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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re ROBERT H., a Person Coming  
Under the Juvenile Court Law.

B281434  
(Los Angeles County  
Super. Ct. No. DK19960)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

ROBERT H., SR.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County.  
Julie Fox Blackshaw, Judge. Affirmed.

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

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County  
Counsel, Shante Sylvester, Deputy County Counsel, for Plaintiff and  
Respondent.

Robert H. (Father) appeals from a dependency court order removing his children, Robert H. Jr. (Robert Jr.) (born July 2008), Joseph H. (Joseph) (born February 2012), and Alexander H. (Alexander) (born July 2015) (collectively, the Children), from his custody. As substantial evidence supports the January 17, 2017 removal order, we affirm.

## **COMBINED STATEMENT OF FACTS AND OF THE CASE**

### **1. Prior Family Events**

On April 4, 2016, the mother of the Children, Doris G. (Mother), age 38, called the police and reported that during an argument that day over how to parent the Children, Father, age 68, kicked her on the left side of her torso and threw an object at her, striking her in the back of her head. Mother then threw her cell phone at Father. Father grabbed Mother on her neck and struck the left side of Mother's face. The Children were not present in the room during this incident, although they were in the home. Mother told the police Father owned a firearm and that she had seen it. She reported that Father had threatened to kill her during prior arguments, and she had dared him to do so. Mother stated that police had responded to the family home on other occasions, but after the police arrived, she had refused to give the police further information about those incidents.

Two days later, the Los Angeles County Department of Children and Family Services (DCFS) was contacted. DCFS made a visit to the home, where the DCFS investigator observed small bruises around Mother's lips; Mother stated these resulted from Father punching her in the mouth. Mother also expressed fear based on her concern over Father's ownership of a handgun. DCFS deemed the need for further action on its part to be "inconclusive." DCFS asked the parents to participate in domestic violence and parenting classes, but neither parent complied with the request.

On April 15, 2016, Mother obtained a temporary restraining order against Father. Shortly after doing so, she allowed Father back into the home because the Children had been affected by Father's absence. Father's gun was confiscated and was "being held for evidence at West Valley [Los Angeles Police] Station for a previous restraining order violation."

## **2. Current Referral and Detention**

On October 9, 2016, DCFS received the present referral after law enforcement officers responded to "a domestic violence incident" at the home of Mother and Father and arrested Father for making "criminal threats" against Mother. Mother stated that as a result of a dispute about whether Father had left beans out of the refrigerator and allowed them to spoil, Father accused Mother of infidelity and told Mother he was going to shoot her, despite the fact that his (known) gun had previously been taken away. Mother reported that Robert Jr. and Alexander were in the living room at the time and did not witness Father's threats, but that four-year-old Joseph was present.

According to the October 2016 police report, Mother said Father told Joseph that "he was no longer going to have a mother because he [Father] was going to shoot [Mother]." When Father then left the home, Mother called police out of fear that she was going to be shot. No gun was located when the police searched the residence and Father's vehicle.

On October 11, 2016, a case social worker (CSW) visited the home and interviewed two of the children and Mother. Robert Jr. told the CSW he did not witness the altercation but Alexander had. Robert Jr. stated that when he misbehaves Mother hits him with a sandal. Joseph "denied that [Mother and Father] hit each other." When asked if he saw his father with a gun, he stated, "he [Father] said he was going to buy one." Mother told the CSW she

has disciplined Joseph on occasion by hitting him “with the back of the hand of the backscratcher.” Referring to the April 2016 DCFS investigation, Mother confirmed she had never participated in the domestic violence or parenting programs to which DCFS had referred her. Mother stated that when Robert Jr. witnessed Father being arrested he “would not stop crying.” Mother also reported Father had said he wanted to get his gun back from the police.

The CSW interviewed Father by telephone on October 17. Father asserted, “There hasn’t been any violence, only conversation. We’re not getting along too good. We only had a three-minute conversation and she said she was going to call the police.” He stated Mother was “the one who needs counseling, not me. I keep from making problems. She’s the one that causes problems.” He denied accusing Mother of infidelity, stated Mother tells him things to make him angry, denied threatening to shoot Mother, and denied any of the children were present at their October 9 altercation.

