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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re GEORGE R., A Person Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

JOHN R.,

Defendant and Appellant.

B238467

(Los Angeles County
Super. Ct. No. CK89138)

APPEAL from an order of the Superior Court of Los Angeles County.
Stephen Marpet, Commissioner. Reversed and remanded with directions.

Eva E. Chick, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, Melinda White-Svec, Deputy County Counsel, for Plaintiff and Respondent.

Appellant John R. (Father) appeals (1) the juvenile court's order asserting jurisdiction over his seven-year old son, (2) its dispositional order, which allowed Father monitored visitation only; and (3) its custody and visitation order, which granted sole legal and physical custody to the boy's mother, Noemi L., and stated that Father's visitation rights were to be as "determined by the parents." We conclude the jurisdictional and dispositional orders are supported by substantial evidence, but that the custody and visitation order delegated too much discretion to Mother. In addition, the custody and visitation order contains language indicating Father had been ordered to attend parenting classes and counseling that does not comport with the court's statements on the record. Accordingly, we remand for the custody and visitation order to be clarified.

FACTUAL AND PROCEDURAL BACKGROUND

A. Detention

On July 27, 2011, at approximately 4:30 p.m., deputies responding to a report of a person in a vehicle with a gun stopped a car containing Father and three other men. Inside the vehicle, deputies found a knife, a sledge hammer, a mallet and metal pipes. One of Father's companions told the deputies he had been called by Father, who reported being "hit-up" by rival gang members and asked for assistance. That man rounded up two others and they went to Father's residence to pick him up. The four men had been driving around looking for the rival gang members when they were stopped. Interviewed by the deputies, Father admitted that his companions had come to his residence at his request to help him go after rival gang members, and that they were looking for the rival gang members when

they spotted the deputies' car and pulled into his apartment complex's parking lot. Father, a parolee, was arrested and taken into custody.¹

Father informed deputies that seven-year old George was in his apartment alone. The deputies located George, took him into protective custody and called the Department of Children and Family Services (DCFS).²

Interviewed by the DCFS caseworker, George reported that he and Father had been out walking, when Father stated they were being followed. They returned to the paternal grandmother's apartment, where they lived. Once there, Father telephoned some friends and asked them to come to his residence as quickly as possible. Before leaving, Father told George he had to go "kick some ass" and "fight some guys." George stated he had been "scared" and "concerned that [Father] could be hurt" or "sent back to jail."

Mother reported that she and father were legally married, but had separated months earlier. Father had been in prison through much of the marriage and their attempt to resume their relationship after his release had been unsuccessful. Mother was unaware of Father's ever having placed George in jeopardy. Father was interviewed by the caseworker and denied any intention to engage in gang combat. He stated that when he and his companions were stopped by the deputies, he had just gone to the entrance of the apartment complex's parking lot to open the gate to let his friends drive in.

¹ Father was on parole after serving time for robbery. He was ultimately charged with violating parole by associating with gang members and remained in custody throughout the proceedings. He was expected to be released after 10 to 12 months.

² George was subsequently detained with Mother. Mother is not a party to this appeal.

B. Jurisdiction/Disposition/Exit Order

Interviewed for the jurisdictional/dispositional report, George reiterated that he had been told by Father they were being followed and that, on returning to the apartment, Father had called friends for assistance. George added further details, stating that Father had left the apartment carrying his “work hammer” and had told George that his friend had a “cowboy gun.”³ George further reported that when Father left the apartment, he asked a neighbor, an older woman George did not know, to check on the boy.⁴ George also reported that “after a while,” the paternal grandmother returned home. George stated that during his visits with Father, they generally engaged in enjoyable activities, such as flying kites and playing video games, and that this was the only time Father had left him alone.

Interviewed for the second time, Mother reported that she had been regularly leaving George with Father for visits since Father’s release from prison. She had been given no reason to be concerned about Father’s behavior and had observed no evidence of misconduct on Father’s part. She was aware that Father had been arrested several months earlier, apparently on a weapons charge, but as he had been immediately released, she concluded it was not serious. The caseworker also reinterviewed Father. He repeated that he had left the apartment to open the security gate for his friends. He stated he had just gotten into their car when they were stopped by deputies. He reported that he had left the apartment door open when he left so he could hear George, and said he had been joking when he told George he was going out to “kick some ass.”

³ George stated he had never seen the gun. Deputies did not locate a gun when they searched Father, his companions and their vehicle; however, Father told deputies he thought his friends were going to bring a gun.

