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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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

B286579  
(Los Angeles County  
Super. Ct. No. DK22695B)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

STEVEN Q.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of the County of Los Angeles, Philip I. Soto, Judge. Affirmed and remanded with instructions.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Stephen D. Watson, Deputy County Counsel, for Plaintiff and Respondent.

## **INTRODUCTION**

Steven Q. (father) appeals from the juvenile court's dispositional order "removing" his minor daughter, B.Q., from him, pursuant to Welfare and Institutions Code section 361, subdivision (c).<sup>1</sup> Father contends: (1) the order was statutorily unauthorized because B.Q. was not living with him at the time the petition was filed; and (2) the removal order must be vacated because there were other reasonable means to protect B.Q. We agree it was error to enter the order pursuant to section 361, subdivision (c), but find such error was harmless. We therefore affirm, but remand with instructions to amend the order.

## **FACTUAL AND PROCEDURAL BACKGROUND**

B.Q. is the five-year-old daughter of father and L.Q. (mother). As of May 2017, father and mother had been married approximately seven years. Mother also has another daughter, nine-year-old A.A. A.A.'s father is R.A., who, as of at least May 1, 2017, was incarcerated.<sup>2</sup>

### **I. The Detention Report**

On May 1, 2017, plaintiff and respondent Los Angeles County Department of Children and Family Services (DCFS)

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

<sup>2</sup> Mother, A.A. and R.A. are not parties to this appeal.

filed a detention report, stating that, on March 31, 2017, it received a referral concerning alleged emotional abuse by father to children B.Q. and A.A. The detention report provided the following information:

At the time of the referral, the children were in custody at the North Hollywood police station. The incident occurred in the presence of the children. It began with father and mother arguing, and escalated to father throwing items. He ultimately “grabbed both of the mother’s arms and caused a superficial cut to mother’s hands” possibly caused by father’s fingernail. Mother left the house with the children, and father locked himself inside the home.

At the time, both children resided with mother, whose listed address was in Burbank,<sup>3</sup> which was different from father’s last known address.

On the day of the March 31, 2017, incident, B.Q. was interviewed and stated she and A.A. resided with both mother and father, and also resided with the maternal grandparents and a maternal aunt in another home. B.Q. said she would feel fine about “going back home” to father because she felt “normal” when they fought. B.Q. said usually when mother and father got mad at each other they would scream at each other using “bad words” and “[s]ometimes [mother would] leave[] to [to go to] my grandma’s house.” Regarding the incident, she stated, “My dad kind[] of pull[ed] [mother’s] arm and scream[ed] at her.” When asked to provide more detail, B.Q. answered that mother told the children to go to a friend’s house, and “[m]y dad grabbed [mother’s] arm and begged her not to go.”

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<sup>3</sup> According to an October 2016 police report, B.Q.’s maternal grandmother lived in Burbank.

A.A. was also interviewed on the date of the incident. She stated that she resided with mother, father, and B.Q. Regarding the incident, A.A. said she heard screaming and saw father holding mother's arms by the wrists, adding that father "kinda" pushed or nudged mother and that mother told A.A. and B.Q. to go to a neighbor's home. A.A. also said that during the incident mother wanted to go to the maternal grandmother's home. A.A. explained that she, mother, and B.Q. had gone to the maternal grandmother's home "many times" as a result of arguments between mother and father.

Mother was interviewed and stated with respect to the incident that "she and the children had been living with [maternal grandmother] for a few weeks [prior to the incident] and [on the day of the incident] she went back [to the house in which father was residing] to see if something changed." Regarding the morning of the incident, she said that father woke up early and wanted to go out for breakfast. They argued because mother wanted to start work and asked father to help watch the children. She also told father she wanted to move out of the city, and he disagreed. When mother tried to leave the house, father "held her hand and said 'please don't go,'" at which time her hand was scratched from a ring she was wearing.

Mother also reported that she had left the home a few weeks prior to the incident because she no longer wanted to live there. As of March 31, 2017, all of mother's belongings, however, were still in the home. Mother said her plan was to live with the maternal grandmother because father would not go there.

