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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re E.W. et al., Persons Coming Under
the Juvenile Court Law.

H043460
(Santa Cruz County
Super. Ct. Nos. 16JU00026 &
16JU00027)

SANTA CRUZ COUNTY HUMAN
SERVICES DEPARTMENT,

Plaintiff and Respondent,

v.

J.W.,

Defendant and Appellant.

J.W. (Mother) appeals the juvenile court's jurisdiction and disposition orders (1) declaring her two minor children (ages three and four) dependents of the juvenile court under Welfare and Institutions Code section 300, subdivision (b) (failure to protect);¹ (2) removing the children from Mother's physical custody; and (3) placing them in the care of J.D.W. (Father), with visitation to Mother every other weekend. Mother and Father were in the process of a divorce and the juvenile court's orders changed the custody arrangement previously ordered by the family court.

¹ Further statutory references are to the Welfare and Institutions Code.

Mother challenges the sufficiency of the evidence to support both the jurisdiction and disposition orders. Mother also contends that the child welfare agency failed to comply with the notice requirements of the Indian Child Welfare Act (25 U.S.C. §§ 1901 et seq.) (ICWA). We conclude that there is substantial evidence to support the court's jurisdiction and disposition orders and that the court did not err under ICWA. We will therefore affirm the orders.

I. FACTS & PROCEDURAL HISTORY

Mother and Father began dating in 2007, married in October 2011, and separated in February 2015. Their children are E.W. (Son), born in April 2011, and G.W. (Daughter), born in December 2012. Daughter was three years old when the court made its jurisdiction and disposition orders; Son turned five the day after the court made its orders. The family originally resided in Sacramento.

In 2013, in Sacramento County, Father—who had filed for divorce—called the police after Mother tried to break into the family home through a window. Father reported Mother hit him during a fight. Both had been drinking. Father said domestic violence had been part of their six-year relationship. Mother was arrested, although Father said he did not want to press charges. Son woke up during the incident; Daughter was asleep. An unnamed party reported general neglect of both children and physical abuse of Daughter to the county social services agency and the family was referred for services. The general neglect claim was deemed inconclusive and the physical abuse claim was deemed unfounded.

By 2015, the family had moved to Santa Cruz. In February of that year, Mother suffered a bloody nose in an altercation with Father. Mother and Father separated immediately thereafter. Mother obtained domestic violence counseling, as well as counseling for Son. Months later, Son told a “reporting party” that he was present during the altercation and recalled seeing blood on a door knob. Mother told the reporting party

she received medical treatment after the altercation, but did not tell the medical staff her children had witnessed the incident.

Father filed for divorce in Santa Cruz County. In May 2015, Mother and Father agreed to joint legal custody of the children with physical custody to Mother and visitation to Father every other weekend. They also agreed Father would not be allowed visits until after he started “counseling to deal with his anger management issues.” Father completed anger management counseling as ordered.

Mother began drinking heavily. In August 2015, the family court confirmed the parents’ agreement to joint legal custody, and sole physical custody to Mother with visitation to Father every first, third, and fifth weekend. The court’s order contained a holiday schedule and directed both parents to complete a co-parenting class. Father moved back to Sacramento in October 2015.

A. Current Referral for Child Welfare Services

When Father came to pick up the children for his weekend visit on Friday, December 4, 2015,² Mother said she was not feeling well. Mother had a history of gallbladder disease and gallstones—for which she needed surgery—so the parents agreed Father would watch the children in Mother’s home, rather than take them to Sacramento. Over the weekend, Mother slept upstairs and Father took care of the children downstairs. Mother slept all weekend; at times she was incoherent and Father had trouble waking her up. Father kept the children out of Mother’s room.³ Mother’s condition did not improve

² Date references that do not include the year are to late 2015 or early 2016.

³ This history is based on Father’s statement to the social worker on January 11. Two weeks earlier, on December 22, Father told a social worker that when he came to pick up the children on December 4, he found Mother “drunk and constantly passing out.” Father said he was aware of Mother’s gallbladder issues and therefore was not sure what was causing her symptoms, but he believed her condition was “mainly ... caused by alcohol.”

and Father needed to return to work in Sacramento, so on Tuesday, December 8, Father called 911. Father went upstairs with the paramedics; they found Mother on the bathroom floor. The paramedics asked Father whether Mother had been drinking or had taken any drugs. Father said he did not know, then found a glass of vodka on the bathroom counter. Mother was taken by ambulance to Dominican Hospital, where she was hospitalized for eight days. On admission, Mother was dehydrated and her “[e]thanol level was markedly elevated at 410.” The parties do not dispute that this is the equivalent of a 0.410 blood alcohol content.

Mother had a history of chronic pain due to reconstructive surgery on her jaw at age 17 and back pain from childbirth. She had previously become addicted to the pain medication Norco, which contains the pain reliever acetaminophen and the opiate hydrocodone. Mother had also been seeing a psychiatrist, who prescribed Subutex to treat Mother’s chronic pain and her addiction to opiates. While in the hospital, Mother told more than one physician she was taking Subutex “to get off [N]orco pills.”

The emergency room physician reported that Mother, “who has a lengthy history of opiate abuse and also ethanol abuse, present[ed] with acute alcohol intoxication, probable alcoholic pancreatitis, and a history of gallstones,” and opined that it was “unlikely she has gallstone[-]related pancreatitis.” On December 10, a consulting physician reported that Mother had told him she drank daily to help with chronic pain issues. The consulting physician agreed that Mother’s pancreatitis was “alcohol-induced.” Mother’s discharge diagnoses included alcoholic pancreatitis, alcoholism, and chronic pain syndrome with opiate dependency.

Hospital staff called the Parents Center Hotline and reported possible neglect of the children based on Mother having been found unresponsive in her home with a blood alcohol content of “ ‘410.’ ” This is how the family came to the attention of the Santa

Cruz County Human Services Department (Department). After Mother was hospitalized, Father took the children to his home in Sacramento.

