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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re C.R., a Person Coming Under the
Juvenile Court Law.

B251771

(Los Angeles County
Super. Ct. No. CK99458)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

MICHAEL G.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County. Philip L. Soto, Judge. Reversed and remanded.

Lori A. Fields, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, Dawyn R. Harrison, Assistant County Counsel, Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Appellant.

SUMMARY

Michael G. (hereafter Father) appeals from the juvenile court's jurisdictional finding against him under Welfare and Institutions Code¹ section 300, subdivision (c) and from the dispositional order under section 361, subdivision (c) removing his daughter, C.R. (born March 2013), from his care.² In addition, Father seeks remand to the juvenile court for compliance with the Indian Child Welfare Act (ICWA).

The Los Angeles Department of Children and Family Services (DCFS) concedes that the jurisdictional finding against Father should be stricken but opposes the reversal of the dispositional order. DCFS also concedes in its brief that the case should be remanded to the juvenile court for compliance with the ICWA, but at oral argument contend that the juvenile court's ICWA determination should be affirmed based on the recent case of *In re Francisco D.* (2014) 230 Cal.App.4th 73, decided by Division Three of this Court.³

This Court requested additional briefing on whether section 361, subdivision (c) applied to Father as a parent "with whom the child resides at the time the petition was initiated" or whether Father was a non-custodial parent and section 361.2 was applicable. Father argues that he was a custodial parent under section 361, subdivision (c), and DCFS argues that Father was a non-custodial parent under section 361.2.

We reverse and remand to the juvenile court to strike the jurisdictional finding under section 300, subdivision (c), and because we conclude that section 361.2, and not 361, subdivision (c), controls, we reverse the dispositional order and remand the matter to the juvenile court for consideration of the requirements of section 361.2. Last, we remand to the juvenile court for compliance with the ICWA.

¹ Statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² The juvenile court also sustained two allegations against C.R.'s mother.

³ On October 15, 2014, DCFS filed a California Rules of Court, rule 8.254 letter informing the court of new authority.

STATEMENT OF FACTS AND PROCEDURE

I. Original Dependency Petition

On May 14, 2013, DCFS filed a section 300 petition (hereafter Original Petition) on behalf of C.R., who was at the time six weeks old. The Original Petition alleged under section 300, subdivision (b), that there was a substantial risk that C.R. would suffer serious physical harm of illness both as a result of the failure of her parent to supervise or protect her adequately, and by the inability of a parent to provide regular care for her due to the parent's mental illness, and under subdivision (d) that there was a substantial risk that C.R. would be sexually abused by a parent. Specifically, in counts b-1 and d-1 which are identical, the Original Petition alleged that in 2012 Father sexually abused C.R.'s minor mother, A.R. (hereafter A.R.), by engaging in sexual intercourse with A.R. when she was 15 years old and Father was 45 years old, resulting in A.R.'s pregnancy and the birth of C.R. Count b-2 also alleged that A.R. had a history of mental and emotional problems, including self mutilation and suicidal ideation, rendering her incapable of providing regular care and supervision to C.R.

II. Detention Report

Also on May 14, 2013, DCFS filed a Detention Report (hereafter Detention Report) indicating that the family came to DCFS's attention on March 31, 2013 – two days after C.R.'s birth – after A.R., who was 16 years old at the time, disclosed to hospital staff during intake that she had used marijuana in the past⁴ and that C.R.'s Father was 46 years old. A.R. also reported that her mother, C.R.'s maternal grandmother, (hereafter Julie), was in and out of jail and Mother did not know Julie's whereabouts.⁵ A.R. disclosed that she and Father had met a year ago when they were both homeless and had been living with his parents, paternal grandfather (hereafter PGF) and paternal stepgrandmother (hereafter PSGM), for almost a year. The reporting party indicated the

⁴ A.R. and C.R.'s toxicology screens were negative.

