Filed 2/28/17 In re D.T. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re D.T. et al., Persons Coming Under the Juvenile Court Law. _____ LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. L.T., Defendant and Appellant.	B270167 (Los Angeles County Super. Ct. No. DK14011)

APPEAL from an order of the Superior Court of Los Angeles County, Nichelle Blackwell and H. A. Staley, Referees. Reversed and remanded with directions.

Annie Greenleaf, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Tracey F. Dodds, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Father appeals from jurisdictional findings declaring his seven-year-old daughter D.T. and five-year-old son A.T. dependent children as defined by Welfare and Institutions Code section 300, subdivisions (a) and (b).[1] Father contends the evidence was insufficient to support the findings concerning his conduct, and that these findings served as the premise for unduly burdensome reunification orders imposed by the disposition order. We conclude the evidence supports the alcohol abuse finding, but does not support the findings concerning the threat of harm posed by domestic violence or father's alleged failure to protect the children from mother's drug abuse. Accordingly, we reverse the disposition order and remand the matter to the dependency court to reconsider what reunification orders are appropriate to address this family's particular issues.

Father also appeals from the placement aspect of the disposition order denying his request for physical custody. At the time of their detention, the children resided with mother and had bi-weekly visits with father, who lived separately. Father contends the dependency court improperly ordered the children removed from his physical custody pursuant to section 361, subdivision (c), despite undisputed evidence that the children did not reside with him. Because father was a noncustodial parent, he is correct that the court was required to make its placement finding pursuant to section 361.2, subdivision (a)—not section 361. Further, based on this record, we cannot conclude that the court's failure to assess placement under the prescribed standard

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[1] Subsequent statutory references are to the Welfare and Institutions Code unless otherwise indicated.

was harmless error. Accordingly, we will reverse the disposition order and remand the matter to the dependency court to determine placement under section 361.2.

FACTS AND PROCEDURAL BACKGROUND

Because resolution of this appeal turns upon the existence of substantial evidence supporting the dependency court's findings, we state the facts in the light most favorable to the court's rulings. (*In re S. O.* (2002) 103 Cal.App.4th 453, 461.)

Mother and father are the parents of two children, D.T., born February 2008, and A.T., born December 2009. When the underlying events occurred, the parents were living in separate homes on Catalina Island.

On October 9, 2015, the Department of Children and Family Services (Department) received a report alleging mother used drugs and neglected the children. When a social worker confronted mother with the allegations, mother admitted she was currently under the influence of marijuana and she had recently used methamphetamine. Mother reported she used drugs to deal with depression. The social worker observed mother's eyes were glassy, her speech was erratic, and the home she shared with the children was cluttered with an odor of trash.

Mother reported she was separated from father. She explained that father was abusive and had assaulted her with a knife in front of the children. The incident occurred years earlier when mother and father were in the process of separating. Father became aggressive, grabbed a knife, got on top of mother and placed the knife against her neck. D.T. witnessed the incident, and screamed for help from mother's stepfather, who intervened. As mother's stepfather struggled with father to take

the knife, father began stabbing himself in the chest. Mother said father had visible scars on his chest from the incident.

Mother obtained a restraining order against father, but did not report the incident to the police. She was uncertain of the date and believed the restraining order had since expired. She also reported that she had been granted full custody of the children, but she did not have a copy of the family law order. She said father maintained visitation with the children once a week.

The social worker contacted law enforcement in an effort to obtain father's address. During the contact, an unnamed law enforcement official informed the social worker that "father is a known alcoholic" and his "home is not appropriate" for children.

On October 27, 2015, the Department filed a juvenile dependency petition alleging the following grounds for jurisdiction: (1) father's prior act of domestic violence places the children at significant risk of physical harm (§ 300, subds. (a) & (b)); (2) mother's ongoing substance abuse, and father inability to protect the children from it, endangers the children (§ 300, subd. (b)); and (3) father's alcohol abuse endangers the children (§ 300, subd. (b)).

The dependency court determined the Department had presented a prima facie case for jurisdiction and detained the children in the Department's custody. The court ordered the children placed with the maternal grandmother pending a full hearing on jurisdiction and disposition.

