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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re S.K., A Person Coming  
Under the Juvenile Court Law.

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

E.K.,

Defendant and Appellant.

B289550

(Los Angeles County  
Super. Ct. No. DK16314A)

APPEAL from an order of the Superior Court of Los Angeles County, Michael E. Whitaker, Judge. Affirmed.

Jesse F. Rodriguez, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Jessica S. Mitchell, Deputy County Counsel, for Plaintiff and Respondent.

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Father E.K. appeals the juvenile court's finding that placement of his son, S.K., with father would be detrimental to his safety and well-being. Finding substantial evidence supports the juvenile court's order, we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On April 1, 2016, then 12-year-old S.K. and his two half siblings were detained from mother A.O. because of domestic violence between mother and her boyfriend.

Over the course of the investigation by the Los Angeles County Department of Children and Family Services (Department), it was discovered that S.K. suffered from severe emotional and behavioral problems. S.K.'s six-year-old brother, T.W., reported S.K. is "bad" and had cut him with a knife. According to mother, S.K. had been diagnosed with attention deficit disorder and oppositional defiant disorder. He displayed violent and aggressive behaviors towards his peers. He had previously been prescribed psychotropic medications.

S.K. and his brother T.W. were initially placed together in a foster home, but S.K. had to be moved a number of times because of his disruptive and aggressive behaviors, including attacks on his younger brother and peers, threats to kill the family pet and burn down the foster home, and thefts from school.

The Department's May 23, 2016 jurisdiction/disposition report stated that the Department had made contact with father, and he was interested in obtaining custody of S.K. Father resided in Louisiana, and was on parole following his release from prison in October 2015.

According to mother, father was incarcerated for most of their relationship. However, mother and father had remained in

contact, and S.K. visited with father following his release from prison in 2015.

Father was not present but was represented by counsel at the May 23, 2016 jurisdictional hearing, where he was found to be S.K.'s presumed father. Mother pled no contest to the allegations in the petition. The court ordered that an Interstate Compact on the Placement of Children (ICPC) be conducted in Louisiana for father, and continued the dispositional hearing.

In June 2016, father told the Department he was still interested in having S.K. placed with him in Louisiana. Father was residing with his girlfriend, E.S.

In August 2016, the Department asked S.K. if he was interested in living with father in Louisiana. S.K. responded, "Kinda yes and kind no." He was worried that he would not see mother and his siblings if he moved to Louisiana. He had last seen father for Thanksgiving in 2015, but had not seen him on a regular basis when he was younger.

On November 3, 2016, the court authorized a visit between S.K. and father in Louisiana. S.K. visited father and father's girlfriend from November 18, 2016 until November 27, 2016. Father reported the visit went well, and that he wanted S.K. to live with him permanently. S.K. also enjoyed the visit, but was not sure if he wanted to reside with father because he would miss his mother and siblings.

After returning from the visit with father, S.K. became emotionally distraught, and threatened to kill himself after mother expressed her displeasure that S.K. was considering relocating to Louisiana with father. S.K. was placed on a psychiatric hold and hospitalized from November 28, 2016 until December 2, 2016. He was diagnosed with Adjustment Disorder

with Disturbance of Mood. After his release, S.K. told the Department social worker he wanted to be placed with father.

The Department recommended that S.K. be released to father. The dispositional hearing as to S.K. was held on January 6, 2017. The court removed S.K. from mother, and ordered that S.K. be released to father in Louisiana. The court stayed the order releasing S.K. for seven days, so that travel arrangements could be made.

In early January 2017, father told the Department he was now living with paternal grandmother. He was no longer living with his “wife” with whom S.K. had visited in November. He also reported he had lost his job following accusations that he stole money from his employer. He denied any current legal problems stemming from the incident.

Father’s parole officer reported there were “no issues” with father. He spoke highly of father and had no concerns about S.K. being placed with him. Father would be released from parole in May 2022.