⁵ DCFS reports use the abbreviation "MGM" and "MGGM" to refer to relatives vis-à-vis their relationship to minor mother A.R. and refer to A.R.'s mother by her name. For consistency, we follow this convention.

Montebello Police Department was contacted but did not arrest Father after Father stated that he was unaware of A.R.'s age as A.R. had told Father she was 19 years old and Father did not discover A.R.'s age until C.R.'s birth. The reporting party stated that C.R. was being discharged from the hospital that day, March 31, 2013, and mother and C.R. were going back with Father to PGF and PSGM's home and requested an in-person response from DCFS to ensure A.R. and C.R. were safe.

On April 5, 2013, a DCFS social worker visited the family home to conduct an investigation. The social worker interviewed A.R. who reported that because Julie was a drug addict, A.R. was sent to live with her (A.R.'s) maternal great-grandmother (hereafter MGGM) until A.R. was 12 years old. A.R. then returned to live with Julie who claimed to be clean but Julie went to jail and A.R. then lived with her maternal grandmother (C.R.'s maternal great-grandmother) (hereafter MGM) who was also a drug user. A.R. reported a very disturbing and horrific childhood, including: being raped when she was 12 years old by her biological father resulting in a pregnancy and miscarriage, being sexually molested by an adult cousin when she was 13 years old, having a sexual relationship marked by domestic violence with her mother's (Julie's) ex-husband while living with Julie and Julie's new boyfriend,⁶ and being raped by MGM's boyfriend who also tried to prostitute her. A.R. also reported being diagnosed with depression when she was seven years old, admitted to cutting herself in the past, and stated that she was at the "lowest point in her life" and contemplating suicide when she met Father. A.R. denied any current thoughts of suicide and denied drug use, stating that she tried methamphetamines but did not like it.

After being "kicked out" by her MGM, A.R. went to live in a homeless tent community where she met Michael in April 2012. A.R. reported that she lied to Father about her age, denied that Father had forced himself sexually on her, and stated that she

⁶ A Multidisciplinary Assessment Team Summary of Findings Report filed in A.R.'s own dependency case in, and as an attachment to a June 18, 2013 last minute information to the juvenile court in this case, reported that A.R.'s "first relationship was at age 13 with her mother's husband who was 32-years-old at the time" and "was physically abusive toward her."

wanted to continue her relationship with Father. A.R. stated that Father has shown her more love than anyone had before. A.R. stated she still loved Julie but wanted Julie's parental rights terminated.

The Detention Report also indicated that the social worker interviewed Father during her April 5, 2013 visit. Father confirmed A.R. told him she was 18, and he believed her because she appeared very mature. He only found out A.R. was a minor when she gave birth to C.R. Father reported that he had previously been married for 14 years and had no other children. Father explained he and A.R. met in a homeless camp. Father went to live in the camp after he was arrested and convicted for transporting marijuana over the Mexican border in 2010. He reported he had been "set up" by a friend and had no idea the contraband was in the gas tank of the car he was driving. After his arrest, he was ashamed, unable to find a job, and did not want to live with his parents, so he went to live in the homeless camp. Father denied any other criminal history,⁷ any current drug use, mental health problems or childhood abuse or neglect. He was adopted and had always been very close to his family. He was currently working for a company doing "long term jobs." Father stated that he was willing to take all steps necessary to "make this right" so he and A.R. could be together at some point.

At the conclusion of its April 5, 2013 investigation, DCFS detained A.R., removing her and placing her in the home of paternal grandmother (hereafter PGM). C.R. was left in A.R.'s care.⁸ DCFS explained to PGM, A.R. and Father that it considered Father's and A.R.'s relationship to be sexual abuse despite the fact that A.R. consented to the relationship and explained that Father was to have no access to A.R., but could have access to C.R. when A.R. was not in the home.

⁷ A criminal background check revealed that Father in fact has an extensive criminal history, including convictions for car theft (1985), personal property theft and a traffic violation (1989), and reckless driving (1991) and numerous arrests for drug-related crimes.

