Filed 9/6/17 In re Ryan P. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 RYAN P., a Person Coming Under the Juvenile Court Law.	B277429 (Los Angeles County Super. Ct. No. DK16129)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RYAN P., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Benjamin R. Campos, Commissioner. Reversed.

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

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

Ryan P., Sr. (Father) appeals from a dispositional order of the juvenile court, declining to place his son, Ryan P., Jr. (Ryan) with paternal relatives and declining to order reunification services for Father. Father contends the juvenile court erred in failing to make the findings required under Welfare and Institutions Code sections 361, subdivision (c), and 361.2.[1] He further contends that the court's finding under section 361.2 was not supported by substantial evidence. In the alternative, he contends that the court erred in denying him reunification services under section 361.5. We conclude that the juvenile court's finding under section 361.2 is not supported by clear and convincing evidence and therefore reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Mother has three children: one with Father (Ryan), and two with Johnny T. The three children lived with Mother and Johnny T. at the time dependency proceedings began. This appeal concerns only Father and Ryan.

Initial Dependency Petition

Mother and Johnny T. came to the attention of the Los Angeles County Department of Children and Family Services (DCFS) in February 2016, based on allegations of general neglect and emotional abuse. DCFS filed a section 300 petition, alleging that the three

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

children came within the meaning of subdivisions (b) and (j) due to Mother's and Johnny T.'s history of drug use and abuse of marijuana (counts b-1 and b-2), and due to sibling abuse of a different child of Johnny T.'s, who had been a dependent of the juvenile court (count j-1). Father's whereabouts were unknown. He had been incarcerated since Ryan was an infant and was still in prison at the time the petition was filed.

On February 17, 2016, Ryan reported witnessing domestic violence between Mother and Johnny T. Ryan also reported seeing Mother and Johnny T. smoke marijuana. Mother admitted smoking marijuana to help with her depression. Mother told the DCFS caseworker she did not have contact with Father, who was imprisoned for attempted murder.

The court ordered the children detained from Mother. They were placed with "non relative extended family members," Adela and John R. (See § 362.7.) The court found Father to be Ryan's presumed father and set a jurisdiction hearing for May 5, 2016.

Amended Petition and Jurisdictional Hearing

DCFS filed an amended petition adding two allegations: count b-3, alleging Mother's mental and emotional problems rendered her incapable of caring for the children; and count b-4, alleging Father's criminal conviction and nine-year prison term placed Ryan at risk of physical harm, damage and danger.

According to the May 5, 2016 jurisdiction/disposition report, Ryan (age 5 at the time) told the DCFS investigator that he did not like his

current placement with Adela and John R. because he did not get to play soccer there. He stated that Johnny T. was mean to him sometimes. When asked to say something about Mother, Ryan stated that Mother played movies for him. He reported that Mother and Johnny T. smoked marijuana and argued, and he described Mother's use of a "pipe" to smoke marijuana.

Ryan stated that he missed Father and was excited that Father would be out of prison soon. He was allowed to visit Father when his grandmother was given permission to take him.

Mother told the investigator that she had used marijuana since she was nine years old but that she had stopped at the time of the report because she was pregnant with a third child with Johnny T. She reported that she met Johnny T. in 2012 and that he had used marijuana and methamphetamine since she first met him. Mother said that she would end her relationship with Johnny T. if necessary to regain custody of her children. Johnny T. was in jail at the time of the report, but Mother did not know why.

Mother believed that Father was incarcerated for nine years for assault. She stated that Father's mother (Paternal Grandmother) took Ryan to visit Father as often as possible, which was approximately once a month, and that Father regularly called Ryan and wrote him letters. She had no concerns about Father and stated that she would agree to joint custody after Father was released from prison.

Father reported that he and Mother were living together during Mother's pregnancy but that he had gone to prison when Ryan was an infant. He had spoken with Mother repeatedly about not wanting

Johnny T. around Ryan because of Johnny T.'s methamphetamine use. Father never reported his concerns about Johnny T. to DCFS because he did not want Ryan placed in foster care. Father wanted Ryan to be placed with his (Father's) sister because Ryan was not happy in his current situation.

Father explained that he was incarcerated because he shot at a friend of Mother's who had threatened him. His expected release date was November 2018. While in prison, he participated in sports, took college courses, and stayed "out of trouble." He stated that he was very close to Ryan, calling him and writing to him often.

