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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re S.U., et al., Persons Coming Under the Juvenile Court Law.	B235570
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. KA. T., et al., Defendants and Appellants.	(Los Angeles County Super. Ct. No. CK87151)

APPEAL from orders of the Superior Court of Los Angeles County. Daniel Zeke Zeidler, Judge. Affirmed in part and reversed in part.

Aida Aslanian, under appointment by the Court of Appeal, for Defendant and Appellant Ka. T.

Michael A. Salazar, under appointment by the Court of Appeal, for Defendant and Appellant Ku. T.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Peter Ferrera, Deputy County Counsel, for Plaintiff and Respondent.

The parents of S.U. and K.T. appeal from orders declaring the children dependents of the court and removing them from their parents' custody. They contend that there is insufficient evidence to show that abuse or neglect on their part caused "non-accidental" injury to K.T., or placed his brother S.U. in danger of similar harm, or that the children should be removed from their home. They also contend that the court failed to formulate an adequate reunification plan.

We affirm the jurisdictional order as to both children. We affirm the dispositional order removing K.T. from the parents' custody; for the reasons explained below we reverse the dispositional order as to S.U.

BACKGROUND

The facts are largely undisputed. After Ka. T. (Mother) gave her three-month-old son K.T. his night feeding on the evening of March 20, 2011, Ku. T. (Father) took K.T. and was about to put the baby to sleep in his bassinette when K.T. suddenly became very still, cried loudly, and stretched his arms out in front of him. The baby's eyes rolled back, and he stopped breathing. The parents rushed K.T. to the closest hospital while Father administered CPR. K.T.'s condition had stabilized by the time they reached the hospital, although he appeared to suffer another seizure in the emergency room.

A CT scan ordered by the emergency room physician revealed that K.T. was suffering from multiple subdural hematomas (bleeding in the brain), and retinal hemorrages that the physician believed were consistent with "Shaken Baby Syndrome." K.T. was transferred to Children's Hospital of Orange County (CHOC), and the police and Department of Children and Family Services (DCFS) were called.

K.T.'s parents denied that they or anyone else in the home had ever harmed K.T.[1] Mother and Father both theorized that K.T.'s brain injuries resulted from his vacuum-assisted birth three months earlier. The DCFS worker noted in her report that K.T. exhibited no outward signs of abuse or neglect. The worker also interviewed S.U., who

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[1] K.T. and his four-year-old half-brother S.U. resided with K.T.'s parents, of Tongan nationality, along with the children's maternal grandfather, and an aunt and uncle.

also had no marks, bruises, or other signs of trauma, and who told the worker he was not fearful of anyone in his home and that no one physically abused or disciplined him. Nevertheless, based on her interviews with doctors at CHOC, the DCFS worker filed a petition under Welfare and Institutions Code Section 300, subdivisions (a), (b), (g), and (j), alleging that K.T. was the victim of "deliberate, unreasonable and neglectful acts on the part of the parents," and that he and S.U. were at risk of "physical and emotional harm, damage and danger.[2]

Following the detention hearing later that month, the court detained K.T. and S.U., placing them in foster care and leaving DCFS with discretion to release them to one or both of the parents. The court also appointed a pediatric surgeon, Dr. Anthony Shaw, Professor Emeritus of Pediatric Surgery at UCLA, to determine and report to the court the nature and causes of K.T.'s injuries, and whether the medical records demonstrate a likely risk of future physical harm.

At the combined jurisdiction and disposition hearing, the court considered whether K.T.'s injuries resulted from abuse, and if so, whether he and S.U. should be removed from their home. It received reports from DCFS and Dr. Shaw, and it heard testimony from the parents, Dr. Shaw, and three other doctors.

The parents' testimony

Mother testified with respect to disposition that she had "no idea" how K.T. suffered his injuries. When asked whether there is anything she would have done differently or that she planned to do differently, she replied "He's a baby. All I did was just love him. That's all I did."

Father testified about the parents' visits with the children after their removal from the home, and what he had learned in the court-ordered parenting class. The DCFS report, admitted in evidence, reported Father's denial that he or anyone in the home had harmed K.T. The social worker's report noted that Father, a native of Tonga, "appeared to be in shock or in disbelief" when he was asked if he or anyone else had shaken the

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[2] All statutory references are to the Welfare and Institutions Code.

child, and he questioned whether people really do that to infants. Father had reported that K.T. was a calm baby who usually cried only when hungry, but that he had had an unusual crying spell, lasting for 20 to 30 minutes, about two or three weeks before his hospitalization.

