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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re B.G., a Person Coming  
Under the Juvenile Court Law.

B286276

(Los Angeles County  
Super. Ct. No. DK23493)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

S.G.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Nichelle L. Blackwell, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed and remanded.

Konrad S. Lee, 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.

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## **INTRODUCTION**

Steve G. (father) appeals from dispositional orders made pursuant to Welfare and Institutions Code<sup>1</sup> sections 361 and 361.2 declining to place his son, B., in his custody after B. was removed from the child's mother.<sup>2</sup> Father contends there was insufficient evidence to support the court's finding that it would be detrimental to B. to place him with father. We agree and therefore reverse.

## **FACTS AND PROCEDURAL BACKGROUND**

### **A. *Initial Detention and Section 300 Petition***

On June 26, 2017, mother called the police to report vandalism in her motel room, where she was living with B. (born 2010). According to the responding officer, mother originally stated that "a random male came into her room and broke her television," but then stated that "she allowed a random man in her motel room." Officers responded to the motel room and found mother; an unrelated man, G.R.; and B. Mother and G.R. were "intoxicated, belligerent, and uncooperative." Mother stated that she needed money and had to pay for the room, and allowed G.R. in. G.R. wanted to have sex with her and became angry when mother refused, then he broke the television. The officers observed B. crying and fearful at the scene. B. stated he had not

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

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

eaten in a week, but did not appear to be malnourished. B. also stated he could not remember when he last showered.

Mother and G.R. were arrested. The officer also reported that he “believed that mother is prostituting.” B. told officers that he had seen G.R. before, but had not seen any other men coming in and out of their room. B. also stated that he and mother moved around “a lot.”

One of the responding police officers reported the incident to the Los Angeles County Department of Children and Family Services (DCFS), noting that there was no one to care for B. A DCFS social worker responded to the police department and assumed custody of B., who was then placed in foster care.

On June 29, 2017, DCFS filed a petition under section 300, subdivision (b)(1).<sup>3</sup> In count b-1, the petition alleged that mother was a current abuser of alcohol, which rendered her “incapable of providing regular care and supervision of the child” and placed B. at risk of serious physical harm. In support, the petition alleged that on June 26, 2017, mother was under the influence of alcohol while home with and caring for B. Mother was arrested on that date for child endangerment and public intoxication. In count b-2, the petition alleged that mother “created a detrimental and endangering home environment” for B. by allowing an unrelated male companion into the home. While there, the companion “consumed and was under the influence of alcohol,” and “engaged in violent behavior, including vandalizing the home and breaking

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<sup>3</sup> This subdivision provides for dependency jurisdiction over a child based on, in relevant part, a risk of “serious physical harm or illness” suffered by the child as a result of a parent’s “failure or inability . . . to adequately supervise or protect the child” (subdivision (b)(1)).

a television.” Mother failed to protect B. by allowing the male companion to have unlimited access to the child. Father was listed by name on the petition, but his address was unknown.

In the detention report, the social worker detailed his interview with B. on June 26, 2017 following mother’s arrest. B. stated that he “could not recall a time” when he and mother did not reside in hotels. He did not always get food to eat because mother did not always have enough money. B. denied seeing mother use drugs but had seen her drink alcohol. B. stated he felt safe with mother; he had seen mother arguing with other people but had never seen mother hitting or being hit by anyone. B. denied any sexual abuse.

B. identified father as his father and stated that father “is involved in his life.” B. last saw father about a week prior at a cousin’s house. B. did not have the address or phone number for father and could not name the city where father lived.

The social worker reported that B. appeared clean and healthy, with no marks or bruises. B. appeared to have a close bond with mother, asking when he would be allowed to return to her.

DCFS also noted a prior referral on April 2, 2016 for sexual abuse of B. Mother had invited a non-relative “to sleep in her bed with [B.] in the middle.” The report was closed as inconclusive.

At the detention hearing, the court found a prima facie case for detaining B. pursuant to section 300. The court ordered continued detention of B. in foster care, with monitored visitation for mother. The court further ordered DCFS to attempt to locate father.

At a hearing on July 11, 2017, mother told the court that father had been present for B.’s birth and had openly held

himself out as B.'s father. Mother also stated that the family court had issued a custody order regarding B. a year ago, granting father visitation one Sunday per month. Mother took B. to paternal grandmother's house each month to allow father to visit with B. The court also asked mother if father had maintained a father/son relationship. Mother responded, "Right now. Yes, now." The court found father to be the presumed father of B.

