

Filed 11/26/18 In re Julia G. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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

B287303  
(Los Angeles County  
Super. Ct. No. DK20174)

LOS ANGELES COUNTY  
DEPARTMENT OF  
CHILDREN AND FAMILY  
SERVICES,

Plaintiff and Respondent,

v.

ROLANDO G.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles  
County, Robert S. Wada, Commissioner. Reversed and  
remanded.

Cristina Gabrielidis, under appointment by the Court of Appeal, for Defendant and Appellant.

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

## **INTRODUCTION**

Rolando G., father of 14-year-old Julia G. (father), appeals from the juvenile court's orders denying his request to place Julia in his home and requiring him to participate in parenting classes and individual counseling. We reverse the order denying placement of Julia with father and remand for further proceedings consistent with this opinion.

## **BACKGROUND**

On November 2, 2016, the Department of Children and Family Services (Department) filed a Welfare and Institutions Code section 300<sup>1</sup> petition that alleged, as ultimately sustained, that Julia's mother's, Cecilia G., and her male companion, Tam N., physically abused Julia, mother failed to protect Julia from Tam's physical abuse, and Julia was afraid to remain in the home due to the abuse.<sup>2</sup> The Department did not allege any claims against father, whose whereabouts were unknown.

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

<sup>2</sup> The Department filed a separate petition with respect to Julia's siblings Lori G., Gloria N., Lana N., Chloe N., and Hailey N. The juvenile court later dismissed that petition.

The case was initiated when Julia refused to go home from school. At a parent-teacher conference on October 20, 2016, mother and Tam learned that Julia had been ditching school and getting bad grades. On the way home from the conference, Tam repeatedly punched Julia. Once home, Tam hit Julia on the buttocks and legs with a stick and on the face with a sandal. Mother also hit Julia with a stick. On October 28, 2016, mother and Tam went to Julia's school and learned she had ditched school again. Tam told Julia that "it was gonna get worse this time."<sup>3</sup> Julia told the school police she was afraid to go home. Later that day, a social worker interviewed Julia and observed bruises on Julia's arms and legs. The Department detained Julia and placed her in a foster home.

Tam denied to the social worker that he hit Julia with a closed fist or an object. He stated that he only spanked Julia on the buttocks with an open hand. Mother also denied that Tam hit Julia with an object and stated she had never seen him hit Julia with a closed fist or stick. Tam stated he was "done with Julia." He added, "Please take her . . . she is a cancer and I don't want her to infect the other girls."

Mother stated that while Julia believed Tam was her biological father, father actually was Julia's biological father. Mother did not know father's current whereabouts. She had not seen or spoken with father in 13 years.

At the November 2, 2016 detention hearing, the juvenile court found that father was Julia's presumed father. It ordered

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<sup>3</sup> In 2005, Tam slapped one-year-old Julia on the face twice because she was crying. Mother tried to intervene and Tam slapped her. Tam was convicted of willful cruelty to a child and domestic violence.

the Department to attempt to locate him. On December 1, 2016, the Department sent letters to the addresses identified in a “due diligence” search for father.

Four days later, on December 5, father contacted the Department from San Antonio, Texas, saying he received the letter and he was Julia’s father. He immediately stated he wanted Julia to live with him and his family. Father has never wavered in his desire to have custody of Julia.

Father explained that he and mother met in 2002 and their relationship, which lasted a year, was terrible from the beginning. Mother accused father of domestic violence. Father left in 2003 and moved to San Antonio, Texas because the accusation was false. When father left, their daughter Lori was one year old. He had no idea that mother was then pregnant with Julia. Father could not maintain contact with Lori because mother changed her number and he had no way to get in touch with her.

Father did not graduate from high school but he later earned his GED. He was gainfully employed, having worked in construction for the past 10 years. He also worked as a mover.

Father has been with his current partner Jamie for over 14 years. Father and Jamie have a 12-year-old daughter, a five-year-old son, and a one-year-old son. Their daughter lives with her grandmother in Ohio and their sons live with father and Jamie in San Antonio.

Father is now stable. As a minor, however, father was “in and out of juvenile detention.” In 2004 and 2005, he was arrested for domestic violence and kidnapping to commit a sex act. Father reported that beginning in 2006 he was incarcerated on and off

for five years for burglary and assault.<sup>4</sup> In 2016, he was convicted of driving while intoxicated and was on probation for that offense when the Department prepared its May 2017 interim review report. Father reported prior cocaine and marijuana use, but not in the last few years. He stated he rarely drank. He participated in drug and alcohol testing and classes as part of his probation. In 2014, father was diagnosed with major depression due to childhood trauma. He was treated by a psychiatrist, attended therapy, and was temporarily on medication.

