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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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

B271121

(Los Angeles County
Super. Ct. No.DK13780)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

A.M.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Rudolph A. Diaz, Judge. Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Julia Roberson, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Father Angel M. (father) challenges a jurisdiction order relating to his daughter J.A. Father shared a home with family members involved with drugs, firearms, and violence, and he brought family members to visit J.A. The juvenile court found jurisdiction for failure to protect under Welfare and Institutions Code section 300, subdivision (b).¹ On appeal, father argues there was no evidence to support jurisdiction, because J.A. did not visit his home. However, one witness said J.A. had visited father's home, paternal family members visited J.A., and the paternal family showed some interest in seeking partial custody of J.A. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Detention

According to the detention report, the Los Angeles Police Department (LAPD) contacted the Department of Children and Family Services (DCFS) on August 28, 2015 about a home where the LAPD had been conducting surveillance relating to a double homicide. Officers stopped a car leaving the home, and found a pistol they believed to be the weapon used in the homicide. Father's sister was one of the occupants of the car, but she was not arrested. Police also had a warrant for Thomas M., father's brother, who was associated with a gang and lived in the home.

A social worker went to the home on August 28, 2015, and found a seven-bedroom house that was clean and well-organized. The home belonged to father's mother (paternal grandmother). The social worker saw children's clothing in the house; paternal grandmother said the clothing belonged to a woman who had

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

been staying there with her children, but the woman had moved out.

The social worker spoke with father, who also lived at the house. The social worker described him as “slow in thought process,” and paternal grandmother explained that father had special needs. Father said he had a daughter, J.A., who was born in August 2014. Father said that J.A. lives with her mother (mother), and “the child never comes to his house to visit, but he goes to see his daughter” at mother’s house. Father denied doing drugs and denied knowledge of any drug use in the house. Father’s father (paternal grandfather) confirmed that father had a daughter, but said that “she never comes over”; instead, father goes to visit J.A. and mother. Father agreed to take drug tests, but the detention report stated that father missed a test.

The social worker met with mother at her home on September 27, 2015. Mother also has special needs. She and father met in high school, and she got pregnant when she was 19 years old and father was 17 years old. Before she got pregnant, mother visited father’s house daily. Mother said she saw weapons in father’s house, and father’s brother Thomas had a rifle and a gun. Mother said father’s family members take their weapons with them everywhere for protection. Mother never saw father use drugs, but Thomas used them. Mother saw Thomas and father “package the drugs and sell them for [another brother] who was in prison.” Mother said she saw a digital scale in father’s bedroom, and one time when she was visiting father “the house was shot at.” Mother said, “All of this happened before I was pregnant.” Mother said J.A. is not allowed to visit father’s home because of these issues.

Mother said father and paternal grandmother come to her home for weekly visits, and “they are always bringing other family members.” Mother said one time paternal grandmother brought over a woman who looked like a gang member but said she was a social worker and she knew about the law. This purported social worker asked why mother was not allowing J.A. to visit father’s house. Mother and her mother (maternal grandmother) said that the woman had no identification showing that she was a social worker, so they did not give her any information. Mother said that father’s family is problematic, they try to intimidate her family, and mother’s family does not say anything about it because they are afraid.

J.A. was clean and well-groomed. She showed no signs of abuse or neglect. She was “crawling, getting up on the sofa and interacting appropriately with her grandparents.”

The social worker met with mother again on October 7, 2015. Mother “indicated that father has been appropriate during the visits in her home.”

On October 13, 2015, DCFS filed a juvenile dependency petition alleging that under section 300, subdivision (b), mother and father failed to protect J.A. The petition alleged that father “has a history of engaging in criminal conduct,” including “drug trafficking and packaging of drugs.” It further alleged that mother “failed to protect the child by allowing the father to have frequent unlimited access to the child.” The petition alleged that “mother and father failed to protect the child by permitting members of the child’s paternal family to have access to the child when the mother and father knew paternal members [*sic*] frequently carry firearms, there is a history of shootings, and drug sales at the paternal family’s home.” The petition also said

that “mother and father are aware that paternal family members have a history of intimidating conduct towards mother and her family.” The petition concluded that the drug trafficking and failure to protect J.A. “endanger[] the child’s physical and emotional health, safety, and well-being, and place the child at risk of serious physical harm, damage, danger and failure to protect.”