B. was placed with his maternal aunt on June 30, 2017.

**B. *Adjudication***

DCFS filed the jurisdiction/disposition report on August 17, 2017. As detailed therein, DCFS interviewed father, who stated he had separated from mother when B. was a few months old. When mother and father were together, father stated he "drank more than her." Father also suspected mother was using drugs and that the people mother "hangs around" with were using drugs and were not "good people." Father also stated he "knows for sure" that mother was stealing and breaking into homes. According to father, mother would take B. with her to burglarize homes and, on one occasion, B. was in the car with one of mother's friends and mother stated, "I have to go hustle." Father reported that he told mother to leave B. with him, but mother refused.<sup>4</sup> Father also said mother neglected B. and never showered the child. B. was always "dirty" when father visited.

Father also reported that mother "is always bringing loser [sic] around my son," including "drug addicts and thieves." Father complained that mother "lets these people around and

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<sup>4</sup> At another point, father said he offered mother \$300 if she would stay home with B. instead of going out.

does not watch” B., which was the reason B. was almost molested.

For the past two years, father had been employed as an electrician. He disclosed past use of alcohol and drugs, including methamphetamines and cocaine. He stated that around 2013 he enrolled in an inpatient substance abuse program and stayed in the program for 20 months. Father stated he has been sober since his graduation from the treatment program. Father told DCFS that he wanted to take care of B. and was willing to comply with court orders.

Maternal aunt told DCFS that B. was adjusting well to her home. At first, B. refused to sleep with the lights off and said he was scared and having nightmares. According to maternal aunt, once mother began visiting and helping put B. to sleep, B.’s nightmares subsided and he no longer needed the lights on to sleep.

DCFS concluded that it was “not safe” to place B. in father’s custody “at this time.” DCFS explained that B. had “experienced a great deal of recent changes, and placing him with the father whom [*sic*] there has been very limited contact, the child would be at high risk of further emotional trauma.” DCFS reported that father “has not been present during the majority of the child’s life.” Father recently began visiting B. once a month. When the social worker asked B. if he wanted to live with father, B. shook his head no and said that he likes being with maternal aunt. DCFS further noted that although father provided proof of completion of a treatment program, it was not a DCFS-approved program.

Father submitted the following exhibits: a letter from his employer, several training program certificates, and a negative drug test from August 1, 2017.

At the adjudication hearing on August 17, 2017, mother pled no contest to the petition. The court accordingly sustained the allegations against her in counts b-1 and b-2 of the petition. The petition did not include any allegations involving father.

Turning to disposition, the court admitted into evidence the DCFS reports and father's exhibits. Counsel for DCFS argued that the court should not place B. with father, citing his previous drug and alcohol use and B.'s stated desire to remain with maternal aunt. DCFS suggested giving father unmonitored visits, requiring additional clean drug tests, and giving father "time to build a relationship with the child." B.'s counsel noted that there was no "issue with substance abuse, as far as father is concerned," and that father was "doing quite well right now in his life." However, she also pointed out his prior "lack of involvement" with B. and that when B. first came to court he displayed obvious attachment to mother and maternal aunt, and "didn't make any references to" father. B. was doing well in his placement with maternal aunt, even referring to his cousin as his "little sister." B.'s counsel cautioned against moving B. and expressed concern with the stability of father's living situation. She also noted that father was "very critical of mother" in his statements to DCFS, compared with his lack of involvement in B.'s life.

Father's counsel requested that B. be released to father, as a nonoffending and previously non-custodial parent. He noted that father had disclosed his prior drug use to DCFS, which occurred approximately four years earlier. Since that time,

father completed a lengthy in-patient drug program and submitted a recent clean drug test. He also pursued an education and was now employed. Counsel also stated that father had moved into paternal grandparents' home, where he had support from his siblings as well as the grandparents.

Mother's counsel joined in the concerns expressed by counsel for DCFS and B. She noted that mother's daily visits with B. had been stabilizing and calming for him and argued that it would be in B.'s best interest to avoid further disruption to his routine. She also expressed concerns about other people who might be residing in paternal grandparents' home.

The court found that returning B. to mother would create a substantial danger to his health and safety. The court also declined to release B. to father, finding by clear and convincing evidence that "it would be detrimental to the child's safety, protection and well-being, as this child has not bonded with his father." Specifically, the court found that father "has not engaged in any form of appropriate parenting with his own son." The court continued, "Although I believe that he is now on the right track towards doing that, it very much concerns this court that at the time [father] believed that the mother was about to burglarize homes with the child his only solution was to give the mother money to stay home rather than take his son out of that environment." The court also noted father's other statements to DCFS regarding mother "always bringing losers around" and "that is how this child almost got molested."

The court ordered family reunification services for father, as well as drug testing and a parenting class. Father was also awarded unmonitored visits of three hours per week, so "he can



make an effort to bond with this child.” Both parents were ordered not to make any disparaging remarks about each other.

Father filed a timely notice of appeal, challenging the court’s finding at disposition that placing B. with him would be detrimental to the child.