Mother was offered formal substance abuse treatment while in the hospital, but declined. She was released from the hospital on December 15. Father returned the children to her care on December 20. Father said Mother “appeared to be her normal self.” He was concerned for his children, but was not sure how to proceed in light of the parents’ custody arrangement, so he returned the children to Mother.

Father spoke with the social worker by phone on December 22, and reported that during the marriage, Mother hid bottles of vodka around the house and hid her drinking from him, so he was not sure how much she drank. He also said Mother was taking Subutex to treat her withdrawal symptoms from narcotics. On December 22, the afterhours social worker and a deputy sheriff made an unannounced welfare check on Mother and the children. Mother welcomed them into her home. She appeared sober and there were no visible signs of alcohol; the children seemed happy and healthy. Mother reported that she started to drink three or four months earlier and “became addicted to it.” She said she was thankful to have gone to the hospital and had not consumed any alcohol since then. Mother signed a safety plan and agreed not to drink alcohol while caring for the children.

The following day, the social worker assigned to the case met with Mother and the children in their home. The home “appeared well cared for and was free from obvious safety hazards.” The children appeared well cared for and unharmed. While Mother was out of the room, Son told the social worker his parents did not live together anymore because “Daddy punched Mommy in the face.” Mother reported that before the divorce, she was a social drinker. She said her drinking had increased over the past four to five months and had become excessive. She drank after the children went to bed and usually had four to five drinks, plus shots. Mother said she ended up in the hospital because of

her gall bladder issues, and was “medically detoxed.” Mother was aware that “her [blood] alcohol level was 410” and said the doctors had told her she had to stop drinking because of her alcohol pancreatitis. Mother said she believed the hospital incorrectly diagnosed her with alcohol-induced pancreatitis, and that her symptoms were due to her failing gall bladder. The social worker concluded Mother wanted to explain her illness by referring to her gall bladder disease rather than acknowledge that it was alcohol-induced. Mother admitted she was addicted to painkillers and reported that she had been taking Subutex—which is used to treat opioid addiction—for about a year. Mother reported that Father also drinks and “has three DUI’s.” When asked why she declined formal substance abuse treatment at the hospital, Mother explained that since she had “detoxed” and was aware of how badly alcohol affects her, she had no desire to drink. Mother reported that she sees a therapist and attends a mothers’ support group at her church, and that the support group was all she needed to refrain from drinking. Mother said she did not need substance abuse treatment and would not go to Alcoholics Anonymous. Mother agreed to random drug testing and to an assessment by a drug and alcohol counselor.

Mother was tested on December 24, and December 31, and January 6. On December 24, she tested positive for benzodiazepine, which was attributed to the Subutex prescribed by her physician. Her results were negative for alcohol on all three dates.

The social worker made another unannounced visit on January 7. The home was well cared for and organized, with fresh food in the kitchen. There were no signs of alcohol. Mother reported that she had just celebrated her birthday with family and had no trouble refraining from alcohol while everyone else was drinking. She said her desire to drink was gone and she was not struggling with her sobriety. Mother had not gone to her church support group for two weeks. The social worker advised Mother that the Department would be filing a petition with the court and recommending family

maintenance services. Mother “vehemently disagreed” that court involvement was necessary.

On January 8, Mother completed the assessment with alcohol and drug specialist Rosie Murillo. Mother told Murillo she was not an alcoholic and the precipitating incident was an isolated mistake. Murillo concluded residential treatment was inappropriate because Mother was caring for young children, and referred Mother for 20 sessions of outpatient treatment at Alto Counseling Treatment Center (Alto), where Mother enrolled on January 13.

B. Juvenile Dependency Petition and Initial Court Proceedings

On January 14, the Department filed petitions with the court pursuant to section 300, subdivision (b) alleging a substantial risk the children will suffer serious physical harm or illness as a result of Mother’s failure or inability to adequately protect or provide regular care for them because of her substance abuse. The petition alleged Mother is the primary caregiver, drinks alcohol daily, and has withdrawals if she does not drink; described Mother’s condition and hospitalization on December 8; and asserted that Mother denied the need for substance abuse treatment. The petition alleged the “age of the children leaves them extremely vulnerable when their only caregiver is drinking to the point of passing out and requiring hospitalization.” The petition also alleged that Father failed to protect the children when he returned them to Mother’s care on December 20. In its investigative report, the Department stated that the allegation of general neglect by Mother had been substantiated and the allegation of neglect by Father was inconclusive. The Department recommended the court establish jurisdiction over the children and stated it was likely to recommend family maintenance services.

On February 3, the social worker spoke to Mother’s psychiatrist, Dr. Helen Nunberg. Dr. Nunberg was unaware of Mother’s alcohol-related hospitalization. Dr. Nunberg said she had prescribed Subutex to treat an opiate addiction, she had no plan

to wean Mother from Subutex, and she had advised Mother to be in treatment or abstain from other substances while on Subutex. Dr. Nunberg stated “the mixture of Subutex and excessive alcohol could result in respiratory depression, which could cause death,” and that Mother always brought the children with her to their sessions, which limited the issues they could discuss. On February 3, the social worker made a third unannounced visit. The children were in bed, Mother was sober, the home was well maintained, and there were no signs of alcohol.

The parents were arraigned on the petition on February 9, and the children remained in Mother’s care. In March, the Department filed a jurisdiction and disposition report dated February 18, describing the case history summarized above. The social worker reported that Mother was attending one group session and one individual session a week at Alto. According to the counselor at Alto, Mother was cooperative, appeared engaged, and was testing negative on the days she attended the program. The social worker opined that the “level of risk to young children with a parent who is drinking and passing out at night is very high,” especially since there is no other adult in the home, and that Mother’s continued denial of her alcohol problem “compounds the concerns.” The social worker recommended Mother be offered family maintenance services and Father be offered supportive services, such as Al Anon, in Sacramento. The Department’s initial case plan recommended: (1) the children remain with Mother and visit Father every other weekend; (2) general counseling, substance abuse counseling, and testing for Mother; and (3) counseling for the children. The plan addressed possible relapse and suggested a completion date of August 18.

