Filed 3/29/17 In re Miranda R. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 MIRANDA R. et al., Persons Coming Under the Juvenile Court Law.	
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. GARY R., Defendant and Appellant.	B275846 (Los Angeles County Super. Ct. No. DK16076)

APPEAL from a orders of the Superior Court of Los Angeles County, Emma Castro, Commissioner. Affirmed.

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel and Jessica S. Mitchell, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Gary R., Sr. (appellant or Father) appeals the juvenile court order asserting jurisdiction over his two children, a 10-year old girl and a six-year old boy, under Welfare and Institutions Code section 300, subdivision (d), and the dispositional order removing his daughter from his custody.[1] Father contends substantial evidence does not support either of the court's orders. He further contends he was a noncustodial parent, and that the court relied on the wrong statutory provision in resolving the issue of his daughter's custody. Our review of the record convinces us that the court's orders were supported by the evidence, and that its reliance on the statutory provision covering custodial parents in determining that appellant's daughter could not be placed with him was, at most, harmless error. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant is the father of Miranda R. (born in April 2005) and Gary R., Jr. (born in October 2009). Marie S. (Mother) is

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

the children's mother. Mother and Father were married, but separated in 2013. Pursuant to a family law order, they had joint custody of the children. Father was given visitation on weekends, holidays and during the summer.

In 1987, prior to his relationship with Mother, Father suffered a misdemeanor conviction for sexually abusing his step-daughter, Michelle D. when she was under 14.[2] He was living with Michelle and her mother at the time.

In April 2015, after Father's relationship with Mother ended and he had reconciled with Michelle's mother, his niece Natalie, then 12 or 13, charged Father with touching her vagina under her clothing. They were living in the same household at the time. The County of San Bernardino investigated the allegation and found the charge substantiated. No petition was filed, but Natalie and Father were separated.[3] Father was unwilling to provide the San Bernardino caseworker information about the whereabouts of Miranda and Gary. As a result, no investigation was undertaken in Los Angeles County.

On March 4, 2016, the Department of Children and Family Services (DCFS) received a report that Mother had pinched and hit Miranda, and pulled her hair. A few days

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[2] Father had a number of older convictions unrelated to child or sexual abuse, and a 2002 conviction for driving under the influence.

[3] The caseworker's report stated that Father moved out. Miranda testified that Natalie and her mother moved from Father's home.

later, it received a new report that Mother had hit Miranda in the face and hit Gary with her fist. Interviewed by the caseworker, the children reported that Mother frequently hit them, and that they were afraid of her.[4] The caseworker interviewed Father, who denied knowledge of the abuse. Neither child expressed any concerns about Father or about living with him. The children were initially released to Father. A few days prior to filing the section 300 petition, DCFS learned of Father's 1987 sexual abuse conviction and the 2015 substantiated allegation of sexual abuse, and detained the children with an adult step-sibling.

In advance of the jurisdictional hearing, Michelle was interviewed and confirmed the 1987 incident, but stated she had forgiven Father because at the time of the abuse he was in an "ugly space in his life" due to "drinking or . . . drugs," and because he had "proven himself" since he and her mother had gotten back together. Asked if she believed Father would harm Gary or Miranda, Michelle said "I don't think that he would ever hurt his own children, but then you never really know." Mother told the caseworker that Father's 1987 conviction had been the result of his accidentally touching Michelle's buttocks, and that Michelle's mother "pushed the issue" because Father was breaking up with her. Father acknowledged the 1987 incident by stating: "Michelle is the

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[4] Gary had a bruise, a scratch and other marks consistent with being grabbed and hit. Mother was arrested for child abuse.

one that had accused me and we still talk and her mother lives with me now." With respect to the 2015 incident, he stated: "[T]hat didn't happen. I wasn't arrested or charged with anything that I know of. I never heard from DCFS again."

At the April 2016 jurisdictional hearing, Mother submitted to jurisdiction, leaving only the allegations concerning Father for contest.[5] Miranda, 10 at the time of the hearing, testified that Father had never touched her inappropriately, that she was unaware if he had ever touched anyone else inappropriately, and that she felt safe with him. She did not want to live with him, however, because she did not want to change schools. Miranda further testified that she visited Father every weekend, including the period surrounding the incident with Natalie. Miranda had her own bedroom at Father's house, and referred to Natalie as "liv[ing] with us" (Father and her). She further testified that she spent holidays and her "whole summer vacation" with Father.