⁴ We note that Father made no such claim in any of his interviews.

The paternal grandmother said Father had called her earlier in the day, when she was out picking something up to eat, and stated that gang members were bothering him. Upon returning to the apartment, the grandmother was accosted by four gang members. After dropping off the food, she and her daughter went out again to look for a new place to live. They returned after receiving a call that Father had been arrested and arrived when the deputies and George were still on the scene.

As Mother was non-offending and appeared unaware of Father's activities, DCFS recommended that the court sustain the allegation of the petition (see below) and terminate jurisdiction after granting custody to Mother and monitored visitation for Father. Counsel for the minor joined in that recommendation.

At the November 18, 2011 jurisdictional/dispositional hearing, counsel for Father argued that the evidence did not support a finding of risk to George because Father's conduct represented an isolated incident, and nothing suggested anything similar would happen in the future. The court disagreed that Father's leaving George alone should be viewed as a one-time incident, and stated that Father's attitude and his activities on the day in question led the court to believe it could happen again. The court sustained the following allegation, finding that it supported jurisdiction under section 300, subdivision (b): "On 07-27-11, [Father] placed [George] in a detrimental and endangering situation by leaving the child home alone without adult supervision for an extended period of time [and] was arrested for a parole violation. The detrimental and endangering situation created for the child by [F]ather and [Father's] failure to provide adult supervision for the child endangers the child's physical and emotional health, safety and well-being and places the child at risk of physical and emotional harm, damage and danger."

The court ordered jurisdiction terminated, but stayed the order to allow Mother's counsel to prepare an exit order granting sole physical and legal custody

to Mother.⁵ The court stated that the order should include a directive that Father's visits be monitored by a monitor approved by Mother. Neither at the hearing nor in the minute order issued on the date of the jurisdictional/dispositional hearing did the court indicate that Father was to participate in parenting classes or counseling. The exit order prepared by counsel on Judicial Council form JV-200 (rev. July 1, 2007) stated that Father had the right to supervised visitation "to be determined by the parents" after Father was released from custody, and that the monitor was to be "[a]ny monitor approved . . . by [M]other." In the section of the order entitled "reasons for no or supervised visitation," boxes were checked indicating that monitored visitation was required because Father had not completed "court-ordered" parenting classes and individual counseling to address child protection. On November 22, the court reviewed the proposed order at a hearing at which counsel were present. The court stated: "Sole legal, physical [custody] to Mother, just like I have in the order. [¶] Father's visits to be monitored by a monitor approved of by Mother after Father is released from custody. [¶] We'll close the case." The court issued a minute order terminating jurisdiction and stating: "See submitted family law order giving [Mother] sole physical and legal custody of the child."

⁵ As explained in *In re John W.* (1996) 41 Cal.App.4th 961, custody and visitation orders issued when the court terminates dependency jurisdiction under Welfare and Institutions Code section 362.4 and transfers jurisdiction over custody matters to family law court are often referred to as "exit" orders. (*In re John W.*, *supra*, at p. 970, fn. 13.) Some courts also refer to them as "family law" orders. (See *In re Chantal S.* (1996) 13 Cal.4th 196, 202.) We use the term "exit" order as shorthand for the custody and visitation order the court ultimately issued under section 362.4. Undesignated statutory references herein are to the Welfare and Institutions Code.

DISCUSSION

A. *Jurisdiction*

Father contends the court's finding that assertion of jurisdiction was warranted under section 300, subdivision (b) was not supported by substantial evidence. Section 300, subdivision (b) provides that a child comes within the jurisdiction of the juvenile court 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, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left" DCFS bears the burden of proving by a preponderance of the evidence that the minor comes under the juvenile court's jurisdiction. (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 185; *In re Shelley J.* (1998) 68 Cal.App.4th 322, 329.) On appeal from a jurisdictional order, "we must uphold the court's findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings." (*In re Veronica G.*, *supra*, 157 Cal.App.4th at p. 185.)