At the detention hearing on October 13, 2015, the court ordered J.A. detained, and released J.A. to mother. The court ordered father to be drug tested, and ordered monitored visitation between father and J.A.

B. Jurisdiction and disposition

The jurisdiction/disposition report dated November 16, 2015 stated that mother was interviewed on October 21, 2015. Mother confirmed the information she provided in the previous report, including Thomas’s use of drugs, seeing a scale in father’s bedroom, seeing father package drugs, and the shooting at father’s house. She confirmed that there was a shooting at father’s house, and that it happened before J.A. was born. Mother said father comes to see J.A., and she has never taken J.A. to father’s house. Paternal grandmother comes to visits and brings other people. Mother said she is afraid of father’s family.

Maternal grandmother said mother does not go to father’s house, but father and his family come visit J.A. at maternal grandmother’s house. Maternal grandmother confirmed mother’s statements about paternal grandmother bringing over a woman who claimed to be a social worker. Maternal grandmother said both mother and father have special needs, and neither is able to care for J.A. She also said that when father and paternal

grandmother visit, paternal grandmother forces father to interact with J.A., which seems to annoy father.

Maternal grandfather said mother does not visit father's home and she has not been there since before J.A.'s birth. Maternal grandfather said paternal grandmother brings father to visit J.A. Maternal grandfather also expressed concern over the fake social worker that paternal grandmother once brought to a visit, and said the woman was present at the detention hearing.

Paternal grandmother was interviewed on October 28, 2015. She said the criminal allegations against her family members were false. She said neither Thomas nor father used or sold drugs. Paternal grandmother "stated that mother would come to the home with the baby to visit and her mother was always with her. [Paternal grandmother] stated that mother stopped bringing the baby because her son did not want a relationship with mother anymore."

A last-minute information dated November 5, 2015 stated that according to paternal grandmother and father's sister, father has the mentality of an eight-year-old boy. In an interview with a social worker, father said he knew that drugs "are something you get high from," but he did not know what "getting high" meant. He said he did not use drugs. He said he played video games with guns in them, but he did not know if there were any real guns in the house. Father said he visited J.A. weekly, and that maternal grandmother monitored the visits. Father's sister said her husband still had an open criminal case against him relating to the homicide the LAPD had been investigating at or near the home.

A last-minute information dated January 12, 2016 stated that father visits J.A. regularly. It also stated, "As well intended

as father is during his visits he needs a lot of prompting during visits with the child and cannot be left alone during visits with the child.” Father’s drug tests dated November 10, 2015 and January 6, 2016 were negative.

On November 16, 2015, the date initially scheduled for the jurisdiction/disposition hearing, counsel for father asked the court to consider appointing a guardian ad litem for father. The court granted the request.

At the jurisdiction/disposition hearing on January 15, 2016, the court amended the petition to remove all allegations against mother. Allegations against father were amended to state that rather than engage in “drug trafficking,” father engaged in “drug sales.” The allegations about father’s family members carrying firearms, being engaged in drug sales, and having access to the child were unchanged. The amended petition concluded that “conduct by the child’s father places the child at substantial risk of serious physical harm.” The court admitted as evidence the October 13 detention report, the November 16 jurisdiction/disposition report, the last-minute information dated November 5, and the January 12 last-minute information.

Counsel for J.A. argued that the allegations against father were supported by mother’s report of what she saw in father’s home: “different drugs, scales in the home, they were packaging in the home.” J.A.’s counsel also pointed to mother’s statement that there was a drive-by shooting, and the LAPD’s investigation of a double homicide at the home.