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[5] Mother did not contest allegations that she used inappropriate physical discipline on the children, including: (1) grabbing Miranda and causing her to fall, hit a wall and sustain bruising and pain; (2) pinching Miranda's arm; (3) striking Miranda with an open hand; (4) spanking Miranda on numerous occasions; (5) repeatedly striking Gary with a sandal and her open hand; and (6) spanking Gary on numerous occasions. Mother has two other children, twins born in 2015, who were subjects of the proceedings below, but are not subjects of this appeal. Mother is not a party to this appeal.

Miranda missed Natalie and reported that she had "text[ed] her every day" since the move.

Counsel for DCFS contended the court should sustain jurisdiction under section 300, subdivision (d). Counsel expressed concern that Father had never taken responsibility for his actions in the 1987 incident, observing that Father told the caseworker that Michelle "accused" him, without acknowledging guilt, and that Mother's statement to the caseworker indicated Father had downplayed the incident to her. Father repeated the pattern in denying the 2015 incident, although it had been substantiated by San Bernardino County Child Protective Services (CPS), and Natalie and her mother had ceased living with him. Also concerning to counsel was the fact that Miranda was approaching the age of Michelle and Natalie when they were molested.

Counsel for the children joined DCFS's counsel in urging the court to find that Miranda and Gary were at risk of sexual abuse within the meaning of section 300, subdivision (d), observing that both the 1987 conviction and the 2015 substantiated allegation involved children who were members of Father's family.[6]

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[6] With respect to disposition, DCFS's jurisdiction/disposition report recommended that the children remain with their stepsister. Counsel for the children recommended they be placed with Father, provided he participated in counseling, and that other services were put in place to protect the children.

Father's counsel contended the subdivision (d) allegation should be dismissed, as Father had never sexually abused or been inappropriate with Miranda or Gary. The court continued the matter several days in order to "carefully [review] all of counsel's arguments and the evidence."

At the continued hearing on April 11, 2016, the court, citing *In re Quentin H.* (2014) 230 Cal.App.4th 608 (*Quentin H.*), ruled that the presumption of section 355.1, subdivision (d) had been rebutted.[7] The court concluded however, that because Father "was found to have engaged in inappropriate sexual touching of a child of approximately [the] age [of] 12 to 13 with whom he resided along with the child's mother and his own daughter, Miranda," had "not accepted responsibility for his sexual abuse" or expressed "remorse[] for his acts of sexual

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[7] Section 355.1, subdivision (d) provides that if the court finds that a parent of a child who is the subject of a petition filed under section 300 "has been previously convicted of sexual abuse as defined in Section 11165.1 of the Penal Code" that finding "shall be prima facie evidence in any proceeding that the subject minor is a person described by subdivision (a), (b), (c), or (d) of Section 300 and is at substantial risk of abuse or neglect." The presumption created by this subdivision "constitutes a presumption affecting the burden of producing evidence." (§355.1, subd. (d).) In *Quentin H.,* the court explained that a presumption affecting the burden of producing evidence requires the trier to fact to assume the existence of the presumed fact until evidence is introduced to support a finding of its nonexistence. (*Quentin H.*, *supra*, 230 Cal.App.4th at p. 614.) Once contrary evidence is introduced, the presumption has no further effect and the matter must be determined on the evidence presented. (*Id.* at p. 616.)

misconduct with a child," had "never engaged in any rehabilitative counseling to address his conviction for sexual abuse of a child," and had "refused to cooperate with CPS in San Bernardino in providing contact information for his children . . . [or] Mother," the evidence supported the finding that Father represented a danger to his children. Accordingly, the court found true that Father's "criminal history" and the "2015 substantiated allegation by Child Protective Services in San Bernardino County of inappropriate sexual touching of a minor child" "endanger[ed] the children's physical health and safety and place[d] [them] at risk of serious physical harm, damage, danger and sexual abuse."[8]

Turning to disposition, the court placed both children under the supervision of DCFS. With respect to Miranda, the court found by clear and convincing evidence pursuant to section 361, subdivision (c) that there was a substantial danger to her physical and emotional well-being if she were returned home, and that no reasonable means existed to protect her without removing her from the custody of both her parents. The court placed Gary in Father's home, finding the evidence insufficient to make a similar finding under section 361, subdivision (c) as to him. DCFS was instructed to make unannounced home visits at least once a month. Father was

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[8] The court struck an allegation under section 300, subdivision (b) (failure to protect) as factually unsupported.

ordered to participate in a sexual abuse counseling program for perpetrators and individual counseling. Father appealed.

DISCUSSION

A. *Jurisdiction*

Father contends substantial evidence does not support the court's finding that the children were at risk of sexual abuse under section 300, subdivision (d).[9] For the reasons discussed, we disagree.