A true finding under subdivision (b) of section 300 requires proof of: "(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." (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1396.) In other words, "[t]he basic question under section 300 is whether circumstances at the time of the hearing

subject the minor to the defined risk of harm.” (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022.)⁶

Appellant contends the necessary showing could not be made because there was only a single instance of misconduct on his part. “The nature and circumstances of a single incident of harmful or potentially harmful conduct may be sufficient, in a particular case, to establish current risk depending upon present circumstances.” (*In re J.N.*, *supra*, 181 Cal.App.4th at p. 1026.) In evaluating current risk based upon a single episode of misconduct, “a juvenile court should consider the nature of the conduct and all surrounding circumstances. It should also consider the present circumstances, which might include, among other things, evidence of the parent’s current understanding of and attitude toward the past conduct that endangered a child, or participation in educational programs, or other steps taken, by the parent to address the problematic conduct in the interim, and probationary support and supervision already being provided through the criminal courts that would help a parent avoid a recurrence of such an incident.” (*Id.* at pp. 1025-1026.)

Here, the nature of the conduct and the surrounding circumstances support the court’s determination. Father exhibited extremely poor judgment in leaving his seven-year old son alone, without appropriate provision for his care, while he went out to engage in senseless criminal activity. The evidence established he and George had arrived safely at home when Father chose to immediately leave to seek

⁶ The majority of courts -- including this one -- have concluded that a court cannot exercise dependency jurisdiction where the evidence shows a lack of current risk. (*In re J.N.*, *supra*, 181 Cal.App.4th 1010; *In re Savannah M.*, *supra*, 131 Cal.App.4th 1387; *In re Carlos T.* (2009) 174 Cal.App.4th 795, 805; *In re J.O.* (2009) 178 Cal.App.4th 139, 152; but see *In re J.K.* (2009) 174 Cal.App.4th 1426, 1434 [holding that subdivisions (a), (b) and (d) of section 300 “are satisfied by a showing that the minor has suffered prior serious physical harm or abuse,” italics omitted].)

out rival gang members who had followed them earlier. Even had Father and his companions not been injured or arrested, Father would not have returned home for a significant period of time, leaving George exposed to the dangers inherent in being a young child without adult supervision. As it turned out, Father was arrested and detained. Father expects plaudits for immediately informing deputies of George's situation. But if Father had been killed or injured in a way that rendered him unable to communicate, George would have been left alone and unprotected until the grandmother and aunt returned, which might not have occurred for many hours.⁷ When confronted with his wrongdoing, Father expressed neither understanding of the seriousness of his conduct nor remorse for engaging in it. Instead, he fabricated a story about having just left the apartment for the sole purpose of escorting his friends inside the security gate. Under these circumstances, the court's conclusion that the single incident justified assertion of jurisdiction, and that Father was likely to put George at risk if his contact with the boy was not restricted was fully supported.

B. Disposition/Exit Order

After finding that a child is a person described in section 300 and therefore the proper subject of dependency jurisdiction, the court must determine "the proper disposition to be made of the child." (§ 358, subd. (a).) Section 364 governs situations such as the present one, in which "an order is made placing a child under the supervision of the juvenile court pursuant to Section 300 and . . . the child is not removed from the physical custody of his or her parent or guardian . . ."

⁷ Father suggests that he had reason to believe the paternal grandmother would return shortly. This was contradicted by the grandmother, who stated that after she and Father discussed the gang presence in the area, she and her daughter had gone out to look for a new place to live, an errand that was likely to occupy a considerable period of time. She returned earlier than scheduled because she heard that Father had been arrested.

(§ 364, subd. (a).)⁸ After a finding that grounds exist to support assertion of jurisdiction but that detention from the custodial parent is not required, a juvenile court has discretion under section 364 to provide reunification services to either or both parents -- or it may “bypass the provision of services and terminate jurisdiction.” (*In re Gabriel L.* (2009) 172 Cal.App.4th 644, 650-651; see also *In re Pedro Z.* (2010) 190 Cal.App.4th 12, 20.) The court has “broad discretion” to determine which of these options would “serve the child’s best interests” (*In re Gabriel L., supra*, 172 Cal.App.4th at p. 652) after consideration of “the totality of the child’s circumstances.” (*In re Alexandria M.* (2007) 156 Cal.App.4th 1088, 1095.) “The reviewing court will not reverse the court’s order in the absence of a clear abuse of discretion. [Citation.]” (*In re Gabriel L., supra*, at p. 652.)

