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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re ISABEL J., et al., Persons Coming  
Under the Juvenile Court Law.

B251747  
(Los Angeles County Super. Ct.  
No. CK99330)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

VICTOR J.,

Defendant and Appellant;

OFELIA J.,

Defendant and Respondent.

APPEAL from an order of the Superior Court of Los Angeles County, S. Patricia Spear, Juvenile Court Referee. Affirmed.

Marsha F. Levine, Leslie Barry, under appointment by the Court of Appeal, for Defendant and Appellant Victor J.

Deborah Dentler, under appointment by the Court of Appeal, for Defendant and Respondent.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Jeanette Cauble, Senior Deputy County Counsel, for Plaintiff and Respondent.

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Victor J. (father) appeals from orders declaring his son and daughter dependents under Welfare and Institutions Code section 300, subdivision (b)<sup>1</sup> and removing them from his custody. Father also appeals from orders requiring him to submit to on-demand drug testing and restraining him from contacting mother for any purpose other than visitation for the next year. We affirm all the dependency court's orders, because substantial evidence supports the jurisdictional findings, removal orders, and the court's restraining order, and the drug testing order was not an abuse of discretion.

## **FACTS**

Mother<sup>2</sup> and father have a 12-year-old son and a 13-year-old daughter, and have been married for more than 25 years. Mother filed for divorce in February 2012, but father remained living in the same home as mother for financial reasons. The family has a lengthy history of frequent, heated arguments between mother and father, at times escalating to the point where law enforcement is called. Father was arrested twice in 2005, once for negligent discharge of a firearm and once for domestic battery. According to mother, father pinned her against the wall in a choke hold, threatened her with a fireplace tool, and pinned her against the back of a bed. Law enforcement was called to

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

<sup>2</sup> Mother did not appeal the court's orders. She has filed a respondent's brief addressing father's contentions regarding the disposition orders and the restraining order.

the home 24 separate times between February 2011 and April 2013. Mother was arrested for domestic violence in 2011 after father threw water at mother, and mother threw a plastic pumpkin at father, but the pumpkin hit the daughter. Father was arrested for spousal abuse in September 2012. He had discovered mother taking photos in a room where he stored belongings, and he tackled her to get the camera. After the altercation, both had scrapes on their elbows. After mother filed for divorce, she slept on a sofa in a different part of the house. At various times after the divorce filing, father hung voodoo dolls or a full-sized hangman's noose in the room where she was sleeping. The children report that their parents argue all the time. Son feels scared when his parents argue, but daughter is indifferent. Both report that they are not afraid of their father.

For the past 10 years, father has suffered severe osteoporosis and experienced major pain, requiring opiates and marijuana for pain relief. He has a prescription for medical marijuana and grows marijuana plants in a shed, which he usually keeps locked. He sometimes takes the plants out of the shed to sun them. Mother has expressed concern that father is abusing his medications, taking more than is needed, and becoming agitated when he does not take his medications. Mother reports that father sees a psychiatrist and is prescribed medications, but she does not know if he takes them. She also claims father has been in and out of rehabilitation for alcohol and marijuana use. The police and the Department of Children and Family Services (Department) have expressed concern that father might be suffering from mental illness, unresolved substance abuse issues, or both. Reports from the police and from the Department describe difficulties getting a coherent statement from father, because he sometimes talks in circles or veers off-topic.

The Department began investigating the family in the spring of 2013 based on concerns the children were victims of physical or emotional abuse. During the Department's investigation, daughter was caught at school with marijuana leaves she had taken from father's plants without his knowledge. Father and mother argued about how to handle the incident, and the argument escalated until father trapped mother and daughter in a room and the paternal grandmother had to call the Department for help.

The Department filed a petition under section 300, subdivisions (a) and (b), alleging the children were at risk of harm based on the parents' history of domestic violence, father's abuse of marijuana and prescription drugs, and the children's access to marijuana plants. Mother had left home with the children and rented another place to live. At the detention hearing, the court ordered the children to be detained from father and placed with mother. The court also granted a temporary restraining order prohibiting father from contacting mother.

At the adjudication hearing, the court heard testimony from mother, father, and both children, and admitted the Department's reports into evidence. The court dismissed allegations under subdivision (a), struck allegations pertaining to father's drug abuse and sustained the remaining allegations under subdivision (b), finding the children were at risk based on their parents' domestic violence and access to their father's marijuana plants. The court ordered the children to remain with mother and granted father unmonitored visitation twice a week, with the possibility of overnight visits after the Department inspected the home for safety concerns. Both mother and father were ordered to attend parenting classes, and the court ordered father to submit to on-demand drug testing so the Department could determine whether he was using any medications beyond what his doctors are prescribing. The court issued a one-year restraining order prohibiting father from contacting mother, except for visitation with the children.

## **DISCUSSION**

As explained in detail below, we reject each of father's contentions on appeal. First, substantial evidence supports the court's jurisdictional findings. Second, father forfeited any objection to the court's disposition order placing the children with mother. Even if father had raised an objection at the hearing, the court's order was supported by substantial evidence. Third, the court did not abuse its discretion when it ordered father to submit to on-demand drug testing. Fourth, substantial evidence supports a restraining order.

