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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION THREE

In re CHRISTOPHER P. et al.,  
Persons Coming Under the Juvenile  
Court Law.

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DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

L.N.,

Defendant and Appellant.

B294247

(Los Angeles County  
Super. Ct. No. 18CCJP06100A-B)

APPEAL from an order of the Superior Court of Los Angeles County, Marguerite D. Downing, Judge. Reversed in part and remanded with directions.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Sally Son, Deputy County Counsel for Plaintiff and Respondent.

Mother L.N. (Mother) appeals the juvenile court's jurisdictional findings and dispositional order declaring her children dependents of the juvenile court. We find insufficient evidence to support the juvenile court's findings that Mother abused alcohol and failed to protect the children from father Jose P.'s (Father) drug use and domestic violence. Further, we find the juvenile court failed to evaluate the allegation that Mother caused serious physical harm to the children under the correct legal standard. We therefore reverse the jurisdictional findings concerning Mother's alcohol use and failure to protect the children, and remand for the court to make findings as to Mother's physical discipline under the factors set forth in *In re D.M.* (2015) 242 Cal.App.4th 634 (*D.M.*).<sup>1</sup>

#### **FACTUAL AND PROCEDURAL BACKGROUND**

##### *A. Background and Prior Dependency History*

The family consists of Mother, Father, and minors Christopher P. (born in August 2010) and Nathan N. (born in August 2011). The parents separated in 2014. The children lived with Mother and her boyfriend at a confidential address unknown to Father.

The children were former dependents of the court and had been the subject of prior referrals to the Los Angeles County Department of Children and Family Services (DCFS). In 2014, DCFS investigated a report of domestic violence between Mother and Father, reporting that the parents "had engaged in prior physical altercations in the presence of the children and

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<sup>1</sup> Father has not appealed from the jurisdictional findings and dispositional order. Thus, we address the facts relevant to Father only as they pertain to the allegations against Mother.

continued to engage in verbal altercations” and that Father had a history of verbal, emotional and mental abuse. The juvenile court sustained an allegation that Mother was “a current abuser of alcohol” and was “under the influence” while the children were in her care.<sup>2</sup> During the period of DCFS supervision, Mother showed “full compliance” with court orders and separated from Father. The court granted parents “50/50 custody” before terminating jurisdiction.

In 2015, a caller reported Mother drank often and neglected the children. Mother tested negative for all substances, and the allegations were deemed “unfounded.”

In April 2018, DCFS substantiated sexual abuse allegations involving both children. The district attorney’s office filed felony charges against a “non-relative minor” for forced sodomy, forced oral copulation, continuous sexual abuse and lewd acts on a child. Mother was noted to be “protective” by contacting the police, seeking treatment services, and moving to another apartment.<sup>3</sup>

Father was arrested for inflicting corporal injury to a spouse in 2007.

#### *B. Detention Report*

The children came to the attention of DCFS in August 2018, when a reporting party alleged that Father hit Mother’s

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<sup>2</sup> It is unclear from the record whether the court also sustained allegations as to Father, but a subsequent notation in the record indicates Father was “inconsistent” with court-ordered services.

<sup>3</sup> There is no indication in the record that a DCFS case was opened as a result of the sexual abuse allegations.

vehicle while the children were inside. A children's social worker (CSW) conducted an investigation.

Mother reported that on August 13, the day before school started, Father took the children shopping for shoes. He returned the children two hours late at 10:30 p.m. When Mother arrived with her boyfriend to pick them up, Father was verbally aggressive and insulting. Mother became upset and threw the shoes at him, then drove away. Father followed her in his vehicle. When Mother stopped to call the police, Father crashed into her vehicle. He then got out of his vehicle and hit the passenger window, yelling at the children to open the door. Father left when Mother told him she had called the police. Officers came to Mother's home and questioned her about the incident. Mother obtained a restraining order against Father following the incident.

The children confirmed Mother's account of the altercation. Nathan said Father had called Mother " 'bitch' " and " 'stupid,' " had followed them in his vehicle, and had hit Mother's vehicle window.<sup>4</sup> The children described previous fights between the parents "before [they] broke up," including "one occasion" in which Father pushed or threw Mother. The children did not want further visits with Father because they were afraid of him.

Both children were bonded to Mother and felt safe living with her. They were clean and appropriately groomed, with no visible marks or bruises. They denied any substance abuse at home, and the social worker observed no signs of drugs or alcohol. The children appeared properly supervised and well-fed, and had

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<sup>4</sup> In a subsequent interview, the children also reported that Father called Mother's boyfriend " 'bad words' " and demanded to know where they were living.

no medical issues. They were in therapy due to the sexual abuse they experienced. Mother denied any mental health or substance abuse issues, and indicated she drank only socially. She submitted to drug and alcohol testing on September 8 and was negative for all substances.