On January 13, 2017, the court entered a home of parent order, placing S.K. with father, and ordered the Department to assist with transporting S.K. to Louisiana. The court ordered mental health services for S.K., and an expedited ICPC to be completed for father.

A Department social worker traveled with S.K. to Louisiana on January 20, 2017. Upon their arrival at the paternal grandmother’s home, father told the social worker he was now residing with a girlfriend, L.S. and that S.K. would live there, along with L.S.’s four biological children. There were no safety hazards observed in L.S.’s home. On February 2, 2017,

L.S. texted photos of S.K.'s room to the Department, and reported that S.K. was doing well.

On January 31, 2017, S.K. completed an initial mental health assessment with Provision Rehab, but had not been assigned a clinician because his Medi-Cal benefits had to be transferred to Medicaid. Father assured the Department he had submitted the necessary paperwork for the transfer of S.K.'s benefits. S.K. was taking his prescribed medications, and had a sufficient supply to last until March.

On March 10, 2017, the Department was informed that S.K. ran out of his medication on March 1st, and was no longer taking any medication. The Department called the Medicaid hotline about expediting S.K.'s medical coverage, but was informed the application could not be expedited. Father promised to cover the cost of the medication in the meantime and be reimbursed at a later date.

Father reported that S.K.'s behavior in the home had generally been appropriate. However, on February 13, 2017, father disciplined S.K. by "whooping" him with a belt. The Department told father and L.S. not to use corporal punishment, and they agreed.

Louisiana Child Protective Services (CPS) received several referrals for the family. One referral alleged that S.K. was not being fed, and was sleeping in a chair. The other referral was that S.K. was punched in the chest. S.K. denied any abuse and said that he felt safe living with father. CPS reported to the Department that they intended to close the referrals as unfounded.

The Department's July 14, 2017 status review report noted that since being placed with father, S.K. had moved to "multiple

residences due to frequent changes in . . . father's personal relationships." The last move occurred after the unexpected death of paternal grandmother. However, S.K. appeared to be transitioning well, and was doing well in school. He did express a strong desire to move back to Los Angeles, because he missed his mother and siblings.

The Department had "significant concerns" about father's parenting skills. S.K. had still not seen a psychiatrist, was not taking his psychotropic medications, and had not received routine medical or dental care. In June, father told the Department he added S.K. to his insurance. However, he was unable to provide supporting documentation. Moreover, father "whooped" S.K. a second time, after he was warned not to use corporal punishment. Father was skeptical that other means of discipline would work; he told the Department S.K. had an "attitude."

Mother, on the other hand, had made great strides with her reunification services. In July 2017, the court authorized an extended unmonitored visit between mother and S.K. The visit went well. While S. K. was visiting mother, she enrolled him in school, and paid for his medical care. S.K. was happy to be with mother.

The Department believed it was in S.K.'s best interests to stay with mother, and planned to transition the other children back to her care as well. While S.K. had a positive relationship with father, father had not provided him with medical, dental, or mental health treatment while in his care, had moved S.K. multiple times, had used corporal punishment, and had failed to remain in regular contact with the Department.

On August 31, 2017, the court ordered that S.K.'s visit with mother be extended. S.K. was happy in mother's care, and wanted to stay with her and his siblings.

At the September 22, 2017 review hearing, the court ordered S.K. to the "home of parents" and ordered that he have visitation with father during his winter and summer school breaks.

On October 20, 2017, a Welfare and Institutions Code section 342<sup>1</sup> subsequent dependency petition was filed alleging that mother had committed a burglary while the children were in her care. She fled with the younger children, leaving S.K. alone, and did not make any provisions for his care. She was arrested on October 17, 2017. The children were detained.

The Department made multiple attempts to contact father, but was unable to reach him. Therefore, on November 3, 2017, a first amended petition was filed, adding allegations that father failed to make an appropriate plan for S.K.'s care by not maintaining contact, and because his whereabouts were unknown.