## **A. Jurisdictional findings**

Father contends substantial evidence does not support the dependency court's finding that the children were described by section 300, subdivision (b). He first claims that the more appropriate forum is family court. He also claims there is insufficient evidence the children are currently at risk of harm, because the children are no longer living in the same home where the domestic violence occurred. We disagree. The parent's history of verbal and physical conflict provides substantial evidence to support the court's jurisdictional findings.

This case is not more properly handled in family court, as father contends. The facts of this case differ significantly from cases cited by father where dependency court jurisdiction is questionable because divorced parents are in the middle of a contentious custody dispute. (See, e.g. *In re Brison C.* (2000) 81 Cal.App.4th 1373 [reversing dependency court's jurisdictional findings and remanding to family court ]; *In re John W.* (1996) 41 Cal.App.4th 961, 975 (*John W.*) [remanding to family court where dependency court terminated jurisdiction and issued an exit order splitting custody between divorced parents after mother had made allegations of sexual abuse against father].) Father even acknowledges the facts are distinguishable, but claims that as a matter of public policy, the dependency court should have declined to exercise jurisdiction because there was already a marital dissolution proceeding pending. Here the facts are not in dispute, as they were in *John W.* This is not a situation where one parent is making inflammatory and potentially dubious allegations to gain an upper hand in a custody dispute. Rather, it is one where the parents initially agreed to a voluntary safety plan, and the Department ultimately decided a petition was necessary. Because we affirm the court's jurisdictional findings, we need not consider whether the matter belongs in family court.

We apply the substantial evidence standard of review when examining the sufficiency of the evidence supporting the court's jurisdictional findings. "[W]e draw all reasonable inferences from the evidence to support the findings and orders of the

dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court." (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193 (*Heather A.*)). The pertinent inquiry is whether substantial evidence supports the finding, not whether a contrary finding might have been made. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

Subdivision (b) of section 300 supports dependency court jurisdiction if a child has suffered, or there is a substantial risk the child will suffer, serious physical harm or illness as a result of the parent's failure to adequately supervise or protect the child. "Physical violence between a child's parents may support the exercise of jurisdiction under subdivision (b) but only if there is evidence that the violence is ongoing or likely to continue and that it directly harmed the child physically or placed the child at risk of physical harm. [Citations.]" (*In re Daisy H.* (2011) 192 Cal.App.4th 713, 717.)

Father argues that the conflicts between mother and father are insufficient to support dependency jurisdiction, and should instead be resolved in the dissolution proceeding. Here, there was evidence that the domestic violence between the parents began in 2005 and continued after mother filed for divorce in 2012. Parents argued constantly in front of the children. Although both children felt safe with both parents, the incident where mother accidentally hit daughter with a plastic pumpkin intended for father demonstrates that the parents could resort to physical violence that places the children a risk of physical harm. Mother and father continued to live in the same home despite ongoing discord, and mother only moved out with the children after the Department had commenced an investigation. Father has not worked for over 10 years, and neither parent offered any evidence showing that circumstances have changed from their earlier situation, where they had separated but continued living together because of financial constraints. Based on this evidence, the juvenile court could reasonably conclude that absent court jurisdiction, the parents would resume living together and the domestic violence was likely to continue, posing a risk to the children of either suffering physical or emotional harm based on encountering their parents during a physical

altercation. (See *In re R.C.* (2012) 210 Cal.App.4th 930, 941, 942 [exposure to domestic violence is detrimental to children].)

The court's jurisdictional findings regarding the children's access to marijuana are also supported by substantial evidence. Father argues there is no current risk, because the children have moved out of the home and therefore no longer have access to his marijuana plants. However, evidence was presented that father possessed marijuana plants, and that daughter had taken some leaves to school. A court could reasonably infer that so long as father possessed a prescription for medical marijuana, he would continue to maintain those plants. The fact that the children have moved out of the home does not mitigate the possible risk because they have unmonitored visitation with him.

## **B. Removal Order**

Father contends the court's removal order must be reversed because section 361, subdivision (d) requires the court to state the facts upon which it based its decision to remove the children from father's custody.<sup>3</sup> In his reply brief, father also contends that the court's disposition order is not supported by substantial evidence.

A claim of error is forfeited on appeal if it is not raised in the trial court. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) "The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*Ibid.*) The rationale behind the forfeiture rule is that it would be "inappropriate to allow a party not to object to an error of which the party is or should be aware . . . ." (*In re Dakota S.*

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<sup>3</sup> It is unclear whether section 361, subdivision (c) grants the dependency court authority to remove the minors from father's custody and concurrently order children to be placed with mother. (See, e.g., *In re N.S.* (2002) 97 Cal.App.4th 167, 172, fn. 5 [because removing daughter from parental custody and immediately placing her with mother would exceed dependency court's jurisdiction, court of appeal construed court's order as only limiting father's control over daughter by removing father from home].) Because neither party addresses this question in briefing, we decline to examine it in this case.