In its December 19, 2016, Jurisdiction/Disposition Report, the Department reported that Julia was comfortable in the foster home. The Department believed Julia could not be released to father because she had never met him and did not even know of his existence. The Department recommended that Julia remain in foster care and that mother and father receive family reunification services and monitored visits.

At the December 19, 2016 jurisdiction hearing, father appeared telephonically from Texas and counsel was appointed to represent him. The court set the matter for a contested adjudication.

On March 6, 2017, the Department reported father was still interested in obtaining custody of Julia. Although Julia initially did not want to have contact with father, she later changed her mind. In February 2017, Julia informed the social worker that she wanted to get to know father. The foster parents agreed to arrange a schedule so Julia could have regular phone

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<sup>4</sup> While father was incarcerated, Jamie went to prison for 18 months for burglary and possession with intent to deliver. While father and Jamie were incarcerated, their daughter went to live with Jamie's mother in Ohio.

calls with father. In mid-March, the social worker gave father the contact information for Julia's foster parents. Julia reportedly was nervous but was looking forward to speaking with father.

In early April, due to behavioral issues in and out of school, Julia was removed from her foster parents and placed in a new foster home. On April 6, father informed the social worker that he and Julia had been speaking daily for two hours and he had been getting to know her. Father reported that Julia stated she wanted to live with him.

The Department contacted Child Protective Services in San Antonio, Texas and asked it to conduct an assessment of father's home for Julia's possible placement. It found father's home was appropriate.

In May 2017, Julia told a social worker that her phone calls with father were going well and that she wanted to see him in person as she had only seen photographs of him. The social worker asked Julia how she felt about visiting or living with father. Julia "smiled and stated that she would like that." She also told the social worker that she did not want to have contact with mother or Tam.

Tam told the social worker that his description of Julia as a "cancer" had been taken out of context. Mother stated she wanted the same right to contact Julia by telephone as father had. The social worker told mother that Julia did not want any contact with her. Mother and Tam continued to state that they did not want to reunify with Julia. Tam said that "should Julia be returned home, they could just buy her a one way ticket to live with her birth father."

At the end of June 2017, Julia told the social worker that she continued to speak with father regularly. She also reported she felt safe in her foster mother's home, she liked her school and her behavior had improved. Julia had not had any contact with mother, Tam, or her siblings, and she did not want any contact with them.

In early July 2017, the social worker contacted father. He informed the social worker that he continued to have phone calls with Julia but they had been less frequent due to his work schedule. Father worked as a truck driver, could not call when he was driving, and usually got home too late to call Julia. He stated that he would still like to reunify with Julia and have her live with him and his family in Texas.

At the end of July 2017, the social worker met with Julia. Julia told the social worker that she speaks with father by phone but not as often as before due to his work schedule. Julia said she understood that father would like to call more but that because he was a driver he was on the road a lot. Julia said she wanted to eventually live with father and study nursing at USC. She continued to feel safe in her foster mother's home.

At the adjudication hearing, which concluded on September 21, 2017, the juvenile court received exhibits in evidence, heard testimony and arguments, and sustained the petition's claims alleging violation of section 300, subdivisions (a) and (b). The court removed Julia from mother.

Mother waived her right to family reunification services. She requested visits "once Julia is ready." Father's counsel asked the court to place Julia with father, arguing the court must place the child with a noncustodial parent who asks for custody unless the court finds by clear and convincing evidence that placement

would be detrimental to the child. Counsel observed that the lack of an established relationship with a parent or the child's preference for foster care do not support a finding of detriment.

Father's counsel also noted that the Department's proposed case plan required him to participate in a parenting class and in individual counseling to address his criminal history, domestic violence, past substance abuse, and other case issues. Counsel did not object to the parenting class, but he objected to individual counseling. He argued that father was non-offending, and there had been no allegations in the petition against father.

Julia's counsel opposed placement with father, arguing father "probably needs some individual counseling along with . . . parenting" to address how to reunify with a daughter who was a stranger to him when the case began. Counsel argued it would be detrimental "to just pluck this child up and move her to Texas to live with strangers." Counsel noted that Julia was in therapy and she and father were still getting to know each other. While counsel thought placement with father was "something that we will be able to do in the future," counsel did not "know at this point that it's in [Julia's] best in interest to release her to [father]."

