Filed 6/14/17 In re Penelope R. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re PENELOPE R., a Person Coming Under the Juvenile Court Law.	B277680
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent. v. ANTHONY R., Defendant and Appellant.	(Los Angeles County Super. Ct. No. DK18018)

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

Ernesto Paz Rey, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Anthony R. (father) appeals from the judgment entered at a jurisdictional hearing declaring his daughter, Penelope R., a dependent of the court and removing her from her parents' custody pursuant to Welfare & Institutions Code section 361, subdivision (c).[1] Father argues that the juvenile court erred in failing to require compliance with the requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.), and by citing the incorrect statute when denying father, a previously non-custodial parent, custody of Penelope. We find no reversible error, therefore we affirm the judgment.

COMBINED FACTUAL AND PROCEDURAL HISTORY

The family

The family consists of father, T.L. (mother), and Penelope (born Aug. 2015). Penelope has two half-siblings, Joseph (born Mar. 2011), and Aurora (born Dec. 2003).[2]

Investigation and detention

On May 6, 2016, the Department of Children and Family Services (DCFS) received a referral alleging that mother was physically abusing Penelope and Joseph. A social worker was unable to make contact with mother or the children that day, but spoke with Aurora's father, Roy, who had primary custody of Aurora because mother "was having issues with stabilizing herself." Roy provided the social worker with contact information for mother.

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[1] All further statutory references are to the Welfare & Institutions Code unless otherwise noted.

[2] Father is not the father of Joseph or Aurora. Mother, Joseph's father, and Aurora's father (Roy E.) are not parties to this appeal. Joseph and Aurora are not subjects of this appeal.

The social worker met with mother and family, including Joseph and Penelope. Mother denied the allegations. Mother admitted to testing positive for methamphetamines during a previous referral. She stated that she had a bad moment when she ran into an old friend and did one line. Mother admitted to having depression and anxiety and listed the prescriptions she takes for those conditions. Both Joseph and Penelope were free of marks or bruises.

In a private interview with Aurora, Aurora disclosed that mother had pulled her hair and pinched her neck in the past. Aurora further stated that mother allowed father to hit Joseph. Aurora had observed mother with father, drinking and unable to walk in a straight line. Aurora stated that mother yelled at Penelope but did not hit her.

Roy said he was formerly friends with father, but not after father got involved with mother. Roy reported that father pulled a knife on him and mother did nothing in response.

On Monday, May 16, 2016, mother tested positive for methamphetamines. Mother denied use of methamphetamines, stating that a positive test was not possible as she had not used methamphetamines since the incident during the prior referral. On June 13, 2016, DCFS requested and received a removal order for all three minors from mother. Aurora and Joseph were released to their respective fathers and Penelope was taken into protective custody.

After reviewing the family's history, DCFS noted that mother and father had been in an on-and-off relationship that involved domestic violence. Mother had obtained two restraining orders against father between September 2014 and October 2015, after multiple incidents of domestic violence which mother did not disclose to law enforcement.

The family had the following history with DCFS:

1. On December 4, 2015, an allegation that mother's home was dirty and she used methamphetamines. The allegation was deemed inconclusive.

2. On September 27, 2015, an allegation that mother struck father during an altercation. The allegation was deemed unfounded.

3. On December 11, 2014, an allegation of domestic violence between mother and father. The referral was evaluated out.

4. On September 22, 2014, an allegation that father choked mother in front of Joseph. The allegation was deemed inconclusive.

Father has a criminal history including robbery, taking a vehicle without the owner's consent, inflicting corporal injury on a spouse/ cohabitant, vandalism, disorderly conduct, possession of unlawful paraphernalia, and violation of a court order to prevent domestic violence. During one of the prior investigations, mother claimed that father was "an alcoholic and is abusive when under the influence."

