Filed 12/14/17 In re R.P. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re R.P., et al., Persons Coming Under the Juvenile Court Law.	B279517 (Los Angeles County Super. Ct. No. DK18445)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RICHARD P., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, D. Zeke Zeidler, Judge. Affirmed.

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 Julia Roberson, Deputy County Counsel, for Plaintiff and Respondent.

Defendant Richard P. (father) appeals a juvenile court jurisdictional order sustaining a Welfare and Institutions Code section 300[1] petition as to his minor children, and the court's disposition order removing the children from his care. Father argues that the jurisdictional findings lack sufficient evidentiary support, that the court exceeded its statutory authority in removing the children from his custody, and that the removal orders are not supported by substantial evidence. We reject father's contentions and affirm.

BACKGROUND

This dependency action involves father, his children, R.P. (born December 2002) and K.P. (born May 2004), the children's teenage half-sister, A.F., and the children's mother.[2] The family came to the attention of respondent Department of Children and Family Services (DCFS), on July 19, 2016,[3] following a physical altercation between father and A.F. A.F. had been staying with father (mother's long-term companion from whom mother was living apart) at his house, in part because of behavioral problems she had been having at mother's house. A.F. told DCFS that, during an argument the night before, father took issue with her attitude and "whooped her butt." He hit her in the eye

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[1] Statutory references are to the Welfare and Institutions Code.

[2] A.F. is not a subject of, and mother is not a party to this appeal.

[3] Unless otherwise noted, dates refer to 2016.

with his hand, and hit her on the butt and arm with his hands and a belt. A.F. had bruises on her butt and arm, and a cut and bruise by one eye. K.P. was at father's house at the time of A.F.'s beating; R.P. was with mother. A.F. believed father treated K.P. and R.P. well, but she was afraid to go back to father's house.

On July 19, DCFS located father at a hospital, where he had gone due to an asthma attack. K.P., who was with father at the time, told the CSW that, for the first time ever, during her visit to father's house, she saw him "whoop[]" A.F., spanking her and hitting her with a belt. K.P. said father spanked her on the butt when she misbehaved.

Father admitted hitting A.F. with his hands and a belt the night before. He said she was staying at his house because of her behavioral problems at mother's home. He perceived no problem with disciplining the children. He said it "was his job to discipline his children, even if he has to use a belt, so that his kids don't go out in the world, do something wrong, and get shot and killed by the police." Father became defensive when the CSW explained that, by leaving bruises on A.F., he crossed a line from appropriate discipline into physical abuse. Father was arrested based on allegations of child abuse and an outstanding warrant.

K.P. and A.F. were released to mother, with whom all three children normally lived. Mother told DCFS she had sent A.F. to stay with father for the summer because of the teen's misbehavior. Although mother and father were separated, they had an amicable relationship and continued to co–parent. R.P. affirmed that his primary

residence was with mother, and said he had last seen father on July 4. He denied that father hit him or his sisters with a belt.[4]

On July 22, DCFS filed a section 300 petition alleging that father's physical abuse of A.F., coupled with his drug–related criminal history, placed R.P. and K.P. at risk of harm. Following a hearing that day, the juvenile court detained the children from father, released them to mother and gave father monitored visitation. DCFS subsequently filed a first amended petition (FAP) adding allegations regarding father's physical abuse of R.P., and mother's failure to protect.

R.P. told a DCFS investigator (DI) that father hit him with a belt when he was five–years–old, and again in 2015 after R.P. skipped school. The beating left marks and bruises. He said father's current method of discipline was to slap him on the face with an open hand which left no marks or bruises. R.P. believed father had a problem with anger management. R.P. had been living with father since about May 2016 because of various behavioral and other problems he had with

[4] There had been prior DCFS referrals for the family, including a May 2015 referral regarding allegations that father had inappropriately disciplined R.P., which was closed as inconclusive. Father had a number of arrests and/or convictions from 1987 through 1994 for controlled substance offenses: In 1989, he registered as a controlled substance offender, and was convicted of carrying a concealed weapon in a vehicle. He also had prior convictions for possessing, purchasing, and/or selling narcotics/controlled substances.

mother.[5] R.P. had been smoking marijuana since he was 11–years–old, had gotten drunk twice and was often in trouble at school. He had last smoked marijuana four days before his interview with the DI. His parents knew he used the drug. R.P. said mother told him to stop, but said that father "knows there's nothing he can do about it because he knows [R.P. is] gonna get it anyway." R.P. told the DI that father had smoked marijuana but stopped three or four months earlier because of his asthma. R.P. knew father smoked marijuana "because [father] told [R.P.] and [R.P. had] seen him." He smoked in the backyard, even when R.P. and his sisters were present. Father stored his marijuana in a locked box, and none of the children had access to the drug. R.P. said father did not use other drugs nor did he drink. Mother did not drink or use drugs.