Counsel for the Department joined the arguments of Julia's counsel. The Department's counsel also noted that father said he was "pretty busy" and planned to have his wife take care of Julia.<sup>5</sup> After all the trauma Julia had experienced, counsel argued, sending Julia to another state to a parent she did not know, only to have her "pawn[ed]" off on father's wife, was not appropriate and not safe when Julia was going to need a lot of

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<sup>5</sup> The last minute information report that counsel cited to support this assertion is not contained in the record on appeal.



counseling and support. In addition, counsel argued father had a history of domestic violence when he lived with mother.

The juvenile court declared Julia a dependent and found that “it would be detrimental to the safety, protection or physical or emotional well-being of the child to be placed in the home or the care, custody and control of the parents.”<sup>6</sup> It ordered father to participate in reunification services including parenting classes and individual counseling “to address domestic violence

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<sup>6</sup> The juvenile court stated:

“The child is hereby declared a dependent of the court under Welfare and Institutions Code section 300. The court finds by *clear and convincing evidence* pursuant to Welfare and Institutions Code 361(c), 361(A) and 362(A) that [*sic*] additionally applying to a non-custodial parent the constitutional and statutory safeguard available to custodial parents under Welfare and Institutions Code 361(c) and to non-custodial parents under 361.2 that it is reasonable and necessary to remove the child from the home, care, custody and control of the parents, because there is a substantial danger to the physical health, safety, protection or physical or emotional well-being of the child. [¶] There are no reasonable means by which the child’s physical health can be protected without removing the child from the home and the care, custody and control of the parents.

“The court finds it would be *detrimental* to the safety, protection or physical or emotional well-being of the child to be placed in the home or the care, custody and control of the *parents*.” (Emphasis added.)

Despite some ambiguity, and absent any argument by father to the contrary, we will assume (1) the juvenile court made its detriment finding under the “clear and convincing evidence” standard stated in the first paragraph and (2) the detriment finding applied to father.

and case issues.” The court granted father monitored visits with Julia, with liberalized visits at the Department’s discretion.

Father appealed.

## **DISCUSSION**

### **I. The detriment finding**

#### **A. Standard of review.**

“We review the record in the light most favorable to the court’s order to determine whether there is substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that the child[ ] would suffer . . . detriment” for purposes of section 361.2, subdivision (a). (*In re John M.* (2006) 141 Cal.App.4th 1564, 1569 (*John M.*).)

#### **B. Placement under section 361.2, subdivision (a).**

Section 361.2 provides that “[w]hen a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, 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. . . .” (§ 361.2, subd. (a).)

Section 361.2 “evinces the legislative preference for placement with the noncustodial parent when safe for the child. [Citation.]” (*In re C.M.* (2014) 232 Cal.App.4th 1394, 1401 (*C.M.*).) A party opposing the child’s placement with a noncustodial parent under section 361.2 has the burden of

proving by clear and convincing evidence that the placement would be detrimental to the child. (*In re K.B.* (2015) 239 Cal.App.4th 972, 979.) “Clear and convincing evidence requires ‘a high probability, such that the evidence is so clear as to leave no substantial doubt. [Citation.]’” (*C.M.*, *supra*, 232 Cal.App.4th at p. 1401.)

### **C. Analysis.**

Father contends that because he was a nonoffending, noncustodial parent, section 361.2 required the juvenile court to place Julia with him at his request unless it found, by clear and convincing evidence, the placement would be detrimental to Julia’s safety, protection, or physical or emotional well-being. Father argues there was not substantial evidence from which the juvenile court could have found clear and convincing evidence that Julia’s placement with him would be detrimental to Julia.

The Department disagrees, raising several points.

#### **1. Father’s criminal history.**

The Department argues that “[t]hough father was gainfully employed and currently stable, he has an alarming criminal history.” The Department points to father’s 2004 and 2005 arrests for domestic violence and kidnapping to commit a sex act; “accounts by mother and her niece of father’s violence when he lived in California over a decade earlier”; father’s prior incarceration for burglary and assault; his 2016 driving while intoxicated conviction and subsequent probation, and his prior marijuana and cocaine use.

