclude that those conditions would continue absent the completion of further services. While father contends his and mother’s representations that they would not argue in front of the children and their current participation in services were sufficient

to remove the risk of harm, the evidence showed a risk of harm remained. This is because neither parent understood that their arguments were more than marital disagreements; they were fights that placed the children in fear and exposed them to a risk of physical harm should the fights escalate to physical violence. Moreover, neither parent understood the causal connection between their use of alcohol and the fights. Until the parents recognized the extent of the problem, the children were at risk of harm.

The juvenile court was entitled to protect the children from the risk of domestic violence. “Both common sense and expert opinion indicate spousal abuse is detrimental to children.” (*In re Benjamin D.* (1991) 227 Cal.App.3d 1464, p. 1470, fn. 5; see *In re Sylvia R.* (1997) 55 Cal.App.4th 559, 562.) “[D]omestic violence in the same household where children are living is neglect; it is a failure to protect [the minors] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it. Such neglect causes the risk.” (*Heather A.*, *supra*, 52 Cal.App.4th at p. 194, italics omitted.) The juvenile court may consider past events to determine whether the child is presently in need of juvenile court protection (*In re Petra B.* (1989) 216 Cal.App.3d 1163, 1169), and the court need not wait until a child is seriously abused or injured to assume jurisdiction and take the steps necessary to protect the child (see *Heather A.*, *supra*, at p. 194). In this case, substantial evidence supported the juvenile court’s jurisdictional findings that domestic violence between mother and father endangered the children and they were in need of the court’s protection.

The Removal Order

Both mother and father challenge the juvenile court’s dispositional order removing the children from their custody. They contend the evidence was not sufficient to support that order because there was insufficient evidence of a substantial danger to the children’s physical health, safety, or well-being if returned home. Mother also contends the evidence does not show that less drastic measures would have been insufficient to protect the children.

As relevant here, before the court may order a child physically removed from his or her parent, it must find by clear and convincing evidence that the child would be at substantial risk of harm if returned home and there are no reasonable means by which the child can be protected without removal. (§ 361, subd. (c)(1).) A removal order is proper if it is based on proof of parental inability to provide proper care for the child and proof of a potential detriment to the child if he or she remains with the parent. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136 (*Diamond H.*), overruled on other grounds in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) The parent's level of denial is an appropriate factor to consider when determining the risk to the child if placed with that parent. (*In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1044 [denial is a factor often relevant to determining whether persons are likely to modify their behavior in the future without court supervision].) The parent need not be dangerous and the child need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child. (*Diamond H.*, *supra*, 82 Cal.App.4th at p. 1136; *In re Jamie M.* (1982) 134 Cal.App.3d 530, 536.) The jurisdictional findings are prima facie evidence the child cannot safely remain in the home. (§ 361, subd. (c)(1).)

With respect to the first prong, i.e. whether the children would be in substantial danger of physical harm if they were returned home, mother argues the children were not in substantial danger because (1) she had learned from her 52-week domestic violence program, as evidenced by her telling the children to stay in their bedroom while she argued with father and that they stopped arguing when the children came out crying, (2) she tried to refrain from engaging in fights by going on the roof to calm down, and (3) father was the violent one, and even then, he did not physically abuse her, while she engaged only in "some verbal disputes" with him. Mother asserts the Agency's delay in investigating the referral and the police's decision not to follow-up on the February incident show there was no immediate danger to the children. In his appeal, father repeats his argument regarding jurisdiction, i.e. that there is not substantial evidence of

substantial danger to the children if they were left in the home because he and mother promptly responded to the referrals for additional services. He asserts the Agency could have monitored the family under a voluntary case plan.

The same substantial evidence that supported the juvenile court's jurisdictional findings also supported its dispositional order. The parents had a history of domestic violence with each other, which in the past had led to physical abuse by both mother and father. Despite receiving intensive domestic violence and substance abuse counseling in the prior dependency, the domestic violence continued. While mother may have been applying some of what she learned from those services after the children were returned to her, she continued to engage in verbally abusive behavior with father that caused the children to be fearful. The evidence of continued fighting showed that mother and father had not yet learned to control their behavior and did not recognize it as domestic violence. Instead mother and father minimized the effect their arguments had on the children, characterizing the arguments as marital disagreements or problems, which showed they had not made sufficient progress in resolving the problems that led to the children's first dependency and detention in this case. Since mother and father did not recognize there was a problem, the children were at substantial danger of physical harm if they were returned home.

Mother asserts that even if there were a substantial danger to the children's physical safety, section 361, subdivision (c)(1), required the court to consider removing father, as the offending parent, from the home and allowing her, as the nonoffending parent, to retain custody. She contends the Agency did not explore options to allow the children to stay in her home and a reasonable alternative would have been to order father to leave the home and return the children to her.

The evidence established, however, that removing father from the home was not a reasonable alternative, as the risk of harm to the children would not be ameliorated if he moved out. This is because the evidence shows the risk of harm to the children lies in

mother's willingness to remain in an abusive relationship at the children's expense. Mother had separated from father several times in the past, but always took him back. Each time she did, the abuse continued. Moreover, mother had a history of entering into violent relationships with men. Mother's history of failing to protect the children, coupled with evidence of her continuing lack of judgment and failure to recognize that she continued to engage in behavior that was harmful to the children, constituted sufficient evidence upon which the court could conclude the children would be at a substantial risk of harm if returned to mother's custody.

In light of this evidence, the record supports the juvenile court's finding that reasonable alternatives to removal did not exist. As mother points out, she had participated in services and learned some techniques from those services. Mother, however, apparently had not gained sufficient insight into her problems, as she continued to engage in verbally abusive behavior with father that harmed the children. Given mother's history of allowing father back into the home, the juvenile court reasonably concluded that returning the children to mother's care would have been insufficient to protect them and removal was necessary to provide mother time to benefit from intensive services to enable her to understand the dangers domestic violence presented to the children and the importance of protecting them from it. While mother points to other evidence that she asserts shows the children would not be at risk of harm if returned to her care, she ignores the evidence that shows such a risk.

In sum, we find substantial evidence supports the juvenile court's removal order and therefore uphold the order temporarily removing the children from mother's and father's custody.

DISPOSITION

The juvenile court's jurisdictional findings and dispositional orders are affirmed.

Gomes, Acting P.J.

WE CONCUR:

Kane, J.

Franson, J.