Paternal Grandmother reported that she took Ryan to visit Father at least once a month. She said that Ryan and Father had a "'wonderful relationship.'"

DCFS did not recommend that the children be released to the parents because Mother continued to test positive for marijuana and both fathers were incarcerated. DCFS recommended that no reunification services be provided to Father because he had been convicted of a violent felony and reunification services would not be in Ryan's best interest. (§ 361.5, subds. (b)(12), (e).)

At the May 5, 2016 jurisdiction hearing, Father, through counsel, asked that Ryan be placed with Father's relatives, who were present at the hearing. Counsel for DCFS, Mother, and the children opposed moving Ryan away from his siblings. The court ordered that Ryan have monitored visits with Father "as frequently as can be arranged," and at least once a month, and to "access all appropriate relatives to transport Ryan to visits with Father." The court further ordered DCFS to assess

"all appropriate paternal relatives of Ryan" for possible placement.[2] The hearing was continued.

At a July 20, 2016 hearing, the court dismissed count b-4, the only allegation regarding Father, such that Father was a nonoffending parent.[3] Counsel for Father argued that under section 361.2, Father was allowed to make an appropriate plan for Ryan because, although incarcerated, Father was a noncustodial, nonoffending parent. Father asked that Ryan be placed with his sister, who was currently being assessed, or with his father, who was present at the hearing.

Counsel for the children opposed the plan for Ryan to reside with paternal relatives, citing the sibling relationship, but did not oppose regular visitation with Father and paternal relatives. She noted that Ryan was very close to Father and believed regular visitation would be to Ryan's benefit. Counsel for DCFS also asked that the children remain placed together and asked for no reunification services for Father.

The court found that it was unlikely Father would be able to reunify with Ryan "given the length of his sentence," and denied his request for placement with paternal relatives. The court stated that

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[2] In a June 2016 Last Minute Information for the Court, DCFS indicated that it was assessing paternal relatives of Ryan, but there is no indication in the record that this assessment was ever completed or what the results were, if completed.

[3] Mother and Johnny T. pled no contest to an amended petition, which dismissed count b-3 (alleging Mother's mental problems) and count j-1 (alleging sibling abuse by Johnny T.).

placing Ryan with paternal relatives would be detrimental to his sibling bonds. The court ordered the children suitably placed. The court did not offer Father reunification services under section 361.5, subdivisions (b)(12) and (e)(1), but ordered DCFS to set up a visitation schedule with Ryan for Father and paternal relatives. Father appealed from all orders and findings of the juvenile court.

DISCUSSION

Father challenges the juvenile court's order on several grounds. First, he contends the court erred in failing to follow *In re Isayah C.* (2004) 118 Cal.App.4th 684 (*Isayah C.*) and section 361, subdivision (c). Father also contends the court erred in refusing to place Ryan with paternal relatives pursuant to section 361.2. Finally, Father contends the court erred in denying reunification services under section 361.5. Section 361, subdivision (c) does not apply because Ryan was not in Father's custody at the time the dependency proceedings began. However, we agree that the finding under section 361.2 is not supported by substantial evidence and therefore reverse the order denying Father's request.

"'[I]n dependency proceedings the burden of proof is substantially greater at the dispositional phase than it is at the jurisdictional phase if the minor is to be removed from his or her home. [Citations.] [¶] This heightened burden of proof is appropriate in light of the constitutionally protected rights of parents to the care, custody and management of the children. [Citation.] [¶] '"Parenting is a fundamental right, and accordingly, is disturbed only in extreme cases of persons acting in a

fashion incompatible with parenthood.' [Citation.] 'In furtherance of these principles, the courts have imposed a standard of *clear and convincing* proof of parental inability to provide proper care for the child and resulting detriment to the child if it remains with the parent, before custody can be awarded to a nonparent.' [Citation.]" [Citation.]' [Citation.] [¶] We review the record in the light most favorable to the trial court's order to determine whether there is substantial evidence from which a reasonable trier of fact could make the necessary findings *based on the clear and convincing evidence standard*. [Citation.]" (*Isayah C.*, *supra*, 118 Cal.App.4th at pp. 694-695.)

I. *Section 361*

Section 361 provides, in pertinent part: "A dependent child shall not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence of any of the following circumstances listed in paragraphs (1) to (5), . . . [¶] (5) . . . a parent who has been incarcerated or institutionalized cannot arrange for the care of the minor . . . ." (§ 361, subd. (c).) Father contends the juvenile court failed to address whether he could arrange for the care of Ryan within the meaning of this provision. However, we conclude that section 361 does not apply here.