A neighbor reported that the parents fought often and had separated prior to the incident. The maternal grandmother confirmed that mother and the children moved in with her three

weeks prior to the incident because they needed to move out and separate from father.

During an April 5, 2017, interview, six days after the incident, mother told DCFS she had not spoken to father since the incident, was not going back to the home, and was going to file for child custody the following day. A DCFS home visit on April 12, 2017, confirmed that mother and the children continued to live with maternal grandmother.

Meanwhile, when DCFS called father on April 11, 2017, to schedule an interview, father stated he was very busy with finding a new home and did not know when he would have time to meet. When DCFS called father again on April 18, 2017, father said “with mother having moved out and everything going on he [was] . . . staying in an RV that was lent to him.” Finally, on April 21, 2017, DCFS interviewed father telephonically. Regarding the incident, father said he and mother had a disagreement and things “got heated.” He also said mother had been gone from the home for several weeks, but showed up to the home the morning of March 31, 2017, to have a “family day.” Father said he and mother began discussing finances and agreed it would be better if the children went to a neighbor’s instead of witnessing the argument. Father denied grabbing mother or blocking her to prevent her from leaving the home. Father also said there was no need for a dependency case because he was “not meeting up with mother.”

On April 25, 2017, father reported to DCFS that there had been a death in his family in Nicaragua. He stated that he may have to go to Nicaragua for six to eight months to take care of family affairs concerning the estate.

Appended to the Detention Report was a police report concerning a domestic violence incident that occurred on October 25, 2016. The report stated that mother and father were living together at the time. According to the report, mother said a verbal dispute occurred between father and her. She also said the dispute escalated to father throwing items in one of the daughter's bedrooms after mother told father she was going to leave the home and was packing the child's belongings.

## **II. The Section 300 Petition and Detention Hearing**

On May 1, 2017, DCFS filed a section 300 petition, alleging the children were at risk of harm. At the detention hearing that same day, the juvenile court made the following findings: that a prima facie case for detaining the children had been established; that the children were persons described by section 300; that father was B.Q.'s presumed father; that R.A. was A.A.'s presumed father; and that both fathers were non-custodial. The juvenile court then released the children to mother, ordered no visitation for father, and ordered that father was not to live in or visit the home with mother and the children. Father did not appear at the hearing.

## **III. The Jurisdiction/Disposition Report**

On June 1, 2017, DCFS filed a Jurisdiction/Disposition report containing the following information:

The children were residing with mother at maternal grandmother's house. Father's listed address was both the North Hollywood address listed in the May 1, 2017 Detention report and an address in Nicaragua. On May 24, 2017, mother said father left the country because father has an ill uncle who resided

in Nicaragua and needed assistance. On May 25, 2017, father advised DCFS of the address where he was staying at in Nicaragua and stated that he would be out of the country for the next six to nine months.

During a May 23, 2017, interview, B.Q. said, “My dad does not live at home. . . . My grandmother and grandpa take care of us.”

In her interview on May 24, 2017, mother said with respect to the March 31, 2017, incident, “I was no longer living there. I had gone to pick up some belongings. We were being evicted from the house. The[] owner had sold the house. I had moved back home with my mother. That day I was going to leave. I had my purse and [A.A.]’s stuff. . . . [A.A.] heard me telling [father] I wanted a divorce. I am going to divorce you. He told me to calm down. It’s our marriage [and] the kids need us both. That is why we went to counseling to keep the family together. We went to one counseling session together. . . . Then we went to Court and he had to leave the country to Nicaragua.”

On May 25, 2017, the maternal grandmother reported mother and the children had been living with her for about a month prior to the incident. The maternal grandmother also reported father did not come to her home, and mother and the girls could stay as long as necessary. Similarly, mother reported that she and the children moved back home with the maternal grandmother when the owner of their house had asked them to move out.