Section 300 petition

On June 23, 2016, DCFS filed a petition on behalf of Penelope, Joseph and Aurora pursuant to section 300. The petition contained the following allegations against father:

> "a-1 [¶] The children['s] . . . mother . . . and the mother's male companion, [father], [have] a history of engaging in domestic violence in the presence of the children. On prior occasions, [father] repeatedly struck the mother's face with an open palm and restrained the mother. On a prior occasion, [father] shoved the mother and destroyed the mother's property by breaking a window. The mother sustained serious injuries to the mother's arms and legs, as a result of the abuse from [father]. . . . Such violent conduct on the part of [father] and the

> mother's failure to protect endangers the children's physical health and safety and places the children at risk of serious physical harm, damage, danger and failure to protect."
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> "b-1 [¶] The children['s] . . . mother . . . has a history of substance abuse, to include methamphetamines and alcohol and is a current user of methamphetamines and abuser of prescription medication. . . . The father . . . knew or should have reasonably known about the mother's substance abuse and was unable to protect the child Penelope."
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> "b-2 [¶] The children['s] . . . mother . . . and [father] . . . [have] a history of engaging in domestic violence in the presence of the children. . . . Such violent conduct on the part of the [father] and the mother's failure to protect endangers the children's physical health and safety and places the children at risk of serious physical harm, damage, danger, physical abuse and failure to protect."
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> "b-5 [¶] The child, [Penelope's father], . . . has a history of substance abuse. . . . The father has a prior criminal conviction for Possession of Unlawful Paraphernalia. . . . The father's substance abuse endangers the child's physical health and safety and places the child at risk of serious physical harm and damage."

At the June 23, 2016 detention hearing, father completed a statement regarding parentage, indicating that he had resided with Penelope from August 2015 through November 2015, the first three months after her birth. The court found father to be Penelope's presumed father.

Also on June 23, 2016, mother filed a parental notification of Indian status,[3] indicating that she may have Indian ancestry. She listed the name of the tribe as Pima, and provided maternal grandfather's name (Norman P.) and telephone number.

The court found that ICWA did not apply to the children's fathers, however it found that mother may have some American Indian heritage and ordered DCFS to further investigate mother's claim.

Aurora and Joseph were detained and placed with their respective fathers. Penelope was placed with maternal grandmother.

ICWA investigation

On July 7, 2016, DCFS re-interviewed mother regarding her claimed Indian heritage by telephone. Mother reported that she has Indian heritage on the maternal grandfather's side of the family, and no Indian heritage on the maternal grandmother's side of the family. However mother noted that her father is not listed on her birth certificate.

On July 12, 2016, mother left a message for DCFS stating that maternal grandmother did not want to give family information to the DCFS investigator. However, she left contact information for the maternal grandfather, Norman P. The investigator tried to call mother back to obtain mother's personal information, but received a recording that "all circuits are busy."

The investigator spoke with Norman P. on July 20, 2016. Norman P. dropped off documents at the DCFS office including one captioned "Certified Degree of Indian Blood" from the Gila River Indian Community listing Norman's enrollment number and indicating a one-half Pima blood quantum. Norman also

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[3] Mother had previously denied Indian heritage. Father filed a parental notification of Indian status form denying Indian ancestry.

provided a copy of a tribal membership card. On July 25 and July 28, 2016, DCFS unsuccessfully attempted to generate ICWA notices but the program was not functioning. On July 29, 2016, DCFS was finally able to generate the notices, but due to the time of day, the notices were not mailed until the following business day, Monday, August 1, 2016.

The notices went to the Gila River Indian Community and the Salt River Pima-Maricopa Community tribes, as well as the Bureau of Indian Affairs and Secretary of the Interior. DCFS received signed, return receipts from all the entities except the Secretary of the Interior.

The notices contained the following information: (1) the child's name, date of birth, and place of birth; (2) the date, time, and location of the next court hearing; (3) mother's name, current address, former address, date and place of birth, and indication of possible Indian heritage through the Gila River and Salt River tribes; (4) maternal grandmother's name, date and place of birth, and indication of possible Indian heritage through the Gila River and Salt River tribes; (5) maternal grandfather's name, date and place of birth, and indication of possible Indian heritage through the Gila River and Salt River tribes; and (6) copies of the section 300 petition, the child's birth certificate, copies of Norman's registration card and "Certified Degree of Indian Blood" from the Gila River Indian Community.

Jurisdiction/disposition report

DCFS filed a jurisdiction/disposition report on August 29, 2016. Penelope was still living with her maternal grandmother.

Aurora denied having seen father hit mother, but stated that she knew father was hitting mother. Aurora described father as "abusive to my mom." Aurora reported that mother would hit Joseph and also allowed father to hit Joseph. Aurora stated that father smoked marijuana. She did not see him

because he would go outside behind a wall, but she could smell the marijuana.