The doctors' testimony

The medical evidence was without conflict that K.T. had suffered subdural hematomas—brain hemorrhages—and retinal hemorrhages behind both eyes. The doctors also agreed that the subdural hematomas caused the seizures his parents had witnessed. However, they did not agree on the cause of these conditions.

Dr. Shaw's written report explained that subdural hematomas can occur at birth, for example from the vacuum extraction process, and that they can later reoccur in a child such as K.T., who has a chronic subdural membrane, with minimal trauma or no trauma at all. However this chronic bleeding could not explain the retinal hemorrhages, which he concluded did not occur at K.T.'s birth. No one in the family had reported a history "that could account for *both* the subdural and retinal hemorrhages." He thus concluded that the presence of both the subdural hemorrhages and the retinal hemorrhages could be explained only by a traumatic cranial injury, "such as shaking," within a few weeks before K.T.'s seizure and hospitalization and possibly again that night. At the jurisdiction hearing Dr. Shaw ruled out the possibility that they were caused by K.T.'s seizure or that they had occurred at birth, but testified that he could not say "with any medical certainty" what caused the retinal hemorrhages.

Dr. Daphne Wong, the Medical Director of the CHOC Child Abuse and Neglect Team, examined K.T., reviewed his medical records, and consulted with an ophthalmologist and other colleagues. She noted that asymptomatic subdural hematomas and retinal hemorrhages are not uncommon following vacuum-assisted births (such as K.T.'s birth), but they ordinarily resolve themselves within a few weeks, and have never been reported to have remained for more than about two or three months. In addition, K.T.'s birth records showed no mention of trauma, he had scored high on the APGAR scale at birth, and further testing had ruled out various likely bleeding disorders, diseases,

and syndromes. Because she found no medical reasons to explain K.T.'s injuries, she concluded that they "were most likely due to an abusive head trauma."

Dr. Charles Imbus, a board certified psychiatrist and specialist in child neurology, testified on the parents' behalf. Dr. Imbus stated that K.T.'s medical records from the night of the seizure showed that K.T. suffered from chronic enlarging subdural hematomas that originated at birth. The records showed that on the night of his hospitalization K.T. had been fed twice within a short period of time, then placed on a bed. Dr. Imbus testified that it is common for a sleepy baby to regurgitate after being fed and laid down, and that although none of the medical reports indicated that K.T. had regurgitated before being brought to the hospital, the emergency room admitting notes mentioned a possibility that he had experienced some reflux later that night. According to Dr. Imbus, a small regurgitation by K.T., along with his chronic subdural hematomas, could have impaired his breathing momentarily, causing the pressure in his skull resulting from the subdural hematoma to increase dramatically. "Those conditions, the subdural hematoma and the regurgitation, contribute to increased pressure in the skull, which leads to the posturing"—the stiffening and extension of K.T.'s arms and legs—that Father had reported. And the pressure in K.T.'s skull during these events would have been great enough to cause "so much back pressure in the veins and vessels in the retina," resulting in his retinal hemorrhages.

Dr. Khaled Tawansy, a board certified ophthalmologist trained in evaluating children with retinal hemorrhages, testified that from his review of K.T's records it appeared there were no signs of trauma apart from the hematomas and retinal hemorrhages—there were no signs of blunt force trauma or indirect trauma "as would occur with the shaking injury, for example." He concurred with Dr. Shaw's opinion that children who sustain subdural hematomas at birth are "likely to suffer another one with incidental or minimal trauma or even no trauma." In Dr. Tawansy's opinion, the new

bleeding in K.T.'s brain caused intracranial pressure, which in turn caused his retinal hemorrhages.[3]

The court's rulings

The court rejected the theories argued on the children's and the parents' behalf as possible causes of K.T.'s injuries, finding it "pretty clear from most of the experts that the retinal hemorrhage didn't occur at the time of the birth and then last for three and a half months," as Dr. Imbus had suggested. That theory, the court found, was not as well supported by the evidence as the conclusions of Drs. Wong and Shaw that "some new incident" caused K.T.'s injuries.