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[9] Father devotes multiple pages of his brief to arguing that the presumption of section 355.1 was rebutted under the holding of *Quentin H*. As discussed, the court found the presumption rebutted. There is no issue concerning the presumption in this appeal.

Respondent contends we need not address the issues raised by Father because the juvenile court's assertion of jurisdiction would be supported by the finding sustained as to Mother, which neither party challenges, and because while the appeal was pending, Father obtained custody of Miranda. (See *In re Alexis E.* (2009) 171 Cal.App.4th 438, 451 [when dependency petition alleges multiple grounds for assertion that minor comes within dependency court's jurisdiction, reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the enumerated bases for jurisdiction is supported by substantial evidence].) Appellate courts generally exercise discretion to reach the merits of a challenge to a jurisdictional finding where, as here, it "(1) serves as the basis for dispositional orders that are also challenged on appeal [citation]; (2) could be prejudicial to the appellant[;] or [(3)] could potentially impact the current or future dependency proceedings [citations]." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763.) We elect to do so here.

Section 300 permits the juvenile court to assert jurisdiction over a child who falls within the provisions of one of its subdivisions, including a child who has been sexually abused or is at substantial risk of being sexually abused (§ 300, subd. (d)). (See *In re I.J.* (2013) 56 Cal.4th 766, 772 (*I.J.*).) DCFS has the burden of proving by a preponderance of the evidence that the child falls under one of the subdivisions of section 300. (*Id.* at p. 773.) "'In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings and disposition, we determine if substantial evidence, contradicted or uncontradicted, supports them. "In making this determination, we 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." [Citation.] "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.] "'[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate].'" [Citation.]" [Citation.]'" (*Ibid.*)

The Supreme Court's 2013 decision in *I.J.* clarified that evidence of a father's sexual abuse of his 14-year old daughter could justify the assertion of jurisdiction over his other children, including those who were younger and of the opposite gender. Observing that "section 300 does not require that a

child actually be abused or neglected before the juvenile court can assume jurisdiction," but requires only a "'substantial risk'" of abuse, the Supreme Court "assume[d] that father's other daughter is at greater risk of sexual abuse than are his sons," but that the risk to his three sons was not "nonexistent or so insubstantial that the juvenile court may not take steps to protect the sons from that risk." (*I.J., supra,* 56 Cal.4th at pp. 773, 779-780.) The court explained that "'[s]ome risks may be substantial even if they carry a low degree of probability because the magnitude of the harm is potentially great . . . [¶] . . . [¶] . . . [I]n order to determine whether a risk is substantial, the court must consider both the likelihood that harm will occur and the magnitude of the potential harm . . . .' [Citation.] In other words, the more severe the type of sibling abuse, the lower the required probability of the child's experiencing such abuse to conclude the child is at a substantial risk of abuse or neglect under section 300. If the sibling abuse is relatively minor, the court might reasonably find insubstantial a risk the child will be similarly abused; but as the abuse becomes more serious, it becomes more necessary to protect the child from even a relatively low probability of that abuse." (*Id.*, at p. 778, quoting *People v. Hall* (Colo. 2000) 999 P.2d 207, 217-218.)

The court further held that juvenile courts may consider the following factors, set forth in section 300, subdivision (j), to assist in determining the degree of risk of harm to a child whose sibling has been sexually abused: "'the circumstances surrounding the abuse or neglect of the sibling, the age and

gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child.'" (*I.J.*, *supra*, 56 Cal.4th at p. 774, quoting § 300, subd. (j).) Courts also may consider the egregiousness of the abuse and the "violation of trust" shown by sexually abusing one child "while . . . other children [are] living in the same home and could easily have learned of or even interrupted the abuse." (*Id.* at p. 778.) In other words, juvenile courts are to consider "'the totality of the circumstances of the child and his or her sibling in determining whether the child is at substantial risk of harm.'" (*Id.* at p. 774.) "[A]fter considering the nature and severity of the abuse and the other specified factors, the juvenile court is . . . to use its best judgment to determine whether or not the particular substantial risk exists." (*Id.* at p. 779.)