A noncustodial parent’s criminal history and past substance abuse do not establish detriment when they do not

form the basis for the juvenile court's jurisdiction and there is no evidence of recent or current criminal conduct or substance abuse. (See *C.M.*, *supra*, 232 Cal.App.4th at pp. 1403-1404 ["Father's 1994 conviction for domestic violence and mother's unsubstantiated claim that father abused alcohol do not change our analysis [that detriment was not shown], especially since neither formed the basis of jurisdiction," the petition did "not include any allegations of substance abuse or domestic violence against father, [and] there was no evidence of any recent, much less current, domestic violence by father"]; *In re Abram L.* (2013) 219 Cal.App.4th 452, 463-464 (*Abram L.*) [finding of detriment was not supported by allegations of father's unresolved alcohol problem and history of substance abuse where the juvenile court dismissed those allegations from the petition and there was no evidence the father used illicit drugs or drank an inappropriate amount of alcohol at any time after the dependency proceedings commenced]; *In re S.D.* (2002) 99 Cal.App.4th 1068, 1077 ["There is no 'Go to jail, lose your child' rule in California"].)

Here, father's criminal history did not form the basis for the juvenile court's jurisdiction and the Department never filed a petition including any allegations involving father. Although father was arrested in 2004 and 2005 and mother and her niece reported violent incidents over a decade ago, there is no evidence father was convicted of an offense related to those arrests and alleged incidents. Father spent five years in prison for burglary and assault and was released several years ago. In 2016, he was convicted of driving while intoxicated and he remained on probation in 2017.

"In determining detriment, the juvenile court can distinguish between a case like [*In re A.A.* (2012) 203 Cal.App.4th

597] – in which the parent remained incarcerated on the charges that had recently led to the removal of the child from her care – and a case in which the parent, despite earlier shortcomings and mistakes, has stabilized his or her circumstances and may be able to provide a safe home for the child.” (*In re Nickolas T.* (2013) 217 Cal.App.4th 1492, 1506.)

By the Department’s own account, father is now stable. The Department presented no evidence showing father’s prior criminal conduct was likely to prevent him from providing a safe home for Julia. Therefore, despite father’s earlier shortcomings and mistakes, his criminal history did not support the juvenile court’s detriment finding.

## **2. Care by stepmother.**

The Department also argues father stated he was busy and his wife Jamie would care for Julia if the court placed her in father’s custody.

Detriment is not established by a showing that, due to the noncustodial parent’s work schedule, the child will be cared for by a step-parent. (See *C.M.*, *supra*, 232 Cal.App.4th at p. 1403 [“the fact that [child] would be in stepmother’s care much of the time because of father’s work schedule [was] . . . insufficient” to constitute substantial evidence of detriment]; *In re Patrick S.* (2013) 218 Cal.App.4th 1254, 1262, 1264 (*Patrick S.*) [noncustodial father’s long military deployment would not result in detriment to 13-year-old child because stepmother was available to care for child].)

Here, father worked as a truck driver and usually got home late. Julia told the social worker she understood that father would like to call her more but because he was a driver he was on

the road a lot. In light of father's work schedule, father's plan to have Julia's stepmother care for her does not support the detriment finding.

### **3. Julia's emotional needs.**

The Department argues, and it is undisputed, that Julia has suffered trauma, including her mother's rejection. The Department further argues, however, that "father's ability to meet Julia's needs was questionable." In particular, the Department asserts "[t]here was no indication that father arranged for [Julia] to obtain treatment in Texas . . . ." (Cf. *Patrick S.*, *supra*, 218 Cal.App.4th at pp. 1263-1264 [noncustodial father "contacted [the Navy's] Fleet and Family Services to arrange therapeutic services for [the child] and informed the court that a wide variety of social services from different sources was readily available to the family"].)

The Department had the burden of proving detriment under section 361.2 and it presented no evidence about father's efforts, or lack of efforts, to arrange services for Julia in Texas. Indeed, father's supposed failure to arrange services for Julia was not raised at the adjudication or disposition hearing. Even assuming father had not arranged services at the time of the disposition hearing, the Department would still need to prove that father would not or could not provide appropriate services for Julia if she was placed with him. The Department did not present such evidence. Therefore, the Department's argument that there was no indication that father arranged for Julia to obtain treatment in Texas does not support the detriment finding.

#### **4. Father's out-of-state residence**

The Department argues father's "out-of-state residency" supports the juvenile court's detriment finding.

The Department does not explain the relevance of father's residence in another state, but to the extent it is a proxy for the lack of an established relationship between father and Julia, it does not establish detriment. In *C.M.*, the Court of Appeal, citing previous decisions, recognized that "neither [the child's] understandable wish to remain with the maternal grandparents in the only home she had ever known, nor the alleged lack of an established relationship with her father, were sufficient to constitute substantial evidence" of detriment under section 361.2, subdivision (a). (*C.M.*, *supra*, 232 Cal.App.4th at p. 1403, citing *John M.*, *supra*, 141 Cal.App.4th at p. 1571 [child's "lack of a relationship with [noncustodial father]" did not support juvenile court's detriment finding] & *Patrick S.*, *supra*, 218 Cal.App.4th at p. 1262 [child's lack of established relationship with father and stepmother did not constitute substantial evidence of detriment].)