⁸ A.R.'s dependency case (No. CK98948) was opened on April 10, 2013, and was also before Judge Soto.

According to an attachment to the Detention Report, A.R. reported that she told Father the first day that they met that she had been sexually abused and that A.R. and Father had sex their first night together. The Detention Report contained summaries of the interviews that were conducted in A.R.'s dependency case. In those interviews, A.R. stated that she wanted to marry Father, that "[w]e already lived together for a year so I don't see why it matters" and that Father "still loved me" even when he found out her true age. A.R. also reported that Father told her she was "his first love" and told her when they first met that their relationship "was meant to be, it was god sent." A.R. stated she did not care who had custody of her, she just wanted "my little family back together."

According to the Detention Report, on April 30, 2013, a DCFS social worker spoke to a detective at the San Bernardino County Sheriff's Department who had conducted an investigation of the allegation that A.R. was sexually abused by Father and the detective reported that "it appears clear that there was an inappropriate and illegal sexual relationship" between A.R. and Father and indicated that the case would be forwarded to the District Attorney's Office for criminal prosecution.

On May 9, 2013, the social worker served Father with the removal warrant for C.R., explaining to him that because he sexually abused A.R., his child C.R. was at risk. Father described himself as being "like a father figure" to A.R. because she had never had one, and he was trying to teach her morals. Father did not understand why A.R. wanted to have any contact with the maternal family or why she still spoke to Julie.

III. Detention Hearing

A detention hearing was conducted on May 14, 2013. A.R. and Father appeared, along with various paternal relatives. Father had filed earlier that day a Statement of Parentage (JV-505) indicating he believed he was C.R.'s father and he had signed a voluntary declaration of paternity when C.R. was born. Father was declared C.R.'s presumed father. Father filed a Parental Notification of Indian Status form stating he may have Indian ancestry through the Chumash tribe. The court evaluated the application of the ICWA as follows:

“THE COURT: Father indicated he’s a member of the Chumash tribe. [¶] Are you registered?

“THE FATHER: No. I was adopted. My adopted grandparents, grandfather, is a Native American as well as my grandmother, but I don’t have Native American blood.

“THE COURT: Did they make you part of the tribe?

“THE FATHER: No, sir.

“THE COURT: Then this is not an ICWA case.”

The court entered detention orders for C.R. with respect to Father, and left C.R. in A.R.’s custody, provided she resided with PGM or any DCFS-approved home. Family maintenance services were ordered and an adjudication hearing was scheduled. Father was given unmonitored visits in PGM’s home if she was present, and monitored visits otherwise. Father was not permitted to reside in A.R.’s home.

IV. First Amended Petition

On June 20, 2013, the Department filed a First Amended Petition under section 300, subdivisions (b), (c) and (d). In addition to the original allegations, a new count c-1 was added that alleged A.R. and Father had a “history of and are currently involved in an emotionally abusive domestic violence relationship” that placed C.R. at risk of “serious physical and emotional harm, damage, and danger.”

V. Jurisdiction/Disposition Report

On June 14, 2013, the DCFS filed a Jurisdiction/Disposition report dated June 20, 2013. The Jurisdiction/Disposition Report indicated that A.R. was re-interviewed on May 30, 2013, and A.R. stated that the case was “stupid” since she and Father were together “consensually” and “no one is really in danger ” and that Father thought the case was “idiotic too because it was consensual.” A.R. stated that if necessary, she and Father would just wait until the day she turns 18 and then marry.

A.R. reported she had suffered from depression since she was a child, and had attempted suicide in the past, but she had not thought about harming herself since the baby was born. She had cut herself in the past, telling the DCFS social worker, “Do you honestly think someone who lost their virginity to their dad wouldn’t want to hurt

themselves.” A.R. stated that she had not cut herself since the age of 14 and that an ex-boyfriend used to tell her that she would be letting everyone else win by dying and that Father tells her “don’t be a baby.”