In advance of the jurisdiction and disposition hearing, the Department interviewed the parents, children and maternal grandmother. Mother largely repeated her description of the domestic violence incident. She corroborated the law enforcement official's report that father was an alcoholic, and

claimed the children " 'are scared of him when he's under the influence of alcohol.' " She said father is " 'violent and aggressive' " when under the influence and he " 'blacks out.' " But, when not drunk, she allowed that he was " 'a good father.' " Nevertheless, she said father " 'drinks daily.' " Finally, she claimed father was " 'recently arrested for domestic violence with his current girlfriend and he was drunk that day.' "

The maternal grandmother expressed similar views concerning father's alcohol use. She said that " '[w]hen the father would drink he would talk a lot.' " She added that he was a " 'very good father' " otherwise, but " 'when he would drink he would become violent.' "

The Department interviewed seven-year-old D.T. about the domestic violence incident. She described the experience in detail: " '[M]y dad wrapped his arm around my mommy's neck. I can't get it out of my mind and sometimes I dream so much about it. He [father] had a knife around my mom's face and he was swinging it. My mom called "[D.T.]" and I ran to my grandma's room and then my grandma's boyfriend came down and he said "[father] don't do this, your kids are right here" and we started crying. I then called my dad's brother and my dad's brother took it [the knife] away and he threw it to the trash.' " D.T. also recalled that father " 'cut himself on his chest' " during the altercation.

When asked about father's alcohol use, D.T. reported that father does drink, but he does it " 'outside so we can't see him.' " When asked if father gets drunk, D.T. replied, " 'he doesn't but he gets talking a lot like a borracho [drunk].' "

The Department also interviewed five-year-old A.T. With respect to the domestic violence incident, A.T. reported that his father " 'had a knife and he was almost trying to choke my mom.' " When asked about father's alcohol use, A.T. said he had never seen his father drink beer, nor had he seen father drunk.

Father denied the reported domestic violence incident. When asked about why a restraining order was issued against him, father said, " '[Mother] put it against me because she would get jealous when she would see me drinking and dancing with other girls at parties. [Mother] did it so that I wouldn't be at the same parties as her.' " When asked if he had ever had a physical altercation with mother, he replied, " 'The only time we fought was the day that she kicked me out of the house. We engaged in a verbal argument but we did not hit each other. And I did not put a knife against her neck.' "

As for mother's drug use, father said he learned about it from the investigating social worker. He objected to the allegation that he had failed to protect the children, explaining that, due to the restraining order, he had little to no contact with mother and no means of learning about her drug use. When asked if he had ever witnessed mother use drugs, father responded, " 'No, and she never used drugs when we were still together.' "

Regarding his own alcohol use, father admitted he was " 'drinking excessively' " when he and mother separated. However, he claimed he never did so around the children " 'because of the restraining order.' " Father explained, " 'I do drink alcohol but I don't drink in excess. I do drink three or four beers but I'm not an alcoholic.' " Father stressed that he had a job and typically drank on his days off. When asked if the

children ever saw him drunk, father replied, " 'No, whenever I see my children I don't drink in front of them.' " He acknowledged, however, that he "used to drink a lot during the time he was in [a] relationship with mother."

Father admitted to a criminal conviction for driving under the influence of alcohol three to four years earlier. He said his most recent arrest was in 2013, and all his arrests had been due to alcohol related offenses and a cocaine offense " 'years ago.' " Father said he had never participated in a substance abuse treatment program. The Criminal Law Enforcement Telecommunications System indicated there were " 'Too Many Hits' " for father's name to provide results.

Based on the interviews and other evidence collected in its investigation, the Department recommended that the court sustain all jurisdictional allegations and declare the children dependents as described in section 300, subdivisions (a) and (b). With respect to disposition, the Department asked the court to remove the children from mother's and father's custody and maintain the children in their current placement with the maternal grandmother. The Department's recommended case plans for each parent included parenting education, substance abuse and anger management programs for father, and parenting education and substance abuse programs for mother.

The court held a combined jurisdiction and disposition hearing on the Department's petition. Mother pled no contest to the jurisdictional allegation concerning her substance abuse. She also submitted to the recommendation for disposition and to her case plan for reunification.

Father contested the jurisdictional allegations concerning his conduct. With respect to the alcohol abuse allegation, father argued the Department's evidence principally concerned his past conduct and that mother's statements concerning his current alcohol use were unreliable because the parents no longer lived together. For the same reason, father argued there was no basis to find he knew of, or failed to protect the children from, mother's drug abuse. As for the domestic violence allegation, father argued the incident described by mother and the children was too remote to serve as a basis for jurisdiction.