## **DISCUSSION**

### **A. *Governing Principles***

“A parent’s right to care, custody and management of a child is a fundamental liberty interest protected by the federal Constitution that will not be disturbed except in extreme cases where a parent acts in a manner incompatible with parenthood.” (*In re Abram L.* (2013) 219 Cal.App.4th 452, 460–461 (*Abram L.*)). “A nonoffending parent has a constitutionally protected interest in assuming physical custody of his or her dependent child which may not be disturbed ‘in the absence of clear and convincing evidence that the parent’s choices will be “detrimental to the safety, protection, or physical or emotional well-being of the child.”’” (*In re C.M.* (2014) 232 Cal.App.4th 1394, 1400 (*C.M.*), quoting *Abram L.*, *supra*, 219 Cal.App.4th at p. 461.)

The rights of a noncustodial and nonoffending parent to custody of a dependent child are governed by section 361.2(a). Under that section, when the juvenile court orders removal of a child pursuant to section 361, it must determine whether there is a noncustodial parent requesting custody of the child. (§ 361.2, subd. (a).) If so, “the 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.” (*Ibid.*) The statute “evinces the legislative preference for placement with the noncustodial parent

when safe for the child.” (*In re Patrick S.* (2013) 218 Cal.App.4th 1254, 1262; see *In re K.B.* (2015) 239 Cal.App.4th 972, 979.)

The burden is on the agency to establish such detriment by clear and convincing evidence. (*In re Jonathan P.* (2014) 226 Cal.App.4th 1240, 1252–1253; *In re Isayah C.* (2004) 118 Cal.App.4th 684, 700 (*Isayah C.*)) “[I]n dependency proceedings the burden of proof is substantially greater at the dispositional phase than it is at the jurisdictional phase if the minor is to be removed from his or her home. [Citations.] [¶] This heightened burden of proof is appropriate in light of the constitutionally protected rights of parents to the care, custody and management of the children. [Citation.] [¶] “. . . ‘In furtherance of these principles, the courts have imposed a standard of clear and convincing proof of parental inability to provide proper care for the child and resulting detriment to the child if it remains with the parent, before custody can be awarded to a nonparent.’”” (*Isayah C., supra*, 118 Cal.App.4th at p. 694.)

The court must specify the factual basis for a finding of detriment. (§ 361.2, subd. (c).) We review the record in the light most favorable to the trial court’s order to determine whether there is substantial evidence from which a reasonable trier of fact could make the necessary findings based on the clear and convincing evidence standard. (*Isayah C., supra*, 118 Cal.App.4th at pp. 694–695, citing *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426 (*Luke M.*)) “Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt.” (*Luke M., supra*, 107 Cal.App.4th at p. 1426; *In re John M.* (2006) 141 Cal.App.4th 1564, 1569–1570 (*John M.*)) In evaluating detriment, the court

weighs all relevant factors to determine whether the child will suffer harm. (*Luke M.*, *supra*, 107 Cal.App.4th at p. 1425.)

**B. *Insufficient Evidence Supports the Finding of Detriment***

Father argues the record does not support the trial court's finding that B. would be at substantial risk of detriment if placed in father's care. The trial court focused its finding of detriment on two factors: (1) the lack of a bond between B. and father; and (2) father's failure to intervene to prevent mother from engaging in unsafe behavior while caring for B. We conclude that substantial evidence does not support the trial court's findings.

"While the child's wishes . . . and the child's relationship with the noncustodial parent may be considered by the juvenile court in determining whether placement of a dependent child with a noncustodial, nonoffending parent would be detrimental to the child's physical or emotional well-being, [neither] of these factors are determinative." (*C.M.*, *supra*, 232 Cal.App.4th at p. 1402; see also *Abram L.*, *supra*, 219 Cal.App.4th at pp. 460–461, [wishes of 14- and 15-year-old brothers and alleged lack of relationship between children and noncustodial parent not sufficient]; *John M.*, *supra*, 141 Cal.App.4th at pp. 1570-1571 [reversing finding of detriment based on 14-year-old's wishes, his relationship with siblings, and lack of relationship with his father, among other things].) Here, B.'s bond with mother and limited relationship with father were insufficient to find detriment. It was undisputed that father recently had been visiting B. at least once per month and held himself out as B.'s father. B. confirmed that father was involved in his life. Further, we note there was no evidence that father's interactions with B. were inappropriate in any way. Indeed, the court

approved unmonitored visitation for father. As such, neither B.'s "understandable wish" to remain with maternal aunt, "nor the alleged lack of an established relationship with father, was sufficient to constitute substantial evidence of the high level of detriment required under section 361.2[, subdivision] (a)."]. (*C.M., supra*, 232 Cal.App.4th at p. 1403.)

Similarly, we are not persuaded that the court properly premised a finding of detriment on father's purported failure to do more to curb mother's behavior. The record shows that father communicated his concerns to mother, recognized that her situation was unsafe, and made at least some attempt to help. He did not, at the time, have physical custody of B. Nor did DCFS seek to bring allegations against father for his inaction. Under these circumstances, the court lacks substantial evidence to conclude that placing B. with father would create a substantial risk of detriment to the child.