#### **IV. The June 30, 2017, Adjudication Hearing**

At the June 30, 2017, adjudication hearing, father’s counsel appeared on his behalf, noting father was available by phone

from Nicaragua.<sup>4</sup> Mother testified there was no physical violence between herself and father during the incident. Instead, mother testified that father was merely holding her hand to pray. According to mother, she received the scratch on her hand from her ring, and the children were next door at the neighbors' house when it occurred. She also denied father had thrown objects. Mother further testified that she and father had been together continually during their seven-year marriage. She also confirmed that she considered herself as living with father at the time of the March incident.

The juvenile court sustained counts (a)-1 and (b)-1 of the petition as pled and dismissed the remaining counts.<sup>5</sup> The court

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<sup>4</sup> The juvenile court appointed counsel for father at the adjudication hearing originally scheduled for June 7, 2017. At that hearing, father's counsel represented that father was in Nicaragua and would be there for six to eight months before returning. The juvenile court continued the adjudication hearing to June 30, 2017.

<sup>5</sup> The petition was sustained as follows: "[a-1/b-1:] The children [A.A.] and [B.Q.]'s mother, [L.Q.], and the mother's male companion[,] [S.Q.], father of the child [B.Q.], have a history of engaging in escalating verbal and physical altercations, in the children's presence. On 03/31/2017, [B.Q.'s] father grabbed the mother's hands and wrist and pushed the mother, inflicting a scratch mark on the mother. The altercation frightened the children. On 10/25/2016[,] [B.Q.'s] father threw objects in the children's home. The mother failed to protect the children. The mother allowed [B.Q.'s] father to reside in the children's home and have unlimited access to the children. Such violent conduct on the part of [B.Q.'s] father towards the mother and the mother's failure to protect the children endanger the children's



found B.Q. to be a person described by section 300;<sup>6</sup> declared B.Q. a dependent of the court; and found “[by] clear and convincing evidence pursuant to [section 361, subdivision (c)]: Substantial danger exists to the physical health of [B.Q.] and/or [B.Q.] is suffering severe emotional damage, and there is no reasonable means to protect without removal from parent’s . . . physical custody.” The court thus removed B.Q. from father’s custody, placed B.Q. with mother on the condition that she reside with the maternal grandmother, granted father monitored visits and telephonic contact with B.Q., and ordered enhancement services. The court also ordered father to complete a 52-week domestic violence course, parenting classes, individual counseling to address case issues, and conjoint counseling with mother if they intended to reconcile.

At the adjudication hearing, the following exchange also occurred between the parties:

“[Father’s Counsel]: [A]t the arraignment, the court found detriment to both fathers. And I wanted it real clear that you were actually removing from the father today; that the father was custodial along with the mother and that he’s a custodial parent.

“The Court: I think everyone can agree to that, right? [¶] . . . [¶] I mean at the time, it seems as though [B.Q.] was living with the father and the mother.

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physical health and safety and place the children at risk of serious physical harm, damage, danger[,] and failure to protect.”

<sup>6</sup> Father does not challenge the juvenile court’s finding that the evidence was sufficient to support dependency jurisdiction.

“[DCFS’s Counsel]: I don’t believe either father was physically custodial at the time of the petition.

“The Court: Whether he was custodial or not, the finding is by clear and convincing evidence that [B.Q.] should not be returned to him.

[¶] . . . [¶]

“[DCFS’s Counsel]: At the detention, the history is that mother had gone back there. She and the children were living at the grandmother’s house for ten days. Mother had gone back there to get some stuff and that’s when this prayer broke out. They were not living with father. She and the children were living at the grandmother’s house.

“The Court: Was that where she was living? Was she living apart from the father in March when this incident occurred?

“[Mother’s Counsel]: Mother indicates she was in the home, Your Honor.

“The Court: She was living there with the father?

“[Mother’s Counsel]: Yes.

“The Court: He was custodial then.

[¶] . . . [¶]

“[Father’s Counsel]: May 1st the Court made a detriment finding as to both fathers.