The Department argued the evidence was sufficient to support jurisdiction on all counts. With respect to father's alleged alcohol abuse, the Department emphasized that father had multiple arrests for driving under the influence, yet he admitted to never completing a substance abuse program in connection with the arrests. The Department also maintained mother could credibly attest to father's ongoing alcohol use because the parents lived in a small community on Catalina Island and saw each other in connection with the children. As for the domestic violence incident, the Department argued the incident had occurred only two years earlier, father had not completed programs to address his alcohol or anger management issues, and, according to mother, father was recently arrested for another act of domestic violence while intoxicated. The minors' counsel joined with the Department in arguing the domestic violence allegation should be sustained. Counsel noted the incident was "still very real and traumatizing to the children" and there was "no indication that the issues, however long ago they may have been, were addressed."

The court sustained the allegations against father. As grounds for its findings, the court cited father's multiple admitted alcohol-related arrests, the combined weight of father's, mother's and maternal grandmother's corroborating statements about father's alcohol use, and father's assault on mother with a knife in front of the children. The court did not explain the basis for its apparent finding that father failed to protect the children from the ill effects of mother's drug use.

With regard to disposition, father objected to the recommended case plan, raising the lack of available domestic violence programs on Catalina Island. Father did not expressly object to the recommendation to place the children with the maternal grandmother.

The court found by clear and convincing evidence that maintaining the children in father's custody posed a substantial risk of danger to their physical health and that no reasonable means existed to protect the children without removing them from father's custody. Consistent with the recommended case plan, the court ordered father to complete parenting, substance abuse, and anger management programs. The parents were granted separate visitation with the children a minimum of three times a week.

DISCUSSION

1. *The Jurisdictional Findings Regarding Domestic Violence and Father's Failure to Protect the Children Are Not Supported by the Evidence; The Reunification Orders Must Be Remanded to the Dependency Court*

Father contends the jurisdictional findings pertaining to his conduct must be vacated because the evidence failed to establish a nexus between his behavior and a risk of harm to the

children. He acknowledges that reversal of the challenged findings will not affect the existence of dependency jurisdiction, as he does not contest the jurisdictional finding based on mother's substance abuse. Nevertheless, father argues we should review the findings on their merits because they served as a basis for the dependency court's reunification orders, which he maintains are unduly burdensome. (See *In re Nolan W.* (2009) 45 Cal.4th 1217, 1229 (*Nolan W.*) ["the juvenile court's discretion in fashioning reunification orders is not unfettered[;] [i]ts orders must be 'reasonable' and 'designed to eliminate those conditions that led to the court's finding that the child is a person described by Section 300' "]; § 362, subd. (d).) We conclude the evidence supports the alcohol abuse finding, but does not support the findings concerning the threat of harm posed by domestic violence or father's alleged failure to protect the children from mother's drug abuse. Under this circumstance, we must remand the matter to the dependency court to reassess whether its reunification orders are reasonably designed to eliminate the remaining basis for jurisdiction.

a. *The alcohol abuse finding*

We begin with the court's alcohol abuse finding under section 300, subdivision (b). "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." (§ 300.2.) Thus, section 300, subdivision (b), creates dependency jurisdiction where it is shown that a "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 . . . 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)(1).)

"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, 1383-1384.) With respect to substance abuse, the Legislature has declared that "[s]uccessful participation in a treatment program for substance abuse may be considered in evaluating the home environment." (§ 300.2.)

"In reviewing the jurisdictional findings . . . , we look to see if substantial evidence, contradicted or uncontradicted, supports them. [Citation.] In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court. [Citation.]" (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193 (*Heather A.*).)