During the interview, the social worker observed A.R.’s behavior and demeanor to be very different than during her prior interview, noting A.R. was fidgety and defensive, her thoughts appeared to be racing, and she made some unusual comments. The social worker was concerned about Mother’s mental health because she had never received formal mental health treatment despite the great deal of trauma she suffered in her life. Individual counseling and parenting were recommended.

Father was re-interviewed, and stated that he and A.R. “are really in love” and that he was not a “pervert” as it was evident from looking at A.R. that she was “not a little girl.” He described himself as a “father figure” and was encouraging A.R. to go to school and become a professional, and he wanted the best for her. He knew having a sexual relationship with a minor was “not something you want to go to jail for. Good stuff does not happen to people who go to jail for that.” He recognized that the law stated they could not be together, but after she turned 18, they wanted to get married. He believed if A.R. was placed in a foster home she would try to run away. Father did not want A.R. or C.R. to have any contact with the maternal family. Father stated that A.R. was “very impressionable and I only want her to get the right impressions. I don’t want her talking to her family or seeing them.” The social worker opined that Father “used coercion and manipulation” to take advantage of Mother, and he was controlling and keeping her away from her friends and family.

PGM was interviewed and stated, “My son is stupid to believe she was 19.” PGM stated that both A.R. and Father were stupid; “[h]er for having a baby when she is just a baby herself and him for not knowing she is underage.” PGM reported that A.R. was learning how to care for C.R. but she needed someone to watch over her with the baby. PGM had also noticed a change in Mother’s behavior. A.R. did not always wake up when C.R. cried at night, and PGM had to wake her up to tend to the baby. A.R. depended “extensively” on PGM for guidance in caring for C.R., and the social worker

was concerned about A.R.'s ability to care for C.R. on her own. The social worker had to educate A.R. on the dangers of "co-sleeping" with C.R., and A.R. was "immature" and had limited knowledge of parenting and child development.

The Jurisdiction/Disposition Report noted that A.R., Father and PGM's statements about visitation were inconsistent and concluded that they were not abiding by the visitation plan. As a result, DCFS no longer had confidence in PGM's ability to provide a safe environment for A.R. and C.R., and the social worker was looking for a new placement for them. The DCFS investigator explained: "[A.R.] has been victimized by adult men since she was 12 years old. [A.R.] has come to believe that it is 'healthy and normal' to be in relationships with adult men. [PGM] supports and encourages this inappropriate relationship between minor mother [A.R.] and father Michael . . . By supporting the relationship [A.R.] is being re-traumatized and it is being reinforced that this inappropriate and illegal relationship is acceptable."

The investigating social worker observed that Father appeared to be very manipulative. He showed no remorse for his actions and believed his relationship with A.R. was acceptable because of his "love" for her. He did not believe his behavior was either abusive or controlling, and justified his actions by stating he was "trying to lead [A.R.] in the right direction." There were concerns that Father's misguided efforts to "rescue" A.R. were just re-traumatizing her. Father expressed much anger about the sexual abuse A.R. had endured, but failed to recognize he was doing the same.

VI. Last Minute Information to the Court form dated June 20, 2013

DCFS submitted a copy of Father's CLETS report and a report generated after a Multidisciplinary Assessment Team (MAT) evaluation was conducted on Mother. She was described as overly trusting of others in a struggle to find someone to genuinely protect her. Though able to share her traumatic history, her emotions did not match her thoughts and she blamed herself for not saying "no" to her father. "[A.R.] has a history of being loyal to individual's who have harmed her emotionally, physically, and sexually as she tends to be trusting of others until they do something to show otherwise." Her history of self-mutilation culminated in three suicide attempts from the ages of 13 to 15,

but she stopped hurting herself after she met Father. “Given [A.R.’s] history of self-harm and sadness surrounding not having her ‘little family’ together it would be beneficial for her to participate in intensive mental health services to help her learn healthy coping skills so she does not resort to unhealthy coping skills given that she is separated from those who she believes are her biggest supports.”