K.P. told the DI that, during the July incident, father used just his hand to hit A.F. She denied seeing marks on A.F. afterwards, and denied having seen father hit her half–sister. Father had hit K.P. once with a belt three or four years earlier, but she felt safe with him. She thought he may have hit R.P. once. K.P. did not think either parent used drugs.

A.F. told the DI father never hit her before the July incident. A police report regarding that incident reflected that A.F. said father

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[5] An October 4 probation report for R.P., produced as part of a joint assessment under section 241.1, reflects that father admitted that, in July 2015, he repeatedly hit R.P. with a belt, leaving marks and bruises, because the child had "cross[ed] the line."

slapped her, punched her multiple times and fell on her causing her shoulder to "pop," and then kicked her as she lay on the ground. Father told the police he had spanked A.F. four times. A.F. confirmed that, about a year before, father hit R.P. with his hand and a belt, leaving marks and bruises. She agreed with her half–brother that father had a problem with anger management. A.F. denied that either parent used drugs. All three children wanted to stay with mother.

Mother informed the DI that she had sent R.P. and A.F. to live with father for behavioral issues; neither child had told her that father was physically abusive. Mother believed father when he said he used only his hand to hit A.F. However, she agreed that his having left marks on the child's body was inappropriate. Mother knew father had hit R.P. hard during an incident in 2015, leaving marks and bruises. Mother had used marijuana in the past but stopped smoking two years ago. She believed father used medical marijuana. Mother conceded that she needed help to learn how better to parent her children.

The DI could not interview father. He would not agree to meet in person and could not be reached for a scheduled telephone interview (his phone was disconnected). Father informed DCFS on August 26 that he was not willing to submit to drug testing,[6] or to participate in counseling, anger management or parenting classes. He would not visit

[6] However, on August 26 and 29 father tested positive for marijuana.

the children until the juvenile court was no longer involved with the family, and he made no effort to contact the children.

Father was awaiting trial on criminal charges of child cruelty.

DCFS filed the operative second amended petition (SAP) on November 2. The SAP mirrors the FAP, and adds a count under section 300 subdivision (a) (based on the same facts alleged in the FAP under subdivisions 300 (b) and (j)), alleging that father's physical abuse of A.F. and R.P. placed his children at risk of harm.

A last-minute information filed November 2 indicated that father's criminal case remained pending and he had not had contact with the children because he believed there was a restraining order in place (although that order concerned only A.F.). Father claimed to have been playing "phone tag" with the CSW in an effort to set up visitation with the children. He acknowledged the CSW wanted to meet with him, but would have only phone contact with her.

At the combined jurisdictional/dispositional hearing on November 2, the court received into evidence DCFS's reports, and father's probation officer's report. Father refused to testify, invoking his right against self-incrimination. At the conclusion of the jurisdictional portion of the hearing, the court sustained as amended, the SAP, on the following grounds:

> "a-2/b-3/j-2: On 07/18/16, . . . father . . . , physically abused . . . [A.F.] striking the child's eye with [his] hand and repeatedly striking [A.F.'s] buttocks and arm with [his] hand and [a] belt. [A.F.] sustained bruising to [her] buttocks, arm, and eye. [A.F.] expressed fear of . . . father. On 07/19/16, . . . father was arrested

> for Willful Cruelty to a Child. In May of 2015, . . . father hit [R.P.] with his hand and a belt. The child sustained bruising to his arms. In 2016 and on prior occasions, . . . father struck [R.P.]'s face with his hand. The mother failed to protect the children of [*sic*] . . . father's physical abuse. Such physical abuse of [A.F.] and [R.P.] by . . . father and the mother's failure to protect, endangers the children's physical health and safety, creates a detrimental home environment and places the children at substantial risk of serious physical harm, damage, danger, and physical abuse.
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> "b-2: The children [R.P.] and [K.P.]'s father . . . has a criminal history including but not limited to being a Registered Controlled Substance Offender, a conviction for Use/Under the Influence of a Controlled Substance, a conviction for Carry Concealed Weapon in Vehicle, a conviction for Poss/Purchase for Sale Narcotics/Controlled Substance, and a conviction for Transport/Sell Narcotic/Controlled Substance. Said criminal history of the father endangers the children's physical health and safety and places the children at substantial risk of serious physical harm, damage and danger."