The Department's January 11, 2018 jurisdiction/disposition report noted that father was in custody in Louisiana. He had been arrested on October 6, 2017 for one count of theft and a parole violation. A criminal history report from the Rapides Parish Sheriff's Office in Louisiana disclosed an extensive arrest history, spanning 1991 until 2017, with over 40 arrests for various crimes including burglary, robbery, theft, possession of a firearm by a felon, carrying a concealed weapon, parole

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

violations, resisting arrest, and contributing to the delinquency of a juvenile.

S.K. was placed in a group home, and enrolled in therapy. His negative behaviors escalated with “frequent AWOL episodes, refusal to attend school, property damage, physical aggression against staff, and fire starting.” He resumed taking his prescribed psychotropic medications in February 2018, and began to improve.

At the February 15, 2018 arraignment hearing for the amended petition, father’s counsel represented that father’s projected release date was May 4, 2019. Counsel requested that paternal aunt, L.J., be assessed for placement of S.K. in Louisiana. The court ordered an ICPC as to the paternal aunt. The hearing was continued so father’s appearance by telephone could be arranged. Father entered a general denial on March 9, 2018.

A March 26, 2018 last minute information for the court reported that the Department had been in contact with paternal aunt, and that she was willing to care for S.K. She lived in paternal grandmother’s home with her 16-year-old son and four-year-old grandson.

The adjudication hearing on the amended petition was held on April 4, 2018. The social worker testified that following mother’s arrest, she attempted to contact father to place S.K. with him, but was unable to reach him. She later learned he was in custody. Father offered a relative in Louisiana for placement of S.K. The social worker believed the relative was generally appropriate for placement, but had concerns about S.K.’s mental health needs being met in Louisiana. She was concerned there



would be an interruption of his medication, and a gap in his ability to continue therapy.

Father's counsel offered the following stipulated testimony from father: "he would like his child to be placed with his sister. . . . [H]e is aware of, and willing to facilitate to the best that he is able, [S.K.'s] mental health issues, his medication, his need to be under the regular care of a mental health professional and that he will talk to his sister about that and make sure that she follows up."

S.K.'s counsel offered stipulated testimony that S.K. wanted to remain in California, and did not wish to go to Louisiana, believing he would not do well living with paternal aunt.

The juvenile court declared S.K. to be a dependent of the court, sustaining allegations against mother (but not as to father), and ordered S.K. removed from mother's custody. As to father, the court found "sufficient evidence to warrant removal of [S.K.] based on [father's] current incarceration." Father's counsel inquired whether the court was making a detriment finding against father "despite the fact that father has an appropriate plan . . . ." The court found that "based on his current incarceration, there's detriment." The court later clarified that its detriment finding was not based solely on father's incarceration, noting "there's other reasons why, as set forth in the record." The court again ordered an ICPC to be conducted for paternal aunt in Louisiana.

The court's minutes reflect that the court made its findings by "clear and convincing evidence" under "sections 361(a)(1), 361(c), . . . 362(a), and . . . 361.2."

Father timely appealed.

## DISCUSSION

Father contends the juvenile court erred by denying his request to have S.K. placed with him. He argues it is unclear whether the court applied section 361, subdivision (c) or section 361.2, subdivision (a) when making its ruling. He argues that section 361.2 is the applicable statute, as S.K. was not residing with him at the time the section 342 petition was filed. Further, he contends that if the court applied section 361.2, substantial evidence does not support the court's detriment finding. He asks that we reverse "the juvenile court's dispositional order denying him custody of [S.K.]" and remand "with directions for the juvenile court to hold a new dispositional hearing on the issue of placement of [S.K.] with father under section 361.2[, subdivision] (a)." We are not persuaded.

The legislative dependency scheme distinguishes between custodial parents with whom a child was residing at the time the dependency petition was filed, and noncustodial parents with whom a child was not residing at the filing of the petition. (§§ 361, subd. (c), 361.2, subd. (a); see also *In re V.F.* (2007) 157 Cal.App.4th 962, 969.) Section 361, subdivision (c) governs removal of a child from his or her custodial parents. It does not, by its terms, apply to noncustodial parents. Section 361.2 is not a removal statute. Rather, it "governs the child's temporary placement with the noncustodial parent . . . and also permits the court to grant legal and physical custody of the child to the noncustodial parent." (*In re V.F.*, *supra*, 157 Cal.App.4th at p. 969; see also § 361.2, subds. (a), (b).)