Section 361, subdivision (c) "governs the removal of children from the physical custody of a parent or guardian 'with whom the child resides at the time the petition was initiated.' (§ 361, subd. (c)(1).)" (*In*

re Andrew S. (2016) 2 Cal.App.5th 536, 544.) Father argues that section 361 applies to him because Ryan lived with him prior to his incarceration and that, because no custody proceedings had been initiated prior to his incarceration, he still had legal custody of Ryan despite his incarceration.

Father contends that his situation is similar to that found in *Isayah C.*, *supra*, 118 Cal.App.4th 684. There, at the time the petition was filed, the child was residing with the mother, but the father had been awarded joint legal custody of him. The child was removed from the mother and placed in the father's custody, but the father subsequently was arrested for a parole violation. The juvenile court denied the father's request that he be allowed to retain custody of his son and send him to be cared for by paternal relatives during his incarceration. Instead, the court ordered the child placed with the mother's sister. The appellate court reversed, stating that "[t]he cases addressing removal by reason of a custodial parent's incarceration, under section 300, subdivision (g) (section 300(g)) have held that '[t]here is no "Go to jail, lose your child" rule in California. [Citation.]' [Citation.] If an incarcerated parent can make suitable arrangements for a child's care during his or her incarceration, 'the juvenile court ha[s] no basis to take jurisdiction in th[e] case, and [the social services agency] simply ha[s] no say in the matter. [Citation.]' [Citation.]" (*Id.* at p. 696.) The appellate court also reversed the detriment finding under section 361.2 because of the juvenile court's "impermissible consideration of [the father's] incarceration." (*Id.* at p. 701.)

Father contends that, similar to *Isayah C.*, he had joint custody of Ryan prior to his incarceration. In *Isayah C.*, the appellate court found that section 361, subdivision (c) applied because, although the child was residing with the mother when the petition was filed, the father had been awarded joint legal custody of him. (*Isayah C.*, *supra*, 118 Cal.App.4th at p. 695.) The court further reasoned that "between the filing of the petition and [the father's] arrest, [the father] had physical custody of Isayah for two weeks, and no allegations under section 300 were ever established as to [the father], whom the Department expressly conceded was a nonoffending parent." (*Ibid.*)

We disagree with Father's interpretation of the statute.[4] Section 361, subdivision (c) clearly states that it applies to a parent or guardian "with whom the child resides at the time the petition was initiated." (§ 361, subd. (c).) (See *In re Julien H.* (2016) 3 Cal.App.5th 1084, 1089 [holding that the dependency court "could not remove [the child] from Father's physical custody under section 361, subdivision (c)(1) because [the child] was not residing with him when the petition was initiated,"

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[4] We note that the circumstances in *Isayah C.* were different from those found here. At the detention hearing in *Isayah C.*, the juvenile court detained the child in the care of the father, who was absent from the hearing because he had taken the child to the emergency room. The father's home was inspected for the jurisdictional report, but before the jurisdictional hearing, the father was arrested because of false accusations by the mother. Here, by contrast, Father had been incarcerated since Ryan was an infant. Even assuming without deciding that Father is correct that the lack of any prior proceedings meant he "was entitled to equal custody" of Ryan, we cannot say that Ryan was in Father's physical custody and residing with Father for purposes of section 361, subdivision (c).

and that, "as a matter of law, section 361, subdivision (c) did not apply"].) The juvenile court accordingly did not err in declining to apply section 361, subdivision (c).

II. *Section 361.2*

A. *Relevant Proceedings*

At the hearing on Father's motion, counsel for the minors acknowledged Father's "loving relationship" with Ryan, but argued that placing Ryan with Father would be detrimental to Ryan for purposes of section 361.2 because of Ryan's relationships with his siblings. After hearing argument from counsel, the court stated: "[T]he sibling bonds, while in and of themselves are not the exclusive factor which the court can render a decision [*sic*], I think it's clear to say that Father has done significant steps towards trying to better himself and better his situation, and [Father's] family . . . clearly has an interest in the child." The court then discussed the importance of family in general, likening family to a tree. The court concluded that "with a strong root, with a strong foundation, the child can be – can go anywhere and can succeed. And that's what this court is concerned about." The court then stated: "The court also has to make a factual finding based on the evidence that it's not likely that [Father] is going to be able to reunify with his child given the length of his sentence, and that this, in essence, would be a pass through provision." The court found the cases cited by Father's counsel "distinguishable because, here, we have a custodial parent with siblings. So, it's not just one factor. It's the cumulative effect of the factors as outlined by [counsel for DCFS and counsel for the minors]