Father contends the evidence was insufficient to find he is a current alcohol abuser under the standard announced by this court in *In re Drake M.* (2012) 211 Cal.App.4th 754 (*Drake M.*) Hence, he maintains the evidence failed to establish a nexus between his behavior and a current risk of harm to the children. In *Drake M.*, this court reaffirmed that "the mere *usage* of drugs

by a parent is not a sufficient basis on which dependency jurisdiction can be found" (*id.* at p. 764, italics added), and held that "a finding of substance *abuse* for purposes of section 300, subdivision (b), must be based on evidence sufficient to . . . establish that the parent or guardian at issue has a current substance abuse problem as defined in the [American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th rev. ed. 2000) (DSM-IV-TR)]" (*Drake M.,* at p. 766, italics added). As relevant to this case, the DSM-IV-TR described the condition as a " 'maladaptive pattern of substance use leading to clinically significant impairment or distress,' " as manifested by " 'recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired by substance use)[;] . . . recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct)[; or] . . . continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights).' " (*Ibid.*, quoting DSM-IV-TR, at p. 199.) This court concluded the evidence was insufficient to establish that the father's use of prescribed medical marijuana to treat his chronic knee pain constituted "substance abuse" under this definition. In so concluding, this court relied on undisputed evidence showing that the father had been employed for many years, had no criminal history, and did not operate a motor vehicle or care for the child within a minimum of four hours after ingesting marijuana. (*Id.* at pp. 767-768.)

Unlike *Drake M.*, substantial evidence in this case supports the dependency court's finding that father is a current alcohol abuser and that his abuse of alcohol poses a risk of harm to the children. Father admitted he was "drinking excessively" during his separation from mother, around the same time he assaulted her with a knife in front of the children. He admitted that he continues to consume three to four beers in a sitting. Though father claimed he no longer drank around the children, D.T. disclosed that she witnessed him drink beer during his visits and that he talked like a drunk. Father admitted he had multiple arrests related to his drug and alcohol use, including a criminal conviction and at least one other recent arrest for driving under the influence of alcohol. Despite his legal troubles, father disclosed that he had never attended a treatment program to address his recurrent problems with alcohol. Mother and the maternal grandmother reported that father became violent when he was drunk.

The dependency court acknowledged the individual pieces of evidence were less persuasive when viewed in isolation; however, the court observed that together the incidents served to corroborate one another and establish that father engaged in persistent conduct while intoxicated that risked endangering the children. Credibility and factual determinations are the province of the dependency court. (*Heather A., supra,* 52 Cal.App.4th at p. 193.) Here, the finding that father's alcohol abuse posed a significant risk of harm to the children is supported by the evidence the court expressly credited in connection with ruling on jurisdiction. Father has not established reversible error with respect to this finding.

b. *The domestic violence finding*

The court determined D.T. and A.T. were dependent children as described in section 300, subdivision (a) based on the following allegation: "On a prior occasion, . . . [mother and father] engaged in a violent altercation in which the father put a knife to the mother's neck in the children's presence. Such violent conduct on the part of the father against the mother endangers the children's physical health and safety and places the children at risk of serious physical harm, damage, and danger." To find a child is within the dependency court's jurisdiction under section 300, subdivision (a) the evidence must show "[t]he 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).) The evidence pertaining to father's prior act of domestic violence against mother failed to support the court's finding.

To begin, as the statutory language plainly states, to sustain a finding under section 300, subdivision (a), there must be evidence of *physical* harm or risk of *physical* harm. (See, e.g., *In re Rocco M.* (1991) 1 Cal.App.4th 814, 823.) No such evidence was presented in this case. On the contrary, the Department's interview with D.T. suggested only that the incident might have made a psychological impression on her, inasmuch as she stated, " 'I can't get [the incident] out of my mind and sometimes I dream so much about it.' " But that evidence could be relevant only to a charge under section 300, subdivision (c); it did not support a finding under section 300, subdivision (a), as was charged in the

dependency petition.[2] (See *In re J.O.* (2009) 178 Cal.App.4th 139, 152, fn. 13 [because " '[f]undamental . . . due process' requires '[n]otice of the specific facts upon which removal of a child from parental custody is predicated,' " dependency court "could not properly consider unalleged actions in making the jurisdictional finding"].)

The Department also failed to offer evidence indicating the prior domestic violence incident entailed a risk of future physical harm to the children. We recognize, of course, that domestic violence in the same home where children are living can present a "substantial risk of encountering the violence and suffering serious physical harm or illness from it." (*Heather A., supra,* 52 Cal.App.4th at p. 194.) Children can be "put in a position of physical danger from [spousal] violence" because, "for example, they could wander into the room where it was occurring and be accidentally hit by a thrown object, by a fist, arm, foot or leg."