“[Children’s Counsel]: Actually, I have risk was found as to [B.Q.]’s dad . . . .

“[Mother’s Counsel]: That’s what I have as well.

“The Court: I have on the minute order that the Court finds that the fathers are non-custodial.”

## DISCUSSION

Father contends that the dispositional order “removing” B.Q. from him was unauthorized under section 361, subdivision (c), because B.Q. did not live with father at the time the petition was filed. We agree, but hold the error was harmless.

### I. Standard of Review

We review the juvenile court’s order removing a child from parental custody for substantial evidence, reviewing the record in the light most favorable to the court’s determinations. (*In re Anthony Q.* (2016) 5 Cal.App.5th 336, 344 (*Anthony Q.*) “When the issue on appeal involves the interpretation and proper application of the dependency statutes, however, our review is de novo. [Citations.]” (*Ibid.*)

### II. Section 361, Subdivision (c)

Section 361, subdivision (c), provides, “A dependent child shall not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless” the juvenile court finds by clear and convincing evidence that there is a risk of substantial harm to the child if he or she were returned home, and there are no reasonable means short of removal to protect the child’s safety. By its explicit terms, section 361, subdivision (c), as a matter of law, does not authorize an order removing a child from the physical custody of a parent if the child did not reside with that parent at the time the petition was initiated. (*In re Julien H.* (2016) 3 Cal.App.5th 1084, 1089 (*Julien H.*) “[Child] did not reside with Father. Consequently, the court could not remove [child] from Father’s physical custody under section 361,

subdivision (c)(1) because [child] was not residing with him when the petition was initiated”].)

Here, we agree with father that there was not substantial evidence to support the juvenile court’s finding that father had physical custody of B.Q. when DCFS filed the petition on May 1, 2017.<sup>7</sup> To the contrary, there was overwhelming evidence that mother and the children were living with the maternal grandmother at the time, and that father was living elsewhere (likely Nicaragua), including: (1) the detention report stating children resided with mother in Burbank at an address different from father’s last known address; (2) mother’s statement that she had been living with the children with the maternal grandmother for a few weeks prior to the March 31, 2017 incident; (3) mother’s statement she planned to continue living with the maternal grandmother precisely because father would not go there; (4) maternal grandmother’s confirmation that mother and the children had moved in with her three weeks prior to the incident in order to be away from father; (5) a neighbor indicating mother and father had already separated prior to the March 31, 2017, incident; (6) mother’s April 5, 2017, statement that she was not going back to father’s home; (7) the April 12, 2017, DCFS home visit confirming mother and the children still lived with maternal grandmother; (8) father’s April 11, 2017, statement to DCFS that he was busy finding a new home; (9) father’s April 18, 2017 statement to DCFS that he was living in an RV because mother had moved out; (10) father’s April 21, 2017, statement to DCFS

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<sup>7</sup> We decline DCFS’s request to exercise our discretion to invoke the doctrine of invited error due to counsel for father asking the juvenile court for a finding that father was custodial at the adjudication hearing.

that mother had been gone from his home for several weeks prior to the March 31, 2017, incident; (11) father's April 25, 2017, statement to DCFS that he was going to Nicaragua; (12) the Jurisdiction/Disposition Report stating the children reside with mother in Burbank and listing father's address as North Hollywood or Nicaragua; (13) mother's statements in the Jurisdiction/Disposition Report that, as of the day of the incident, she no longer lived with father and had moved back in with her mother; and (14) maternal grandmother's statements in the Jurisdiction/Disposition Report that mother and children had been living with her for about one month prior to the incident. Indeed, the juvenile court had found at the detention hearing that father was non-custodial. Notably, during the June 30, 2017, adjudication hearing, DCFS's counsel advised the juvenile court, "I don't believe either father was physically custodial at the time of the petition."