On October 19, 2016, DCFS filed its Welfare and Institutions Code section 300 petition.<sup>1</sup> Pursuant to section 300, subdivision (a), DCFS alleged: the parents’ history of domestic violence, including Father’s threats and striking of Mother, and also that Mother failed to protect the Children (§ a-1); excessive corporal abuse of Robert Jr. by Mother, and that Father failed to protect the Children (§ a-2); and excessive corporal abuse of Joseph by Mother and that Father failed to protect the Children (§a-3). DCFS alleged three similar counts under section 300, subdivision (b). DCFS requested that the Children be detained and that Father be granted visitation with the Children in a neutral setting, without Mother present.

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

At the detention hearing on October 19, 2016, Mother and Father, through their respective counsel, denied the allegations of the petition. Father was deemed the presumed father of the Children. The juvenile court found DCFS had demonstrated a prima facie case for detention of the Children from Father and released the Children to the care and custody of Mother, while stating that “court jurisdiction” over the children would continue. The court also entered an order that Mother could not engage in any corporal punishment of the Children and granted a temporary restraining order against contact by Father with Mother. The court allowed for monitored visits by Father, which were not allowed to occur in the family home and at which Mother was not allowed to be present.

### **3. The Jurisdiction and Disposition Report**

On December 22, 2016, DCFS filed its Jurisdiction and Disposition Report, in advance of the January 17, 2017 jurisdiction and disposition hearing. The family’s prior child welfare history was described. The report also contained summaries of statements from Mother, Father, and from all of the Children, except for Alexander due to his young age. Robert Jr. was reported as saying that “my mom doesn’t want to be with my dad no more.” He stated he had not seen his parents arguing at the October 2016 event but that “Joseph and Alexander saw them.” He denied his parents hit each other, and denied seeing a gun in the house, or that Father had one.

DCFS reported that at its second interview of Joseph, he stated “my da[d] made my mom[’s] mouth bleed, he hit her really hard with a wooden spoon.” He also stated Mother “hits my big brother [Robert Jr.] with the [wooden spoon],” but denied that caused bruises. He stated his Father does not hit him, only his Mother. He reported he likes that Father buys him candy. When asked if there was something he did not like about Father, he

stated, “I don’t like guns” and that Father had “a pistol, it’s a gray one.” He also stated that one time “he [Father] point[ed] it [at Mother’s] face.” He said it had been a “long time” since he had seen the gun; “like 2 years ago my dad punched my mom[’s] mouth and try to take out a tooth”; and “I was dreaming that my dad was going to jail,” and “I want to be military and have pistols and be a sniper.”

Mother admitted spanking the two older children (Robert Jr. and Joseph) with her open hand on their buttocks and with the “hand scratcher.” She admitted she hit Robert Jr. “once softly with the hand scratcher because he hit Joseph” and this “left him a bruise on his leg as he was wearing short[s].” Joseph “tantrums and misbehaves regularly.” Mother also stated Joseph would argue with Father and tell Father he should not be in the house if Father was going to hit Mother. She reported she was afraid of Father “not because he is go[ing] to do something to me but because he states he is going to leave me with nothing.” She admitted that when Father angered her, “I would also respond badly,” but stated Father was good with the Children, never hit them, and the Children ask for him a lot. She stated Father “always threatened her that he is going to go get his gun and shoot her,” and she stated that in March 2016 Father showed her his gun and “it was loaded.” In her October 2016 request for a restraining order, Mother stated that in that month alone, Father threatened to kill her “about eight times.”

According to Father, DCFS exaggerated the situation because “nothing happened” that should prevent him from being with the Children. He denied ever threatening Mother, but admitted they argue. He expressed frustration that DCFS “involved the children and they were not even there” and said he and Mother were arguing “about the same freaking black beans.” Father

stated that on the day of the October 2016 incident, Mother “threw a punch at me[,] then I was trying to stop her from hitting me [in] my face,” and “[m]y arm just happened to touch her mouth; I don’t recall her mouth bleeding.” Father confirmed he was not enrolled in any anger management or domestic violence program, and stated, “I am not the aggressor. I’m trying to keep it from happening.” Father also denied that Mother hits the Children, saying she might have spanked the two older children softly with an open hand on their buttocks.

The adult half sibling of the Children, Jocelyn G., stated that on rare occasions Mother’s and Father’s arguments get physical. She stated, “They are both guilty parties. I’ve seen her push him a little more than she should.” She also stated that “Joseph’s behavior is very challenging” and “[M]other sometimes spanks him,” and that Mother has also spanked Robert Jr., but it did not cause bruises.