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[2] In any event, the evidence also did not support a finding under section 300, subdivision (c). That subdivision requires evidence that "[t]he child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent." (§300, subd. (c).) D.T.'s statement that she "sometimes" dreamed about the incident does not indicate serious emotional damage, nor does it serve as evidence of severe anxiety, depression, withdrawal, or untoward aggressive behavior. Moreover, perhaps because it did not charge the incident under section 300, subdivision (c), the Department did not offer an evaluation from a psychologist or other clinician that might have substantiated a serious emotional damage allegation.

(*Ibid*.) However, a risk of future harm finding must be predicated on evidence reasonably establishing past conduct will be subsequently repeated. (*In re M.W.* (2015) 238 Cal.App.4th 1444, 1454.) No such evidence is presented here. On the contrary, the evidence shows the subject incident happened years ago, when the parents were in the midst of an acrimonious separation, and no further altercations have occurred.[3] The parents no longer live together and, at most, they see each other only briefly for visitation exchanges. There is simply no evidence that the family's current circumstances place the children at risk of suffering serious physical harm from a repeat of the prior domestic violence incident. (See *id.* at p. 1454 [single domestic violence incident seven years earlier did not support finding of current risk, particularly where father was incarcerated at the time of the hearing].) The domestic violence finding must be vacated.

c. *The failure to protect finding*

Section 300, subdivision (b) authorizes jurisdiction where there is evidence that "[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 . . . 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." (§ 300, subd. (b)(1).) In the dependency petition, the Department alleged father "knew or reasonably should have known of the mother's drug use and failed to protect the

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[3] In the wake of the incident, mother obtained a restraining order against father, which had since expired without apparent violation or grounds for renewal.

children," thereby placing them at risk of physical harm. The dependency court, without articulating the basis for its finding, sustained the section 300, subdivision (b) allegation. We conclude the evidence was insufficient to support the court's ruling.

Here, the evidence conclusively demonstrates that father had no reasonable basis to suspect mother was using drugs or endangering the children by her drug use. Father no longer lived with mother, and there is no indication in the Department's reports that he ever had occasion to observe mother under the influence of drugs. Moreover, the reports indicate the children were unaware of mother's drug use, and they offer no evidence that the children disclosed anything to father that might have raised concern about the care the children received in mother's custody. Father asserted he did not know mother used drugs, and mother agreed father was unaware of her drug use. Finally, the maternal grandmother, who lived with mother and the children, reported that she also was unaware of mother's drug use. All told, the record is devoid of any evidence to suggest father knew, or reasonably should have known, of mother's drug use. Accordingly, the failure to protect finding must also be vacated.

d. *The reunification orders*

As discussed, father acknowledges that vacating the foregoing domestic violence and failure to protect findings will have no effect on the dependency court's jurisdiction. However, he maintains the lack of evidence supporting those findings calls into question the propriety of the reunification orders imposed upon him. Insofar as reunification orders "shall be designed to eliminate those conditions that led to the court's finding that the

minor is a person described by Section 300" (§ 362, subd. (d)), we conclude the dependency court must reassess whether the challenged orders are appropriate in view of our decision regarding the vacated findings.

"The overarching goal of dependency proceedings is to safeguard the welfare of California's children. [Citation.] 'Family preservation, with the attendant reunification plan and reunification services, is the first priority when child dependency proceedings are commenced. [Citation.] Reunification services implement "the law's strong preference for maintaining the family relationships if at all possible." [Citation.]' [Citation.] Reunification services are typically understood as a benefit provided to parents, because services enable them to demonstrate parental fitness and so regain custody of their dependent children." (*Nolan W., supra,* 45 Cal.4th at p. 1228.)

Consistent with the foregoing purpose, section 362, subdivision (d) provides: "The juvenile court may direct any reasonable orders to the parents or guardians of the child who is the subject of any proceedings under this chapter as the court deems necessary and proper to carry out this section . . . . That order may include a direction to participate in a counseling or education program, including, but not limited to, a parent education and parenting program . . . . The program in which a parent or guardian is required to participate shall be designed to eliminate those conditions that led to the court's finding that the child is a person described by Section 300." (§ 362, subd. (d); see also *Nolan W., supra,* 45 Cal.4th at pp. 1228–1229.)