According to the social worker, when she met with Mother on February 24, Mother continued to deny problems with alcohol. Mother acknowledged that she had made a mistake and understood the seriousness of it. On February 25, the social worker offered to make a referral to Children’s Mental Health to facilitate the counseling for the

children, but Mother declined, saying she would like Son to see Holly Hughes, the counselor he saw in 2015.

The children's counsel and Mother's counsel advised the court they did not agree with the Department's recommendations and asked that the matter be set for a settlement conference and a contested hearing. The court scheduled a settlement conference for March 29, with a contested hearing on April 11.

The Department filed an updated report regarding disposition. The social worker described her February 24 meeting with Mother and reported that Mother was attending weekly group and individual sessions at Alto. Mother's counselor at Alto told the social worker that Mother denied that she had a problem with alcohol and opiates, Mother is happy and engages in the sessions, and sometimes Mother avoids talking about her drinking and talks about her divorce and other issues instead. As of March 29, Mother had not obtained counseling services for the children, nor had she started the parenting classes and counseling recommend in the initial case plan. Based on Mother's continued lack of insight, despite access to services, the social worker changed her recommendation regarding disposition. She recommended the parents change their custody arrangement and that the children reside primarily with Father, and have visitation with Mother every other weekend. The case did not settle on March 29.

On April 11, the Department filed another update with the court regarding jurisdiction and disposition. The social worker reported that Mother continued to deny that she struggled with substance abuse and was only minimally engaged in services. Mother continued her counseling at Alto, but sometimes discussed issues other than her substance abuse. The social worker reported that although she had referred Mother for individual counseling and parenting classes at the Parents Center on February 5, as of March 29, Mother had not scheduled an appointment. Mother also had not followed through on the Department's February 25 recommendation that she enroll the children in

counseling. The Department recommended that the court: (1) establish jurisdiction over the children; (2) remove them from Mother's care; (3) place them in Father's primary care, with visitation to Mother every other weekend; and (4) dismiss the dependency case, with new family court orders reflecting the custody changes.

C. Jurisdiction and Disposition Hearing and Orders

At a contested jurisdiction and disposition hearing on April 11, the Department relied in part on the reports it had filed with the court.⁴

Sharon Fox, the person who supervised the assigned social worker, testified on behalf of the Department. Fox had never met with Mother. Fox testified that Mother had complied with the Department's initial safety plan, completed the assessment with Murillo, undergone drug and alcohol testing at the Department's request, and participated in outpatient treatment and testing at Alto. Fox acknowledged that Mother's testing at Alto was not random and opined that Mother would benefit from random testing.

Fox said the Department did not investigate Father's anger management or ask him to test or be assessed for substance abuse. Fox was not concerned about the year-old domestic violence or prior substance abuse by Father. (His three convictions for driving under the influence were more than 15 years old.)

Fox opined the risk to the children's physical safety was extremely high due to their ages and Mother's continued denial of her alcohol problem. As far as Fox knew, Mother had never made any statement accepting that she had a problem with alcohol. Fox opined that Mother's lack of insight impacted her ability to formulate a plan to prevent a future incident because Mother does not acknowledge that a problem exists. Fox acknowledged that Mother had failed to get Son into counseling because Mother

⁴ We will summarize the record relating to the ICWA issue in the discussion portion of this opinion.

wanted him to see the same counselor he saw before, but according to Fox, whether the children are in counseling does not affect their risk of harm.

Father testified that he owns a home in Sacramento. His parents live nearby and can help with child care. Father had already investigated school and daycare services near his home. Father works long hours in sales, but his territory had recently changed and he expected to be home every night. Father said he was also considering other employment options. Father had completed the anger management training ordered by the family court and was willing to participate in additional services if ordered by the juvenile court.

Mother's evidence included a letter from Rose George of Alto verifying that Mother had completed 17 of 20 group and individual counseling sessions there. The letter stated Mother was "very open and willing to learn," had "gained knowledge about Substance [U]se Disorder," and was willing "to make positive changes for herself and her children." The parties stipulated to these facts at the hearing.

George, a registered addiction specialist, testified on behalf of Mother. George had worked for Alto for 14 years as a coordinator, trainer, and counselor. In January, George had assessed Mother at low risk for relapse and withdrawal based on the information provided by Mother. At the time of the hearing, George continued to assess Mother at low risk for relapse and described her as "doing great." George stated that a person who denied an alcohol problem would not be at risk for relapse if he or she was in treatment. She agreed that a person who repeatedly denied having an alcohol problem probably had a higher risk of relapse.

George knew Mother's ethanol level upon admission to the hospital was 0.410, which she described as a "very dangerous level." George disagreed with the social worker's statement that Mother continued to deny her struggle with substance abuse and was minimally engaged in services. She believed Mother was open and honest with her.

But she conceded that additional information could change her assessment of Mother's risk level. For example, George was unaware that Mother had been addicted to narcotics and was taking Subutex to address that addiction. Although Mother had told her of a church support group, George did not know that Mother was not attending the group. George also was not aware of the quantity of alcohol Mother was consuming in 2015 leading up to her hospitalization.

Mother testified. She denied allegations that she used alcohol daily in 2015 and had withdrawal symptoms if she did not drink. She denied telling the social worker she had withdrawal symptoms in the absence of alcohol. Someone told Mother a nurse smelled alcohol on Mother's breath when she was admitted to the hospital, but Mother did not believe that was true, even though she admitted she had been drinking for a few days. Nor did she know that an emergency room physician had stated it was unlikely her pancreatitis was due to her previously diagnosed colitis but rather that it was alcohol-induced.

Mother stated she had not consumed alcohol since December 8. Mother told the court she is not addicted to opiates. Prior to 2013, a doctor in Sacramento had prescribed Norco for Mother's chronic pain from jaw surgery and low back pain. Mother stated that after 2013, her doctor prescribed Subutex for pain management, not to treat an opiate addiction. Mother said she took herself off opiates and tried Subutex to see if it worked for her pain. Dr. Nunberg had recently changed her prescription to Suboxone because Subutex was being taken off the market.