DCFS reported that Mother and Father “have been cooperative and are willing to participate in services.” After the entry of the October 2016 temporary restraining order, Mother allowed Father to reside in the home until sometime in December. DCFS did not know if Father had obtained another gun. DCFS recommended that the Children be declared under the jurisdiction of, and dependents of, the juvenile court pursuant to section 300, and that the Children remain released to Mother. DCFS requested monitored visitation by Father consistent with the juvenile court’s prior detention order, and that Mother and Father be required to take parenting classes and participate in domestic violence programs.

#### **4. The Jurisdiction and Disposition Hearing**

On January 17, 2017, the court held the jurisdiction and disposition hearing. Mother and Father appeared with their respective counsel. The

DCFS reports were admitted into the record without objection and the court heard arguments from counsel for the parties and for the children.

The juvenile court sustained counts relating to Father's actions (counts a-1 and b-1). The court did so on the basis of Joseph's statements that Father made Mother's mouth bleed, the statement that Father pointed a gun at Mother, the police reports filed in April and October 2016, and Mother's statement that Father hit her and threatened to shoot her.

The court sustained the counts in the petition relating to domestic violence and Mother's corporal abuse of Joseph (counts a-1, a-3, b-1, b-3, and j-2), and dismissed the counts relating to Robert Jr. (counts a-2, b-2, and j-1).

The court found by clear and convincing evidence that it had jurisdiction over the Children; there was substantial danger to the physical and emotional well-being of the Children if they were to be returned to Father; and no other reasonable means existed to protect the Children. It then ordered that the Children be removed from Father's custody and be placed with Mother.

The court rejected the argument of Father's counsel that the order restraining Father from contact with Mother be dissolved, emphasizing that "Father has hurt Mother, has caused injury. The Children have seen it. He has threatened to shoot her. The Children have seen that. He's pointed a gun in Mother's face. The gun which was confiscated by the police was loaded. I think that that certainly constitutes a significant threat." The juvenile court issued the restraining order against Father, effective until January 17, 2020.

Father timely appealed the January 17, 2017 jurisdiction and disposition order.<sup>2</sup>

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<sup>2</sup> Mother is not a party to this appeal.



## CONTENTION AND DISCUSSION

Father contends the court erred in removing the Children from his custody, arguing substantial evidence does not support the juvenile court's finding there was substantial danger to the Children.<sup>3</sup>

### **I. Legal Standard**

Removal of a child from the physical custody of a parent upon disposition is appropriate when the juvenile court finds by clear and convincing evidence that “[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be protected without removing the minor from the minor’s parent’s or guardian’s physical custody.” (§ 361, subd. (c)(1).) There must be “proof of parental inability to provide proper care for the child and proof of a potential detriment to the child if he or she remains with the parent. (*In re Jeannette S.* (1979) 94 Cal.App.3d 52, 60.)” (*In re N.M.* (2011) 197 Cal.App.4th 159, 169.) ““The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child.” [Citation.] The court may consider a parent’s past conduct as well as present

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<sup>3</sup> We reject DCFS’s initial contention that Father waived any challenge to the order removing the Children from his custody by failing to object to that proposed disposition in the juvenile court. As Father’s counsel points out, the record indicates his counsel asked that “all [the] commensurate allegations” be dismissed. In the context in which this request was made, it included the predicates to a determination that the Children be removed from his custody. Thus, his objection extended to the court taking jurisdiction, defeating DCFS’s claim of waiver and validating his right on this appeal to challenge the sufficiency of the evidence to support the court’s determination.

circumstances.’ [Citation.]” (*In re A.S.* (2011) 202 Cal.App.4th 237, 247; see also *N.M.*, at pp. 169-170; *In re Cole C.* (2009) 174 Cal.App.4th 900, 917.) The juvenile court’s “jurisdictional findings are prima facie evidence that the child cannot safely remain in the home.” (*Cole C.*, at p. 917.)<sup>4</sup>

“On appeal from a dispositional order removing a child from a parent we apply the substantial evidence standard of review, keeping in mind that the trial court was required to make its order based on the higher standard of clear and convincing evidence. [Citation.]” (*In re Ashly F.* (2014) 225 Cal.App.4th 803, 809; see also *In re Hailey T.* (2012) 212 Cal.App.4th 139, 146-147.) “[W]e look to see if substantial evidence, contradicted or uncontradicted, supports [the juvenile court’s findings]. [Citation.] In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court’s determinations; and we note that issues of fact and credibility are the province of the trial court.’ (*In re Heather A.* [(1996)] 52 Cal.App.4th [183,] 193; see *In re I.J.* (2013) 56 Cal.4th 766, 773.)” (*In re R.T.* (2017) 3 Cal.5th 622, 633.) As part of this review for substantial evidence, the appellant bears the burden of showing there is no evidence of a sufficiently substantial nature to support the court's findings or orders. (See *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