According to Mother, she did not use any objects to physically discipline the children, and she had never left bruises or marks from spankings. The children said Mother disciplined them by taking away privileges, and that she sometimes spanked Christopher on the buttocks with an open hand or belt. Neither child could recall the last time Mother had spanked Christopher, and both children denied that Christopher had ever had marks or bruises from a spanking. The CSW did not observe marks or bruises on either child's body, and both boys stated they felt safe with Mother.

A CSW interviewed Father on September 4. He reported the family had a history with DCFS due to Mother's "false allegations of domestic violence identifying him as the aggressor. Father indicated that when [the] parents were involved in [a] relationship mother would hit herself and call law enforcement to report[] that father hit her. Father stated that following an incident of false allegations by mother DCFS became involved and the family had a case." Father said he wanted a DNA test because he believed "there [was] a possibility the children are not his."

With regard to the August 13 incident, Father reported that Mother was upset that he was late returning the children, and he believed she "was drunk as she insulted him and threw the children's shoes at him." He admitted following Mother in his vehicle briefly, but said he did so to make sure the children were

okay, and he explained he knocked on Mother's window only to ask about the children. He claimed he did not call the police because Mother had already called them. Father expressed concern for the children's safety because he said he had observed Mother driving while intoxicated in the past. Father also reported that the children told him "multiple times that mother hits them." Father admitted he used marijuana outside the children's presence, and he refused to submit to drug testing. Father also admitted that he had a criminal history, but said it resulted from "other false domestic abuse allegations."

DCFS conducted other interviews. A social worker who had investigated the April 2018 referral noted the parents seemed "appropriate" and "protective," and she observed no indication that Mother was under the influence. Mother's boyfriend had known her for over four years and had no concerns about the children's safety while in Mother's care. The children's sexual abuse therapist, who had been treating them for four months, reported Mother was "actively engaged in the children's services speaking with [the therapist] after every session." The therapist had no concerns about the children when they were in Mother's care, but expressed concerns about their safety when they were in Father's care.

The court detained the children from Father and released them to Mother. Father was granted monitored visitation.

### *C. Dependency Petition*

DCFS filed a dependency petition on September 21, 2018 under Welfare & Institutions Code<sup>5</sup> section 300, subdivisions (a)

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<sup>5</sup> All subsequent undesignated statutory references are to the Welfare and Institutions Code.

and (b)(1). The petition alleged Mother physically abused the children by striking them with a belt (counts a-1, b-1); failed to protect the children by engaging in violent altercations with Father in their presence and allowing Father unlimited access to them (counts a-2, b-2);<sup>6</sup> drove a vehicle while under the influence of alcohol while the children were passengers (count b-3); had a history of alcohol abuse and was a current alcohol abuser, rendering her incapable of caring for the children (count b-4); and knew of Father's substance abuse and failed to protect the children by allowing Father unlimited access to them (count b-5). The petition also alleged counts as to Father.

*D. Jurisdiction/Disposition Report*

DCFS conducted further interviews in October 2018. Christopher reported Mother hit him and Nathan with a belt when they misbehaved. He said the last time Mother had used a belt was “ ‘one week ago because I hit my brother but she does not leave us purple.’ ” When questioned further, he said, “ ‘she does not hit us anymore I think it was in the past.’ ” Nathan reported Mother disciplined them by making them go to their

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<sup>6</sup> Specifically, counts a-2 and b-2 alleged the parents “have a history of engaging in violent altercations in the children’s presence. On 08/[13]/18, the father chased the mother’s vehicle while the father drove the father’s vehicle, followed the mother closely and hit the mother’s car, while the children were passengers in the mother’s vehicle. The father struck the mother’s vehicle windows and father used derogatory and demeaning language towards the mother and engaged in extreme verbal confrontations with aggressive and threatening conduct towards the mother in the children’s presence. On a prior occasion, the father pushed the mother, in the presence of the children.”

room, “‘but she does not do that anymore, she never leaves us purple.’” When pressed about what Mother “‘does not do,’” Nathan stated, “‘she does not hit us or leave us any purple.’” No visible marks or bruises were observed on their bodies. Mother explained she “‘never hit them like that’” and denied any inappropriate physical discipline, but admitted to occasional spankings on the buttocks with an open hand.

Mother and the children denied she was intoxicated during the August 13 incident. Mother admitted a history of alcohol consumption, but said she no longer drank at all. Mother was cooperative with court orders and willing to participate in services.<sup>7</sup> Regarding Father’s drug use, both children had observed Father smoking drugs outside his vehicle. According to Mother, Father was addicted to marijuana and possessed a medical marijuana card, though he had no medical condition.

Based on Father’s failure to address past and current domestic violence and substance abuse issues, the children’s presence during the August 13 incident which caused them “undue stress and anxiety,” and the family’s past dependency history, DCFS recommended continued supervision of the children in Mother’s residence. DCFS noted Mother had been “protective” by contacting law enforcement and obtaining a restraining order. However, DCFS had concerns about Mother, noting she had escalated the August 13 altercation by throwing the shoes at Father. Despite Father’s claim that Mother was intoxicated, it was “unknown if this is true since mother was not asked to drug test by [DCFS] until several weeks after the

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<sup>7</sup> Father refused to participate in services and did not appear for an interview.



incident, after father reported concerns about mother abusing alcohol.” Although Mother tested negative, she “had a previous issue with alcohol during [the] last DCFS case . . . .” DCFS was also concerned about the children’s statements that Mother disciplined them with a belt.