“When the juvenile court terminates its jurisdiction over a dependent child, section 362.4 authorizes it to make custody and visitation orders that will be transferred to an existing family court file” (*In re Roger S.* (1992) 4 Cal.App.4th 25, 30.) “Such orders become part of any family court proceeding concerning the same child and will remain in effect until they are terminated or modified by the family court. [Citation.]” (*In re T.H.* (2010) 190 Cal.App.4th 1119, 1123.) An exit order issued under section 362.4 “shall not be modified [in family court] unless the court finds that there has been a significant change of circumstances since the juvenile court issued the order and modification of the order is in the best interests of the child.” (§ 302, subd. (d).) Custody decisions of

⁸ (See § 361, subd. (c)(1) “[A dependent child may not be taken from the physical custody of his or her parents . . . with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence [¶] [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 . . . physical custody.”].)

the juvenile court differ from family law court custody determinations in that the presumption that joint custody is in the best interest of the minor does not apply in juvenile court. (*In re Jennifer R.* (1993) 14 Cal.App.4th 704, 712.) Nor does the presumption of parental fitness that underlies custody disputes in the family court. (*Ibid.*) “Rather[,] the juvenile court . . . make[s] custody determinations based on the best interests of the child without any preferences or presumptions.” (*Ibid.*; accord, *In re John W.*, *supra*, 41 Cal.App.4th at p. 972.) Custody decisions of the juvenile court are reviewed under the abuse of discretion standard. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

Father challenges the court’s decision to give sole legal and physical custody of George to Mother and order monitored visitation for him, again arguing that it was based on “an isolated incident” that was “unlikely to re-occur” and that “it is highly unlikely that [F]ather would ever put George into any sort of danger.” Support for an order removing custody from a parent or restricting a parent’s visitation does not require proof of actual harm to the child by the parent; the standard is substantial risk or danger of harm. (*In re Marriage of Birdsall* (1988) 197 Cal.App.3d 1024, 1030; see *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1656-1658.) In determining the need for such an order, “the court may consider the parent’s past conduct as well as present circumstances.” (*In re Cole C.* (2009) 174 Cal.App.4th 900, 917; see also *In re Y.G.* (2009) 175 Cal.App.4th 109, 116 [juvenile court may “consider a broad class of relevant evidence in deciding whether a child is at substantial risk from a parent’s failure or inability to adequately protect or supervise the child”].) The court found that Father posed a danger if allowed unrestricted access to George because he failed to appreciate the young boy’s need for appropriate supervision and was willing to leave him unattended for an indefinite period of time. This supported the court’s decision to vest custody with Mother and allow Father monitored visitation only.

Father further contends that the court improperly delegated the power to determine the extent of visitation to Mother, and left Mother with the power to obstruct visitation from taking place. The court's order stated that visitation was to be "determined by parents" after Father's release from custody. Similar language was found to constitute an improper delegation of authority over visitation in *In re T.H.*, *supra*, 190 Cal.App.4th 1119, where the court stated: "The power to determine the right and extent of visitation by a noncustodial parent in a dependency case resides with the court and may not be delegated to nonjudicial officials or private parties. [Citation.] This rule of nondelegation applies to exit orders issued when dependency jurisdiction is terminated. [Citation.] ¶ A visitation order may delegate to a third party the responsibility for managing the details of visits, including their time, place and manner. [Citation.] [But] 'the ultimate supervision and control over this discretion must remain with the court' . . . [¶] Here, the visitation order provided that supervised visitation would occur, but only upon the 'agreement of the parents.' As the custodial parent of the children, mother could conceivably agree to only one visit a year or less without violating the letter of the court's order. This is more than simply a delegation of the authority to set the 'time, place and manner' of the visitation -- it effectively delegates to mother the power to determine whether visitation will occur at all." (190 Cal.App.4th at p. 1123, quoting *In re Julie M.* (1999) 69 Cal.App.4th 41, 51.)

The order here suffers from the same deficiency. By providing no outline for the general scope of visitation, the court left too much to Mother's discretion. The court's order could properly leave the details -- time and place -- to the parents, but should have set forth a certain minimum number of hours per week or month for visitation to occur. Father also points out that the exit order prepared by counsel and approved by the court indicated that he had been ordered to participate in parenting classes and counseling, but the record reflects no such order was made

by the court in determining appropriate disposition. On remand, the exit order should be corrected so that it is consistent with the court's intended ruling. As the family's circumstances may have changed while this appeal was pending, the court may consider any relevant evidence proffered by the parties in formulating the new exit order. (See *In re T.H.*, *supra*, 190 Cal.App.4th at p. 1124; *In re Ryan K.* (2012) 207 Cal.App.4th 591, 599.)

DISPOSITION

The exit order is reversed. The matter is remanded for the court to clarify Father's visitation rights as set forth above.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.