Counsel for father pointed out that there was no connection between the activities at father’s home and J.A. The only contact between father and J.A. was at mother’s home. Father’s counsel argued, “[A]ll of the interviews corroborate mother’s statement,

that she has not been to the paternal relatives' home since sometime during her pregnancy." Also, all interviews showed that father's behavior with the child during visits was appropriate. Father's counsel argued there was no connection between father's living situation or family and any alleged risk of harm to the child. There was no indication that father knew his family carried firearms, and "there's simply no indication that any firearms were ever placed around" J.A. Father never attempted to bring weapons into mother's home. While there were allegations that father's brother Thomas carried weapons and sold drugs, nothing in the record indicated that Thomas ever visited J.A. In addition, father never had attempted to bring J.A. to the paternal family home. In the one instance that paternal grandmother brought a questionable woman to a visit, mother's family showed that they were able to protect J.A.

Counsel for DCFS pointed to the record where paternal grandmother said mother used to bring the baby to visit father's house. He continued, "So the child was at the paternal family's home and that home clearly presents a substantial risk. Two people were murdered there. The gun that was involved was found at the home. Drug sales were going on. Law enforcement indicated that it was a known residence for drug sales." DCFS counsel also noted mother's observations regarding drugs and guns in the home.

The court found that "father's residence is an inappropriate place for this child to be in." The court cited the murders, the drive-by shooting, the drug and gang activity, and said, "This child needs to be protected and I can't think of any other way to address protecting this child but to sustain the petition and ensure that this child is never at this location."

Father's counsel said, "My client has never disturbed the arrangement that the child is at the mother's home." The court replied, "But he can, counsel." Father's counsel said there was no indication father intended to do so, and if there was such an indication, mother could move for a court order. The court said, "Well, but he can. If he has a right to custody, he can do that. And if you're saying to wait until something happens then she can go to family law court, and I'm trying to avoid that necessity. And I think that's father's position: Nothing's happened yet. The point is I don't think father is willing or able to protect his child at this point. . . . He lives there and he doesn't have the means to move out and be on his own, from what I've seen, and I don't want to wait until tragedy occurs."

The court sustained the allegations as amended, and deemed J.A. a dependent of the court. Proceeding to disposition, the court found "by clear and convincing evidence pursuant to section 361(c), that there is a substantial danger if he child were returned home There are no reasonable means by which the child's physical health can be protected without removing the child from father's custody."

The court ordered J.A. into mother's custody, J.A. to not visit father's home, father and mother to participate in parenting classes, and father to be drug tested. Father's counsel said that there were no allegations that father used drugs, and father's previous tests were negative. J.A.'s counsel said that paternal grandmother said father used marijuana; father's counsel correctly pointed out that those statements related to Thomas, not father. The court said that father would be required to continue drug testing and "if he continues to test clean, then only on-demand testing after that." The court also ordered father to

participate in parenting classes. The court ordered monitored visitation with father, and neither mother nor paternal grandmother were to be the monitor.

Father timely appealed.

STANDARD OF REVIEW

Father argues that the court's order was not supported by substantial evidence of a current risk of harm to J.A. "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.]" (*In re I.J.* (2013) 56 Cal.4th 766, 773.)

DISCUSSION

A. Jurisdiction

Jurisdiction under subdivision (b) is warranted where "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to

adequately supervise or protect the child.” (§ 300, subd. (b)(1).) A jurisdictional finding under section 300, subdivision (b) requires “(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) ‘serious physical harm or illness’ to the minor, or a ‘substantial risk’ of such harm or illness.” (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) “The third element . . . effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future (e.g., evidence showing a substantial risk that past physical harm will reoccur).” (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1396.)

Father argues that substantial evidence does not support the juvenile court’s ruling because “[father] did not live with [J.A.], only had contact with her through weekly supervised visits and was not mentally capable of removing the child from mother’s care. He, therefore, posed no risk of current or imminent future harm to the child.” DCFS disagrees, arguing that father’s home was inappropriate for a child, and paternal grandmother “threatened the maternal family” and used a pretend social worker to assert that father’s family should have partial custody of J.A.

The parties do not dispute that father’s home was an inappropriate place for a child. The evidence largely suggested that J.A. did not visit father at his home. Paternal grandmother said mother used to bring the baby to visit the paternal home, but that she no longer did.