Section 361, subdivision (c) provides that "[a] dependent child shall not be taken from the physical custody of his or her parents or . . . guardians with whom the child resides at the time

the petition was initiated, unless the juvenile court finds clear and convincing evidence . . . . [¶] . . . There 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.” Section 361, subdivision (c) requires the court to consider “allowing a nonoffending parent to retain custody of the child” as a reasonable means of protecting the child “as long as that parent or guardian presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm.” (*Id.*, subd. (c)(1)(B).)

In contrast, section 361.2 provides that when a noncustodial parent “desires to assume custody of the child,” the juvenile court “shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child.” (*Id.*, subd. (a).)

Because S.K. did not reside with father at the time the section 342 petition was filed, section 361.2 is the applicable statute. (*In re Andrew S.* (2016) 2 Cal.App.5th 536, 544-545.) The juvenile court correctly applied section 361.2. The court expressly found that placing S.K. with father would be “detrimental,” and the court’s minutes make clear that its ruling was based, in part, on section 361.2.

A finding of detriment under section 361.2 must be made by clear and convincing evidence. (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1829.) We review the trial court’s order under the substantial evidence standard of review, notwithstanding the evidentiary standard used at trial. (*In re Heather A.* (1996) 52

Cal.App.4th 183, 193; see also *In re E.B.* (2010) 184 Cal.App.4th 568, 578.) “In reviewing the sufficiency of the evidence on appeal, we look to the entire record to determine whether there is substantial evidence to support the findings of the juvenile court. We do not pass judgment on the credibility of witnesses, attempt to resolve conflicts in the evidence, or determine where the weight of the evidence lies. Rather, we draw all reasonable inferences in support of the findings, view the record in the light most favorable to the juvenile court’s order, and affirm the order even if there is other evidence that would support a contrary finding.” (*In re Cole C.* (2009) 174 Cal.App.4th 900, 915-916.)

The record amply support’s the court’s detriment finding. Father neglected S.K.’s medical needs by failing to obtain treatment, medication, or mental health services for S.K. He used corporal punishment to discipline S.K., even after being warned that such discipline was not appropriate. Father had been unable to provide stability for S.K., moving him multiple times in the six months that S.K. lived with him. S.K. has a strong bond with his siblings, and wanted to stay in Los Angeles, where he was receiving mental health treatment and medication, and where he was beginning to stabilize. Father was projected to be in custody until May 2019, and had no plan to address S.K.’s significant needs from custody, other than to place him with paternal aunt, about whom the Department had nearly no information. (See *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426-1427 [sibling bond an appropriate factor to consider when assessing detriment]; see also *In re Patrick S.* (2013) 218 Cal.App.4th 1254, 1263 [a caregiver’s ability to obtain mental health services is relevant to the detriment analysis].)

Moreover, even if the court erroneously applied section 361, subdivision (c) in denying father custody of S.K., any error was necessarily harmless. (See *In re D'Anthony D.* (2014) 230 Cal.App.4th 292, 303-304 [wrongful application of section 361, subdivision (c) to noncustodial parent subject to harmless error analysis].) The evidence, discussed *ante*, supports a finding that there would be a substantial danger to S.K.'s physical or emotional well-being, and therefore it is not reasonably probable the court would have reached a different outcome had it applied section 361, subdivision (c). (*D'Anthony D.*, at pp. 303-304.)

#### **DISPOSITION**

The order is affirmed. The Department's request for judicial notice is denied.<sup>2</sup>

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

STRATTON, J.

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<sup>2</sup> The Department asks us to take judicial notice of a subsequent minute order demonstrating father's noncompliance with reunification services. We decline to do so. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 295, fn. 21 [a court need not take judicial notice of irrelevant documents].)