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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re J.L., JR., a Person Coming  
Under the Juvenile Court Law.

B277869

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

(Los Angeles County  
Super. Ct. No. CK94551)

Plaintiff and Respondent,

v.

JUAN L.,

Defendant and Appellant.

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

Nancy Rabin Brucker, under appointment by the Court of  
Appeal, for Appellant.

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

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Juan L. , Sr. (Father) challenges disposition findings and orders issued by the dependency court as to his son, J.L., Jr. (hereafter J.L.). The reporter’s transcript from the disposition hearing shows that the court denied placing J.L. with Father as an available, noncustodial parent as contemplated in Welfare and Institutions Code section 361.2.<sup>1</sup> On appeal, Father argues the court erred in treating him as a noncustodial parent under section 361.2, and that the court instead should have treated him as a custodial parent from whom J.L. could not be removed except as provided in section 361, subdivision (c) (hereafter 361(c)). Father argues the error prejudiced him because, had the court correctly applied section 361(c), there would be insufficient evidence in the record to support an order removing J.L. from Father’s custody. We affirm the disposition orders.

### **FACTS**

Father and E.R. (Mother) are the parents of J.L., born in May 2004. Mother is also the parent of three younger children by two different fathers: E.R., born in July 2009; M.R., born in March 2011; and M.A.R., born in July 2012. Only Father — as to his parental relationship with J.L. — is involved in the present appeal.

According to Father’s court-appointed counsel in the dependency court: “[Father] was a noncustodial parent for most of [J.L.]’s life.” According to J.L.’s court-appointed counsel in the dependency court: “[J.L.] . . . historically never really resided with his father. [J.L.] stayed with his father for the few months prior to this petition being filed . . . .” Mother and her children moved into Father’s home sometime around late 2015, and had

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<sup>1</sup> All section references are to the Welfare and Institutions Code.

been living with Father for about two months prior to events leading to the initiation of the present dependency case. Mother was “only staying [in Father’s home] until she got her own apartment.”

On January 30, 2016, the Los Angeles County Department of Children and Family Services (DCFS) received a referral through its child protection hotline regarding a domestic violence incident between Mother and Father late on the night of January 29, 2016. The caller reported that the incident involved a knife, and that Mother and Father both suffered injuries in the incident. Further, the caller reported that J.L. (then 11 years old) witnessed at least a part of the incident. The caller reported that police arrested Mother for assault with a deadly weapon. A police report from the January 29, 2016 incident, which was eventually submitted to the dependency court in a DCFS report, indicates that Father called the police to report the incident, and that both he and Mother were treated at a local hospital. Further, the police report indicates that one of the treating physicians at the hospital had opined to officers that Father’s injuries were “consistent with defensive wounds.” Finally, the police report indicates that officers arrested Mother based on statements from the parents and the treating physician.

During early February 2016, a DCFS case social worker interviewed the family members. At that time, the social worker learned that Mother had driven J.L. to stay with a paternal aunt, Maricela B., immediately after the incident on January 29, 2016, and that J.L. was still living with Ms. B. at the time of DCFS’s investigation.

In the course of the investigation, the social worker talked to J.L. at his school, and to Maricela B. at her home. J.L. understood that Mother was in “prison” because of what had happened on January 29, 2016. J.L. said that he woke up and saw Mother on top of Father, and Father was “holding a knife.” J.L. said that he had witnessed “2-3 fights” between the parents since he and Mother and the other children had moved into Father’s home. J.L. stated that “Father sometimes drinks too much.”

The social worker talked to Mother (then still in police custody) and Father. The parents gave differing stores about the incident on January 29, 2016.<sup>2</sup> In addition, Father stated that he “works all day and cannot take care of [J.L.],” and consented to the social worker detaining J.L. from Father in Maricela B.’s home. Acting on Father’s consent, the social worker initiated a home assessment for J.L. to be placed with Maricela B.