While the discretion conferred upon the dependency court is broad, it is "not unfettered." (*Nolan W., supra,* 45 Cal.4th at p. 1229.) Rather, as our Supreme Court has emphasized, the

court's reunification orders "must be 'reasonable' and 'designed to eliminate those conditions that led to the court's finding that the child is a person described by Section 300.' " (*Nolan W.,* at p. 1229.) In that regard, "[t]he reunification plan ' "must be appropriate for each family and be based on the unique facts relating to that family." ' " (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1006 (*Christopher H.*); *Nolan W.,* at p. 1229.) Thus, in *Basilio T.* for instance, the court reversed a dispositional order requiring substance abuse counseling because there was no evidence to suggest either parent had a substance abuse problem. (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 172-173.)

In the instant case, after sustaining the jurisdictional allegations against father, the court ordered father to comply with the case plan submitted by the Department, without modification. The case plan included orders for father to compete a full drug/alcohol program with aftercare and on demand drug/alcohol testing every other week, an anger management course, and a developmentally appropriate parenting class.

While the extent to which these orders were intended to address the sustained alcohol abuse finding is not entirely clear, it is apparent that the anger management and parenting class orders were at least in part based upon the court's finding that the past domestic violence incident posed a serious risk of physical harm to the children. For instance, at the disposition hearing, father's counsel preemptively objected to an order requiring father to attend a domestic violence program. The Department responded by pointing out that the case plan called for only an anger management class. The dependency court remarked that it had been amenable to ordering a domestic

violence program, but that it would accept the recommendation set forth in the case plan instead. Likewise, with respect to the parenting class, the court observed that the past domestic violence incident "show[ed] extremely poor parenting skills" on father's part insofar as he assaulted mother "in front of at least one of the children." As we have determined there was insufficient evidence to support the domestic violence and failure to protect findings, we conclude the proper course is to remand the matter to the dependency court to reassess what reunification orders are appropriate under section 362 in view of this opinion and the unique circumstances of this family. (See *Christopher H., supra,* 50 Cal.App.4th at p. 1006.)

2. *The Court Failed to Make a Mandatory Disposition Finding under Section 361.2 Regarding the Suitability of Placement with a Noncustodial Parent*

Father contends the dependency court erred when it entered an order removing the children from his physical custody pursuant to section 361, subdivision (c). He argues section 361 does not apply to D.T. and A.T. because the children did not reside with him at the time the Department filed the dependency petition. The Department concedes the court erred by entering the disposition order pursuant to section 361, but maintains the error was harmless because the evidence and court's finding were sufficient to deny father's request for physical custody under the standard established by section 361.2 for placing children with a noncustodial parent. Based on the record presented, we cannot conclude the error was harmless.

Section 361 authorizes a child's removal "from the physical custody of his or her parents . . . *with whom the child resides* at the time the petition was initiated." (§ 361, subd. (c), italics added.) This court recently observed that "the term 'resides' has been commonly used and understood to mean ' " 'to dwell permanently or for a considerable amount of time.' " ' " (*In re Dakota J.* (2015) 242 Cal.App.4th 619, 628 (*Dakota J.*).) Applying this definition to the language of section 361, this court held "the statute does not contemplate that a child could be removed from a parent who is not living with the child at the relevant time." (*Dakota J.,* at p. 628.) Consistent with that holding, we conclude the dependency court erred by entering an order pursuant to section 361 that purported to remove the children from father's physical custody despite undisputed evidence establishing the children did not reside with father when the petition was initiated.

Father argues the error requires reversal of the disposition order and remand to the dependency court to determine whether the children should be placed with father under the standard established by section 361.2. The Department concedes the dependency court erred, but maintains the error was harmless because the court would have made the same disposition order based on the evidence had it applied the section 361.2 standard. "We cannot reverse the court's judgment unless its error was prejudicial, i.e., ' "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." ' " (*In re Abram L.* (2013) 219 Cal.App.4th 452, 463 (*Abram L.*); Cal. Const., art. VI, § 13.) To assess whether the error was prejudicial, we begin with the text of the relevant statutes.