## **II. Analysis**

Substantial evidence supports the order removing the Children from Father. The record before the juvenile court established the following: (1) a prior domestic abuse police report and referral, from April 2016, in which

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<sup>4</sup> Father does not challenge the juvenile court’s determination that it possessed jurisdiction.

Mother stated Father kicked her and threw an object at her head; (2) possession at one time by Father of a pistol, which Father displayed to Mother when loaded with bullets, and which was confiscated by the police as a result of Father's violation of a restraining order; (3) statements by Mother that Father made multiple threats over time to kill Mother, including eight times in October 2016; (4) independent observation of bruises around Mother's lips after she reported, in the prior domestic abuse referral, that Father had punched her in the face (though DCFS found the allegations inconclusive at the time); (5) Mother's statements in the present referral and proceeding that Father had again told Mother he was going to shoot her, which was witnessed by Joseph; (6) Father telling Joseph he was no longer going to have a mother because Father was going to shoot her; (7) Joseph's statement in October 2016 that Father said he was going to buy a gun; (8) Mother's report that Father said he wanted to get his old gun back from the police; (9) Joseph's statement in October 2016, that Father "made my mom[s] mouth bleed, he hit her really hard with a wooden spoon"; and (10) Father's statement, with regard to Mother's bloodied mouth, that "[m]y arm just happened to touch her mouth."

Thus, there is extensive evidence of Father's battery of Mother and his threats to her life, some of which were made in the presence of at least one of the Children.

Father's argument that Joseph's statements do not establish a danger to Mother fails. Joseph, then four years old, told the CSW of seeing Father point a gray pistol at Mother's face, hit her in the mouth with a wooden spoon and punch her in the mouth. He was present during Father's assault and battery of Mother, a circumstance that places the child in danger of both physical injury and mental anguish. DCFS reports, admitted into evidence

without objection, establish that the Children were aware of Father's repeated violent conduct.

Father argues that the "full context of [Mother's] account precluded a valid finding of risk." Father's argument is essentially a request that this court reweigh the credibility of witnesses' statements which were admitted in evidence without objection. The juvenile court deemed Mother credible and trustworthy, as it placed the Children with her and maintained them in her custody. It is not our role to second-guess such credibility determinations. (*In re Mark L.* (2001) 94 Cal.App.4th 573, 581 [appellate court does not judge the effect or value of the evidence, weigh the evidence or consider the credibility of witnesses].)

Father does not cite any authority to support his contention that Mother's level of fear for her own safety is relevant to disposition and to removal of the Children from Father's custody. The trial court was tasked not with determining whether Mother was subjectively afraid of Father, but rather with determining whether under section 361, subdivision (c), there was substantial evidence the Children were in physical or emotional danger. (*In re Heather A, supra*, 52 Cal.App.4th at p. 194.) Nor does Mother's fear that Father would leave her "with nothing" mean the juvenile court removed the Children from Father's custody to "ensure more equitable economic arrangements," as he argues.

Father relies on *In re Basilio T.* (1992) 4 Cal.App.4th 155 (*Basilio T.*) to support his contention there was a lack of substantial physical danger to the Children, and thus the removal order was improper (because Father was gentle with them and protected them). This argument ignores the fact "the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child." [Citation.]" (*In re*

*A.S.*, *supra*, 202 Cal.App.4th at p. 247; see also *In re N.M.*, *supra*, 197 Cal.App.4th at pp. 169-170; *In re Cole C.*, *supra*, 174 Cal.App.4th at p. 917)

Additionally, ““domestic violence in the same household where children are living . . . is a failure to protect [the children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it.” (*In re 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 . . . .” (*Ibid.*)’ (*In re E.B.* [(2010)] 184 Cal.App.4th [568,] 576.) Further, our Division One colleagues noted: “Both common sense and expert opinion indicate spousal abuse is detrimental to children.” (*In re Benjamin D.* (1991) 227 Cal.App.3d 1464, 1470, fn. 5; see *In re Sylvia R.* (1997) 55 Cal.App.4th 559, 562; [citations].)’ [Citation.]” (*In re R.C.* (2012) 210 Cal.App.4th 930, 941-942.)

