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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re BABY BOY H.,

a Person Coming Under the Juvenile  
Court Law.

B238533

(Los Angeles County  
Super. Ct. No. CK82834)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

ALEXIS G.,

Defendant and Appellant;

BABY BOY H.,

Appellant.

APPEALS from orders of the Superior Court of Los Angeles County, Elizabeth Kim, Juvenile Court Referee. Reversed, vacated and remanded with directions.

Nancy O. Flores, under appointment by the Court of Appeal, for Defendant and Appellant Alexis G.

Karen J. Dodd, under appointment by the Court of Appeal, for Appellant Baby Boy H.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Alexis G. and his son, Baby Boy H., appeal from the jurisdictional findings and disposition orders made on December 12, 2011, by the juvenile court pursuant to Welfare and Institutions Code<sup>1</sup> sections 300 and 361. We reverse the jurisdictional order, vacate the dispositional order and remand with directions.

## FACTUAL AND PROCEDURAL BACKGROUND

Baby Boy H. (Baby Boy) came to the attention of the Department of Children and Family Services (DCFS) through a referral alleging general neglect in October 2011, when Baby Boy was born. A children's social worker (CSW) interviewed his mother at the hospital.<sup>2</sup> She told the CSW that she was incarcerated for felony corporal punishment of three of her other children.

In the November 2, 2011 detention report, DCFS reported further that the three other children had been declared dependents of the court under section 300, subdivisions (a), (b) and (j) in July 2010 and removed from the mother's home. They were receiving permanent placement services at the time of Baby Boy's birth. The

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Baby Boy's mother is not a party to this appeal. We include factual and procedural background about her which is relevant to Father's appeal.

mother also told the CSW that she had a prior child dependency history in another state. She said she had a daughter, born in 2005, who had been adopted, and a son, born in 2003, who was in foster care in that state. She stated that two of the three children who were the subject of the July 2010 dependency proceedings were in the legal custody of the maternal grandmother until she passed away in 2009. The mother said that she then moved the two children with her to California.<sup>3</sup>

At the hospital, the mother identified Alexis G. (Father) as Baby Boy's father and her boyfriend for over a year. She told the CSW that Father was unable to care for Baby Boy and requested that his sister, Olga F., take guardianship over Baby Boy.

According to the DCFS detention report, a CSW interviewed Father when he came to visit Baby Boy at the hospital. Father was Spanish-speaking and the CSW used a purported "extended family member," Erick D., to translate. According to the CSW, Father was unsure whether Baby Boy was his child, in that he and the mother had been together "on and off." The CSW reported that Father was at first reticent about caring for Baby Boy and stated that he had not planned to be a father and did not make very much money. He requested a DNA paternity test. According to the CSW, Father wanted Olga F. to care for Baby Boy and he would give her money. The CSW reported that Father and Olga F. consider themselves siblings, but they were not biologically related.

The CSW reported that the mother submitted to a criminal background check, which showed the mother's extensive criminal history. Her history included child abandonment, arrests for assault on a peace officer, possession with intent to distribute marijuana, criminal mischief, resisting arrest, and importing a controlled substance. She served a term in federal prison and was no longer on probation. In 2010, the mother was incarcerated in Orange County for forging checks.

On November 2, 2011, DCFS filed a petition against the mother and Father. The petition alleged eight counts against the mother pursuant to section 300, subdivisions (a),

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<sup>3</sup> Father was unrelated to the mother's other children and had not been involved in the July 2010 proceedings.

(b) and (j), based upon the mother's physical abuse of her other children and an allegation regarding the mother's mental condition and illicit drug use. The petition included one count against Father pursuant to section 300, subdivision (b), alleging that Father refused and was unwilling to provide appropriate care or supervision for Baby Boy.

In an addendum report, DCFS indicated that Father contacted the CSW on the same day the petition was filed, stating that the allegation was not true and that he wanted to care for his son. Father also stated that Olga F. would care for the child when he was at work.

That same day, Father filed a parentage form stating that Baby Boy was his child and he understood his duty to provide support for the child. Father requested that the juvenile court grant him presumed parent status.

At the November 2 detention hearing, the juvenile court made no paternity findings. The court detained Baby Boy and ordered a supplemental report regarding placement with a relative or with siblings. Father denied the allegations against him. DCFS placed Baby Boy in foster care.

At the mother's arraignment hearing on November 7, the juvenile court found Father to be Baby Boy's presumed father, in response to the request from Father's attorney. Father did not attend the hearing. In response to DCFS's request to have Baby Boy placed with one of his siblings in foster care when space became available, the court ordered DCFS to look into the matter and submit a report.