*E. Jurisdiction/Disposition Hearing*

At the November 20, 2018 adjudication, the court sustained all counts against Mother and Father, amending counts a-1 and b-1 to reflect “inappropriate physical discipline,” rather than physical abuse, by Mother. The court found Mother had contributed to the August 13 altercation by throwing the shoes at Father, and did not find “anybody’s statements” regarding physical discipline of the children “credible” because they were inconsistent. The children were declared dependents of the court, removed from Father, and placed with Mother under DCFS supervision. Father was granted monitored visitation.

The court ordered Mother and Father to submit to 10 random drug and alcohol tests, and to participate in parenting classes, individual counseling, and a domestic violence program.<sup>8</sup> Mother’s domestic violence program was for survivors, while Father’s was a 52-week batterer’s intervention program.

Mother timely appealed the jurisdictional findings and dispositional order.

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<sup>8</sup> The court also granted Mother’s request for reissuance of the temporary restraining order against Father.

## DISCUSSION

### A. *Mother's Appeal Is Justiciable.*

The juvenile court assumed jurisdiction based on findings against both Mother and Father, but Father has not appealed, and Mother does not challenge the jurisdictional findings concerning him. Thus, DCFS argues, Mother's appeal is non-justiciable because the juvenile court would retain jurisdiction despite a favorable ruling on Mother's appeal. (*In re Briana V.* (2015) 236 Cal.App.4th 297, 308 [“‘[A] jurisdictional finding good against one parent is good against both.’”]; *In re I.A.* (2011) 201 Cal.App.4th 1484, 1492 [“an appellate court may decline to address the evidentiary support for any remaining jurisdictional findings once a single finding has been found to be supported by the evidence”].) “An important requirement for justiciability is the availability of ‘effective’ relief – that is, the prospect of a remedy that can have a practical, tangible impact on the parties’ conduct or legal status.” (*In re I.A., supra*, at p. 1490.)

“[W]e generally will exercise our discretion and reach the merits of a challenge to any jurisdictional finding when the finding (1) serves as the basis for dispositional orders that are also challenged on appeal [citation]; (2) could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings [citations]; or (3) ‘could have other consequences for [the appellant], beyond jurisdiction’ [citation].” (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763.) Findings that Mother “knowingly or negligently” harmed the children or exposed them to a substantial risk of physical harm are “pernicious” and “could potentially impact the current or future dependency proceedings.” (*In re M.W.* (2015) 238 Cal.App.4th 1444, 1452.) The jurisdictional findings are also the basis for the

dispositional order that Mother challenges on appeal. We therefore will exercise our discretion to review the court's jurisdictional findings against Mother.

*B. Standard of Review and Applicable Law*

Mother challenges the sufficiency of the evidence supporting each of the jurisdictional findings against her. "On appeal from a juvenile court order in a dependency hearing, an appellate court's review of the sufficiency of the evidence to support the judgment is limited to whether the judgment is supported by substantial evidence. Issues of fact and credibility are questions for the trial court and not the reviewing court. The power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trier of fact." (*In re Christina T.* (1986) 184 Cal.App.3d 630, 638-639.)

The court found jurisdiction appropriate under section 300, subdivisions (a) and (b). Under subdivision (a), a court assumes jurisdiction if the child "has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian." (§ 300, subd. (a).) Subdivision (b) permits the court to assume jurisdiction where "[t]he 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 . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's . . . substance abuse." (§ 300, subd. (b)(1).)

C. *Jurisdictional Findings*

1. Alcohol Abuse (counts b-3, b-4)

The court found Mother posed a risk of serious physical harm to the children because she drove while under the influence on the night of the August 13 altercation and had abused alcohol in the past. We find no substantial evidence to support these findings.

A parent's past substance abuse, without evidence of a current risk of harm, does not justify the juvenile court's exercise of jurisdiction over his or her child. (See, e.g., *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1001, 1004 [no evidence of "current risk of serious physical harm" where, at the time of hearing, mother had tested clean for three months, child was well cared for, and home was clear of drugs].) There " 'must be some reason beyond mere speculation to believe the alleged conduct will recur. [Citation.]' " (*In re D.L.* (2018) 22 Cal.App.5th 1142, 1146.) Courts have found a single recent incident of serious alcohol abuse, or even a parent's ongoing substance abuse problem, insufficient to bring a child within the jurisdiction of the dependency court if there is no evidence of a serious risk of harm to the child. (See *In re David M.* (2005) 134 Cal.App.4th 822, 829-832 [no specific, defined risk of harm despite mother's ongoing substance abuse and mental illness where child was healthy and well cared for and mother tested negative for drugs over four months]; *In re J.N.* (2010) 181 Cal.App.4th 1010, 1025-1027 [no evidence of substantial risk of harm based on single incident of driving while intoxicated, considering "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”].)