Mother said her divorce had been stressful. She manages the stress by attending monthly and weekly church group meetings, taking the children on play dates, and attending the therapy offered by the Department. She also sees Dr. Nunberg every three months to "check-in." Mother had surgery on April 1 to have her gallbladder removed. The children stayed with Father when she had the surgery. She was still recovering from

the surgery on the date of the hearing. She did not take the Norco her surgeon prescribed and was managing her post-surgical pain on Suboxone.

Mother was willing to participate in general counseling and attend a parenting class. Mother had not started the counseling or the parenting class yet because she had just received the contact information on March 28. She was also willing to obtain counseling for the children, but wanted them to see Holly Hughes, who had seen Son in 2015. Mother had not yet scheduled an appointment with Hughes because Hughes was on vacation. Mother has been the children's sole caretaker since birth. During the marriage, Father's job took him away from home for weeks at a time. Mother believes the children should remain in her custody; they have a home in Santa Cruz and everything they know is there.

The court sustained the petitions; found jurisdiction under section 300, subdivision (b); adopted the recommendations of the Department regarding custody changes; and dismissed the dependency case. The court ordered joint legal custody, physical custody to Father, and visitation every first, third and fifth weekend to Mother, essentially reversing the parents' roles under the earlier family court orders.

II. DISCUSSION

A. Burden of Proof and Standard of Review

For jurisdiction orders, “[t]he Department has the burden of proving by a preponderance of the evidence that the children are dependents of the court under section 300. (§ 355, subd. (a); [citation].)” (*In re I.J.* (2013) 56 Cal.4th 766, 773; *In re D.P.* (2015) 237 Cal.App.4th 911, 917 [child welfare authorities have the burden to establish the jurisdictional facts by a preponderance of the evidence].) The burden of proof is higher for the challenged disposition orders: the child welfare agency has the burden to prove, by clear and convincing evidence, that removal of the child from the

physical custody of a parent with whom the child resides is necessary. (§ 361, subd. (c); Cal. Rules of Court, rule 5.695(c); *In re Marilyn H.* (1993) 5 Cal.4th 295, 308.)

We review both the juvenile court’s jurisdictional findings and its disposition orders under the substantial evidence standard of review. (*In re D.P.*, *supra*, 237 Cal.App.4th at pp. 917–918; *In re E.B.* (2010) 184 Cal.App.4th 568, 578 [the “substantial evidence rule applies no matter what the standard of proof at trial”]; *In re Henry V.* (2004) 119 Cal.App.4th 522, 529 (*Henry V.*) [appellate court applies the substantial evidence test to determine the existence of the clear and convincing evidence].) “ ‘In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings and disposition, we determine if substantial evidence, contradicted or uncontradicted, supports them. “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.” [Citation.] “We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.] ‘ “[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence ... such that a reasonable trier of fact could find [that the order is appropriate].” ’ [Citation.]” [Citation.]’ [Citation.]” (*In re I.J.*, *supra*, 56 Cal.4th at p. 773.)

Under the substantial evidence standard of review, we must uphold the trial court’s findings “ ‘unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings. [Citation.]’ ” (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022 (*J.N.*.)

To be sufficient to sustain a juvenile dependency petition the evidence must be reasonable, credible, and of solid value. (*In re R.V.* (2012) 208 Cal.App.4th 837, 843 (*R.V.*)) “Substantial evidence ... is not synonymous with any evidence. [Citation.] ‘A decision supported by a mere scintilla of evidence need not be affirmed on appeal.’ [Citation.] Although substantial evidence may consist of inferences, those inferences must be products of logic and reason and must be based on the evidence. Inferences that are the result of mere speculation or conjecture cannot support a finding. The ultimate test is whether a reasonable trier of fact would make the challenged ruling considering the whole record. [Citations.]” (*In re James R.* (2009) 176 Cal.App.4th 129, 135.)

B. Substantial Evidence Supports the Jurisdiction Finding

Mother contends the evidence is insufficient to support the court’s jurisdictional finding under section 300, subdivision (b) (failure to protect).

1. Legal Principles Governing Jurisdiction

Section 300 et seq. provides “a comprehensive statutory scheme establishing procedures for the juvenile court to follow when and after a child is removed from the home for the child’s welfare. [Citations.]” (*In re Celine R.* (2003) 31 Cal.4th 45, 52.) “The objective of the dependency scheme is to protect abused or neglected children and those at substantial risk thereof and to provide permanent, stable homes if those children cannot be returned home within a prescribed period of time. [Citations.] Although a parent’s interest in the care, custody and companionship of a child is a liberty interest that may not be interfered with in the absence of a compelling state interest, the welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect. [Citations.]” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.)

Section 300, subdivision (b), which is referred to in the pleadings by the shorthand phrase “failure to protect,” sets forth several grounds for finding a child a “dependent

child” within the jurisdiction of the juvenile court. In relevant part, it provides for jurisdiction 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 [the] parent ... to adequately supervise or protect the child, ... or by the inability of the parent ... to provide regular care for the child due to the parent’s ... substance abuse.” (§ 300, subd. (b).) The Department relied on both of these grounds in its petitions.

A jurisdiction finding under section 300, subdivision (b) requires proof of three elements: “ ‘(1) neglectful conduct by the parent in 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.’ [Citation.]” (*In re John M.* (2013) 217 Cal.App.4th 410, 418.) “ ‘Subdivision (b) means what it says. Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness.’ [Citations.]” (*Ibid.*) “ ‘The third element, ... effectively requires a showing that *at the time of the jurisdictional hearing* the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur).’ (*In re Savannah M.* [(2005)] 131 Cal.App.4th [1387,] 1396, ... , see also *In re S.O.* (2002) 103 Cal.App.4th 453, 461 ... [past conduct probative “ ‘if there is reason to believe that the conduct will continue’ ”].) [¶] The paramount concern of any dependency proceeding is the child’s best interests. (*In re Josiah Z.* (2005) 36 Cal.4th 664, 673)” (*In re B.T.* (2011) 193 Cal.App.4th 685, 692.)