Also included in the last minute information were a copy of the minute order from the May 8, 2013 adjudication and disposition hearing in A.R.’s dependency case, along with a copy of the sustained section 300 petition.

VII. Jurisdiction Hearing Continued

The adjudication hearing was initially scheduled for June 20, 2013, and A.R. and Father were present. The First Amended Petition was filed, the original petition was dismissed, and the matter was continued for a contested hearing to July 31, 2013. DCFS advised the court it was evaluating whether the case might be appropriate for a section 301 informal supervision contract, and the court stated the case might be appropriate for that type of disposition.

VIII. Ex Parte Request to Detain C.R. Under Section 385

On July 10, 2013, DCFS filed an Ex Parte Application under section 385, asking the court to detain C.R. from A.R.’s custody. Both A.R. and C.R. had been removed from PGM’s home on July 3, 2013, because while living there, A.R. continued to struggle meeting the baby’s basic needs and, as a result, C.R. was not gaining weight. There was also indication in the medical reports that A.R. and Father were living together, and C.R. slept with both parents.

In the process of moving A.R. and C.R. to a new home, the social worker observed A.R. to be under the influence, appearing disheveled, pacing, and repeatedly visiting the restroom, which A.R. left in disarray. While looking at the condition of the bathroom, a DCFS staff person found a four-inch long straw. A.R.’s purse was searched, and the social worker found a worn, empty, plastic baggie that A.R. denied was hers.

Two days later, A.R. admitted to methamphetamine use and tested positive for methamphetamine, explaining she opted for drug use rather than cutting herself to

alleviate stress. She was worried that if she began cutting herself, she would not stop and would cut too deeply. A.R. stated she obtained the drugs from one of her previous “John’s” in exchange for a promise of sex in the future. A.R. was placed on a psychiatric hold and diagnosed with Mood Disorder and prescribed Prozac.

On July 10, 2013, the juvenile court granted DCFS’s section 385 request to detain C.R. from A.R. and ordered DCFS to confer with paternal grandparents within 48 hours about the possibility of releasing C.R. to their care. The court ordered a mental health and developmental assessment of C.R. to be performed, as well as a medical examination. The case was continued for one week to arraign A.R.

On July 17, 2013, A.R. appeared for a further hearing on the section 385 petition. A.R. was now placed at Penny Lane. The court authorized DCFS to release C.R. to any appropriate relative and ordered DCFS to conduct a Team Decision Meeting (TDM) to explore placement with a paternal relative. The court made a variety of other orders pertaining to A.R.’s care that were detailed on an attorney order.

IX. Second Amended Petition and Interim Report

On July 28, 2013, the Department filed a Second Amended Petition, again under section 300, subdivisions (b), (c) and (d). In addition to all of the previous allegations, two new identical counts were added under subdivisions (b) and (d) asserting Father had engaged in lewd and lascivious acts with A.R. on prior occasions in 2012, when A.R. was 15 years old, that placed C.R. at risk of physical harm and sexual abuse. A new allegation under subdivision (b) asserted that A.R. had a history of substance abuse and was a current user of methamphetamines.

X. Jurisdiction Hearing

The juvenile court tried the matter on July 31, 2013, and both parents were present. The court received into evidence: DCFS reports and petitions, C.R.’s medical records, and stipulated testimony. All counsel stipulated that if called to testify the DCFS investigator would state that she strongly believed C.R. was at risk of sexual abuse based on Father’s improper and illegal relationship with A.R. Counsel further stipulated that if

called to testify, Father would state he has four nieces and nephews ranging in ages from 9 to 18, was in constant communication with them and oftentimes babysits them.