The more concerning evidence, however, was that father, through paternal grandmother and the purported social worker, asserted a right to partial jurisdiction to J.A. As the court recognized at the hearing, without any custody order in place,

father was free to assert his custody rights at any time: “If he has a right to custody, he can do that.” Moreover, mother and the maternal grandparents said that father’s family intimidated them because they were gang members, tended to carry firearms, and brought various family members to visits. The evidence offers no suggestion that father, who had developmental disabilities and was unable to live on his own, was in a position to protect J.A.’s best interests if it conflicted with the interests of his family.

The court’s jurisdictional finding was therefore supported by substantial evidence. The legislatively declared purpose of section 300 and related statutes “is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm.” (§ 300.2, italics added.) Thus, “the court need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child.” (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1383.) Father himself was appropriate during visits with J.A., but his living situation, J.A.’s tender age, father’s family’s attempted assertion of custody through a fake social worker, and father’s family’s intimidation of mother’s family supports the court’s finding that jurisdiction was appropriate to ensure J.A.’s well-being. The jurisdiction order is therefore affirmed.

B. Disposition

Father contends that the juvenile court erred as a matter of law when it ordered at disposition that J.A. be removed from father’s custody under section 361, subdivision (c). DCFS does

not disagree,² but argues that the court's orders restricting physical custody and visitation were appropriate under sections 361, subdivision (a) and 362, subdivision (a). DCFS asks that we remand so the court can clarify the basis of its order. This is an issue of law, which we review de novo. (*In re J.F.* (2011) 196 Cal.App.4th 321, 329.)

Father is correct that "Section 361, subdivision (c), authorizes a child's removal '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.' (§ 361, subd. (c), italics added.)" (*In re Dakota J.* (2015) 242 Cal.App.4th 619, 628.) Therefore, "the statute does not contemplate that a child could be removed from a parent who is not living with the child at the relevant time." (*Ibid.*) The court's reliance on section 361, subdivision (c) was therefore erroneous.

Inappropriate reliance upon that statute, however, may be deemed harmless error where the court otherwise has the authority to enter orders limiting parental control over a child. As both father and DCFS acknowledge, "the 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

² DCFS argues that father forfeited his claim by failing to object in the juvenile court. "However, application of the forfeiture rule is not automatic. [Citation.]" (*In re Nickolas T.* (2013) 217 Cal.App.4th 1492, 1501.) Where the facts are undisputed and the effect of those facts is a question of law, we may exercise our discretion to address the issue. (*Ibid.*) We do so here.

noncustodial parent.”³ (*In re Julien H.* (2016) 3 Cal.App.5th 1084, 1090.) Indeed, “section 361, subdivision (c), is not the source of the juvenile court’s statutory authority to make orders concerning the care and custody of a dependent child, but a limitation on that power when the child actually resides with the custodial parent.” (*In re Anthony Q.* (2016) 5 Cal.App.5th 336, 353.) Where there is clear and convincing evidence supporting a finding of danger to the child if the parent were to exercise the right to physical custody, and no reasonable means exists to protect the child without suspending the parent’s custody rights, “the citation to the incorrect statute [is] harmless error.” (*Id.* at p. 354.)

Here, the court found clear and convincing evidence that J.A. would be in danger of physical custody were provided to father, and that reasonable efforts had been made to eliminate the need for removal of custody. The court was therefore authorized to make the orders it did, even though it cited an inapplicable statute.

Father argues that the erroneous citation is prejudicial because it is the first step in a progression that may lead to

³ Section 361, subdivision (a)(1) states in part, “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 dependent child by any parent or guardian and shall by its order clearly and specifically set forth all those limitations.” Section 362, subdivision (a) states, “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.”

termination of parental rights. As the court found in *In re Anthony Q.*, however, this does not necessarily render the error prejudicial. Where the court has made the appropriate findings and therefore has authority to enter orders to protect a dependent child from a substantial risk of harm, “[i]t certainly does not demonstrate prejudice to the parent if the court refers to the wrong statute when otherwise properly exercising that authority.” (*In re Anthony Q.*, *supra*, 5 Cal.App.5th at p. 355.)

The court’s orders relating to custody and visitation were fully justified by the court’s factual findings concerning father’s living situation, his family, and his ability to care for J.A. The court’s citation to the incorrect statute when making these orders at disposition was harmless.

DISPOSITION

The court’s jurisdiction and disposition orders are affirmed.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.