Joseph reported that father and mother would fight and "mommy tells him to get out." Joseph denied being afraid of either father or mother, and did not have marks or bruises.

Mother stated that father has an alcohol issue and "started getting violent," motivating her to get a restraining order. She explained, "He would break things, break my window and hit me in the face with his fists. One time, he did it in front of Joe and Joe was upset and crying. I'd tell him no more than two beers because I knew how he would get." Mother said father was "not in the picture as the relationship was very volatile." Father called mother in May 2016 after the restraining order expired. She saw no reason why father could not see Penelope. Mother denied allegations that she engaged in physical abuse of her children or used drugs.

Aurora's father, Roy, stated he was aware of domestic violence between mother and father because mother would call him crying and ask him to pick her up. Roy was aware father had a drinking problem and also smoked weed.

Joseph's father, Fred R., stated that Joseph had told him "[father] pushed my mom." Fred did not know father.

Father denied hitting mother saying, "She would hit me too and a lot of times she would start it." Father admitted that he slapped mother a few times, but stated that the children were never there. Father's spousal battery arrest, for which he spent 18 months in prison, did not involve mother. Father denied any alcohol abuse issues. He admitted that he would drink at home when he was "minding [his] own business." Father and his father would finish a 24-pack over the weekend but father didn't think he had a problem with alcohol. Father denied getting angry or violent when drinking alcohol.

DCFS attached to the jurisdiction/disposition report a police report dated February 14, 2006, alleging that father struck Vanessa R. "with his right, open palm hand to the face" resulting in a half-inch laceration to her bottom lip. Another police report dated July 2007 indicated that father hit Crystal M. "on the back of the [head] with an unknown hand." A third police report dated November 29, 2010, noted that Crystal M. and father had lived together for four years and had two children. The couple began an argument resulting in father punching her arms several times, then pushing her against a wall and causing visible injuries. Another police report from December 2013 indicated that law enforcement personnel responded to a disturbance involving father who claimed the argument was his fault. Father was unable to walk a straight line and swayed when he walked. He asked to be arrested as he had nowhere to go.

Father informed DCFS that he wanted to get his daughter back. He admitted he had to "clean up a little bit by doing my parenting class and being more responsible." On July 7, 2016, father enrolled in a parenting course through the El Monte-Rosemead Adult School.

DCFS recommended that family reunification services be provided to father.

Adjudication

Father and mother were present for the adjudication hearing on August 25, 2016. Maternal grandmother, her husband, and a maternal aunt were also present at the hearing. As the proceedings began, the following colloquy ensued:

> "THE COURT: Thank you. We're here for an adjudication hearing. The court finds notice is proper. There is a possible ICWA issue here. The mother has relatives on her side that maternal grandmother and grandfather -- it's my

understanding -- are registered members of -- I'm sorry, which tribe is it?

"[MATERNAL GRANDMOTHER]: Gila River.

"THE COURT: Notices have been sent out. They were sent out on August 1, 2016. We have not received any response from the tribe as to whether or not they would like to intervene in this case. However, I will go forward given that the likely placement of the children will be either with their father or with the maternal grandparents. So it is appropriate to go forward today. I will set a non-party progress 60 days out from -- I will set a non-party progress at the end of this hearing around October 1st to get a final update on whether or not there is any request from the tribe to intervene."

The court received the DCFS reports and progress letters in evidence, and heard argument from counsel.

Following argument, the court declared the children dependents under section 300, subdivisions (a), (b), and (j), based on the parents' history of domestic violence, drug use, and mother's physical abuse of Joseph. Aurora and Joseph were detained in the custody of their respective fathers.[4] Penelope was detained in relative care. She was removed from both parents pursuant to section 361, subdivision (c), based on clear and convincing evidence of risk of detriment and a lack of a reasonable means of protecting her absent removal from the parents. The court ordered reunification services for both parents and scheduled the matter for a six-month review hearing.

On August 25, 2016, father filed a timely notice of appeal.

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[4] The court terminated Aurora's case after granting her father full custody.

DISCUSSION

I. ICWA

We first address father's argument that the juvenile court and DCFS failed to comply with the inquiry and notice requirements of ICWA.