2. Analysis

Mother agrees that the events of December 4 through December 8, leading up to her hospitalization, establish the first two elements of section 300, subdivision (b) and support the Department’s decision to obtain a safety plan from her. She contends, however, that at the time of the hearing there was insufficient evidence of the third

element, “serious physical harm or illness” or a “substantial risk” of such harm or illness to the children. Mother argues “the evidence established an absence of current risk,” there was no evidence of substance abuse by Mother since December 8 (either alcohol or narcotics), “no evidence of untoward conduct in the presence of her children,” and “no evidence her conduct of self-medicating with alcohol was likely to recur.” Mother adds there was no evidence her maintenance program on Subutex or Suboxone created a substantial risk or that she had even used alcohol after December 8.

“Although section 300 generally requires proof the child is subject to the defined risk of harm at the time of the jurisdiction hearing [citations], the court need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child [citation]. The court may consider past events in deciding whether a child currently needs the court’s protection. [Citation.] A parent’s ‘ “[p]ast conduct may be probative of current conditions” if there is reason to believe that the conduct will continue.’ ” (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1383.) The Legislature has declared, “The provision of a home environment 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. Successful participation in a treatment program for substance abuse may be considered in evaluating the home environment.” (§ 300.2.)

Mother questions the court’s reliance on the testimony of social worker supervisor Fox, who opined the risk to the children’s physical safety was high due to their ages and Mother’s continued denial of a problem. Mother notes that Fox never met her and attacks the factual basis for Fox’s opinion, asserting that Fox relied wholly on the reports of Mother’s denial from unnamed sources, and that Fox was unaware of Mother’s statements to treatment counselor George accepting a problem with alcohol. Mother also relies on Fox’s testimony that Mother had complied with the safety plan and the Department’s requests for random drug testing, and that each time the assigned social

worker visited, she found mother sober and the children healthy and well. Mother argues that contrary to Fox, George opined that Mother was not in denial about her substance abuse and assessed Mother at low risk for relapse.

Mother essentially asks us to reweigh the competing opinions of Fox and George, which is not our role. Reviewing for substantial evidence, “[w]e do not evaluate the credibility of witnesses, attempt to resolve conflicts in the evidence or determine the weight of the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court’s order and affirm the order even if there is other evidence supporting a contrary finding. [Citations.]” (*R.V., supra*, 208 Cal.App.4th at p. 843.) Although there is evidence that supports Mother’s position, there is other substantial evidence that supports the juvenile court’s orders.

Mother oversimplifies George’s testimony and does not discuss the entirety of that testimony. When George first assessed Mother at low risk for relapse, George did not know that Mother had been addicted to narcotics and took Subutex or that Mother relied on her church group for support, but was not attending those meetings. George did opine that Mother was willing to make positive changes for herself and her children and stated that a person who denied an alcohol problem would not be at risk for relapse if he or she was in treatment. But Mother’s treatment was scheduled to end shortly after the hearing and the court may have considered that fact. George disagreed that Mother continued to deny her struggle with substance abuse and was minimally engaged in services, but conceded that additional information could change her assessment of Mother’s risk level. George also opined that a person who repeatedly denied an alcohol problem had a higher risk of relapse.

Mother’s own testimony contradicted George’s testimony and supported the conclusion that Mother was still in denial about her alcohol abuse at the time of the hearing. Contrary to statements Mother made in the hospital, at the hearing she denied

using alcohol daily before December 8 and denied having had withdrawal symptoms if she did not drink. Mother testified that she had been drinking for a few days before entering the hospital, but did not believe a hospital nurse smelled alcohol on her breath. Although two physicians opined that her pancreatitis was alcohol-induced, Mother disagreed with their diagnoses and attributed her pancreatitis and hospitalization to the colitis she was diagnosed with in October 2015. Mother denied being addicted to opiates and told the court her doctor prescribed Subutex for pain management, not to treat an opiate addiction. She also denied telling the social worker she had withdrawal symptoms in the absence of alcohol. All of this was substantial evidence supporting the trial court's finding that Mother continued to deny both that she had a problem with alcohol and that she was dependent on narcotics. Indeed, the court found that "even on the stand," Mother "failed to show this Court that she understands that alcohol played such a significant role in her health."

Citing *J.N.*, *supra*, 181 Cal.App.4th 1010, 1026, Mother argues that "a single incidence of significant insobriety" fails to establish evidence of risk of chronic and endangering substance abuse. Mother's reliance on *J.N.* is misplaced. In that case, the parents went with their three children to a restaurant, where both parents drank beer. On their way home, the father—who was driving with a blood alcohol content of 0.20—struck another car and, while fleeing that accident, hit a signal light pole. Two of the children suffered physical injuries as a result of the crash. (*Id.* at pp. 1014–1017.) The first issue in *J.N.* was "whether evidence of a single episode of parental conduct was sufficient to bring the three children within the juvenile court's jurisdiction." (*Id.* at p. 1022.) In *J.N.*, the juvenile court did not find that either parent had an ongoing substance abuse problem, and nothing in the record would have supported such a finding. Thus, this court held the child welfare agency failed to establish the first element for jurisdiction under section 300, subdivision (b). (*Ibid.*) As for the third element, this

court concluded that although there was evidence that one of the children suffered serious physical harm in the car crash, the exercise of dependency jurisdiction was improper because “there was no evidence from which to infer there is a substantial risk such behavior will recur.” (*Id.* at p. 1026.) There was no evidence that the parents were substance abusers or that they even consumed alcohol on a regular basis, and the record supported the conclusion that the parents were remorseful and willing to learn from their mistakes on the day of the crash. (*Ibid.*)

In *J.N.*, this court explained: “In evaluating risk based upon a single episode of endangering conduct, a juvenile court should consider the nature of the conduct and all surrounding circumstances. It should also consider the present circumstances, which might include, among other things, evidence of the parent’s current understanding of and attitude toward the past conduct that endangered a child, or participation in educational programs, or other steps taken, by the parent to address the problematic conduct in the interim, and probationary support and supervision already being provided through the criminal courts that would help a parent avoid a recurrence of such an incident. The nature and circumstances of a single incident of harmful or potentially harmful conduct may be sufficient, in a particular case, to establish current risk depending upon present circumstances.” (*J.N.*, *supra*, 181 Cal.App.4th at pp. 1025–1026.) The appellate court must have a basis to conclude there is a substantial risk the parent’s endangering behavior will recur. (*Id.* at p. 1026.)