On appeal, however, DCFS contends there was sufficient evidence that B.Q. was living with father because: (1) on the day of the March 31, 2017, incident both B.Q. and A.A. said they resided with father; and (2) mother, during the June 30, 2017, adjudication hearing, testified that she never separated from father in March 2017, and that she considered herself as living with father at the time of the March incident.<sup>8</sup> While such evidence might support a finding that the children lived with

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<sup>8</sup> DCFS also cites to mother's "Yeah, of course" response to the question "And you've been continually together [with father] during that seven-year period?" When viewed in context, it is clear mother's answer refers to her remaining as a couple continually during their seven-year marriage, and not their living arrangements.

father on the date of the incident, it says nothing about where the children resided over a month later, namely, on May 1, 2017, when the petition was filed. Determination of custodial status on May 1, 2017, is the relevant focus, and, as discussed above, the uncontroverted and overwhelming evidence indicates that mother and the children no longer lived with father at least as of that date. (*Anthony Q*, *supra*, 5 Cal.App.5th at p. 351 [“[T]he Legislature plainly intended the formal commencement of the dependency action to be the relevant point for determining whether the child at risk was residing with one or both of his parents”].)

Accordingly, we find the juvenile court erred in entering an order removing B.Q. from father’s custody pursuant to section 361, subdivision (c).

### **III. Harmless Error**

Despite our conclusion that the juvenile court erred, we do not reverse because such error was not prejudicial, i.e., it is not reasonably probable that father would have obtained a more favorable result in the absence of the error. (*Julien H.*, *supra*, 3 Cal.App.5th at pp. 1089-1090.) Even though the provisions of section 361, subdivision (c), do not apply to this case, “the juvenile court had broad authority, pursuant to sections 361, subdivision (a), and 362, subdivision (a), to enter orders reasonably necessary to address the problems that led to these dependency proceedings” and to protect B.Q.’s well-being.<sup>9</sup>

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<sup>9</sup> Section 361, subdivision (a) provides, in part: “(1) In all cases in which a minor is adjudged a dependent child of the court on the ground that the minor is a person described by Section 300, the court may limit the control to be exercised over the

(*Anthony Q.*, *supra*, 5 Cal.App.5th at p. 353.) The juvenile court did precisely that, including *inter alia*, placing B.Q. with mother under the supervision of DCFS, prohibiting father from living with or visiting the home of mother, and ordering a case plan that provided for father’s visitation of B.Q. and participation in programming (e.g., domestic violence classes and individual counseling).

The juvenile court’s orders were well justified, having found by clear and convincing evidence that a substantial danger exists to the physical health of B.Q. and/or that B.Q. is suffering severe emotional damage. Father has not challenged such findings on appeal. Consequently, but for the provisions referencing section 361, subdivision (c) and ordering removal of B.Q. from father pursuant to that inapplicable statutory provision, the June 30, 2017, order at issue on this appeal “was fully justified; and the citation to the incorrect statute harmless error.”<sup>10</sup> (*Anthony Q.*,

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dependent child by any parent or guardian and shall by its order clearly and specifically set forth all those limitations.” Section 362, subdivision (a) provides: “If a child is adjudged a dependent child of the court on the ground that the child is a person described by Section 300, the court may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child, including medical treatment, subject to further order of the court.”

<sup>10</sup> Because we find section 361, subdivision (c) inapplicable and the juvenile court’s order removing B.Q. pursuant to that provision error, we need not reach father’s additional contention that the juvenile court erred by failing to find there were no reasonable means to protect B.Q. short of removal in accordance with subdivision (c)(1) of that section.

*supra*, 5 Cal.App.5th at p. 354; see also *Julien H.*, *supra*, 3 Cal.App.5th at pp.1089-1090.)

### **DISPOSITION**

The juvenile court's order is affirmed, and the matter is remanded for the juvenile court to amend its order by:

(1) striking reference to section 361, subdivision (c) and removal of B.Q. from father pursuant thereto; and (2) reflecting that it is made pursuant to section 361, subdivision (a) and section 362, subdivision (a). (See *Julien H.*, *supra*, 3 Cal.App.5th at p. 1090.)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIN, 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.