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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re M.G., a Person Coming
Under the Juvenile Court Law.

B291347
(Los Angeles County
Super. Ct. No. DK23619A)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

JOSEPH G.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Nancy Ramirez, Judge. Reversed.

Elizabeth C. Alexander, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Navid Nakhjavani, Principal Deputy County Counsel, for Plaintiff and Respondent.

Father challenges the juvenile court's jurisdictional and dispositional orders concerning his 15-year-old daughter, M.G. Father contends substantial evidence did not support the juvenile court's findings. We agree and reverse.

BACKGROUND

The Los Angeles County Department of Children and Family Services (DCFS) filed a petition alleging M.G. was sexually abused by her stepfather and that her mother knew of the abuse and failed to protect M.G. and her half siblings.¹ (Welf. & Inst. Code, subds. (b)(1), (d), & (j).)

Mother and father separated in 2003 or 2004, sharing joint legal custody of M.G. M.G. resided primarily with mother and was supposed to visit father, who was living in Washington, during school breaks. After the separation, father did not see M.G. often due to his disability and because M.G. did not want to visit him. He would call M.G. multiple times per week, but she was always curt with him. Consequently, M.G. had not seen her father in years.

After father learned about the allegations against stepfather and mother, father said he would like to obtain custody of M.G. Nevertheless, he respected M.G.'s desire to remain with her mother and recognized the disruption to her community and family ties that would result from a change in custody at her age. Father indicated that M.G.'s needs should be

¹ Mother and stepfather are not parties to this appeal.

prioritized. However, after his initial statement to DCFS, father told DCFS that he wanted physical custody of M.G. and that he did not care if she wanted to live with him. This statement notwithstanding, father never requested physical custody of M.G. from the court.

DCFS discovered that father had a history of alcoholism that included a series of convictions for driving under the influence, most recently in 2016. Father admitted he was in treatment for alcohol abuse.

After interviewing father, DCFS amended the petition to add several counts against father. Count b-3 alleged father had a history of substance abuse and was a current user of alcohol, amphetamine, marijuana, and opiates. Count b-4 alleged father failed to establish a strong bond with M.G. Count b-5 alleged father had a history of unaddressed mental and emotional problems. Count g-1 alleged father was unable to provide M.G. with the basic necessities of life. The juvenile court detained M.G. from father.

At adjudication, the juvenile court dismissed counts b-4, b-5, and g-1. It also struck the allegation that father was a current user of amphetamine, marijuana, and opiates. However, the juvenile court sustained count b-3 as amended, alleging that father had a history of substance abuse and was a current user of alcohol which placed M.G. at risk of harm.

At disposition, over father's objection, the juvenile court declared M.G. a dependent and removed custody from father. The juvenile court then ordered father to participate in a full drug and alcohol program with aftercare, weekly random or on demand testing and a 12-step program.

Father timely appealed. While his appeal was pending, the juvenile court terminated jurisdiction and granted mother and father joint legal custody of M.G. while mother retained physical custody.

DISCUSSION

I. Father's appeal is not moot

Before turning to the merits of father's appeal, we must address DCFS's argument that the issues presented are nonjusticiable and moot. "Juvenile dependency appeals raise unique mootness concerns because the parties have multiple opportunities to appeal orders even as the proceedings in the juvenile court proceed." (*In re N.S.* (2016) 245 Cal.App.4th 53, 59.) In this case, since father's timely appeal, the juvenile court has terminated jurisdiction and restored the status quo with father sharing joint legal custody over M.G and mother having sole physical custody. Father contends, however, that the finding against him creates the possibility of prejudice in subsequent family law proceedings. As no family proceedings are now pending, the contention is speculative. However, because dismissal of the appeal affirms the underlying order, we consider the merits of father's appeal. (See *In re C.C.* (2009) 172 Cal.App.4th 1481, 1488–1489.)

II. There was no nexus between father's substance abuse and risk of harm to M.G.

Turning to the merits, father contends that the evidence was insufficient to support the juvenile court's finding that M.G.

was at substantial risk of harm due to father's substance abuse. We agree.

We review the juvenile court's jurisdictional findings for sufficiency of the evidence. We determine whether there is any substantial evidence to support the juvenile court's conclusions, and we resolve all conflicts and make all reasonable inferences from the evidence to uphold the juvenile court's orders, if possible. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 763.)

Section 300, subdivision (b) permits the juvenile court to assert jurisdiction over a child if there is a substantial risk that the child will suffer serious physical harm or illness as a result of a parent's inability to provide regular care for the child due to the parent's substance abuse. A jurisdictional finding under this subdivision requires that the parent's substance abuse has caused serious physical harm or places the child at substantial risk of incurring serious physical harm. (*In re Drake M.*, *supra*, 211 Cal.App.4th at p. 769.)

It is undisputed that M.G. was never harmed as a result of father's alcohol abuse. Nevertheless, DCFS, relying on father's history of convictions for driving under the influence, argues that father's alcohol abuse created a future risk of harm. According to DCFS, although there is no immediate risk of harm to M.G., had father obtained custody of her, she would have been placed at substantial risk of harm.

This scenario is highly speculative if not impossible under the facts of this case. M.G.'s parents separated when she was three to four years old. While M.G.'s mother and father shared legal custody, father had very limited contact with M.G. and had not seen her in years. At the time of the petition, M.G. was living with mother and had no desire to move in with father. Despite

father's desire to have physical custody of M.G., he respected M.G.'s wishes to remain with mother. And, beyond a single phone call to DCFS, there is no evidence that father followed through with any request for custody. As such, there is no substantial evidence that father's alcohol abuse placed M.G. at a substantial risk of harm.

Moreover, DCFS's contention that, if not for the juvenile court's findings against father, M.G. would end up in his custody is incorrect. Welfare and Institutions Code section 361.2, subdivision (a) provides that when a court orders removal of a child, "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." In other words, the statute creates a preference for placement with a noncustodial parent, but only when that placement would not be detrimental to the child. (*In re C.M.* (2014) 232 Cal.App.4th 1394, 1401.) Section 361.2 therefore provides a tool to prevent future placement with father should the elements of that statute be satisfied. Because M.G. was already adjudged a dependent as a result of stepfather's sexual abuse and mother's failure to protect her, the juvenile court retained the discretion to deny father's request for physical custody.

DISPOSITION

The order is reversed.

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DHANIDINA, J.

We concur:

EDMON, P. J.

LAVIN, J.