The record does not support the juvenile court’s finding that Mother was intoxicated on the night of the August 13 altercation. The only evidence in this regard was Father’s statement that he believed Mother was intoxicated. However, it is undisputed that Father was not with Mother for most of that evening, and he never asserted that he saw her consume alcohol. By his own account, he believed she was intoxicated only because she was upset and threw shoes at him—but that behavior does not, on its face, suggest intoxication. Further, Father’s account of the incident is undermined by his own actions: He admitted following Mother in his vehicle and knocking on her window to check that the children were fine, but despite his purported concern for their safety, he drove away without calling the police or reporting Mother was driving under the influence. Finally, although there is no dispositive evidence that Mother was *not* under the influence, we note that Mother, not Father, called the police—an act incongruous with driving under the influence—and Mother and both children denied she was intoxicated.

Neither does the record support the findings that Mother was currently abusing alcohol or that her past alcohol abuse presented a current risk of harm to the children. Social workers who interviewed the family in April, August and October of 2018 found no indication of alcohol abuse; to the contrary, Mother submitted to testing the day after DCFS requested it and was negative for all substances. Further, DCFS never substantiated the 2015 referral that Mother drank often and neglected the children, noting that Mother had tested negative for all substances then.

The only evidence of alcohol abuse, therefore, is the juvenile court's sustained allegation that Mother abused alcohol in 2014, including when the children were in her care. The sustained allegation of alcohol abuse in 2014 is, in our view, too remote to establish any such abuse four years later, particularly because Mother showed "full compliance" with the court's 2014 orders and had successfully reunified with the children.

Finally, there was no evidence Mother was unable to provide regular care for the children. Christopher and Nathan were observed to be healthy, well cared for, and bonded to Mother. The children's sexual abuse therapist – who spoke to Mother after every therapy session for four months – had no concerns about Mother's sobriety and noted Mother was actively engaged in monitoring the children's progress. Lastly, Mother was cooperative and willing to participate in services, indicating an understanding of her past wrongful conduct and a willingness to reform it. On this record, we find no substantial evidence either that Mother currently abused alcohol or that her past alcohol abuse posed a current, substantial risk of harm to the children.

2. Failure to Protect from Domestic Violence and Father's Drug Use (counts a-2, b-2, b-5)

The court found that Mother failed to protect the children by engaging in violent altercations with Father in their presence, and by allowing Father unlimited access to the children when she knew of his marijuana abuse. These findings are not supported by substantial evidence.

Domestic violence regularly inflicted on one parent by another has been held to expose the children to a risk of serious physical harm within the meaning of section 300, subdivisions (a)

and (b). (See *In re Giovanni F.* (2010) 184 Cal.App.4th 594, 598-600 [“Domestic violence is nonaccidental.”]; *In re E.B.* (2010) 184 Cal.App.4th 568, 575-576 [“ ‘even if they are not physically harmed, children suffer enormously from simply witnessing the violence between their parents’ ”].) In contrast, isolated instances of domestic violence will not support jurisdiction, particularly where the only violence established by the evidence occurred years earlier. (See *In re Daisy H.* (2011) 192 Cal.App.4th 713, 717.) The determinative issue is whether “there is evidence that the violence is ongoing or likely to continue and that it directly harmed the child physically or placed the child at risk of physical harm.” (*Ibid.*)

Here, there is insufficient evidence of regular domestic violence from which Mother failed to protect the children. Although there was evidence of earlier domestic violence between the parents in 2014, it is undisputed that Mother separated from Father that same year and subsequently moved to a confidential location unknown to Father. Indeed, it appears that Father attacked Mother in August 2018, in part, because she refused to disclose where she and the children were living—conduct that is consistent with *avoiding* domestic violence, not submitting to it.

The juvenile court found Mother failed to protect the children from domestic violence because she contributed to the August 13 altercation by throwing shoes at Father. While Mother should not have engaged in the dispute by throwing shoes at Father, we do not agree that her conduct is indicative of a failure to protect. Mother promptly drove away when Father became aggressive, and immediately called the police when he followed her and crashed his vehicle into hers. She continued being proactive in protecting herself and the children by

obtaining a restraining order against Father. On this record, we discern no pattern of a failure to protect the children from domestic violence.

Neither does the record support the finding that Mother failed to protect the children by providing Father unlimited access to them and exposing them to his marijuana abuse. To establish jurisdiction under section 300, subdivision (b), there must be a causal nexus between a parent's failure to protect a child and the risk of serious physical harm to the child. (*In re Joaquin C.* (2017) 15 Cal.App.5th 537, 561.) Here, although the extent of Father's marijuana dependency is unclear, it appears Mother was required to permit Father regular unmonitored visitation pursuant to the court's custody order. DCFS cites no supporting authority for its proposition that "[a] '50/50 custody order' does not require that she give Father access to the children where they would be placed at a risk of harm." Nor does DCFS offer any meaningful evidence that Mother's allegedly neglectful conduct caused substantial risk of harm to the children, beyond its speculation that because the children reported Father screamed at them and slept a lot, "[t]hese could reasonably be attributed to Father's marijuana use." We find no substantial evidence that Mother failed to protect the children by knowingly exposing them to Father's marijuana abuse.