Proceeding to disposition, the court found "by clear and convincing evidence that father pose[d] a substantial risk of detriment to the children's physical health, safety, protection, or physical or emotional well-being." The court observed that mother was the "custodial parent," rejected father's request to place the children in both parents' custody, and placed the children with mother.[7] The court ordered the parents to participate in joint counseling with the children and drug testing, and

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[7] The November 2 minute order reflects the children were removed from father's care under section 361, subdivision (c).

rejected father's request to exclude drug programs or drug testing requirements from his case plan, as well as his request to continue using medical marijuana. Father was ordered to participate in anger management and parenting programs, and given monitored visitation.

Post-Judgment Events

On March 30, 2017, the juvenile court granted mother sole legal and physical custody of R.P. and K.P., and gave father monitored visits at least once per week. On April 3, 2017, the court signed a custody order memorializing the family's custodial arrangement and terminated dependency court jurisdiction.

DISCUSSION

1. *Justiciability*[8]

Although he disagrees with them, father explicitly notes that he "is not attacking" the juvenile court's findings as to sections a-2, b-3 and j-2 of the SAP that his physical abuse of A.F. and R.P., coupled with mother's failure to protect the children from that abuse, created a detrimental home environment and endangered the children, placing them at substantial risk of, among other things, serious physical harm and abuse. Father's sole jurisdictional challenge on appeal is his contention that the finding sustaining section b-2, i.e., that his criminal

[8] We addressed and rejected DCFS's contention that this appeal is moot in our August 11, 2017, Order Denying Motion to Dismiss.

history of primarily drug–related convictions placed the children at risk of harm, lacks sufficient evidentiary support.[9]

Father acknowledges that where, as here, a "petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence." (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 (*Alexis E.*); *In re M.W.* (2015) 238 Cal.App.4th 1444, 1452.) In such a case, an appellate court need not address whether there is sufficient evidentiary support as to any other jurisdictional finding if a single finding is found to be supported by the evidence. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1492.) The simple reason is that the appellate court "cannot render any relief to [the parent] that would have a practical, tangible impact on his position in the dependency proceeding." (*Ibid.*) Here, as father concedes, even if we found that the record lacked sufficient evidence to support the b-2 allegations, we would nevertheless affirm the jurisdictional order based on sufficiently substantiated allegations of physical abuse. (*Alexis E., supra*, 171 Cal.App.4th at p. 451.)

Father nevertheless urges us to exercise our discretion to address the merits of his jurisdictional challenge arguing that the juvenile

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[9] Although father's arguments claim the court sustained findings based on his use of marijuana, the allegations of the SAP do not refer to his current drug use.

court's "finding under section 300, subdivision (b), paragraph b-2 regarding drug abuse, if erroneous, has the potential to be prejudicial or impact current or future dependency proceedings involving [father] or his children." (See *In re D.P.* (2015) 237 Cal.App.4th 911, 917; *In re Drake M.* (2012) 211 Cal.App.4th 754, 762–763 (*Drake M.*).) We decline to do so.

Courts that have recognized an exception to the doctrine of nonjusticiability to address a challenge to collateral jurisdictional findings have done so where such a finding "(1) serves as the basis for dispositional orders that are also challenged on appeal [citation]; (2) could be prejudicial to the appellant or could potentially impact the current or future dependency proceedings [citations]; or (3) 'could have other consequences for [the appellant], beyond jurisdiction' [citation]." (*Drake M., supra*, 211 Cal.App.4th at pp. 762–763.) These conditions do not apply here.

First, the dispositional order removing the children from father's care is premised primarily, if not entirely, on risks arising from unresolved issues concerning his physical abuse of the children, not the sustained allegations regarding his history of drug-related crime.

Second, father's cursory evidentiary challenge to the b–2 allegations is couched in terms of the potential prejudice he may suffer in this or another dependency action as a result of findings regarding his drug use. Father misstates the court's findings. Again, the core allegations of the b-2 count do not refer to current drug use, but to an undisputed history of primarily drug–related crime. As to the juvenile

court's actual findings, our review would do nothing to alter the evidence or to deflect potential prejudice to father in a future action. (See *In re N.S.* (2016) 245 Cal.App.4th 53, 63 [acknowledging that undisputed evidence will be available in future proceeding regardless of whether appellate court addresses the merits of a parent's jurisdictional challenge].)

For these reasons, we conclude there is no basis to invoke the exception and consider the merits of father's challenge to the b–2 jurisdictional findings. Father's jurisdictional challenge is nonjusticiable.