On February 4, 2016, DCFS filed a section 300 petition on behalf of J.L. and his three half-siblings. By this time, J.L. had been living with Maricela B. for almost one week. The petition, as subsequently amended by interlineations by the dependency court, alleged counts pursuant to section 300, subdivisions (a) [serious physical harm] and (b) [failure to protect]. Specifically, the petition alleged that Mother and Father had “a history of engaging in violent altercations in the presence of the children,”

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<sup>2</sup> Mother alleged the fight started when Father began asking her about the fathers of her other children. She claimed that she tried to walk away, but Father became angry, then grabbed a pocket knife and attempted to stab her. Mother said she received injuries attempting to secure the knife. Father’s version of the events was that Mother attacked him with a knife, and that he grabbed it away from her, receiving injuries in the process.

and recounted the incident on January 29, 2016, with Mother alleged to be the aggressor, with an allegation that Father “attempted to protect himself with a knife.” Further, the petition alleged that Mother had a criminal history, including convictions for assault on a cohabitant and for assault with a deadly weapon, not a firearm. The petition also alleged that J.L., E.R. and M.R. were prior dependents of the dependency court due to Mother’s “violent conduct.” Finally, the petition alleged that “[t]he violent conduct . . . place[d] the children at risk of serious physical harm.”

In February 2016, the dependency court detained J.L. with Maricela B., and ordered DCFS to prepare multidisciplinary assessments of all of the children and parents. Further, the court granted Father visitation with J.L. three times a week with a DCFS-approved monitor.

In March 2016, DCFS filed its initial jurisdiction and disposition report. At a hearing on March 15, 2016, the dependency court granted mutual temporary restraining orders as to Mother and Father. Further, the court made findings that reasonable efforts had been made to prevent or eliminate the need for the children’s temporary removal from the family home, and that continuance in the home was contrary to the children’s welfare. Based on those findings, the court vested temporary placement and custody of the children with DCFS. The court ordered Father to complete a 52-week course in domestic violence.

In April 2016, DCFS submitted information to the court indicating that Father had enrolled in a domestic violence class and a parenting class, and that he was regularly attending his classes.

In May and August 2016, DCFS filed interim reports. The reports indicated that J.L. was “comfortable and accustomed to living with [Maricela B.]” When the social worker asked J.L. about going back to live with Father, J.L. replied: “I like living here [with Maricela B.], or with my grandmother.” When the social worker tried to explain to J.L. that he would still spend time with Maricela B. because his father worked, and that Maricela B. would still do things like take him to school and pick him up, J.L. became upset and stated: “I want to live with my aunt or my grandmother.” The social worker did not press further when she saw that J.L. had “started tearing up and was obviously upset.”

The reports clarified the context of the incident on January 29, 2016. Father had allowed Mother to move into the family home after Mother got in an argument with her own mother and left her mother’s home. After Mother started living with Father, she would “get on her cell phone and basically neglect[] her role as [a parent].” Further, Mother was “partying” frequently. The incident with the knife had occurred when Father tried to ask Mother about her plans regarding their relationship and living arrangements. Finally, the interim reports also showed that Father was participating in his programs.

At a combined adjudication and disposition hearing on August 18, 2016, roughly six months after the case was filed, both Mother and Father pled “no contest” to the amended section 300 petition, and the dependency court found the allegations to be true. The court declared J.L. to be a dependent of the court (along with the other children). The court then turned to the issue of disposition. As an initial matter, the court issued permanent restraining orders to keep Mother and Father apart.

As to Mother, the court ordered that all four of the children, including J.L., were removed from Mother's custody pursuant to section 361(c).

As to Father, the reporter's transcript from the disposition hearing shows that Father's court-appointed counsel told the dependency court that Father was a "noncustodial parent" for "most" of J.L.'s life. A moment after counsel's comment, the court stated that, because "it's noncustodial . . . all we need to find is detriment."<sup>3</sup> Immediately, J.L.'s counsel agreed with the trial court, stating: "Yes, your Honor. . . . As stated by Father's counsel, [J.L.] historically never really resided with his father. He stayed with his father for the few months prior to this petition being filed . . . ." After listening to additional comments from the lawyers, the court declined to place J.L. with Father, finding that such a placement would be a "detriment" to J.L. "based on the documents supplied."