3. Physical Discipline Causing Serious Physical Harm (Counts a-1, b-1)

The court found Mother's physical discipline of the children put them at risk of serious physical harm. We conclude the court failed to make adequate findings concerning the necessity and severity of Mother's physical discipline, and thus we remand for further findings.



As noted above, section 300, subdivisions (a) and (b)(1) provide that a child is within the jurisdiction of the juvenile court if he or she “has suffered, or there is a substantial risk that the child will suffer, *serious physical harm*.” The statute does not define “serious physical harm,” but it states that serious physical harm “does *not* include reasonable and age-appropriate spanking to the buttocks if there is no evidence of serious physical injury.” (§ 300, subd. (a), italics added.)

In *D.M., supra*, 242 Cal.App.4th 634, the Court of Appeal considered whether hitting children on the buttocks with an object is per se physical abuse within the meaning of section 300, subdivisions (a) and (b). The mother admitted using her hand or a sandal to spank her two children on the buttocks on those “ ‘rare’ ” occasions when lesser disciplinary measures proved ineffective, but never hard enough to leave bruises or marks. (*D.M.*, at p. 637.) DCFS investigators observed no marks, bruises, welts, or scars, and no one the investigators spoke to had ever observed any marks or bruises. (*Id.* at pp. 637-638.) The juvenile court sustained a physical abuse allegation pursuant to section 300, subdivisions (a) and (b), concluding that “ ‘hitting children with shoes is not a proper form of discipline, and it’s physical abuse.’ ” (*D.M.*, at p. 638.)

The Court of Appeal reversed. It noted that jurisdiction under section 300, subdivisions (a) and (b) required a showing that a child either had suffered, or was at substantial risk of suffering, “serious physical harm,” and the legislative declarations in section 300 were consistent with “the long-standing principle of California law that “ ‘a parent has a right to reasonably discipline his or her child and may administer reasonable punishment . . . .’ ” [Citations.]” (*D.M., supra*, 242

Cal.App.4th at pp. 640-641.) Accordingly, the court said, whether a parent's use of discipline on a particular occasion fell within (or instead exceeded) the scope of the appropriate discipline necessarily turned "on three considerations: (1) whether the parent's conduct is genuinely disciplinary; (2) whether the punishment is 'necess[ary]' (that is, whether the discipline was 'warranted by the circumstances'); and (3) 'whether the amount of punishment was reasonable or excessive.' [Citations.]" (*Id.* at p. 641.)

In *D.M.*, the juvenile court had found, without further analysis, that " 'hitting children with shoes' on 'repeat occasions' 'is not a proper form of discipline, and it's physical abuse.' " (*D.M.*, *supra*, 242 Cal.App.4th at p. 642.) The Court of Appeal concluded this "blanket rule" was inconsistent with the law because it did not take into account "the genuineness, necessity or reasonableness of mother's use of spanking as a disciplinary measure," and it "treat[ed] the implement of punishment (a sandal rather than a hand) as dispositive, which is also not consistent with the law." (*Ibid.*, citing 80 Ops.Cal.Atty.Gen. 203, 204 (1997) ["It is not unlawful for a parent to spank a child for disciplinary purposes with an object other than the hand . . . ."]; *Gonzalez v. Santa Clara County Dept. of Social Services* (2014) 223 Cal.App.4th 72, 92 ["We cannot say that the use of a wooden spoon to administer a spanking necessarily exceeds the bounds of reasonable parental discipline"].) Accordingly, the Court of Appeal remanded for the juvenile court "to apply the correct legal standard"—i.e., to consider "evidence relevant to the genuineness of mother's disciplinary motive, the necessity of her punishment or the reasonableness of its severity." (*D.M.*, at p. 643.)

As in *D.M.*, the juvenile court in the present case sustained allegations of serious physical harm to the children based solely on Mother's use of a belt, without considering the genuineness of Mother's disciplinary motive, the necessity of her punishment, or the reasonableness of its severity. The evidence relevant to these issues was, moreover, both ambiguous and contradictory. Although it appeared that Mother had used physical discipline at some point in the past, it was not clear when she had most recently done so: Both boys said Mother did not hit them " 'anymore' "; Christopher said that Mother had spanked him " 'one week ago,' " but then added moments later that " 'I think it was in the past' "; Nathan either was not asked, or could not say, when he or his brother were last physically disciplined; and Father said the children had reported that Mother hit them, but he did not say when she had done so. There was, moreover, no evidence concerning either the circumstances under which Mother used physical discipline or the severity of the discipline, other than the children's ambiguous statements that Mother " 'does not leave us purple.' "