The court amended the petition and sustained the petition as amended, finding that K.T. and S.U. are dependent children under Section 300, subdivisions (a), (b), and (j).[4] The court struck the allegations of paragraph b-2, b-3, and e-1 of the petition, and it struck the allegations concerning violent shaking in paragraph a-1, b-1, and j-1. It sustained the petition's a-1, b-1, and j-1 allegations, as amended, with respect to subdivisions (a) and (b) of section 300, finding that K.T.'s injuries were consistent with nonaccidental trauma and that "such injuries would not ordinarily occur except as a result of deliberate, unreasonable, and neglectful acts by the child's parents . . . ." The court also sustained the petition's paragraph g-1 allegations, finding that S.U.'s alleged father's

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[3] We do not suggest the absence of evidence of conflicting theories with respect to possible causes of K.T's trauma, which are not relevant to the issues in this appeal.

[4] Subdivision (a) of section 300 requires proof that the child suffered or is at risk of suffering serious physical harm inflicted nonaccidental by a parent.

Subdivision (b) requires proof that the child suffered or is at risk of suffering serious physical harm or illness based on a parent's failure or inability to adequately supervise or protect the child, or the willful or negligent failure of the parent to adequately supervise or protect the child from the conduct of a custodian with whom the child has been left.

Subdivision (j) requires proof that the child's sibling has been found under subdivisions (a) or (b) to have been abused or neglected, and that there is a substantial risk of such abuse or neglect to the child.

failure to provide S.U. with the necessities of life endangered his health, safety, and well-being, and placed him at risk of physical damage.[5]

With respect to disposition, the court found, by clear and convincing evidence, that "substantial danger exists to the children's physical and/or mental health." It placed their care and custody under the supervision of the DCFS for suitable placement with relatives, and ordered reunification services for the parents. Mother and Father filed timely appeals.

DISCUSSION

The parents' appeals contend that the court erred in finding dependency jurisdiction, because the evidence is insufficient to show that K.T. had been intentionally or negligently injured, and because S.U. was not similarly positioned; and that the evidence is insufficient to support the children's removal from the parents' custody. They also contend that the court erred by failing to adequately state its reasons for the children's removal, by ordering removal when reasonable alternatives were available, and by failing to make a reasonable reunification plan.

We conclude that the dependency court's findings under subdivisions (a), (b), and (j) of section 300, and therefore its exercise of dependency jurisdiction, is supported by substantial evidence as to both K.T. and S.U. With respect to the disposition rulings, we find that in light of the jurisdictional findings the evidence fully supports the order removing K.T. from the parents' home, and that the court's failure to state the factual basis for that ruling constitutes harmless error. However, because the factual basis for the court's determination to remove S.U. from the home is less clear in light of possible alternatives to removal shown by the evidence, we are unable to say that the court's

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[5] The subdivision (g) finding affected only S.U's alleged father, who did not appear below, and who is not a party to this appeal. For that reason we do not further address the section 300, subdivision (g), finding.

failure to state the basis for that ruling is harmless, and we therefore reverse that portion of the dependency court's order.[6]

1. Substantial Evidence Supports Dependency Jurisdiction Over K.T. and S.U.

We apply the substantial evidence standard of review to determine "whether evidence that is of reasonable, credible and solid value supports the dependency court's findings." (*In re E.H.* (2003) 108 Cal.App.4th 659, 669; *In re Angelia P.* (1981) 28 Cal.3d 908, 924.)

It is undisputed that the CT scan of K.T.'s brain on March 21, 2011 showed that he had fresh subdural hematomas and retinal hemorrhages. Dr. Wong testified that even though such conditions may have nonabusive causes, when they are found together in a fresh injury, they are "most likely due to an abusive head trauma." Dr. Shaw concurred with this conclusion, "inasmuch as infection, blood clotting disorder, and metabolic disease have been ruled out" by the studies done when K.T. was brought to the hospital. It is also undisputed that since his birth, K.T. had only rarely been outside the custody of his parents, and had never been outside the custody of his parents or family members.

In sustaining the petition's allegations, the court found that K.T.'s injuries "would not ordinarily occur except as a result of deliberate, unreasonable and neglectful acts by the child's parents who had care, custody and control of the child." "Where the court finds, based upon competent professional evidence, that an injury, injuries, or detrimental condition sustained by a minor, is of such a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, the guardian, or other person who has the care or custody of the minor, that finding shall be prima facie evidence that the minor is a person described by subdivision (a), (b) or (d) of Section 300." (§ 355.1, subd. (a).)