Father points to the following deficiencies in the ICWA notices: (1) maternal grandfather, Norman P.'s address was listed as "unknown"; (2) Norman P.'s date and place of death was listed as "unknown," although he is still alive; (3) information about the maternal great-grandparents was omitted, without any clear indication that there was an unsuccessful effort to obtain such information; and (4) the notices stated it was "unknown" whether anyone in Penelope's family attended an Indian school without any indication that there was any effort to obtain that information.

A. Applicable law and standard of review

ICWA was enacted to address "the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement." (*Mississippi Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32.) "At the heart of the ICWA are its provisions concerning jurisdiction over Indian child custody proceedings." (*Id.* at p. 36.) Various provisions "set procedural and substantive standards for those child custody proceedings that . . . take place in state court." (*Ibid.*)

When a court "knows or has reason to know that an Indian child is involved," ICWA notice mandates are triggered, requiring DCFS to notify the relevant tribes, the Bureau of Indian Affairs, and the Secretary of the Interior of the proceedings. (25 U.S.C. § 1912, subd. (a); § 224.2, subd. (a).) "The purpose of the ICWA notice provisions is to enable the tribe or the BIA to investigate

and determine whether the child is in fact an Indian child. [Citation.] Notice given under ICWA must therefore contain enough information to permit the tribe to conduct a meaningful review of its records to determine the child's eligibility for membership. [Citations.]" (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 576.)

An ICWA notice violation may be held harmless where such violation does not affect the outcome of the proceedings. (*In re S.B.* (2005) 130 Cal.App.4th 1148, 1162.) For example, in *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, an incorrect birth year for the mother was considered harmless error where mother did not claim any direct connection to any tribe. (*Id.* at p. 783.) However, sending the ICWA notice to the wrong address was not harmless error. (*Id.* at p. 784.) There was no conclusive evidence in the record that the tribe had received actual notice of the proceedings, thus the matter was remanded for proper notice. (*Ibid.*) In addition, where the name of a great grandparent with alleged Indian heritage was entirely omitted from the ICWA notice, such error was not harmless and a limited remand for compliance was necessary. (*In re S.E.* (2013) 217 Cal.App.4th 610, 614-616.)

DCFS and the juvenile court have "an affirmative and continuing duty to inquire whether a child . . . is or may be an Indian child." (§ 224.3, subd. (a).) "[I]f the court [or] social worker . . . subsequently receives any information required under paragraph (5) of subdivision (a) of Section 224.2 that was not previously available or included in the notice issued under Section 224.2, the social worker . . . [must] provide the additional information to any tribes entitled to notice under paragraph (3) of subdivision (a) of Section 224.2 and the Bureau of Indian Affairs." (§ 224.3, subd. (f).)

B. Father's claims regarding ICWA deficiencies are moot

Father asserts that this matter should be remanded to the juvenile court to ensure that DCFS makes further inquiry regarding the Indian status of the child as soon as practicable. (§ 224.3, subd. (c).) Father argues that DCFS should be required to re-notice the tribes, including the maternal grandfather's address and the maternal great-grandmother's name and address.

However, DCFS and the juvenile court complied with their ongoing duty to update the tribes with additional information. (§ 224.3, subd. (a), (f).) On February 21, 2017, the juvenile court found that "further ICWA information was received during the pendency of an appeal and [DCFS] is to re-notice the tribes consistent with the new information."[5] Thus, father's request for a limited remand is moot.

"When no effective relief can be granted, an appeal is moot." (*In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1315.) This occurs "'"[w]hen . . . an event occurs which renders it impossible for this court, if it should decide the case in favor of [appellant], to grant him . . . any effectual relief whatever . . . . [Citations.]"' [Citation.]" (*Id.* at p. 1316.) Because the juvenile court has already ordered DCFS to provide further notice to the tribes with

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5 Postjudgment evidence may be considered for the purpose of upholding a juvenile court's orders where such action would "'expedit[e] the proceedings and promot[e] the finality of the juvenile courts orders and judgment.'" (*In re Josiah Z.* (2005) 36 Cal.4th 664, 676-677.) On February 23, 2017, DCFS filed a "Motion for Judicial Notice of Post-Judgment Evidence," which attached a copy of the minute order dated February 21, 2017, ordering DCFS to re-notice the tribes with updated information. Father did not oppose the motion. On March 7, 2017, this court granted the motion.

updated information, father's request that we remand and order the juvenile court to do so is moot.