Without reconciling the ambiguities and conflicts in the record, the juvenile court concluded that Mother's physical discipline exceeded the bounds of reasonable discipline and inflicted serious physical harm on the children. "Where, as here, the juvenile court applies the incorrect legal standard, we may decline to engage in substantial evidence review and instead remand to allow the juvenile court to apply the correct legal standard." (*D.M.*, *supra*, 242 Cal.App.4th at p. 643.) Thus, remand is appropriate for the juvenile court to make appropriate findings in the first instance as to the genuineness of Mother's disciplinary motive, the necessity of her punishment, and the

reasonableness of its severity. These issues likely turn, as *D.M.* recognized, on “questions of credibility” which “the juvenile court is in a far better position to assess in the first instance.” (*Ibid.*)

*D. Dispositional Order*

Because we reverse the jurisdictional findings as to Mother, we also reverse the dispositional order based on those jurisdictional findings. (See *In re Roger S.* (2018) 31 Cal.App.5th 572, 583; *In re Jesus M.* (2015) 235 Cal.App.4th 104, 106.)

### **DISPOSITION**

We reverse the jurisdictional findings concerning Mother's alcohol use and failure to protect the children from father (counts a-2, b-2, b-3, b-4, b-5). We conditionally reverse the jurisdictional findings as to Mother's physical abuse (counts a-1, b-1) and the dispositional order as to Mother. We direct the juvenile court on remand to make findings concerning Mother's alleged physical abuse consistent with this opinion and, if appropriate, to enter a dispositional order as to Mother, unless continuing dependency jurisdiction is unnecessary in light of Mother's compliance with her case plan. If the court concludes continuing dependency jurisdiction is unnecessary, it need not make new findings regarding Mother's alleged physical abuse or enter a new dispositional order as directed herein.

### **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EDMON, P. J.

I concur:

DHANIDINA, J.

LAVIN, J., Dissenting:

The juvenile court found jurisdiction over the minors based upon seven separate counts under Welfare and Institutions Code<sup>1</sup> section 300, subdivisions (a) and (b), after an August 2018 domestic violence incident between the minors' parents. Three of those counts—counts a-2, b-2, and b-5—involve allegations against both mother and father. After sustaining all the allegations in the petition, the court declared the minors dependents of the court, removed them from father, and placed them with mother under the supervision of the Department of Children and Family Services (Department). Father was granted monitored visitation.

On appeal, mother contends the jurisdictional findings relating to her inappropriate physical discipline of the minors, alcohol abuse, and failure to protect the minors from father, are not supported by substantial evidence. Mother hopes to avoid the court's case plan, which requires her to submit to 10 random or on demand drug and alcohol tests, and to participate in a parenting program, individual counseling, and a domestic violence program for survivors. Father does not appeal.

Because the jurisdictional findings regarding father's domestic violence and substance abuse are unchallenged, our decision would have no impact on the court's ongoing jurisdiction over the minors. Further, even in the absence of specific jurisdictional findings regarding mother's discipline of the minors, alcohol abuse, and failure to protect the minors from father, the court would have been well within its discretion, on

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

the facts of this case, to require mother to comply with the case plan. Mother's appeal does not present a justiciable controversy and we should dismiss the appeal.

## **BACKGROUND**

The minors were former dependents of the juvenile court and had been the subject of prior referrals to the Department. For example, in 2014 the Department investigated a referral of domestic violence between mother and father, reporting that the parents "had engaged in prior physical altercations in the presence of the children and continued to engage in verbal altercations" and that father had a history of verbal, emotional, and mental abuse. The juvenile court sustained an allegation that mother was "a current abuser of alcohol" and was "under the influence" while the children were in her care. More recently, in April 2018, the Department substantiated sexual abuse allegations involving the minors.<sup>2</sup>

In the present case, the minors came to the Department's attention after an August 2018 referral involving domestic violence between mother and father. In response to this referral, the Department interviewed the family in late August and early September 2018.

Mother reported that on August 13, 2018, the day before school started, father took the minors shopping for shoes. Father was supposed to return the minors to mother by 8:30 p.m. Because father was running late, mother agreed to pick up the

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<sup>2</sup> In response to these allegations the district attorney's office filed 10 felony charges against a "non-relative minor" for forced sodomy, forced oral copulation, continuous sexual abuse, and lewd acts on a child.

minors from father at 10:30 p.m. at a local 7-Eleven. According to mother, when she arrived with her boyfriend to pick up the minors, father was verbally aggressive and insulting; he told mother she was lucky he bought shoes for the minors. Mother became upset and threw the shoes at father, then drove away. Father followed her in his vehicle. When mother stopped to call the police, father crashed into her vehicle. He then got out of his vehicle and pounded on her window, yelling at the minors to open the door. Father left when mother told him she had called the police. Police officers came to mother's home and questioned her about the incident but did not provide her with an emergency protective order.