2. *Dispositional Order*

Father maintains the juvenile court exceeded its jurisdictional authority by ordering the children removed from his custody, leaving them solely in mother's care. He also argues that the record lacks sufficient evidence to support the court's order removing R.P. and K.P. from his care because there is insufficient evidence that DCFS expended reasonable effort to prevent the necessity of removing the children from his care. We reject father's contentions.

a. *The juvenile court did not act in excess of its jurisdiction by ordering the children removed from father's custody*

Father maintains that the juvenile court lacked jurisdiction to remove the children from one of two custodial parents under section 361, subdivision (c)(1).

In pertinent part, section 361, subdivision (c)(1), provides that a dependent child may be removed from the care of a custodial parent where the juvenile court finds, by clear and convincing evidence, that there "is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the . . . parent's . . . physical custody." The question whether a court exceeded its statutory authority is one of law, subject to independent review. (*In re Donovan L.* (2016) 244 Cal.App.4th 1075, 1088; *In re Marquis H.* (2013) 212 Cal.App.4th 718, 725.)

In support of his contention, father points out that section 361, subdivision (c)(1) identifies, as a possible alternative to removal, "[a]llowing a nonoffending parent . . . to retain physical custody as long as that parent . . . presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm." (§ 361, subd. (c)(1)(B), see also (c)(1)(A) [possible alternative to removal of children is the "removal [of] offending parent . . . from the home"].) Father also relies on case law which, he claims, holds that a juvenile court exceeds its jurisdiction by removing a child from one of two custodial parents. (See *In re N.S.* (2002) 97 Cal.App.4th 167 (*In re N.S.*), and *In re Ashly F.* (2014) 225 Cal.App.4th 803 (*Ashly F.*).) Father argues that, because R.P. and K.P. remained with mother (one of two custodial parents), the court lacked the authority to remove them from him under section 361, subdivision (a)(1), and could have

used a less drastic measure to protect them, simply by limiting his contact with and control over them.

The statutory argument advanced here by father has repeatedly been rejected by our colleagues who have considered the issue before us. Specifically, we have found no case authority that has held that a juvenile court is statutorily precluded from removing a minor from just one custodial parent. (See e.g., *In re Michael S.* (2016) 3 Cal.App.5th 977, 984–985 (*Michael S.*); *In re Yolanda L.* (2017) 7 Cal.App.5th 987, 996-998 [removing children from custodial father and permitting them to remain with custodial mother previously ignorant of father's offending conduct, but committed to doing whatever was necessary to protect the children in the future]; *In re D.G.* (2012) 208 Cal.App.4th 1562, 1574 [ordering removal from one parent and placing child with the other]; *In re E.B.* (2010) 184 Cal.App.4th 568, 574, 578 [same].)

These courts have rejected father's argument based on sound reasoning. Section 361, subdivision (c)(1) states that a court may order removal whenever there is "clear and convincing evidence" of "substantial danger" to a child's "physical health, safety, protection, or physical or emotional well-being." The statute does not explicitly create an exception to the court's authority if the court finds that removal is warranted only against one of the parents with whom the child was living. As explained in *Michael S., supra*, 3 Cal.App.5th 977, section 361, subdivision (c)(1)(A) requires the court to consider removing an offending parent from the home as a possible alternative to removing the child from his or her parent. (*Id.* at p. 984.) But the statute "does

not, by its terms, preclude the possibility of ordering both removal of the parent from the home and removal of the child from the parent. [¶] Flexibility in ordering removal from only one custodial parent makes sense in light of the many different custody arrangements that a juvenile court might need to address. For example, two parents might live apart and share custody of a child. Or the parents might live together with a child most of the time, but one of the parents maintains a separate residence that the child sometimes visits. In such situations, if only one parent engages in the conduct underlying a dependency petition, the juvenile court might conclude that it is appropriate to remove the child only from the offending parent and allow the child to remain in the other parent's custody." (*Id.* at pp. 984–985.) We are persuaded by this reasoning.[10]

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[10] Father's reliance on *In re N.S., supra,* 97 Cal.App.4th 167, and *Ashly F.*, *supra*, 225 Cal.App.4th 803, is misplaced. The court in *In re N.S.* did not hold that a child may never be removed from just one custodial parent, only that the statutory scheme precludes removing a child from a parent only to immediately return that child to the same parent. (*In re N.S.* at p. 172; *Michael S., supra,* 3 Cal.App.5th at p. 986.) *In Ashly F.*, the court did not address father's statutory argument, but found only that there was insufficient evidence to support an order removing children from their custodial parents (one of whom had physically abused the children), without first considering reasonable alternatives to removal. (225 Cal.App.4th at pp. 806–811.)

b. *Sufficiency of the Evidence*

Father also challenges the sufficiency of the evidence underlying one portion of the removal order.[11] We review a juvenile court's dispositional removal order under the substantial evidence standard of review. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1216.)