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<sup>3</sup> When a court orders removal of a child from a custodial parent under section 361(c), the court must "first" determine whether there is a noncustodial parent "who desires to assume custody of the child." (§ 361.2, subd. (a).) If there is such a noncustodial parent, "the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a).) Section 361.2 reflects the legislative preference "for placement with [the noncustodial] parent.'" (*In re John M.* (2006) 141 Cal.App.4th 1564, 1569.) A party opposed to placing a child with a noncustodial parent has the burden to prove "detriment" from the placement by clear and convincing evidence. (*Ibid.*)

## DISCUSSION

### I. The Appeal Has Not Been Shown to be Moot

As a preliminary matter, we deny DCFS's motion, filed in conjunction with the filing of its respondent's brief, to dismiss Father's appeal as moot. DCFS's motion to dismiss Father's appeal is premised on the well-founded principle that an appellate court may deem an appeal moot, and decline to address the merits of the appeal, when no effective relief can be granted to a parent on appeal due to events that transpired while the appeal was pending. (See, e.g., *In re N.S.* (2016) 245 Cal.App.4th 53; and *In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1315-1316.) Here, DCFS correctly notes that Father's appeal challenges only disposition findings and orders dealing with J.L.'s custody and or placement with Father. DCFS argues that those orders are now moot because the dependency court recently issued a minute order on April 4, 2017, that "returned [J.L.] to [Father]'s custody." DCFS's motion is supported by a request for judicial notice of the dependency court's recent minute order.

While DCFS's argument for dismissal of Father's appeal cites sound legal principles, we deny the motion because the copy of the dependency court's minute order issued on April 4, 2017, does not factually establish that J.L. has been placed back in Father's custody, unfettered by any ongoing issues as to J.L.'s custody and or any continued supervision by the dependency court system.

Although the minute order indicates that the dependency court issued a "home of parents" order as to J.L., "under supervision of DCFS," it also includes the following language: "DCFS to work out with [Father] a schedule for his overnight visits." DCFS has not submitted a reporter's transcript from the



hearing on April 4, 2017. Further, DCFS has not submitted a copy of any of its reports underlying the hearing on April 4, 2017. Thus, we do not have a complete explanation of the court's minute order. Because the court's minute order does not plainly establish the current status of this case as to Father and J.L., we decline to view Father's appeal as moot.

## **II. Father's Status as a Custodial or Noncustodial Parent**

Section 361(c) provides: "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 . . . : (1) 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 is no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . custody."

Section 361(c) reflects the Legislative's recognition that a parent's right to custody of his or her child is fundamental, and protected both by constitutional and statutory guarantees. (*In re Henry V.* (2004) 119 Cal.App.4th 522, 525.) Thus: "A child may not be taken from a parent's physical custody during juvenile dependency proceedings, except for a temporary detention period, unless clear and convincing evidence supports a ground for removal specified by the Legislature. Removal on any ground not involving parental rejection, abandonment or institutionalization requires a finding that there are no reasonable means of protecting the child without depriving the parent of custody. [Citations.]" (*Ibid.*)

Parallel to section 361(c) addressing a custodial parent is section 361.2 which addresses a noncustodial parent's role in dependency proceedings. Generally speaking, section 361.2 provides that, when the dependency court orders removal of child from a custodial parent's home, and there is another parent 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," and which parent wants custody, the dependency court must consider as a first placement option whether to place the child with that noncustodial parent. The court may deny placing the child with the noncustodial parent when the evidence establishes by a clear and convincing standard that the child will suffer "detriment" from the placement. (See, e.g., *In Patrick S.* (2013) 218 Cal.App.4th 1254, 1262; and *In re John M.* (2006) 141 Cal.App.4th 1564, 1569.)