Additional evidence in the record also supports father's argument. He presented evidence that he had a stable income and living situation, with support from other family members. He voluntarily disclosed prior drug and alcohol problems, but had remained sober for four years. Although counsel for mother raised a concern regarding disparaging remarks, the court addressed that concern by ordering both parents to refrain from such conduct.

DCFS cites to *Luke M., supra*, 107 Cal.App.4th 1412, to suggest that the court could have properly concluded it would cause harm to B.'s emotional well-being to remove him from his placement with maternal aunt. We find *Luke M.* inapposite. There, a noncustodial, nonoffending father challenged the placement of his two children with other relatives rather than

with him in Ohio. The juvenile court found moving the children to Ohio would cause detriment to their emotional well-being, in part relying on a social worker's observation of the "extremely strong bond" they had with their siblings and her opinion they would suffer detriment. (*Id.* at pp. 1417–1419, 1426–1427.) The Court of Appeal upheld that finding, concluding there was ample evidence that moving the children to Ohio would have a "devastating emotional impact" on them and noting the trial court's conclusion after listening to the children's testimony that "these siblings' bond helped them survive." (*Id.* at pp. 1426-1427.)

Here, although DCFS noted B.'s strong bond with mother and his successful adjustment to his placement with maternal aunt, there is no evidence to support a similar finding of emotional detriment from placing B. with father, nor did the court make such a finding on the record. Further, there is no evidence to suggest that placement with father, who lived locally, would interfere with visitation by mother or her relatives.

We conclude that DCFS did not meet its burden of proving detriment by clear and convincing evidence, and the juvenile court erred by finding that B.'s placement with father would be detrimental within the meaning of section 361.2.

Although we reverse the court's order, we do not direct the court to transfer custody to father after remand. "[W]hen an appellate court reverses a prior order of the [juvenile] court on a record that may be ancient history to a dependent child, the [juvenile] court must implement the final appellate directive in view of the family's current circumstances and any development in the dependency proceedings that may have occurred during the pendency of the appeal." (*In re Anna S.* (2010) 180 Cal.App.4th 1489, 1501.) Accordingly, although we reverse the

trial court's dispositional order, we remand the matter with directions to the court to conduct a new hearing regarding father's request for custody. On remand, the court may consider all evidence in the record relevant to whether returning B. to the custody of father will create a substantial risk of detriment, while remaining mindful of a nonoffending parent's constitutionally protected interest in the custody of his or her child. (See *C.M.*, *supra*, 232 Cal.App.4th at p. 1400 [nonoffending parent's custody may not be disturbed "in the absence of clear and convincing evidence that the parent's choices will be 'detrimental to the safety, protection, or physical or emotional well-being of the child'"].) We leave it to the juvenile court to determine the appropriate result "in light of our reversal, the grounds on which it was based, and the current state of affairs in [the] family." (*In re Anna S.*, *supra*, at p. 1501; see also *In re Isayah C.*, *supra*, 118 Cal.App.4th at p. 701.)

#### **DISPOSITION**

The dispositional order denying custody to father is reversed. The case is remanded for further proceedings consistent with this opinion.

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COLLINS, J.

I concur:

WILLHITE, J.

EPSTEIN, P. J.

I respectfully dissent.

The issue in this dependency case is whether the trial court erred in finding it would be detrimental to the child, B., to place him with his father. While that finding requires a showing by clear and convincing evidence (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426), on appeal we are bound by the trial court's determination so long as it is supported by substantial evidence. (*Sheila S. v. Superior Court* (2004) 84 Cal.App.4th 872, 880.) We also are bound by the trial court's merits determination so long as it is supported by substantial evidence. (*In re John V.* (1992) 5 Cal.App.4th 1201.)

Barring a clear demonstration that the trial court applied the wrong standard, and there is no suggestion that it did, we are bound by its determination on the merits. I believe we all agree that this is a relatively close case. That is all the more reason to uphold the decision of the trial court unless it is clearly wrong. While father had reformed from his previous drug problem, which he shared with mother, and had remained sober since graduating from a drug program, he had little presence in the child's life until recently, when he began visiting once a month. The trial court ruled that he was non-offending, yet while aware of mother's severe substance abuse problems, he did little to intervene. The trial court commended his efforts and acknowledged that he was on the right track, but concluded that, at this point, it would be detrimental to place the child in his custody. The trial court was concerned about father's lack of involvement with the child, and the little he did to protect the child. That may be arguable, but I in my view the evidence of father's efforts was sufficient.

In sum I do not believe the record supports a conclusion that the trial court abused its discretion in ruling as it did. I would affirm.

EPSTEIN, P. J.