During the Department's investigation, mother said she does not use any objects to discipline the minors, and denied ever leaving any marks or bruises on them. She does not use drugs and drinks socially. Although father smokes marijuana, mother is not sure if he uses any other drugs. After a Department social worker called mother on September 4, 2018, to remind her about obtaining a restraining order against father, mother reported that she went to a help center but did not have time to file the documents. On September 7, 2018, mother obtained a temporary restraining order against father protecting mother and the minors.

For his part, father reported that mother became upset on August 13 because he was taking too long to buy the minors shoes. When they exchanged custody of the minors at the 7- Eleven, mother screamed at father, insulted him, and then threw the minors' shoes at father. According to father, mother was drunk during the incident. Father followed mother to make sure the minors were okay. Father also reported that "he is



concerned because mother drinks alcohol often and doesn't care for the [minors and] that's why the [minors] were sexually abused." Father explained that the minors had been sexually abused in the past because mother left them with strangers when she was drunk. A July 2018 call log confirmed that father called the police to report that mother left with the minors and was driving under the influence. Although the minors told father "multiple times" that mother hits them, they asked him not to tell mother because the minors would get in trouble.

The Department interviewed the minors on August 21, 2018. Christopher reported that mother and father screamed at each other on August 13. After mother threw the shoes that father had purchased at father, he followed mother in his car. Christopher also reported that mother's method of discipline is loss of privileges and spankings on the butt with an open hand or belt; father screams at him but has never hit him. Christopher could not recall the last time mother spanked him. Nathan reported that the method of discipline used by mother is time outs "and hitting Christopher on the hands or leg with a belt or open hand." The minors denied ever having any marks or bruises after being spanked or hit by mother. The August 13 incident made the minors sad, and Nathan felt like he was going to throw up.

The Department interviewed the family again in October 2018. At first, Christopher stated that mother would hit him and Nathan with a belt on their bodies when they misbehaved. Christopher also stated that mother hit him with a belt one week ago because he had hit Nathan, but mother "does not leave us purple." When asked where he was hit, Christopher changed his story and said mother "does not hit us anymore I think it was in

the past.” Nathan stated that mother does not hit them anymore and does not leave them “any purple.” Mother denied hitting the minors “like that;” at most, she disciplines them by spanking them on their buttocks with an open hand on top of their clothes. In a last minute information filed on November 19, 2018, the Department stated that the minors have been consistent in reporting that mother has used a belt as a form of discipline. The Department concluded mother is struggling in properly disciplining the minors and in controlling her temper.

On November 20, 2018, the court sustained all the jurisdictional allegations in the petition as amended by interlineation. Specifically, the court found that mother inappropriately disciplined the minors by striking them with a belt (counts a-1, b-1); failed to protect the minors by engaging in violent altercations with father in their presence and allowing father unlimited access to them (counts a-2, b-2); drove a vehicle while under the influence of alcohol while the minors were passengers (count b-3); had a history of alcohol abuse and was a current alcohol abuser, rendering her incapable of caring for the minors (count b-4); and knew of father’s substance abuse and failed to protect the minors by allowing father unlimited access to them (count b-5). As to father, the court found he had a history of engaging in violent altercations with mother in the minors’ presence which endangered their safety and placed them at risk of harm (counts a-2, b-2), and father had a history of substance abuse and is a current abuser of marijuana rendering him incapable of caring for the minors (count b-5).

As to disposition, the minors were declared dependents of the court, removed from father, and placed with mother under Department supervision. Father was granted monitored

visitation. The court-ordered case plan requires both parents to submit to 10 random drug and alcohol tests, and to participate in parenting classes, individual counseling, and a domestic violence program.<sup>3</sup> Mother's domestic violence program was for survivors.

## DISCUSSION

Although mother appeals the court's dispositional order, she does not seek to alter the current custody arrangement, nor does she challenge the award of monitored visitation to father. Instead, mother argues that all the jurisdictional findings made by the dependency court related to her physical discipline of the minors, alcohol abuse, and failure to protect the minors from father, are unsupported by substantial evidence and, therefore, the court's case plan is invalid. I agree with the Department that mother's appeal does not present a justiciable issue.

### 1. Justiciability

It is a fundamental principle of appellate practice that an appeal will not be entertained unless it presents a justiciable issue. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1489–1490.) “ ‘A judicial tribunal ordinarily may consider and determine only an existing controversy, and not a moot question or abstract proposition. ... [A]s a general rule it is not within the function of the court to act upon or decide a moot question or speculative, theoretical or abstract question or proposition, or a purely academic question, or to give an advisory opinion on such a question or proposition. ...’ ” (*Wilson v. L.A. County Civil Service*

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<sup>3</sup> The court also granted mother's request for a one-year restraining order against father. That order expires on November 20, 2019, and only protects mother.