The facts before the court were far from sufficient to conclusively demonstrate that K.T's injuries were nonaccidental, or that they were inflicted by the parents or other

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[6] Because the parents could have raised their concerns about the reunification plan in the juvenile court, but did not, those contentions are forfeited on appeal. (*In re Cheryl E.* (1984) 161 Cal.App.3d 587, 603.)

family members; but that is not the test. We do not reweigh the evidence, and we do not evaluate matters of credibility. (*In re E.H.*, *supra*, 108 Cal.App.4th at p. 669.) If substantial evidence supports the dependency court's findings, we must affirm those findings even though substantial evidence would also support a contrary finding. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)[7]

Relying on the evidence before it, the court was fully justified in finding that K.T. suffered serious physical harm inflicted nonaccidentally by a parent (§ 300, subd. (a)); that he suffered serious physical harm resulting from a parent's willful or negligent failure to adequately protect him from the conduct of a custodian (§ 300, subd. (b)); and that those deliberate, unreasonable and neglectful acts placed him at a present or future risk of physical and emotional harm, damage, and danger. That constitutes evidence sufficient to support the court's determination that K.T. is a person described by subdivision (a) and (b) of Section 300. (§ 355.1, subd. (a); *In re Savanah M.* (2005) 131 Cal.App.4th 1387, 1399.)

We also affirm the court's finding, upon a preponderance of the evidence, that S.U. is a dependent child under subdivision (j) of Section 300. S.U.'s sibling, K.T., was found under subdivisions (a) and (b) of section 300 to have been abused. Based on the injuries suffered by K.T., the court was justified in finding that S.U., too, was at risk of such abuse. S.U. resided in the same home and shared the same parents and extended family with K.T.[8] His sibling had suffered severe injuries as a result of what the court found to be parental or familial abuse, but the parents and family—the children's sole caretakers—had failed to explain or acknowledge that abuse. In light of these

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[7] For this reason, we disagree with the argument that the jurisdictional finding is unsupported because the evidence does not *rule out* the possibility of injury without the parent's knowledge or neglect. For the same reason, we disagree that the dispositional order should be set aside because the evidence would have been sufficient to support a conclusion contrary to that reached by the trial court.

[8] S.U. accepts K.T.'s father as his own father.

circumstances, we cannot second-guess the court's conclusion that S.U., like K.T., remained at risk of suffering such abuse in the future.

2. The Juvenile Court's Failure To Comply With The Requirements Of Section 361 Was Prejudicial As To S.U.

Section 361, subdivision (c), provides (so far as is relevant here) that even after being determined to be a dependent child under Section 300, the child nevertheless may not be subject to a dispositional order removing him from his parents' custody unless the court makes additional findings—this time upon clear and convincing evidence—that remaining in the home would be a substantial danger to the child's physical health, safety, protection, or physical or emotional well-being, and that there are no reasonable means other than removal to protect the child. (§ 361, subd. (c)(1).) Subdivision (d) of the same section requires that the court determine that reasonable efforts were made to eliminate the need for the child's removal from the home, and that it state on the record the facts on which the decision to remove the child is based. (§ 361, subd. (d).)[9]

Father contends that at the dispositional hearing the court failed to make the statutorily mandated identification of the factual basis for its order removing the children from the parents' custody, and that it failed to make the required finding that there were no reasonable means to protect the children without their removal. Respondent does not deny these errors.[10] Respondent contends, however, that the failure to articulate the

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[9] Subdivision (e) of section 361 requires that in cases such as this (where the child has been living in an out-of-court placement under section 319), the court must also make all of the findings required by subdivision (a) of section 366. The parents make no contention in this appeal that the trial court erred with respect to this requirement.

[10] The court's minute order for that date recites a finding, by clear and convincing evidence, that "there is no reasonable means to protect [the children]" without removal from the parents' custody. The reporters' transcript of the hearing reflects no such finding. Father urges that this conflict in the record should be reconciled in favor of the reporter's transcript—reflecting a failure to make the required finding; Respondent does not argue otherwise. (See *In re Merrick V.* (2004) 122 Cal.App.4th 235, 249 [conflicts between reporter's and clerk's transcripts generally are resolved in favor of reporter's transcript].)

required finding is harmless, because "it is not reasonably probable such finding, if made, would have been in favor of continued parental custody," quoting *In re Clyde H.* (1979) 92 Cal.App.3d 338, 346-347.