Unlike *J.N.*, this case does not involve a single incident of excessive alcohol use. There was evidence that Mother abused alcohol for some time. During the marriage, she hid her drinking and Father was unsure how much she drank. After Father filed for divorce, Mother started drinking to excess. She told a physician she drank daily, after she put the children to bed, and had four to five drinks a day, plus shots. This went on for months prior to December 8. As for Mother’s current understanding and attitude toward

her past conduct that endangered the children (*J.N.*, *supra*, 181 Cal.App.4th at pp. 1025–1026), although Mother participated in outpatient substance abuse treatment after December 8, there was evidence that rather than work on her substance abuse issues, on occasion she discussed her divorce and other issues. She refused to attend Alcoholics Anonymous and said the women’s support group at her church provided adequate support, but she did not attend those meetings regularly. As we have noted, even at the hearing, Mother continued to deny that she has a problem with alcohol. An additional concern in this case is that the children were just three and almost five years old when the court made its jurisdiction order and there were no other adults in the household that could step in and take care of the children in the event Mother relapsed and passed out again from substance abuse. “Exercise of dependency court jurisdiction under section 300, subdivision (b), is proper when a child is ‘of such tender years that the absence of adequate supervision and care poses an inherent risk to [his or her] health and safety.’ [Citations.]” (*In re Kadence P.*, *supra*, 241 Cal.App.4th at p. 1384.)

Mother also relies on *In re Rebecca C.* (2014) 228 Cal.App.4th 720 (*Rebecca C.*). The mother in *Rebecca C.* had a history of drug abuse, with criminal convictions for drug and theft crimes and a prior dependency proceeding. The mother completed a substance abuse program in 2006. (*Id.* at p. 722.) The mother relapsed and started using drugs again toward the end of 2012 after her son was arrested, she separated from her husband, and she had financial problems. (*Id.* at pp. 722–723.) *Rebecca C.*, who was 13 years old, was removed from the home in August 2013 after the mother tested positive for methamphetamine, marijuana, and amphetamine. Thereafter, the mother enrolled in a drug treatment program. The mother, who had obtained a medical marijuana card, was not very compliant with the program. She tested positive for marijuana eight out of nine times, went to only half of her drug treatment sessions, and failed to comply with her treatment plan. (*Id.* at p. 723.) The appellate court concluded that although there was

sufficient evidence to support a substance abuse finding, there was insufficient evidence that the mother's "substance abuse [had] caused or [was] causing a substantial risk of harm to Rebecca." (*Id.* at p. 727–728.) The child denied physical or emotional abuse and denied knowledge of the mother's drug use. There were no signs of abuse, the child was otherwise well cared for, and the mother was involved in the child's special education program. When confronted with a positive drug test, the mother said she had made a mistake by relapsing and sought drug treatment. (*Id.* at pp. 722–723, 727.) The appellate court concluded that drug use alone is not a basis for asserting dependency court jurisdiction because it "excises out of the dependency statutes the elements of causation and harm." (*Id.* at pp. 727–728.) The court also rejected the child welfare agency's argument that the mother's failure to insure the child did her homework required the court to take jurisdiction, reasoning that section 300, subdivision (b) required "a risk of 'physical harm,' and homework issues do not rise to a level of physical harm." (*Id.* at p. 727.)

This case is distinguishable from *Rebecca C.* in several respects. Although the mother in *Rebecca C.* was not fully compliant with her drug treatment program, she admitted she had a drug problem. At the hearing in this case, Mother continued to deny her alcohol and opiate addictions and denied that the condition for which she was hospitalized was alcohol-induced. Further, Rebecca C. was 13 years old, old enough to seek help on her own in the event of an emergency. She also had adult siblings who lived in the family home and nearby. (*Rebecca C.*, *supra*, 228 Cal.App.4th at p. 722.) In contrast, the children here were three and almost five years old, too young to fend for themselves in the event Mother relapsed and again drank to the point where she has passed out and is unable to care for the children. The only adult in the household was Mother; Father and the children's extended family all lived in the Sacramento area, hours away from Santa Cruz.

C. Substantial Evidence Supports the Disposition Order

Mother contends the juvenile court abused its discretion when it removed the children from her custody and gave physical custody to Father. She argues the record fails to establish by clear and convincing evidence that there was no way to protect the children from the substantial danger of harm without removing them from her home. She notes that in January and February, the Department recommended Mother retain physical custody with family maintenance services but changed its recommendation in March. Mother argues the juvenile court failed to consider any alternatives to removing the children from her custody and thereby abused its discretion. Mother does not challenge the finding that placement with Father would not be detrimental to their children.

Under section 361, a child may not be removed from the home of a parent with whom the child has been residing unless the juvenile court finds by “clear and convincing evidence” that “[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be protected without removing the minor from the minor’s parent’s ... physical custody.” (§ 361, subd. (c)(1).)

“The statute ‘is clear and specific: Even though children may be dependents of the juvenile court, they shall not be removed from the home in which they are residing at the time of the petition unless there is clear and convincing evidence of a substantial danger to the child’s physical health, safety, protection, or physical or emotional well-being *and* there are no “reasonable means” by which the child can be protected without removal.’ ” (*In re Ashly F.* (2014) 225 Cal.App.4th 803, 809 (*Ashly F.*), quoting *In re Jasmine G.* (2000) 82 Cal.App.4th 282, 288, original italics.) “The parent need not be dangerous and the child need not have been actually harmed before removal is appropriate. [Citation.]” (*R.V., supra*, 208 Cal.App.4th at p. 849.) Section 361, subdivision (c)(1) provides that

the “court shall consider, as a reasonable means to protect the minor, each of the following: [¶] (A) The option of removing an offending parent ... from the home. [¶] (B) Allowing a nonoffending parent ... to retain physical custody as long as that parent ... presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm.”