The first claim asserted by Father in his opening brief on appeal is that the dependency court "erroneously proceeded pursuant to section 361.2 with respect to Father . . .," and that the court "should have proceeded under section 361[(c)] when making disposition orders as to Father."<sup>4</sup> Here, the full extent of Father's supporting argument is as follows: "[J.L.] had been residing with Father at the time of the domestic violence which resulted in the filing of the section 300 petition." The remaining dozen or so pages of Father's brief is dedicated to explaining why the evidence would not support removal disposition findings and orders under section 361(c). There is no fall-back argument that the court's findings and orders under section 361.2 are not

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<sup>4</sup> As we noted above, the dependency court stated at the disposition hearing that it viewed J.L.'s case as involving a "noncustodial" parent.

supported by substantial evidence. Given the construct of Father's opening brief, we understand his position to be that the court's error in applying section 361(c) prejudiced him because, had the court correctly applied section 361(c), there would be insufficient evidence in the record to support an order removing J.L. from Father's custody.

In its respondent's brief, DCFS posits that Father's claim about the application of the wrong statutory provision has no bearing on the issues presented by his appeal because Father "does not contend that this [error] is cause for reversal." Further, DCFS argues that, even had Father claimed that reversal was warranted based on the error in applying section 361.2, "reversal would not be warranted because sections 361 and 361.2 are functionally equivalent." As summed up by DCFS: "[The dependency] court's decision to proceed under section 361.2 instead of 361[(c)] is of no consequence [on appeal]." The remaining, majority part of DCFS's brief is dedicated to arguing that there is substantial evidence to support the dependency court's "disposition orders," which we take to mean under either section 361(c) or section 361.2.

We reject Father's claim that the dependency court erred in applying section 361.2 because, if there was an error, we find that the error was invited. (*In re G.P.* (2014) 227 Cal.App.4th 1180, 1193 [invited error doctrine applied to dependency court ruling].) As we noted above, during the disposition hearing, before the court's first statement that it viewed the case to involve a noncustodial parent, Father's counsel stated that Father was "a noncustodial parent for most of [J.L.'s] life." Also, counsel for J.L. and the other children concurred that "[J.L.] historically never really resided with his father." At no point during the

disposition hearing do we see an objection or an argument by Father's counsel that the dependency court was incorrectly applying section 361.2. Finally, we note again that, at the time DCFS filed its section 300 petition, J.L. was residing with Maricela B. in accord with Father's agreement with the department.

Given the state of the record, it is plain that, to the extent the dependency court's disposition findings and orders were based on its understanding that the relationship between Father and J.L. relationship involved that of a noncustodial parent, the court's understanding was based on statements from Father's counsel and J.L.'s counsel, and on the failure of Father (or any party) to raise any objection to proceeding under section 361.2. It would be unfair to both the trial court and DCFS, and most importantly J.L., to allow Father to argue for application of section 361(c) on appeal when he did not do so below. This is particularly true where, as here, the argument made on appeal may contemplate facts that were not placed at issue in the lower court. (Cf. *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 874, 879.)

All of the above said, we observe briefly here that there is substantial evidence in the record to support the dependency court's detriment finding under section 361.2. There was a history of aggression between Mother and Father in the home during the short period of time the family all lived together. J.L. told the social worker that he (i.e., J.L.) saw 2-3 fights, and he saw the incident with the knife which led to both parents being treated at a local hospital. J.L. felt uncomfortable with Father's drinking, and expressed a preference for living with his aunt, rather than Father. While a child's stated preference for his or

her living arrangements is not controlling, the dependency court is not required to ignore such a preference. (*In re Patrick S.*, *supra*, 218 Cal.App.4th at p. 1265.) Father himself recognized that he would have difficulties caring for J.L. due to Father's work schedule. All circumstances considered, we cannot say the dependency court abused its discretion in finding that J.L.'s best interests and stability would be better served by allowing him to stay outside of Father's home for a period which allowed for reunification services to become effective.

For all of the reasons stated, we find no ground for reversing the dependency court's disposition orders.

**DISPOSITION**

The dependency court's disposition findings and orders are affirmed.

SORTINO, J.\*

We concur:

FLIER, Acting P.J.

GRIMES, 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.