that give the court deep pause. [¶] I find that it would be pretty much a legal fiction to just turn the child over to the relatives. I really don't care that the adults may have some – harbor some bitterness because I'm also not going to cut off the relationship between the grandparents and the auntie. I think that's equally important. [¶] However, at this point, based on my analysis of the case law presented, the facts as alleged in the various reports, the argument of counsel, the court is going to respectfully deny [Father's] motion." The court cited sections 361.5, subdivision (e) and 361.5, subdivision (b)(12), concluding that "[t]his is difficult, extremely difficult."

At the end of the hearing, counsel for DCFS asked, "by denying [Father's] request, the court is making a detriment finding?" The court replied that it was, stating that Ryan's "sibling bonds would be destroyed by virtue of the plan proposed by [Father's counsel]."[5]

B. *Analysis*

"'"A parent's right to care, custody and management of a child is a fundamental liberty interest protected by the federal Constitution that will not be disturbed except in extreme cases where a parent acts in a manner incompatible with parenthood." [Citation.]' [Citation.] A nonoffending parent has a constitutionally protected interest in assuming physical custody of his or her dependent child which may not be disturbed "'in the absence of clear and convincing evidence that the

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[5] The minute order does not cite section 361.2 nor indicate that any finding of detriment was made under that statute.

parent's choices will be 'detrimental to the safety, protection, or physical or emotional well-being of the child.'" [Citation.]" (*In re C.M.* (2014) 232 Cal.App.4th 1394, 1400 (*C.M.*).)

Section 361.2, subdivision (a) provides: "When a court orders removal of a child pursuant to Section 361, the court shall first 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. If that parent requests custody, 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).)

"The statute 'evinces the legislative preference for placement with the noncustodial parent when safe for the child. [Citation.]' [Citation.] It requires placement with a noncustodial, nonoffending parent who requests custody 'unless the placement would be detrimental to the child.' [Citation.] [¶] To comport with due process, the detriment finding must be made under the clear and convincing evidence standard. [Citations.] Clear and convincing evidence requires 'a high probability, such that the evidence is so clear as to leave no substantial doubt. [Citation.]' [Citations.]" (*C.M.*, *supra*, 232 Cal.App.4th at p. 1401.) "The nonoffending parent does not have to prove lack of detriment. Rather, the party opposing placement with a nonoffending parent has the burden to show by clear and convincing evidence that the child will be harmed if the nonoffending parent is given custody. [Citation.]" (*Id.* at p. 1402.)

"'[T]he trial court's decision at the dispositional stage is critical to all further proceedings. Should the court fail to place the child with the noncustodial parent, the stage is set for the court to ultimately terminate parental rights.'" (*C.M.*, *supra*, 232 Cal.App.4th at p. 1401.) The importance of the dispositional stage is reflected in the case law, which consistently requires a showing of detriment by clear and convincing evidence under section 361.2. A review of the case law and the record shows that the detriment finding here is not supported by substantial evidence. Accordingly, we reverse.

In *In re John M.* (2006) 141 Cal.App.4th 1564, the noncustodial father appealed the juvenile court's dispositional order denying his request that his 13-year-old child be placed with him in Tennessee. The juvenile court found detriment under section 361.2, subdivision (a) based on the child's wishes, his need for special needs services, his relationship with his half-sister and other members of his extended family, his lack of a relationship with his father, the paucity of information about the father, and the mother's reunification plan. On appeal, the court reasoned that, although the child "was entitled to have his wishes considered, he was not entitled to decide where he would be placed. [Citation.]" (*Id.* at p. 1570.) The court further reasoned that there was little evidence concerning the sibling relationship and that the father was willing to facilitate sibling visitation. (*Ibid.*) The court found no support for a finding that moving to Tennessee "'would have a devastating emotional impact'" on the child or that a move away from his extended family would be detrimental to him or prevent the mother from reunifying. (*Ibid.*) The court thus

found that the finding of detriment was not supported by clear and convincing evidence. (*Id.* at p. 1571.)