C.R.'s counsel agreed with the court's tentative to dismiss the counts relating to Father's sexual abuse of A.R. under section 300, subdivisions (b) and (d), stating there was no indication that Father posed a threat of sexual or physical abuse to C.R. and also asked the court to dismiss the emotional abuse count, under subdivision (c), stating that subdivision required a showing that C.R. was suffering emotional abuse evidenced by anxiety and untoward aggression, which had not been established.

A.R.'s attorney asked the court to dismiss the petition in its entirety.

Father's attorney asked the court to dismiss the counts relating to his relationship with A.R. and the emotional abuse count pled under section 300, subdivision (c).

The court noted: "You know, I have to comment that it is apparent to this court that there's ongoing sex abuse by the father as against the minor mother. She is under 18. She is not in a position where she can consent to sex. She's been taken advantage of by older men almost her entire life from age 12 onward including her father and stepfather. And he took advantage of the same situation. But that does not mean in and of itself that he would take advantage sexually of the baby that's the product of this illegal sexual intercourse with the minor mother." Accordingly, the juvenile court dismissed counts b-1, b-3, d-1 and d-2. The court sustained the allegations pertaining to A.R.'s drug use (count b-4) and mental and emotional problems (count b-2), and also sustained the serious emotional damage allegation (count c-1) under section 300, subdivision (c) as follows: "... Alexis ... and ... Michael ... have a history of and are currently involved in an emotionally abusive domestic violence relationship. The father Michael ... has used coercion, threats, intimidation, and isolation to dominate and control mother The father's emotionally abusive behavior towards the mother endangers the child's physical and emotional safety and places the child at risk of serious physical and emotional harm, damage, and danger."

In finding the subdivision (c) count true, the court explained: "And I have to disagree with counsel with regards to the safety issues on (c)(1). Father is abusive and

coercive and using threats to isolate and control the mother and that is clearly affecting the child. [¶] I also have to note that the situation is such that the court has . . . made clear to the father he was not to have unmonitored visits with the child and/or the minor mother and he disobeyed those orders. And the caretaker, paternal grandmother, allowed him to disobey those orders. And it would not be in the child's best interest to not find [an] allegation as against the father true and to simply dismiss him from the petition and award him the child especially since the minor mother we're finding allegations true against her. [¶] So we will be finding allegations true against both parents at this time."

The court continued the matter for disposition to explore foster care options where C.R. could be placed with A.R. The court admonished the parents: "I want to make this next order clear as crystal to both the minor mother and the father: This young woman is still under age. Every sexual contact with her is a violation of California law. I can't sit still and allow that even though this is not a criminal court. The father and the minor mother are not to have any unsupervised visits together. They are not to have any telephonic contact where they talk about any kind of sexual involvement together, living together, getting married, raising the child together. None of that is allowable. I'm ordering it to stop today."

XI. Disposition Hearing

A disposition hearing was conducted on September 24, 2013. Father was present but A.R.'s whereabouts were unknown as she had run away from her group home in August 2013. According to Father, he did not know A.R.'s whereabouts, but had received several telephone messages from her stating C.R. deserved better than A.R. could provide.

The court received the DCFS reports in evidence and took judicial notice of the prior orders and findings. Father asked that C.R. be released to his custody, stating that even if his relationship with A.R. was not appropriate, there was no evidence he posed any threat to C.R. C.R.'s counsel agreed with DCFS's recommendation that she be suitably placed in DCFS custody.

The juvenile court declared C.R. a dependent, removed her from parental custody, and ordered reunification services and monitored visits for the parents. The court found by clear and convincing evidence there was a substantial danger to C.R.'s physical or emotional health and she was suffering "severe emotional damage" and there were no reasonable means to protect her without removal from parental custody. In so ruling, the court said, "You know, I understand what [Father's attorney] is saying, but I can't help but think that the father took great advantage of this minor mother who was desperately in need of need [*sic*], and he should have known better." Father was ordered to have no contact with A.R. The court issued a protective custody warrant for A.R. and instructed Father to advise DCFS immediately if he found out where she was.