Although *I.J.* involved assertion of jurisdiction over siblings of the victim, while here the children were cousins and step-siblings of the victims, we believe the test set forth by the Supreme Court is equally applicable. The juvenile court followed the test in carefully considering the totality of the circumstances before concluding Miranda and Gary were at risk. The evidence established that Father had twice inappropriately touched barely pubescent girls; the more recent incident occurred approximately two years before the instant petition was filed. In both instances the victims were living in Father's household and were related to him by marriage or blood. Father had taken no responsibility for his

actions. Nor had he expressed remorse. To the contrary, he downplayed the incidents both to Mother and in his interview with the caseworker. He made no effort to obtain treatment or counseling. Miranda, at the time of the hearing, was nearing the age of the two girls when the molestations occurred, placing her directly in harm's way. In addition, as numerous courts have held, children in the same household where abuse occurs are at risk of harm from observing or interrupting the act. (See, e.g., *In re Ana C.* (2012) 204 Cal.App.4th 1317, 1332 [father's sexual abuse of 11-year old with mental disabilities on couch in living room where abuse could have been observed by other children supported "the commonsense conclusion that most every person in the family home was at risk of sexual abuse"]; *In re R.V.* (2012) 208 Cal.App.4th 837, 846-847 [upholding jurisdictional finding where boy witnessed father's abuse of older sibling and attempted to help her resist]; *In re Andy G.* (2010) 183 Cal.App.4th 1405, 1411-1415 [upholding jurisdictional finding as to son where father exposed himself to stepdaughter while the boy was in the room].) The circumstances supported the court's finding that the children were at risk.[10]

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[10] Father suggests that the court "implicitly determined Gary's risk of sexual abuse was not substantial" by allowing Gary to be placed in Father's custody. Gary was a young boy. As discussed above, the court could reasonably conclude that the risk to him was not of directly being abused, but of observing or interrupting Father in the act of abusing others in the household. By ensuring no pre-teen or teenage girls were in the household, instructing DCFS to

(*Fn. continued on next page.*)

Father contends the situation was distinguishable from *I.J.* and other similar cases because his actions were less egregious. Father's action in touching a young girl on her vagina was reprehensible by any measure. Moreover, egregious abuse often starts with less serious misbehavior. (See, e.g., *In re Jordan R.* (2012) 205 Cal.App.4th 111, 116 [father's sexual abuse of his niece began with "teach[ing] her to wrestle" and seemingly accidentally bumping her breasts and buttocks].) Further, both Michelle and Natalie reported Father's conduct to others and were removed from his presence before his behavior could escalate. (See *Los Angeles County Dept. of Children & Family Services v. Superior Court* (2013) 215 Cal.App.4th 962, 970 [observing in response to father's argument that abuse of stepdaughter occurred years earlier that "it was mother's installation of locks on the doors and taking father's key that likely stopped the abuse, not any change in father's desire for sex with preteen girls"].) The fact that Father twice inappropriately touched young girls living in his household at different periods in his life, including within the past two years, together with the other circumstances outlined by the court, was sufficient to support the court's determination that he had inappropriate feelings for young girls and could not be trusted around his own children without intervention.

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make frequent unannounced visits, and insisting that Father commence counseling and a sexual abuse program for perpetrators, the court minimized that risk.

B. *Disposition*

Father contends that if the jurisdictional finding relating to him is reversed, the dispositional order also must be reversed. As discussed above, we find no basis for reversing the court's jurisdictional finding.

Father further contends the court erred when it cited section 361, subdivision (c) in removing Miranda from his custody because Miranda was not residing with him at the time of the hearing. Father contends that the court should instead have evaluated him for placement under section 361.2.[11] Preliminarily, it appears that the dispositional order is moot because while this appeal was pending, the court placed Miranda in Father's custody. Accordingly, we can provide Father no effective relief by reversing the dispositional order.[12] Second, Father forfeited the issue by failing to object when the court stated its intent to resolve the custody issue

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[11] Section 361.2, subdivision (a), which provides that when a court orders removal of a child pursuant to section 361, it shall "determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child," and "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."

[12] Although we denied respondent's request for judicial notice of the post-appeal order, appellant does not dispute that he currently has custody of both his children.

under section 361, subdivision (c). (See *In re A.A.* (2012) 203 Cal.App.4th 597, 605-606.) Finally, any error was harmless for the reasons discussed below.

Section 361, subdivision (c) permits the court to remove a child from the physical custody of parents or guardians "with whom the child resides at the time the petition was initiated" if the court finds by clear and convincing evidence that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody." (§ 361, subd. (c)(1).) It has been consistently held that a juvenile court may not "remove" a child from a parent's physical custody under section 361, subdivision (c) unless the child was residing with that parent when the section 300 petition was initiated. (*In re Anthony Q.* (2016) 5 Cal.App.5th 336, 350 (*Anthony Q.*); *In re Julien H.* (2016) 3 Cal.App.5th 1084 (*Julien H.*); *In re Dakota J.* (2015) 242 Cal.App.4th 619, 632 (*Dakota J.*); *In re Abram L.* (2013) 219 Cal.App.4th 452, 460; *In re V.F.* (2007) 157 Cal.App.4th 962, 969.)