As discussed, section 361, subdivision (c) authorizes a child's removal from the physical custody of a parent with whom the child resides. More accurately, the statute prohibits the court from removing the child from a custodial parent, "unless the juvenile court finds *clear and convincing evidence* of . . . [¶] (1) . . . *a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor* if the minor were returned home . . . ." (§ 361, subd. (c), italics added.) In contrast, section 361.2 governs whether a dependent child must be placed with a noncustodial parent after the child has been removed from the custodial parent's physical custody.[4] Like section 361's "substantial danger" standard, section 361.2 mandates placement with the noncustodial parent, "unless [the court] finds that placement with that parent would be *detrimental to the safety, protection, or physical or emotional well-being of the child*." (§ 361.2, subd. (a), italics added.) Because both statutes authorize state intervention to deny a parent custody of his or her child, this court and several others have affirmed that due process implicitly requires the detriment finding under section 361.2 to be made under the same heightened clear and convincing evidence standard of proof that applies to the substantial danger finding under section 361. (*In re D'Anthony D.* (2014) 230 Cal.App.4th 292, 301 (*D'Anthony D.*); see also *In re*

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[4] Section 361.2 provides in relevant part: "When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child." (§ 361.2, subd. (a).)

Liam L. (2015) 240 Cal.App.4th 1068, 1081; *In re C.M.* (2014) 232 Cal.App.4th 1394, 1400-1401; *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1829.)

In *D'Anthony D.* this court recognized that the respective findings mandated by sections 361 and 361.2 are substantially similar, and this similarity can, in certain circumstances, compel the conclusion that the dependency court's failure to make the prescribed finding under section 361.2 was harmless. (*D'Anthony D., supra,* 230 Cal.App.4th at p. 303.) Like the dependency court here, the lower court in *D'Anthony D.* entered a disposition order under section 361 purporting to remove the dependent children from the father's physical custody, despite undisputed evidence that the children did not reside with the father. (*D'Anthony D.,* at p. 297.) This court acknowledged the removal order was erroneous, but reasoned that "in assessing whether this error was prejudicial, we can neither ignore the similarity between [section 361's and section 361.2's] mandatory findings, nor disregard the evidence supporting the court's 'substantial danger' finding concerning placement with father." (*D'Anthony D.,* at p. 303.) Cognizant of the statutes' similar standards, this court concluded the error was harmless because the dependency court's substantial danger finding, coupled with evidence showing the father physically abused one of the children, demonstrated the father likely would not have obtained a more favorable result had the lower court applied section 361.2's detriment standard in ruling on disposition. (*D'Anthony D.,* at p. 304; cf. *Abram L., supra,* 219 Cal.App.4th at pp. 460-464 [finding miscarriage of justice where court made § 361 finding as to custodial mother, but not noncustodial father, and "[n]othing in the record" indicated the court considered the requirements of § 361.2].)

The principal factors that compelled this court to find the error harmless in *D'Anthony D.* are not present in this case. For instance, the lower court in *D'Anthony D.* was "*unequivocal*" about its disposition finding, observing, " 'I've now heard a trial. I heard a little boy say "Oh yeah he hit me, he hit me in the face, he hit me there." ' " . . . 'I realize that there are different standards in different countries about what's appropriate child discipline . . . . But I'm here, he's [(father)] here, [and] he's been here before. And I am not comfortable releasing [the children] to him *period*.' "[5] (*D'Anthony D., supra,* 230 Cal.App.4th at p. 304, italics added.) We have no equivalent statement from the dependency court here. On the contrary, the court was quite equivocal about the quality of the evidence upon which it based its jurisdiction and disposition findings, noting that much of the evidence, "in and of itself alone has limited weight," though taken together it persuaded the court that there was "enough of an issue there regarding the drinking, [and] the domestic violen[ce] incident with a knife," that the petition should be sustained as to father. Further, insofar as we have concluded the past domestic violence incident was insufficient to support a finding that the children faced a current risk of physical harm from father, we also are not persuaded that the dependency court would have reached the same conclusion regarding placement had it considered the issue under the detriment standard mandated by section 361.2. (See *Abram L., supra,* 219 Cal.App.4th at p. 464 [finding miscarriage of justice "[i]n light of the evidence in this

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[5] The child in *D'Anthony D.* reported that the father hit him with a belt and struck him in the face when the child had visited the father in Mexico. (*D'Anthony D., supra,* 230 Cal.App.4th at p. 297.)

case, *or lack thereof*"], italics added.) As we conclude the court's failure to consider placement with father under the standard prescribed by section 361.2 was prejudicial, we must remand the disposition order to the dependency court to consider the matter under the appropriate standard.

DISPOSITION

The disposition order is reversed and the case is remanded to the dependency court to reconsider reunification and placement in accordance with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GOSWAMI, J.*

We concur:

ALDRICH, Acting P. J.

LAVIN, J.

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