The evidence before the trial court constituted substantial evidence that its removal order was proper. Father directly involved Joseph in the domestic disputes by telling him that he was going to shoot Joseph’s Mother. According to Robert Jr., Joseph and Alexander witnessed the dispute that led to this referral. Also, Joseph, unlike his siblings, witnessed Father’s threats to Mother. Joseph’s statement on December 19, 2016, indicates he witnessed physical violence, as he said “my da[d] made my mom[s] mouth bleed” and “she wiped it off.” Substantial evidence also supports the dependency court’s conclusion that Joseph and his siblings were at risk of suffering physical harm from domestic violence.

To the extent Father relies on *Basilio T.* to support his contention there was insufficient evidence of emotional harm, he overlooks the circumstance that when *Basilio T.* was decided, section 361, subdivision (b)(1) did not

address emotional harm to the children, nor was the potential for *emotional harm* to the children at issue in that case. The issue before the *Basilio T.* court concerned the court’s finding of “substantial danger to the *physical health* of the minor” under the then-extant version of section 361, subdivision (b)(1). (*Basilio T.*, *supra*, 4 Cal.App.4th at pp. 169-170, italics added.)<sup>5</sup> It is therefore not authority with respect to the evidence and determination by the dependency court in this case addressing the issue of *emotional harm* to the Children.

At the time *Basilio T.* was decided, a different subdivision of section 361, subdivision (b)(3), allowed removal if “[t]he minor is suffering severe emotional damage, as indicated by extreme anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, and there are no reasonable means by which the minor’s emotional health may be protected without removing the minor from the physical custody of his or her parent or guardian.” (Stats. 1999, ch. 182, §7, p. 1308.) Thus, although “emotional damage” was addressed in the then-extant version of section 361, that statute

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<sup>5</sup> As explained in *In re J.S.* (2014) 228 Cal.App.4th 1483, “The law, however, has changed significantly since *Basilio T.* was decided. At that time, the relevant subdivision of Welfare and Institutions Code section 361 allowed removal only if there was ‘a substantial danger to the physical health of the minor . . . .’ (Welf. & Inst. Code, former § 361, subd. (b)(1); Stats.1990, ch. 182, § 7, p. 1307.) Since then, however, the subdivision has been amended [and relettered] (Stats. 1996, ch. 1084, § 4, p. 7606; Stats. 1996, ch. 1139, § 8.5, p. 8145) so that [former subdivision (b)(1) has been redesignated as subdivision (c)(1) and expanded to] now allow[] removal if there is ‘a substantial danger to the physical health, *safety, protection, or physical or emotional well-being* of the minor . . . .’ (Welf. & Inst. Code, § 361, subd. (c)(1), italics added.) Ongoing domestic violence, committed by both parents, in the presence of the children, from 2008 through 2012, is substantial evidence of a substantial danger to the children’s emotional well-being, if not their physical well-being [under the amended statute].” (*Id.* at pp. 1493-1494.)

required a much higher burden to support a removal order based on emotional damage to the child. (See Stats. 1996, ch. 1084, § 4, p. 7606.)

By contrast, the statute now demands that a court inquire whether there “is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor.” (§ 361, subd. (c)(1).) The juvenile court referred to this full statutory range of dangers when stating its findings in this case.

In the present case, there was substantial evidence to support the dependency court’s removal order, including that Robert Jr. “would not stop crying” when the police came to arrest Father, and his school referred him to therapy; and Joseph directly witnessed his mother being hit at least once if not twice, he witnessed Father’s threats to Mother, and Father told Joseph he was going to shoot Joseph’s Mother. Thus, there was “substantial danger to the . . . emotional well-being of the [Children].” (§ 361, subd. (c)(1).).

Although there is evidence in the record that Father loves his children and they love him, those circumstances cannot outweigh either the emotional harm done and threatened, or the risk of physical injury to the Children, all of which are the result of repeated incidents of domestic violence in the record. Accordingly, there is substantial evidence to support the January 17, 2017 order removing the Children from Father’s custody.

**DISPOSITION**

The January 17, 2017 order is affirmed.

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

GOODMAN, J.\*

We concur:

ASHMANN-GERST, Acting P.J.

CHAVEZ, J.

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