Moreover, courts have reversed detriment findings even when the noncustodial parent lived in another state. (See *John M.*, *supra*, 141 Cal.App.4th at p. 1567 [Tennessee]; *Patrick S.*, *supra*, 218 Cal.App.4th at pp. 1256, 1261 [Washington State].)

#### **5. Viewing the facts together**

According to the Department, "[t]aken together, the evidence substantially supports" the juvenile court's order finding by clear and convincing evidence that it would be detrimental to Julia to be placed with father.

Several decisions have reversed detriment findings despite arguments that multiple factors, viewed together, established

detriment. In *Patrick S.*, *supra*, 218 Cal.App.4th 1254, the juvenile court ruled that placement of a 13-year-old child with his father in Washington State would create a substantial risk of detriment to the child's emotional well-being based on "the totality of the circumstances, including [the child's] wishes, his anxiety about moving to his father's home, his need for continued therapeutic services, the lack of an established relationship with his father and stepmother, [the father's] scheduled [military] deployments and his plan to home school [the child], and the lack of available child welfare services in father's home state." (*Id.* at p. 1262.) The Court of Appeal reversed, holding none of these factors constituted substantial evidence of detriment. (*Id.* at pp. 1262-1265; see also *C.M.*, *supra*, 232 Cal.App.4th at p. 1402 [reversing detriment finding despite agency's argument that detriment to child from potential placement with father was established by evidence that "[child] wanted to remain with maternal grandparents; she wanted to visit but did not want to live with father; she did not want to be separated from [her half-sibling] or change schools; father worked long hours and was often away from home, as a result of which [child] would often be in the care of her stepmother; although he was nonoffending, father had a history of alcohol abuse (as reported by mother) and domestic violence (one 1994 conviction and a dismissed misdemeanor arrest)"]; *John M.*, *supra*, 141 Cal.App.4th at p. 1571 [child's lack of relationship with out-of-state father, his need for services, and the paucity of information about father did not support the juvenile court's detriment finding].)

Here too, even when the evidence is viewed as a whole, it does not create anything more than the sum of its parts, which as we have shown do not establish detriment.



## **II. Dispositional issues to be addressed on remand**

On remand, the juvenile court will hold a new dispositional hearing on the issue of Julia's placement with father under section 361.2, subdivision (a), consistent with this decision. The court may consider new evidence or changed circumstances relevant to that issue that may have occurred during the pendency of this appeal. (See *C.M.*, *supra*, 232 Cal.App.4th at p. 1405; *Abram L.*, *supra*, 219 Cal.App.4th at p. 464, fn. 6; *Patrick S.*, *supra*, 218 Cal.App.4th at pp. 1265-1266.)

If the juvenile court concludes that section 361.2, subdivision (a) mandates Julia's placement with father, it must then apply section 361.2, subdivision (b), which authorizes the court to do one of the following: "The court may order the noncustodial parent to assume custody of the child, terminate juvenile court jurisdiction and enter a custody order. (§ 361.2, subd. (b)(1).) It may continue juvenile court jurisdiction and require a home visit within three months, after which the court may make orders as provided in subdivision (b)(1), (2) or (3). (§ 361.2, subd. (b)(2).) Or the court may order reunification services to be provided to either or both parents and determine at a later review hearing under section 366.3 which parent, if either, shall have custody of the child. (§ 361.2, subd. (b)(3).)" (*In re Adrianna P.* (2008) 166 Cal.App.4th 44, 55, emphasis omitted.)

If, however, the juvenile court concludes that new information or changed circumstances create clear and convincing evidence that Julia's placement with father would be detrimental for purposes of section 361.2, the court will need to determine whether father should be ordered to participate in reunification services.

We leave these matters for the juvenile court's resolution on remand.

### **DISPOSITION**

The detriment finding is reversed and the matter is remanded to the juvenile court with directions to hold a new dispositional hearing on the issue of placement of Julia G. with father under section 361.2, subdivision (a). On remand, the court may consider new evidence or changed circumstances that may have occurred during the pendency of this appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

JASKOL, J.\*

We concur:

BAKER, Acting P. J.

MOOR, J.

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