In *C.M.*, DCFS cited the following evidence to support a detriment finding: "C.M. wanted to remain with maternal grandparents; she wanted to visit but did not want to live with father; she did not want to be separated from [her half sibling] or change schools; father worked long hours and was often away from home, as a result of which C.M. would often be in the care of her stepmother; although he was nonoffending, father had a history of alcohol abuse (as reported by mother) and domestic violence (one 1994 conviction and a dismissed misdemeanor arrest)." (*C.M.*, *supra*, 232 Cal.App.4th at p. 1402.) The appellate court concluded that the juvenile court's finding of detriment under section 361.2 was not supported by clear and convincing evidence. (*Ibid.*) The court reasoned that, "[w]hile the child's wishes, sibling bonds and the child's relationship with the noncustodial parent may be considered by the juvenile court in determining whether placement of a dependent child with a noncustodial, nonoffending parent would be detrimental to the child's physical or emotional well-being, none of these factors is determinative. [Citations.]" (*Ibid.*; see also *In re K.B.* (2015) 239 Cal.App.4th 972, 980-981 (*K.B.*) [child's relationship with his maternal family and lack of contact with his noncustodial father, as well as the father's marital issues and lack of a job not sufficient bases for finding detriment]; *In re Abram L.* (2013) 219 Cal.App.4th 452, 460-461 (*Abram L.*) [rejecting DCFS arguments that noncustodial father's relationship with his girlfriend and his lack of

involvement with the children constituted detriment]; *In re Patrick S.* (2013) 218 Cal.App.4th 1254, 1262 (*Patrick S.*) [juvenile court's finding of detriment not supported by substantial evidence where circumstances cited by the juvenile court included the child's "wishes, his anxiety about moving to his father's home [in Washington State], his need for continued therapeutic services, the lack of an established relationship with his father and stepmother, [the father's] scheduled [naval] deployments and his plan to homeschool [the child], and the lack of available child welfare services in father's home state"; *Isayah C.*, *supra*, 118 Cal.App.4th at p. 700 [sibling relationship and move from Redding to Marin not sufficient to constitute detriment].)

DCFS relies on *In re Luke M.* (2003) 107 Cal.App.4th 1412 (*Luke M.*), to argue that "sibling bonds could be considered when determining detriment pursuant to section 361.2, subdivision (a)." In *Luke M.*, however, there was substantial evidence of an "extremely strong bond" among the siblings. (*Id.* at p. 1417.) The social worker testified that the children "had repeatedly asked not to be separated" and "depended upon each other for support, love, and security." (*Id.* at p. 1418.) She testified that the children cried every time the possibility of separation was discussed and emphasized that "from the inception of the case, all the children have asked of her is not to be separated from each other." (*Ibid.*) She also testified that it would be detrimental to place two of the siblings in Ohio with the father because they were very bonded with the other two siblings, who were staying in California. (*Id.* at p. 1426.) The appellate court thus affirmed the order placing the children with

maternal relatives rather than with the father in Ohio, citing the trial court's comment about the "'depth'" of one child's reaction to the prospect of being separated from his siblings and the finding that "these siblings' bond helped them survive and was much closer than in normal sibling relationships." (*Id.* at p. 1427.)

The appellate court in *C.M.* distinguished *Luke M.*, noting that "the evidence of detriment from separating [the siblings] was nowhere near as strong as that in *Luke M.* First, [the child] was not being moved halfway across the country, as were the children in *Luke M.* Second, there was no evidence that the bond between [the siblings] was any greater than the normal sibling bond." (*C.M.*, *supra*, 232 Cal.App.4th at p. 1404; see also *Isayah C.*, *supra*, 118 Cal.App.4th at p. 700 [finding the evidence of detriment "nowhere near as strong as it was in *Luke M.*" where there was no evidence of the strength of the sibling bond, the distance between Redding and Marin was not as great as that between San Diego and Ohio, and the paternal relatives were willing to facilitate sibling visitation].)

There is much less evidence here of detriment than in the cases that found insufficient evidence of detriment. The juvenile court's detriment finding was based on Ryan's relationship with his siblings. This is not sufficient to support a finding of detriment, particularly where, as here, there is no evidence that the bond between Ryan and his siblings "was any greater than the normal sibling bond." (*C.M.*, *supra*, 232 Cal.App.4th at p. 1404.) This case is unlike *Luke M.*, where

there was substantial evidence of the sibling bond and the detriment the potential separation posed to the children.