In dependency proceedings the burden of proof is substantially greater at the dispositional phase than at the jurisdictional phase, if the minor is to be removed from the parents' custody. (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 169.) At the jurisdictional phase, proof is by preponderance of the evidence. But at the dispositional phase, in furtherance of the constitutionally protected rights of parents to custody of their children, the law imposes """a standard of *clear and convincing proof* of parental inability to provide proper care for the child and resulting detriment to the child if it remains with the parent,""" before the child can be removed from parental custody. (*Ibid.*; see also §§ 355, 361, subd. (c).) In assessing this assignment of error on appeal, the substantial evidence test remains the appropriate standard of review, "bearing in mind the heightened burden of proof." (*In re Kristen H.* (1996) 46 Cal.App.4th 1635, 1654.) "'[T]he substantial evidence test applies to determine the existence of the clear and convincing standard of proof . . . .'" (*In re Basilio T., supra*, 4 Cal.App.4th at p. 170.)

We conclude that the court's error in failing to make the required finding that there were no reasonable means to protect K.T. without removal from the parents' home, and in failing to identify the factual basis for its order removing K.T., was harmless. In the adjudication proceedings the focus had been on the trauma to the infant K.T.—fresh subdural hematomas and retinal hemorrhages for which nonabusive causes had been virtually ruled out—and the court had found that K.T. remained at risk of future abuse. In a supplemental letter to the court Dr. Shaw had observed that K.T. "remains at risk absent a resolution of the caretaker issues within [the] family group," providing support for the continued removal of K.T. from the parents' home. And although the parents had urged their love for K.T., they continued to deny any abuse, and they noted the absence of any evidence at all that the family suffered from social issues (such as drug or alcohol abuse) that might place the children at continuing risk in the home. However they were unable to suggest any significant way to eliminate the need for K.T.'s removal from their

home in light of the abuse the court had found he had suffered, or any substantial means in which K.T. could be protected from further abuse without removal. Moreover, the court did expressly find that DCFS "has provided reasonable services to prevent removal."

On this record, we cannot conclude that it is reasonably probable that any finding the court would have articulated with respect to the custody of K.T. would have been in favor of continued parental custody. The court's erroneous failure to articulate its finding on that point therefore was harmless.

The same cannot be said with respect to the court's error in failing to make the required finding that there were no reasonable means to protect S.U. without removal from the parents' home, and in failing to identify the factual basis for its order removing S.U. from the home. The evidence was sufficient to support the court's determination, by a preponderance of the evidence, that as the sibling of an abused child, S.U. was at risk of future harm, and thus was appropriately found to be a dependent child. But the proof required to support the dispositional determination that S.U. should be removed from his parents' custody requires a greater degree of proof than merely by a preponderance of the evidence. And the evidence with respect to the risk of harm to S.U. if he were not removed from the parents' home does not so clearly satisfy the "clear and convincing" standard of proof as to render harmless the court's failure to identify the facts supporting its determinations.

No evidence at all suggests that S.U. was himself a victim of abuse in the parents' home, or that he suffered any harm as a result of the abuse that the court found with respect to K.T.; the finding of dependency jurisdiction as to S.U. was grounded on the finding of a risk of future harm to him, made upon a preponderance of the evidence, not clear and convincing evidence. Evidence of past abuse is probative in determining whether a child is in need of the juvenile court's future protection. (*In re Laura F.* (1983) 33 Cal.3d 826, 833.) But such evidence does not alone meet the clear and convincing standard of proof required to justify removal of a child from his parent's custody, much

less to justify removal of a sibling of the abused child. If it did, section 361 would be superfluous.

Moreover, the record in this case provides possible grounds for differentiation between K.T. and S.U. It indicates that the risks to S.U. of future abuse, as well as the risk to him of harm resulting from continued removal from his parents' home, might reasonably be found to be quite different from those facing K.T. S.U. was not an infant of only a few months old, who would be unable to articulate any abuse to which he might be subjected, and who would be completely isolated from the observations of mandated reporters of abuse. S.U. was a four-year-old child, with at least some language skills, who had regular contact with teachers and others who were mandated reporters of any suspected abuse. And there is evidence that S.U., far more than K.T., had suffered from his separation from his parents and removal from their home.