Father assumes he meets the definition of non-custodial parent. He disregards that he had been given full custody by DCFS shortly before the petition was filed. Moreover, as explained in *Anthony Q.*, "if parents shared physical custody of a child who lived part of the year with one of them and part of the year with the other, the juvenile court could find the child

resided with both parents . . . [,] and remove him or her from the physical custody of both if the conditions for removal under section 361, subdivision (c), were otherwise satisfied as to each parent." (*Anthony Q. supra,* 5 Cal.App.5th. at p. 352; cf. *Dakota J.*, *supra*, 242 Cal.App.4th at p. 628 [observing that "historically, the term 'resides' has been commonly used and understood to mean ""to dwell permanently or for a considerable time"""].) The evidence established that Miranda was with Father every weekend and holiday, and during the entire summer. Miranda, during her testimony, referred to "liv[ing]" in Father's home as if it were her own, and described having her own room there. The court specifically found that both Miranda and Natalie were residing with Father at the time of the 2015 incident. Accordingly, the court did not err in relying on section 361, subdivision (c) when determining custody.

Moreover, assuming Father was non-custodial, the court's reliance on section 361, subdivision (c) was, at most, harmless error for the reasons explained in *Julien H.* There, the father challenged the order limiting access to his child to monitored visitation, contending removal under section 361, subdivision (c) was inappropriate, and "no other authority grants the court the power to limit his access to his child in [an analogous] manner." (*Julien H.*, *supra,* 3 Cal.App.5th, at pp. 1089-1090.) The court disagreed: "[T]he dependency court has the power under section 361, subdivision (a) and section 362, subdivision (a) to limit the access of a parent with whom the child does not reside and thus effectively remove the child

from the noncustodial parent."[13] (*Id.* at p. 1090.) Because the father "d[id] not argue that in order to justify exercise of its power under section 361, subdivision (a) and section 362, subdivision (a), the dependency court must make a different factual finding or apply a higher standard of proof than would be required under section 361, subdivision (c)," he failed to show that the court's reliance on section 361, subdivision (c) was prejudicial. (*Julien H., supra,* at p. 1090.) Similarly, in *Anthony Q.*, the court held that the court erred by taking custody of a boy from his father under section 361, subdivision (c) when the boy was living with another relative at the time the petition was filed, but that the error was harmless in view of the "broad[] grant of authority [to the juvenile court] in section 361, subdivision (a) and 362, subdivision (a)." (*Anthony Q.*, *supra*, 5 Cal.App.5th at p. 339.) Although the juvenile court "erred in citing section 361, subdivision (c), when entering its disposition orders, those orders were authorized by the dependency statutes and justified by the court's factual findings." (*Id.* at p. 356.) Here, Father similarly challenges

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[13] Section 361, subdivision (a)(1) grants the court authority to "limit the control to be exercised over the dependent child by any parent or guardian," and applies to "any parent or guardian." Section 362, subdivision (a) authorizes the court to "make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child," once he or she is "adjudged a dependent child of the court."

the court's citation to section 361, subdivision (c), but does not suggest the court was required to make a different factual finding or apply a higher standard of proof than the one required under that provision in order to remove Miranda from his care. Accordingly, he has shown no prejudice, and any error in proceeding under section 361, subdivision (c) was harmless.

Finally, Father contends that substantial evidence did not support the court's decision to remove Miranda from his custody. To support a dispositional order removing custody from a parent, the court may consider "a broad class of relevant evidence" (*In re Y.G.* (2009) 175 Cal.App.4th 109, 116), including the parent's "past conduct" and "present circumstances." (*In re Cole C.* (2009) 174 Cal.App.4th 900, 917.) ""[T]he minor need not have been actually harmed before removal is appropriate The focus of the statute is on averting harm to the child." [Citation.]"" (*In re John M.* (2012) 212 Cal.App.4th 1117, 1126.) The court's jurisdictional findings represent prima facie evidence that the child cannot safely remain in the home. (*Ibid.*; *In re Cole C.*, *supra*, at p. 917; *In re T.V.* (2013) 217 Cal.App.4th 126, 135.) Although the juvenile court's findings must be made on clear and convincing evidence, "[o]n review, we employ the substantial evidence test, however bearing in mind the heightened burden of proof." (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) Father's two confirmed instances of inappropriate sexual behavior with pre-teen or barely teenage girls living in his household to whom he was related and towards whom he

should have had parental feelings, along with his failure to take responsibility for his actions or undergo treatment to eliminate his inappropriate behavior toward young girls, supported the court's finding that 10-year-old Miranda was at risk if allowed to reside with him.

DISPOSITION

The jurisdictional and dispositional orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.