(2000) 85 Cal.App.4th 494, 501.) At the disposition hearing, father's counsel did not point out that the court had failed to state the reasons for removing the children from father's custody. Had counsel done so, the court could have articulated its reasons, eliminating any error. By failing to object, father forfeited any claim of error relating to the court's failure to specify its reasons for removing the children from father's custody.

Even if father had objected, the court's disposition order is supported by substantial evidence. Before removing a child from parental custody, a court must find clear and convincing evidence that if the child were returned home, there is or would be "substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor" and that there are no reasonable means to protect the child without removal. (§ 361(c)(1).) We review the court's findings for substantial evidence. (*Heather A.*, *supra*, 52 Cal.App.4th at p. 193.)

There is substantial evidence supporting the court's order removing the children from father's custody. The parents have a documented history of frequent disagreements, sometimes requiring law enforcement intervention and sometimes rising to the level of physical violence. Although there may be a medical reason for father's use of marijuana and opiates, the Department presented evidence that such use leads him to make erratic statements and take actions that create a risk of harm to the children. Although a different inference could be drawn from the evidence, we do not second-guess the dependency court's determination.

### **C. Drug testing**

Father contends the dependency court erred when it ordered random, on-demand drug testing despite striking allegations relating to father's substance abuse.

Section 362, subdivision (d) states in pertinent part: "The program in which a parent or guardian is required to participate shall be designed to eliminate those conditions that led to the court's finding that the minor is a person described by Section 300." "The juvenile court has broad discretion to determine what would best serve and



protect the child's interests and to fashion a dispositional order accordingly. On appeal, this determination cannot be reversed absent a clear abuse of discretion.’ [Citation.]” (*In re A.E.* (2008) 168 Cal.App.4th 1, 4.)

Here, the court did not abuse its discretion in ordering drug testing for father. The purpose of the drug testing requirement is not to establish that father has discontinued using marijuana or opiates, but rather that he is taking only what his doctors have prescribed. The court stated: “I’ll ask that he comply with his doctors’ prescriptions and sign releases. And the department needs to make sure that he is only taking what’s being prescribed by a reasonable number of physicians.” Responding to a request from county counsel, the court ordered drug testing. It is not outside the bounds of reason for the court to have inferred that the domestic violence that led to the dependency proceeding had its roots, at least in part, in father’s possible over-medication. Father began using medications in 2004 and was first arrested for domestic violence in 2005. Mother believed that father’s irritability may be linked to over-use of prescribed medications. Father argues that the court’s order cannot be based on mother’s mere speculation about possible overuse, but additional evidence supports the court’s order as well. Police and Department reports state that father would sometimes talk in circles and be difficult to follow. Because it is reasonable to infer that father’s aggressive or erratic behaviors may be caused by an overuse of medications, drug testing is a reasonably tailored order to ensure the children remain safe when with their father.

#### **D. Restraining order**

Father contends the restraining order is not necessary because father and mother no longer reside in the same home. He further contends that mother’s role as an “offending party” means that the court should have issued a *mutual* restraining order, rather than one in favor of mother. Father’s arguments on appeal fail for several reasons. First, the court’s issuance of a restraining order protecting mother is supported by

substantial evidence. Second, father forfeited the right to claim error by failing to object during the hearing or to seek his own restraining order against mother.

Applying the substantial evidence standard of review, “we view the evidence in a light most favorable to [mother], and indulge all legitimate and reasonable inferences” in favor of the dependency court’s determination. (*In re Cassandra B.* (2004) 125 Cal.App.4th 199, 210.) If substantial evidence supports the restraining order, we must affirm. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.)

Section 213.5, subdivision (a) provides that the dependency court may issue an order: “enjoining any person from molesting, attacking, striking, stalking, threatening, . . . harassing, telephoning, . . . destroying the personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of any parent . . .” If the protected individual’s safety would be placed in jeopardy without the restraining order, the court may issue the order. (*In re B.S., Jr.* (2009) 172 Cal.App.4th 183, 194.)

Here, there was substantial evidence of ongoing feuding between mother and father, with repeated calls to law enforcement and evidence that father hung voodoo dolls and a hangman’s noose in mother’s sleeping area. Such evidence, considered in the context of the parents’ ongoing divorce proceedings, is sufficient evidence for a restraining order. The fact that mother and father now live in separate residences does not mitigate the need for a restraining order, considering that they still share two children and will be interacting to make parenting decisions and to comply with the court’s visitation orders. Although the potential flashpoints for an argument are fewer, they still exist.

Mother also points out that father forfeited any claim of error with respect to the restraining order by failing to object at the time the court made the order. Father’s counsel requested that the children be removed from the restraining order, and the court agreed. At no point did father argue that a restraining order protecting mother was not warranted, or that any such order should be mutual, listing father as a protected person as well. Regarding whether the restraining order should have been mutual, father concedes

that he never requested a restraining order against mother. It is entirely possible that had father requested one, the court would have granted it. The fact that mother may have initiated some instances of the ongoing domestic violence between the parents is irrelevant to evaluating whether substantial evidence supports the court granting her request.

### **DISPOSITION**

The court's orders are affirmed.

KRIEGLER, J.

We concur:

TURNER, P.J.

MOSK, J.