This record does not provide a showing of risk of future abuse sufficient to render harmless the court's failure to articulate the facts—the clear and convincing evidence—on which its dispositional ruling as to S.U. was based. If the court believed that the record contained facts that constitute clear and convincing evidence that S.U. remained at risk of future abuse if he were to return to his parents' custody, and that there were no viable less drastic alternatives to removal, the law required it to articulate those facts. Because the court failed to fulfill its statutory duty to identify the factual basis for its dispositional ruling as to S.U., and it is not clear from the record what factual determinations would support that ruling, its failure cannot be considered harmless error. (*In re Basilio T., supra,* 4 Cal.App.4th at p. 171.)

DISPOSITION

The findings of dependency jurisdiction over K.T. and S.U. under subdivisions (a), (b), and (j) of Section 300 are affirmed. The dispositional order removing K.T. from the parents' home is affirmed. The dispositional order removing S.U. from the parents' home is reversed, based on the court's failure to fulfill its statutory duty to identify the factual basis for its determination that remaining in the home would be a substantial

danger to S.U's physical health, safety, protection, or physical or emotional well-being, and that there are no reasonable means to protect him other than removal.

NOT TO BE PUBLISHED.

CHANEY, J.

I concur:

JOHNSON, J.

Rothschild, J. concurring and dissenting

I concur in the majority's decision to reverse the dispositional order removing S.U. from his parents' home but I concur on a different ground. In my view there is no substantial evidence to support jurisdiction over S.U., or his brother K.T., thus the validity of the court's dispositional order is moot.

1. Jurisdiction over K.T.

In order for the court to take jurisdiction over K.T. there must be substantial evidence that his mother or father or both intentionally caused his injury[1] or that either or both of them willfully or negligently failed to adequately protect him from the conduct of a custodian.[2]

The trial court pinned the blame on the parents. It found that K.T.'s injuries "would not ordinarily occur except as a result of deliberate, unreasonable and neglectful acts by the child's parents who had care, custody and control of the child." This finding is not supported by the evidence because the evidence does not rule out the reasonable possibility that K.T.'s injuries could have been inflicted *without the parents' knowledge or neglect* by one of the other household members—the grandfather, aunt, uncle, even his four year old brother, S.U. "Everyone plays with [K.T.]," Mother told the DCFS worker.

Recognizing the lack of substantial evidence to support the court's finding that the parents abused K.T., the majority relies on Welfare and Institutions Code section 355.1,

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[1] Under Welfare and Institutions Code section 300, subdivision (a), a child is a dependent child of the court if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidently upon the child by the child's parent or guardian."

[2] Under Welfare and Institutions Code section 300, subdivision (b), a child is a dependent child of the court if he or she "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 the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left[.]"

subdivision (a),[3] which dispenses with the need to identify a culprit in cases of physical harm under section 300, subdivisions (a), (b) or (d), if the court finds "based on competent professional evidence" that the child's injury "would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, the guardian, or other person who has the care or custody of the minor[.]" The majority's reliance on section 355.1, subdivision (a) fails for two reasons. Although a plurality of doctors agreed that K.T.'s injury was the result of a recent trauma, none of them expressed the view that the trauma would not ordinarily occur "except as the result of the unreasonable or neglectful acts or omissions" of the parents or a caretaker. In other words, none of the doctors who examined K.T. ruled out the possibility that the injury was accidental and not the fault of the parents or a caretaker. Moreover, it does not logically flow from the evidence that K.T. had never been outside the custody of his parents or family members that his parents reasonably should have known if someone was inflicting abuse on the child. This might be the case if K.T. had been subjected to a sustained course of physical abuse by someone in the household. (Cf. *In re E.H.* (2003) 108 Cal.App.4th 659, 669-670.) Here, however, there was no evidence of recurring abuse—only a single incident.

2. Jurisdiction over S.U.

No substantial evidence supports jurisdiction over S.U.

There was no evidence whatsoever that S.U. had ever suffered serious physical harm at the hands of his parents or others. Thus, jurisdiction under section 300, subdivisions (a), (b) and (j) required the DCFS produce substantial evidence that S.U. was at "substantial risk" of suffering such injury in the future. The DCFS produced no such evidence. Indeed, the evidence it *did* produce, in the form of reports of interviews and the family's social history, contradicts the court's finding of a substantial risk of harm. The evidence showed that S.U. is a happy, healthy four-year-old child. The DCFS worker reported that he exhibited no outward signs of abuse nor developmental problems.