C. The deficiencies in the ICWA notice were harmless

Even if father's claims regarding ICWA were not moot, we would find the omissions to be harmless because they did not prevent the tribe from determining whether Penelope was an Indian child. Although his address and date of death were listed as "unknown," the tribes were provided with Norman P.'s name, date and place of birth, as well as copies of Norman's tribal registration card and "Certified Degree of Indian Blood" letter from the Gila River Indian Community. Given this pertinent and useful information, the tribes had sufficient data to determine Penelope's membership eligibility. Because the tribes had direct evidence of Norman P.'s tribal affiliation and degree of Indian blood, they had enough information to conduct a "meaningful review of [their] records to determine the child's eligibility for membership." (*In re Cheyanne F., supra,* 164 Cal.App.4th at p. 576.)

In re Charlotte V. (2016) 6 Cal.App.5th 51 (*Charlotte V.*), is instructive. DCFS provided two notices via certified mail to the tribe containing information about mother, father, and the child's grandmother and uncle. (*Id.* at p. 57). Information provided to the tribe included "Mother's tribal identification card and number as well as information about Mother's time at the reservation and [the child's] health care at a health clinic on the reservation." (*Ibid.*) Mother contended on appeal that the notices were insufficient because they excluded information about the child's grandmother other than her name, and failed to contain information about the child's grandmother and great-grandparents, from whom the mother claimed Indian ancestry. (*Ibid.*) The Court of Appeal disagreed, stating, "[s]ince Charlotte claims Indian ancestry from Mother, that information would be

sufficient for meaningful review." (*Ibid.*) Similarly, here, since Penelope's claimed Indian ancestry is from Norman P., his tribal information is sufficient for meaningful review.

The *Charlotte V.* court noted that "additional information regarding Charlotte's grandmother and great-grandparents, . . . was required to be provided only if known." (*Charlotte V., supra*, 6 Cal.App.5th at p. 57.) There is no indication in the record that the omitted information was known to DCFS, or that it failed to undertake reasonable efforts to interview the family members. (See, e.g., *In re A.G.* (2012) 204 Cal.App.4th 1390, 1393 [reversing order terminating parental rights where Alameda County Social Services Agency did not dispute that it violated ICWA's inquiry and notice requirements].) In fact, there was evidence that maternal grandmother did not want to provide family information to DCFS.

D. The trial court did not err in proceeding with adjudication

Further, we note that the trial court did not err in proceeding with the adjudication on August 25, 2016. Father cites *In re Kadence P.* (2015) 241 Cal.App.4th 1376 for the proposition that it is error to adjudicate a petition and make a dispositional order before giving notice to the tribe and waiting the requisite time for the tribe to respond. (*Id.* at p. 1388.) Title 25 of the United States Code, section 1912, subdivision (a), provides that "[n]o foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary." (See also Cal. Rules of Court, rule 5.482, subd. (a)(1) ["If it is known or there is reason to know that a child is an Indian child, the court hearing must not proceed until at least 10 days after the parent, Indian custodian, tribe, or the Bureau of Indian Affairs have received notice"].) Here, the tribes

received the notices on August 8, 2016, and the disposition hearing was held on August 25, 2016. Thus, the juvenile court did not err in proceeding with the adjudication on August 25, 2016.

In sum, the claimed ICWA errors are moot, and in any event, were harmless because the tribes had adequate opportunity to undertake a meaningful review of their records to determine whether Penelope is an Indian child.

II. The removal order

Father contends that the removal order was improper because the juvenile court applied section 361, subdivision (c) to remove Penelope from father's custody. Section 361, subdivision (c) is applicable when the juvenile court removes a child from the custody of a parent with whom the child resides. The section does not authorize removal of a child from a non-custodial parent. Because father was a non-custodial parent, father argues, the removal was improper. This issue is subject to de novo review. (*In re Dakota J.* (2015) 242 Cal.App.4th 619, 627 (*Dakota J.*).)