*Com.* (1952) 112 Cal.App.2d 450, 452–453; *In re I.A.*, at p. 1490.) An important requirement for justiciability is the availability of “effective” relief—that is, the prospect of a remedy that can have a practical, tangible impact on the parties’ conduct or legal status. This court must decide actual controversies by a judgment which can be carried into effect, and not give opinions upon moot questions or abstract propositions, or declare principles or rules of law which cannot affect the matter in issue in the case before us. (*Costa Serena Owners Coalition v. Costa Serena Architectural Com.* (2009) 175 Cal.App.4th 1175, 1205–1206; see also *In re Anna S.* (2010) 180 Cal.App.4th 1489, 1498 [a case is moot when it is “‘impossible for the appellate court to grant the appellant effective relief’”]; *Simi Corp. v. Garamendi* (2003) 109 Cal.App.4th 1496, 1503 [“A case becomes moot when a court ruling can have no practical impact or cannot provide the parties with effective relief”].) When the court cannot grant effective relief to the parties to an appeal, the appeal must be dismissed. (*Costa Serena*, at p. 1206; *In re I.A.*, at p. 1490.)

**2. Mother’s appeal does not present a justiciable controversy.**

“It is commonly said that the juvenile court takes jurisdiction over children, not parents.” (*In re I.A.*, *supra*, 201 Cal.App.4th at p. 1491.) And it is settled that if the court finds one parent’s conduct has created circumstances triggering section 300, the court may assert jurisdiction over the child. (*In re P.A.* (2007) 155 Cal.App.4th 1197, 1212; *In re Alexis H.* (2005) 132 Cal.App.4th 11, 16.)

Here, because the three jurisdictional findings involving father’s conduct are not challenged, those findings are final and adequately support the court’s jurisdiction over the minors.

Accordingly, even if the court's jurisdictional findings relating to mother's conduct were not supported by substantial evidence, the majority's disposition can have no impact on the court's ongoing jurisdiction over the minors.

I also note that mother has made no specific showing of how the findings involving her conduct were prejudicial. That is, mother does not contend that resolution of her claims on appeal will have any legal or practical consequence on the dependency proceedings. (See *In re I.A.*, *supra*, 201 Cal.App.4th at p. 1493.) In fact, because of the court's findings, the minors were removed from *father* and placed in mother's custody and, as of May 2019, the minors remain in mother's custody. And the substance of the inappropriate discipline, alcohol abuse, and domestic violence allegations concerning mother would almost certainly be available in any future dependency or family court proceeding, regardless of any determination on our part as to whether they formed an independent basis for juvenile court jurisdiction. (See *In re Madison S.* (2017) 15 Cal.App.5th 308, 330.) Under these circumstances, an appellate court may decline to address the evidentiary support for any remaining jurisdictional findings once a single finding has been found to be supported by the evidence. (E.g., *In re I.A.*, at p. 1495; *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 [addressing remaining findings only "[f]or [f]ather's benefit"]; *In re Joshua G.* (2005) 129 Cal.App.4th 189, 202 [when a jurisdictional allegation involving one parent is found supported, it is "irrelevant" whether remaining allegations are supported]; *In re Shelley J.* (1998) 68 Cal.App.4th 322, 330 [declining to address remaining allegations after one allegation found supported]; *Randi R. v. Superior Court* (1998) 64 Cal.App.4th 67, 72 [same].)

Nevertheless, mother asks this court reach the merits of her appeal because the challenged jurisdictional findings serve as the sole basis for her case plan. (See *In re A.F.* (2016) 3 Cal.App.5th 283, 289–290.) I disagree.

The court could require mother to submit to drug or alcohol testing, participate in parenting classes, individual counseling, and a domestic violence program for victims in this case even in the absence of specific jurisdictional findings based on mother’s conduct. (*In re I.A.*, *supra*, 201 Cal.App.4th at p. 1491 [noting dependency court asserts personal jurisdiction over parents, which allows court to enter orders affecting parental conduct].) Considering the court’s jurisdictional findings involving father’s conduct, mother’s prior alcohol abuse, and the uncontested evidence in the Department’s reports,<sup>4</sup> the court’s case plan for mother was not an abuse of discretion. (*In re Briana V.* (2015) 236 Cal.App.4th 297, 311 [“The problem that the juvenile court seeks to address need not be described in the sustained section 300 petition. [Citation.] In fact, there need not be a jurisdictional finding as to the particular parent upon whom the court imposes a dispositional order.”]; *In re I.A.*, at p. 1492 [“[a] jurisdictional finding involving the conduct of a particular parent is not necessary for the court to enter orders binding on that parent, once dependency jurisdiction has been established”]; see generally § 362, subd. (a) [the juvenile court “may make any and

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<sup>4</sup> “If a party to the jurisdictional hearing raises a timely objection to the admission of specific hearsay evidence contained in a social study, the specific hearsay evidence shall not be sufficient by itself to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based” unless it fits into one of the enumerated exceptions. (§ 355, subd. (c)(1).) Mother did not object to any of the evidence in the Department’s reports.

all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child”].)

In short, even if the jurisdictional findings related to mother’s conduct were erroneous, we should not grant the requested relief because the court’s case plan is adequately supported. Because mother’s appeal does not present a justiciable controversy, I respectfully dissent.

LAVIN, J.