“To aid the court in determining whether ‘reasonable means’ exist for protecting the children, short of removing them from their home, the California Rules of Court require [the Department] to submit a social study which ‘must include’ among other things: ‘A discussion of the reasonable efforts made to prevent or eliminate removal.’ (Cal. Rules of Court, rule 5.690(a)(1)(B)(i).)” (*Ashly F.*, *supra*, 225 Cal.App.4th at p. 809.) Section 361, also requires the juvenile court to “make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her home” and to “state the facts on which the decision to remove the minor is based.” (§ 361, subd. (d).)

“ ‘[O]ur dependency system is premised on the notion that keeping children with their parents while proceedings are pending, whenever safely possible, serves not only to protect parents’ rights but also children’s and society’s best interests.’ (*Henry V.*, *supra*, 119 Cal.App.4th 522, 530.) The requirement for a discussion by the child welfare agency of its reasonable efforts to prevent or eliminate removal (Cal. Rules of Court, rule 5.690(a)(1)(B)(i)), and a statement by the court of the facts supporting removal (§ 361, subd. (d)), play important roles in this scheme. Without those safeguards there is a danger the agency’s declarations that there were ‘no reasonable means’ other than removal ‘by which the [children’s] physical or emotional health may be protected’ and that ‘reasonable efforts were made to prevent or to eliminate the need for removal’ can become merely a hollow formula designed to achieve the result the agency seeks.” (*Ashly F.*, *supra*, 225 Cal.App.4th at p. 810.)

“Maintenance of the familial bond between children and parents—even imperfect or separated parents—comports with our highest values and usually best serves the interests of parents, children, family, and community. Because we so abhor the involuntary separation of parent and child, the state may disturb an existing parent-child relationship only for strong reasons and subject to careful procedures.” (*Henry V.*, *supra*, 119 Cal.App.4th at pp. 530–531.) “ ‘A mere finding of parental abuse does not sever the legal and familial bond between parent and child. The Juvenile Court Law restricts judicial power to remove a child from the care and society of even an abusive or abuse-tolerant parent. (§§ 319, subd. (d), 360, 361, subd. (b) [now subd. (c)].)’ ” (*Id.* at p. 531, quoting *In re Kieshia E.* (1993) 6 Cal.4th 68, 76–77, italics omitted.)

Unlike *Ashly F.*, where (1) the child welfare agency’s reports failed to state what “ ‘reasonable means’ ” it had considered for protecting the children or the “ ‘reasonable efforts’ ” it had made to eliminate the need to remove the children from the home, and (2) the juvenile court failed to state the facts supporting its conclusions (*Ashly F.*, *supra*, 225 Cal.App.4th at pp. 807–810), both the Department’s reports and the court’s order in this case complied with the procedural requirements for removal.

The Department’s reports set forth the results of the social worker’s interactions with Mother and the services offered to Mother in an effort to avoid removal from the home. Although Mother freely admitted the extent of her drinking when she first met with social workers in December, she said she did not need the substance abuse treatment offered by the hospital or that suggested by the social worker. She did, however, agree to the drug testing, assessment, and outpatient treatment recommended by Murillo. That the Department initially recommended continued custody with Mother with family maintenance services belies Mother’s assertion that the court failed to consider any alternatives to removal. The Department changed its recommendation on March 29 based on Mother’s “continued lack of insight, despite access to services.” Even Mother’s

counselor at Alto had stated that Mother continued to deny having a problem with alcohol, sometimes avoided talking about her drinking, and denied any problem with opiates. The Department also reported that when the social worker met with Mother on February 24, Mother continued to deny problems with alcohol, said she was a social drinker, and said “she viewed Alto as one-on-one counseling.” And as we have stated, Mother demonstrated a continued lack of insight into her substance abuse when she testified at the hearing. At that time, she minimized and denied both her alcohol and substance abuse problems.

In making its disposition order, the juvenile court found that the Department had made reasonable efforts to prevent removal of the children and had complied with the case plan. Those efforts included referring Mother for an alcohol assessment, which was done; parenting classes and general counseling, which Mother had not followed through on; and referring the children for counseling, which had not been done. The court found that while Mother participated in the treatment at Alto, her engagement had been “minimal” and that Mother’s testimony showed “a lack of insight into the role that alcohol has played in her ability to be a safe parent given the age of the children.”

Noting that Mother “drank herself almost into a coma,” the court stated that the “children are so young that there are not adequate safety means to intervene for these children to be safe if the mother were to engage in that behavior again.” The court also observed that Mother had not disclosed her alcohol use to her psychiatrist, who had recommended against using alcohol while on Subutex, that the psychiatrist had reported that “the mixture of Subutex and excessive alcohol could result in respiratory depression, which could cause death,” and that Mother’s psychiatric treatment had been limited by the fact that Mother always brought the children with her. Substantial evidence supported each of these findings.

The juvenile court also complied with the requirement of section 361, subdivision (c)(1) that it consider the option of removing Mother from the home, or allow Father to retain physical custody as long as he presented an acceptable plan demonstrating that he will be able to protect the child from future harm. Since Mother was the only adult residing in her household, removing her from the home was not an option in this case. The court found that Father had a stable home, the ability to provide childcare, the support of his family, and possibly the support of Mother's family. The court also found that Father had obtained services for anger management after the domestic violence incident in 2015, noted that Mother was the aggressor in the 2013 domestic violence incident, and suggested both parents continue to address their anger management issues.

Like the mother in *R.V.*, in which substantial evidence supported the removal order, although Mother was engaged in services and making progress, she continued to deny the substance abuse problems that placed her children in danger. (*R.V.*, *supra*, 208 Cal.App.4th at p. 849.)