Father contends there is insufficient evidence to support the court's conclusion that DCFS expended reasonable efforts to prevent the need for removal of his children. (See Cal. Rules of Court, rule 5.690(a)(1)(B)(i) [requiring DCFS to submit report with "discussion of the reasonable efforts made to prevent or eliminate removal"].) He also argues that nothing other than meaningless "boilerplate" in the court's minute orders reflects that it either considered the issue or identified the factual bases for its conclusion that DCFS expended reasonable efforts to prevent removal. (§ 361, subd. (c)(1).) We conclude otherwise.

It is true that the juvenile court did not explicitly state on the record the facts in support of its November 2 conclusion that there were no reasonable means short of removal to protect the children from father, and that DCFS exerted reasonable efforts to prevent the children's removal. (§ 361, subd. (d).) But a court's failure expressly to state its findings on the record will not require reversal where, as here, such findings may be implied, and the appellate record contains

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[11] Father does not take issue on appeal with the evidence supporting the juvenile court's conclusion that he posed a substantial danger to R.P. and K.P., under section 361, subdivision (c)(1).

substantial evidence to support such implied findings. (See *In re Andrea G.* (1990) 221 Cal.App.3d 547, 554-555.)

The entirety of father's substantial evidence argument is that DCFS's reasonable efforts to prevent the children's removal consisted solely of "a referral to [father] for drug and alcohol testing," and "contact letters." The record reflects otherwise. Specifically, it contains evidence that father persistently resisted DCFS's involvement with his family, and consistently failed or refused to cooperate with the agency's efforts to contact or work with him to address the issues that precipitated this dependency action. Father engaged in a single interview on July 19, during which he became defensive when questioned about whether his physical discipline of A.F. had crossed over into abuse. After that, he refused to make himself available for and/or failed to participate in scheduled interviews, and refused to meet with DCFS personnel or to respond to their letters indicating the agency's desire to meet with him. Throughout this proceeding father has flatly refused to participate in programs DCFS has recommended (e.g., parenting and anger management), and resisted drug testing (although he did ultimately take two tests, each of which was positive for marijuana). He has also refused to see and made no effort to contact his children while DCFS and the juvenile court remain involved with his family.

Moreover, father has never accepted responsibility for the physical abuse he inflicted, i.e., the alarming conduct that brought his family to the juvenile court's attention. The one time father did agree to speak with DCFS after the incident during which he repeatedly hit, punched

and kicked A.F., father claimed he was free to discipline the children. In 2015, father felt free to hit R.P. with a belt multiple times, leaving marks and bruises, because he believed R.P. had "'cross[ed] the line.'" Even K.P. reported that father had hit her with a belt in the past. Father never acknowledged that he did anything wrong by hitting the children so hard he left marks and bruises on their bodies. Indeed, when it was pointed out that his conduct could be construed as physical abuse, he became defensive and claimed it was his parental duty "to discipline his children, even if he ha[d] to use a belt, so that his kids don't go out in the world, do something wrong, and get shot and killed by the police."

Courts have affirmed juvenile court decisions finding no reasonable means to protect a child absent removal in cases in which a parent has failed to accept responsibility for the wrongful actions that brought his or her family before the dependency court. (See, e.g., *In re Cole C.* (2009) 174 Cal.App.4th 900, 918 [no reasonable means to protect absent removal where father failed to acknowledge "inappropriate nature of his parenting techniques"]; *In re John M.* (2012) 212 Cal.App.4th 1117, 1125–1127 [child could not be placed with mother under "strict supervision" where mother, among other things, failed fully to acknowledge her wrongful conduct].) It is also reasonably implied from the record, given father's refusal to accept responsibility for his conduct, or to participate in any program designed to ameliorate his abusive behavior, that he remains convinced he did nothing wrong and will not change his behavior without strict juvenile court

supervision. (See *In re Gabriel K.* (2012) 203 Cal.App.4th 188, 197 ["One cannot correct a problem one fails to acknowledge"].)

On this record, we find the juvenile court reasonably concluded there was clear and convincing evidence that a removal order was the appropriate method to protect the children, given the parents' informal shared custody arrangement, the severity of father's physical abuse, and his refusal to acknowledge any wrongdoing or to attempt to change his behavior.

DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.