DISCUSSION

Father contends, and DCFS concedes, that the juvenile court's finding sustaining the Second Amended Petition's allegation under section 300, subdivision (c), of serious emotional damage from Father's and A.R.'s "emotionally abusive domestic violence relationship" (count c-1) should be stricken. DCFS, however, opposes Father's contention that the juvenile court's dispositional order under section 361, subdivision (c) should be reversed. Because Father was not a custodial parent at the time the Original Petition was filed, we find that section 361, subdivision (c), is not applicable and remand to the juvenile court to consider the application of section 361.2 for non-custodial parents.

In addition, while DCFS initially conceded that the matter should be remanded for compliance with ICWA, at oral argument DCFS contends that a new case supports affirming the juvenile court's order. We find the newly cited case to be distinguishable and remand to the juvenile court for compliance with the ICWA.

I. Disposition

On appeal, Father argues that if the section 300 jurisdictional finding on count c-1 is stricken, then the disposition order removing C.R. from Father should also be reversed as Father would be non-offending and the higher "clear and convincing" standard under

section 361, subdivision (c) was not satisfied. DCFS contends that because the petition was sustained as to A.R. and the juvenile court is not limited to the contents of the sustained petition, under the substantial evidence standard the juvenile court could and did properly order C.R.'s removal from Father's custody.

We asked parties to brief whether section 361, subdivision (c) was applicable or whether section 361.2 applied. Under section 361, subdivision (c), "A dependent child shall not be taken from the *physical custody of his or her parents . . . with whom the child resides at the time the petition was initiated*, unless the juvenile court finds clear and convincing evidence of any of the following circumstances listed in paragraphs (1) to (5)"⁹ (§ 361, subd. (c), italics added.) Under section 361.2, subdivision (a), a juvenile court ordering removal of a child under section 361 must "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), italics added.)¹⁰

⁹ The enumerated circumstances in subdivision (c) include under paragraph (1) that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected *without removing the minor from the minor's parent's or guardian's physical custody*" and under paragraph (3) that "[t]he minor is suffering severe emotional damage, as indicated by extreme anxiety, depression, withdrawal, or untoward aggressive behavior toward . . . herself or others, and there are no reasonable means by which the minor's emotional health may be protected *without removing minor from the physical custody of his or her parent or guardian.*" (§ 361, subd. (c)(1) & (3), italics added.)

¹⁰ In making a finding of detriment, the court may consider any jurisdictional findings that may relate to the noncustodial parent under section 300, as well as any other evidence showing there would be a protective risk to the child if placed with that parent. In the absence of a finding of detriment, the court must place the child with the noncustodial parent. (§ 361.2, subd. (a).) (*In re V.F.* (2007) 157 Cal.App.4th 962, 969,

Father argues that section 361 applied as DCFS took C.R. “into protective custody from Father on April 5, 2013” and nothing “indicated that Father voluntarily agreed to have the child removed from his care or otherwise surrendered his right to physical custody.” Father also noted that he “voluntarily complied with the Department’s requests” between April 5 and May 9, 2013—when C.R. was detained from Father, “however, nothing legally prevented him from taking physical possession of his child.” Father thus argues that section 361.2 does not apply to Father because C.R. was residing with him “at the time the events or conditions arose that brought the child within the provisions of Section 300.” (§ 361.2.) Father argues that, in the event section 361.2 is found to apply, “the record permits the Court to conclude that substantial evidence does not support a detriment finding by clear and convincing evidence under either section 361, subdivision (c) or section 361.2.”

DCFS argues that section 361.2 applies to Father because he was the “noncustodial parent at the time of the second-amended petition that was based on mother’s drug use.” DCFS argues that the juvenile court found by clear and convincing evidence a substantial danger to the child’s physical and emotional well-being under section 361, subdivision (c), and therefore this Court need not remand to the juvenile court to apply section 361.2.