Mother argues that as in *Henry V.*, there was ample evidence that appropriate services could have been provided to her and the children in her home. In *Henry V.*, the psychologist who evaluated the child recommended, among other things, a bonding study with the mother and child. The social worker testified that the mother—who had burned her son with a curling iron—needed therapy to create a better bond with the child and that “services were available to support bonding in the home, if Henry were returned, including a counseling program that comes to homes, unannounced visits, and public health nursing services.” (*Henry V.*, *supra*, 119 Cal.App.4th at pp. 526–527.) We see no such evidence in this case.

D. Indian Child Welfare Act

Mother argues the court committed reversible error by failing to comply with the notice provision of the ICWA after Father reported possible Native American heritage. The Department contends there was no error because although Father initially indicated he might have Native American heritage, he later stated he did not. The Department also asserts that if there was error, it was harmless because the children were placed with Father and were not placed in foster care or adopted. We agree with the Department.

Before filing its petitions, the Department asked both parents whether they had any Native American heritage. Mother said she did not; Father said he might. When the Department filed the petitions on January 14, the social worker reported on the Indian Child Inquiry Attachment form (Judicial Council form ICWA 010(A)) that the Indian child inquiry had been made and that the Department was “still waiting for [a] response from parents.”

In its minute orders of the February 9 “First Appearance Hearing,” which both parents attended, the court stated: “Based on parents[’] indication that they have no Indian heritage, the Court finds that the child is not an Indian child and that ICWA does not apply in this matter.” The record does not contain a reporter’s transcript of the February 9 hearing.

In her February 18 jurisdiction and disposition report, which was filed on March 3, the social worker stated: “[ICWA] may apply. The father was asked on 1/11/15 [*sic*] if he had Indian Heritage, and he stated he might. The mother was asked on 1/7/2015 [*sic*] if she had Indian Heritage, she stated that she did not. The Department will be taking the necessary steps to notify the appropriate tribes.” Mother relies on this report. The issue of ICWA compliance was not discussed at the jurisdiction and disposition hearing.

“ICWA was enacted ‘to promote the stability and security of [Native American] tribes and families by establishing minimum standards for removal of [Native American]

children from their families and placement of such children “in foster or adoptive homes which will reflect the unique values of [Native American] culture” ’ [Citations.]”
(*In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520 (*Jeremiah G.*.)

When a court knows or has reason to know that a Native American child is involved in a dependency proceeding, a duty arises under ICWA to give the appropriate tribe or tribes notice of the pending proceedings and their right to intervene. Alternatively, if there is insufficient reason to believe a child is a Native American child, notice need not be given. (*In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538.)

“ICWA defines an ‘Indian child’ as a child who is either (1) ‘a member of an Indian tribe’ or (2) ‘eligible for membership in an Indian tribe and ... the biological child of a member of an Indian tribe.’ (25 U.S.C. § 1903(4).) Conversely, if the child is not a tribe member, and the mother and the biological father are not tribe members, the child simply is not an Indian child.” (*Jeremiah G., supra*, 172 Cal.App.4th at p. 1520.)

The circumstances that may provide probable cause to believe the child is Native American include, but are not limited to: “ ‘(A) A person having an interest in the child ... informs the court or the county welfare agency ... or provides information suggesting that the child is an Indian child; [¶] (B) The residence of the child, the child’s parents, or an Indian custodian is in a predominantly Indian community; or [¶] (C) The child or the child’s family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the Indian Health Service.’ [Citations.] If these or other circumstances indicate a child may be an Indian child, the social worker must further inquire regarding the child’s possible Indian status. Further inquiry includes interviewing the parents, Indian custodian, extended family members or any other person who can reasonably be expected to have information concerning the child’s membership status or eligibility. [Citation.] If the inquiry leads the social worker or the court to know or have reason to know an Indian child is involved,

the social worker must provide notice. [Citations.]” (*In re Shane G.*, *supra*, 166 Cal.App.4th at pp. 1538–1539.)

Both federal regulations and California law require more than a bare suggestion that a child might be a Native American child. (*Jeremiah G.*, *supra*, 172 Cal.App.4th at p. 1520.) “In a juvenile dependency proceeding, a claim that a parent, and thus the child, ‘may’ have Native American heritage is insufficient to trigger ICWA notice requirements if the claim is not accompanied by other information that would reasonably suggest the minor has [Native American] ancestry.” (*Id.* at p. 1516, citing *In re O.K.* (2003) 106 Cal.App.4th 152, 155.) In *Jeremiah G.*, the assertion that there was a “ ‘possibility’ ” the great-grandfather of the father “ ‘was Indian,’ ” without more, was too vague and speculative to require ICWA notice to the Bureau of Indian Affairs. (*Jeremiah G.*, at p. 1516.) The court concluded the mother’s claim of ICWA error lacked merit because the father later retracted his claim, telling the court that he “ ‘didn’t actually have’ ” Native American ancestry. (*Ibid.*)

This case is like *Jeremiah G.* and *In. re O.K.* On January 11, Father told the social worker he might have Native American heritage without providing more information. This was too vague and speculative to require notice to the tribes under ICWA. Moreover, Father personally told the court at his first appearance that he did not have Native American heritage and the court found ICWA did not apply. It appears the social worker lost track of that finding in her February 18 report when she stated that ICWA may apply and the Department would “be taking the necessary steps to notify the appropriate tribes.” The social worker’s statements were based on the information she gathered in January; the social worker did not report receiving any new information after the initial hearing that would have triggered the ICWA inquiry anew.

Even if the trial court had erred, any error was harmless because the Department did not pursue foster care or adoption, instead recommending initially that the children

remain with Mother and later changing its recommendation to placement with Father. (*In re Alexis H.* (2005) 132 Cal.App.4th 11, 14–16.) “By its own terms, [ICWA] requires notice only when child welfare authorities seek permanent foster care or termination of parental rights; it does not require notice *anytime* a child of possible or actual Native American descent is involved in a dependency proceeding.” (*Id.* at p. 14.) California law is in accord. (*Id.* at p. 15.)

DISPOSITION

The orders are affirmed.

Grover, J.

WE CONCUR:

Rushing, P.J.

Walsh, J.*

H043460
In re E.W. et al.; Santa Cruz County HSD v. J.W.

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.