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[3] All statutory references are to the Welfare and Institutions Code.

S.U. denied ever being physically abused by his parents[4] or being afraid of them or anyone else in his household. S.U. attends preschool where he is seen every day by mandated reporters. Finally, the DCFS admitted that Mother and Father are law abiding citizens with no alcohol or drug issues and no prior encounters with the juvenile dependency system.

The DCFS argues that jurisdiction over S.U. is supported by "the totality of the circumstances" surrounding *K.T.'s* injury. But the DCFS offers no explanation why S.U., who suffered no abuse in the first four and a half years of his life, would suddenly become vulnerable to harm based on the one-time injury of his three-month-old brother.

3. Removal of the children from their parents' home.

Even assuming the court was correct in taking jurisdiction of K.T. and S.U., it erred in ordering the children removed from their home.

A finding of dependency jurisdiction does not require removing the children from the custody of their parents. "The governing statute, section 361, subdivision (c), is clear and specific: Even though children may be dependents of the juvenile court, they shall not be removed from [their home] 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 Jasmine G.* (2000) 82 Cal.App.4th 282, 288; italics in original.) "Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt." (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 695.) The parties agree that this heightened standard of proof is not swallowed up on appeal by the substantial evidence test. Rather, we apply the substantial evidence test "bearing in mind the heightened burden of proof." (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.)

In *In re Basilio T.* (1992) 4 Cal.App.4th 155, 171, the court noted that under section 361 a child can be removed from his parents' custody "only in extreme cases of

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[4] S.U. considers K.T.'s father to be his father.

parental abuse or neglect." This is not such an extreme case as to warrant the children's removal. (Cf. *In re Henry V.* (2004) 119 Cal.App.4th 522, 526, 529 [single occurrence of mother deliberately burning four year old on his bottom with a curling iron did not warrant removal from mother's custody]; *In re Jasmine G.*, *supra*, 82 Cal.App.4th at pp. 285, 292-293 [striking child with leather belt, switch and open hand did not justify removing child from parents].) Here the court struck the allegations that K.T. had been "violently shaken" and that his parents failed to obtain timely necessary medical care and treatment for his injuries. Furthermore, although there was substantial evidence to support the court's finding that K.T.'s injury was "a result of deliberate, unreasonable and neglectful acts" the evidence was far from overwhelming and there was expert medical testimony to the contrary that would have been sufficient to support an order denying the petition. In any event, K.T. made a "rapid, complete recovery" from whatever caused his seizure and if the seizure was caused by nonaccidental trauma, it was an isolated event which the court did not consider an obstacle to family reunification services. (Cf. *In re Henry V.*, *supra,* 119 Cal.App.4th at p. 529.)

Moreover, section 361 required the DCFS to provide "clear and convincing" evidence that the removal of S.U. and K.T. from their parents' custody was necessary and that no reasonably available alternative would protect them. The only evidence that even remotely supported removing the children from their parents' custody was Dr. Shaw's comment that K.T. "remains at risk absent a resolution of the caretaker issues within [the] family group." Dr. Shaw did not characterize this risk as "substantial" or of "high probability" (see *In re Isayah C.*, supra, 118 Cal.App.4th at p. 695.) Nor did he state this "resolution" could not be performed while the children remained in their parents' custody. Evidence of past events and conduct is probative in determining whether a child is in need of the protection of the juvenile court. (*In re Laura F.* (1983) 33 Cal.3d 826, 833.) But such evidence alone does not meet the "clear and convincing" standard required for the removal of a child from his parents' custody. If it did, section 361 would be superfluous. On the other hand, the record shows that the

parents completed a 12-week parenting class, visited the children regularly and stayed from early morning until the children went to bed. (See *In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1043-1044 [parents' response to the conditions that gave rise to jurisdiction is an important factor in considering dispositional order].) Finally, Dr. Shaw, who was charged with providing an opinion on the risk of future physical harm to K.T., could find no evidence in the medical records to support such a risk. On the contrary, Dr. Shaw noted that "there is nothing in this family's past history (or in the Tongan culture) that documents domestic violence or abuse/neglect of the two children[.]"

ROTHSCHILD, Acting P. J.