In this case, A.R. was moved on April 5, 2013, from her residence with Father to placement with PGM as part of A.R.’s own dependency proceeding and C.R. was left in A.R.’s care, moving with A.R. and leaving Father’s residence. Thus, the record indicates that when the Original Petition was filed on May 14, 2013, C.R. was no longer residing with Father. C.R. continued to remain in A.R.’s physical custody until C.R. was detained from A.R.’s custody on July 10, 2013.

fn. omitted, superseded on other grounds, as stated in *In re Adrianna P.* (2008) 166 Cal.App.4th 44, 57–58; *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1425 [“A detriment evaluation requires that the court weigh all relevant factors to determine if the child will suffer harm”].)

In the meantime, DCFS served Father with a removal warrant on May 9, 2013, and C.R. was ordered “detained” from Father on May 14, 2013. DCFS filed a first amended petition on June 20, 2013, which included a count under subdivision (c) which was sustained by the juvenile court but which DCFS concedes on appeal should be stricken and after A.R.’s drug use, DCFS filed a second amended petition on July 28, 2013, which was ultimately sustained.

Thus it appears that section 361, subdivision (c), does not apply to Father. Although Father at oral argument raised the contention that it was the actions of DCFS that placed Father in the role of a non-custodial parent to C.R., there can be no real dispute that DCFS acted properly in removing mother A.R., herself a minor, and initiating a dependency action after her real age became known. With Father and A.R. living separately, C.R. could remain in the “physical custody of” and reside with only one of her parents, regardless of each parent’s “right” to physical custody.¹¹

We conclude that section 361.2 applies in this case. Because section 361.2 requires the juvenile court to weigh all relevant factors to determine whether placement with a parent would be detrimental (*In re Luke M.*, *supra*, 107 Cal.App.4th at p. 1425), and because additional developments may have occurred after the record in this matter, we decline the parties’ invitation to use the juvenile court’s section 361, subdivision (c) findings to either affirm or reverse under section 361.2. “Although this record arguably would support a finding that placement with [father] would be detrimental to the child[], we believe the better practice is to remand the matter to the trial court where that court has not considered the facts within the appropriate statutory provision.” (*In re Abram L.* (2013) 219 Cal.App.4th 452, 463, quoting *In re V.F.*, *supra*, 157 Cal.App.4th at p. 973; see § 361.2, subd. (c) [“court shall make a finding either in writing or on the record of the basis for its determination under subdivisions (a) and (b)”].)

¹¹ Indeed, if Father and A.R. had resided together with C.R., Father could potentially have been alleged to have failed to protect C.R. from A.R.’s alleged drug use. (See § 300, subd. (b).)

Because it appears that the juvenile court did not consider the correct standard, we remand the matter to the juvenile court to consider section 361.2, including any facts which have developed since the last hearing, and to make findings in writing or on the record of the basis for its determination.

II. ICWA

Father contends that the juvenile court did not comply with the ICWA and DCFS in its brief conceded the error. However, at oral argument, DCFS argued that the recent case of *In re Francisco D.*, *supra*, 230 Cal.App.4th 73—decided by Division Three of this Court after briefing in this matter was completed—supports affirming the juvenile court’s ICWA determination.

We find *In re Francisco D.* to be distinguishable. In *In re Francisco D.*, Mother claimed she was a member of an Indian tribe but the court concluded ICWA did not apply to her adoptive son as he himself was “neither a tribal member nor is he related to one by blood.” (230 Cal.App.4th at p. 84.) In contrast, C.R. is Father’s biological daughter and Father indicates that his adoptive grandparents belonged to the Chumash tribe. As DCFS noted in its brief, *In re B.R.* (2009) 176 Cal.App.4th 773 is specifically on point. In that case the father’s adoptive grandfather had Apache ancestry and the court concluded that the matter had to be remanded for ICWA compliance.

Accordingly, we remand the matter for ICWA compliance.

DISPOSITION

The juvenile court’s orders are reversed and the case is remanded for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.