Section 361, subdivision (c) prohibits removal from custodial parents unless there is clear and convincing evidence of a substantial danger to the child, or a risk of such danger, and no reasonable means to protect the child without removal. Section 361.2 provides protection for parents with whom the child did not reside at the time of the dependency petition. If such a non-custodial parent requests custody of the child, the court must place the child with that parent unless there is clear and convincing evidence of detriment to the child. (§ 361.2,; *In re Abram L.* (2013) 219 Cal.App.4th 452, 461.)

Assuming the court should have applied section 361.2 instead of section 361, the error was harmless. (*In re D'Anthony D.* (2014) 230 Cal.App.4th 292, 303-304.) The juvenile court found clear and convincing evidence that there was a substantial

danger to the physical health and safety, or physical or emotional well-being of Penelope in father's home. Although the juvenile court's findings were incorrectly made under section 361, subdivision (c), rather than section 361.2, "in assessing whether this error was prejudicial, we can neither ignore the similarity between these statutes' mandatory findings, nor disregard the evidence supporting the court's 'substantial danger' finding concerning placement with father. [Citations.]" (*D'Anthony D., supra*, at p. 303.) Father does not argue that the evidence did not support the court's finding of substantial danger to Penelope. The finding of substantial danger under section 361 is sufficiently similar to a finding of detriment under section 361.2 to uphold the removal in this case. Furthermore, father does not set forth any showing of prejudice from the juvenile court's error. Under the circumstances, the error was harmless.

In addition, the juvenile court has broad authority to "limit the control to be exercised over the dependent child by any parent." (§ 361, subd. (a).) Section 361, subdivision (c), restricts a court's authority when the court is considering removing a dependent child from the physical custody of the parent with whom the child actually resides. However, as the court explained in *In re Anthony Q.* (2016) 5 Cal.App.5th 336, 350 (*Anthony Q.*):

> "In all other circumstances, pursuant to sections 361, subdivision (a), and 362, subdivision (a), orders limiting the control of the parents of a dependent child and providing for the care, custody, supervision, conduct and support of that child, including removing the child from the custody of a nonresident custodial parent and determining where that child shall live while under the jurisdiction of the court, are proper so long as the evidentiary record supports the court's findings that the orders are reasonable and necessary for the protection of the child. [Citation.]"

In *Anthony Q.,* the father contended that the juvenile court had no authority to remove the child from his custody because the child was living with his maternal stepgrandmother at the time the section 300 petition was filed. (*Anthony Q., supra,* 5 Cal.App.5th at p. 339.) While the *Anthony Q.* court concluded that the removal of the child from the father under section 361 was error, it also concluded that such error was harmless. (*Anthony Q.*, at p. 353.) Although the child was not living with his father at the time, "the juvenile court had broad authority, pursuant to sections 361, subdivision (a), and 362, subdivision (a), to enter orders reasonably necessary to address the problems that led to [the] dependency proceedings and to protect [the child's] well-being. [Citations.]" (*Ibid.*) "Based on the jurisdiction findings . . . , the juvenile court found by clear and convincing evidence there was a substantial danger to [the child] if [the father] was allowed to resume living with him or otherwise exercise his right to legal and physical custody." (*Id.* at p. 354.)

The *Anthony Q.* court distinguished *Dakota J.*, where the court came to the opposite conclusion, holding the juvenile court's error was not harmless when it issued a removal order under section 361, subdivision (c), for a parent not residing with her children during the dependency proceedings. (*Anthony Q., supra*, 5 Cal.App.5th at p. 354.) In *Dakota J.*, the mother had custody of the children, but they were living with a relative for five years prior to the initiation of the dependency proceedings. The *Dakota J.* court found:

> "Although there is ample evidence in the record concerning mother's current inability to care for her children, we also acknowledge that mother recognized her situation and made arrangements for her boys to live with a relative who has cared for them and provided them with a stable home. Imposing a removal order in that instance is not only

> contrary to the plain language of the statute but is also punitive."

(*Dakota J., supra*, 242 Cal.App.4th at p. 632.)

In contrast to the mother in *Dakota J.*, father in this matter has failed to protect Penelope. In addition, father requested custody of Penelope. Thus, unlike the situation in *Dakota J.*, a removal order was necessary to protect Penelope. Because the juvenile court had the authority to make the order, and the evidence supported the court's decision, the juvenile court's citation to the wrong statute was harmless.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

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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.