DCFS contends that Father "was not a safe parent, did not have sound judgment, and had not acted in a protective capacity." To support its argument that placing Ryan with paternal relatives would be detrimental to him, DCFS points to Father's criminal background and incarceration, and his failure to act on his concerns regarding Johnny T. However, these arguments are based on facts and circumstances that arose prior to DCFS involvement and that were not necessarily present at the time of the dispositional hearing. (Compare *In re S.O.* (2002) 103 Cal.App.4th 453, 461 ["'[T]he question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm.'"].) Moreover, as stated above, the court's detriment finding was based on Ryan's relationship with his siblings.

DCFS contends that the court could have inferred that moving Ryan would result in less contact between Mother and Ryan. This speculation, however, does not constitute "clear and convincing evidence of emotional detriment, that is, '"evidence . . . so clear as to leave no substantial doubt."' [Citation.]" (*K.B.*, *supra*, 239 Cal.App.4th at p. 981.) Furthermore, we cannot make implied findings for purposes of section 361.2. (*Abram L.*, *supra*, 219 Cal.App.4th at p. 463.) Nor has DCFS provided any evidence that paternal relatives would not facilitate visitation between the siblings. (See *C.M.*, *supra*, 232 Cal.App.4th at p. 1404 [finding insufficient evidence of detriment under § 361.2 where,

"there was nothing to suggest [the father] would not foster an ongoing relationship between siblings"].)

The record does not support DCFS' contention that Ryan wanted to live with Mother instead of Father. Instead, the citations provided by DCFS indicate that, when Ryan was asked "what he wants to happen," he replied that he wanted Mother to "move back in." Ryan's desire for Mother to return to the home where he was living with non-related caregivers does not indicate a preference to live with Mother rather than Father.

DCFS also relies extensively on Father's incarceration and offense to support the juvenile court's order. However, "'[t]here is no "Go to jail, lose your child" rule in California. [Citation.]' [Citation.]" (*Maggie S. v. Superior Court* (2013) 220 Cal.App.4th 662, 672.) "Section 361.2, subdivision (a) does not automatically exclude from consideration for placement a noncustodial parent who has a history of incarceration, institutionalization or prior involvement with child dependency proceedings. Instead, it directs the court to place the child with the parent unless placement would be detrimental to the child." (*In re Nickolas T.* (2013) 217 Cal.App.4th 1492, 1504; see also *Isayah C.*, *supra*, 118 Cal.App.4th at p. 700 [finding the father's incarceration not sufficient to show detriment, citing "the case law holding that the juvenile dependency system has no jurisdiction to intervene when an incarcerated parent delegates the care of his or her child to a suitable caretaker"]; *In re V.F.* (2007) 157 Cal.App.4th 962, 973, undermined in part on other grounds as stated in *In re Adrianna P.* (2008) 166

Cal.App.4th 44 ["The mere fact a noncustodial parent is incarcerated does not relieve the court of its obligation to determine whether the incarcerated parent is seeking custody of the child and, if so, whether placement with that parent would be detrimental to the child" under § 361.2].)

DCFS also faults Father for failing to "present the court with a plan." However, the juvenile court here ordered DCFS to assess paternal relatives for placement, and there is nothing in the record to indicate that they were found unsuitable. Under section 361.2, "'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.' [Citation.] . . . It is the burden of the party or parties opposed to such placement to prove detriment by 'clear and convincing evidence.' [Citation.]" (*K.B.*, *supra*, 239 Cal.App.4th at p. 979.)

"Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt. [Citation.]" (*Patrick S.*, *supra*, 218 Cal.App.4th at p. 1262.) DCFS has not met its burden of proving by clear and convincing evidence that placing Ryan with paternal relatives would cause emotional detriment to Ryan for purposes of section 361.2. We therefore reverse the order denying Father's motion and remand for the juvenile court to hold a

new hearing on the issue of placement under section 361.2.[6] (See *id.* at p. 1265 [reversing the detriment finding and remanding for a new dispositional hearing].) On remand, the court may consider new evidence or circumstances that have arisen during the pendency of this appeal. (*Id.* at pp. 1265-1266; *C.M.*, *supra*, 232 Cal.App.4th at pp. 1404–1405.)

DISPOSITION

The order of the court denying Father's request to place his son with paternal relatives and denying him reunification services is reversed and the matter remanded.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J. COLLINS, J.

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[6] In light of our reversal of the court's denial of Father's request for custody, we do not address Father's contention that the juvenile court erred in denying him reunification services under section 361.5. On remand, when the court reconsiders Father's custody request, the court may reconsider his request for reunification services.