For the November 7 hearing, DCFS submitted a supplemental report. The CSW reported that Father and the mother wanted Baby Boy placed with Olga F., but he could not be placed with her. The CSW explained that investigation showed Olga F. had a prior DCFS history of a substantiated physical abuse allegation in 1998 and an inconclusive physical abuse allegation in 2006. The criminal history investigation showed Olga F. was arrested on an immigration warrant in 2000 and for a domestic dispute in 1998. Olga F. told the CSW that she was released from the domestic dispute arrest because it was self-defense after her ex-husband assaulted her. She also said that she had never been convicted of anything and has since become a United States citizen.

In DCFS's November 18, 2011 jurisdiction and disposition report, the CSW stated that on the previous day, November 17, she attempted to contact Father, but he did not answer and did not respond to her voicemail message. Based upon Father's request for a paternity test, DCFS requested the court to order the test. The foster parents reported that Father visited Baby Boy on November 9, and the visit went well.

At the November 22, 2011 progress review hearing, Father appeared. His attorney stated that Father was seeking custody and asked that DCFS be ordered to assess Father's home. The juvenile court ordered DCFS to investigate Father's home for appropriateness of releasing Baby Boy to Father and submit a report. In response to Father's attorney's request, the court granted Father visitation for at least three hours a week. The court set the matter for adjudication.

In the December 5, 2011 last minute information for the court, DCFS reported that CSWs went to Father's home on November 28. He lived in one bedroom of a three-bedroom, two-bath home. In his room, Father had a bassinet, a car seat and a bouncy chair for Baby Boy. The kitchen and living space were clean. Two families lived in the other bedrooms. When a CSW told Father everyone in the household would need to be fingerprinted, he said he would ask them and if no one would agree, he would consider moving. As of December 5, the CSW had not been contacted by Father and, without CLETS<sup>4</sup> reports and clearances for the other persons in the house, DCFS could not proceed. DCFS recommended unmonitored visits for Father in Baby Boy's placement location, with discretion for DCFS to liberalize to allow unmonitored visits outside of the location.

Father was present at the December 5 hearing. The court found that a home inspection of Father's home had not been conducted, ordered DCFS to complete the inspection, and trailed the matter to December 6. Father had moved to a new home. A

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<sup>4</sup> CLETS is the acronym for California Law Enforcement Telecommunications System, a system containing criminal history information.

CSW telephoned on December 5 and left messages for Father to call in order to schedule an inspection, but as of December 6, Father had not contacted the CSW.

Father was present at the December 6 hearing. The court trailed the matter for completion of an inspection of Father's home and ordered DCFS to submit a supplemental report on Father's daycare plan and live scan results of the residents of Father's home. The court noted that the DCFS reported that Father did not contact the CSW to set up an appointment for inspection of his new home. Father told the court that, on December 5, he had waited at the court to have DCFS set an appointment and had given his new address and telephone number to the court officer, but he had not received any calls from DCFS. Father stated that he called Lupe, a Spanish-speaking CSW that he had dealt with in the past, but Lupe said she was not the right CSW and knew nothing about coming to his home. The mother told the court that Lupe was the CSW who translated when Father contacted DCFS.

On December 12, 2011, the juvenile court held a contested jurisdiction hearing. According to a last minute information for the court dated December 8, the CSW inspected Father's new home on December 7. Father resided with an adult couple and their three-year-old son. The couple did not have a California identification card. Father rented a room in the home. He had a play pen, car seat, a bouncer and baby clothes. The home was clean and tidy.

According to the DCFS report, the CSW also spoke with the babysitter Father identified, Edith Z. She stated that she had a California license, but would have to speak to Father regarding payment before she agreed to live scan. She also stated that she had given Father the wrong birth date because she wanted to speak with the CSW first. According to the CSW, Edith Z. was not a licensed day care provider. The CSW did not know of all the persons living in her home and all of them would have to be live scanned prior to DCFS's approval of her to provide daycare for Baby Boy. The CSW submitted CLETS requests for Father, Edith Z., and the adult couple, but no results had been received as of the time of the report.

Father testified. He stated that he was the father of Baby Boy. He did not have a California driver's license, but got around by bus and rides from his friend. He generally worked Monday through Friday, 40 hours a week, but sometimes he worked six days a week or he would have a weekday off. Father testified that the couple he lived with had never been arrested and he had known the husband four years. He stated that "Effie Sambrano (phonetic)" was going to care for Baby Boy while he was at work. He had known her about four years and, to his knowledge, none of the persons living in her home had ever been arrested. Father testified that he could afford to have Baby Boy placed with him and that he was willing and able to provide the necessities of life to his child. He visited with Baby Boy four times prior to the hearing.

The DCFS attorney asked Father if the mother would be moving in with him if she was released from custody. Father stated: "Yes. We are thinking about it." When asked if he knew what the mother was in custody for, Father said: "Supposedly because she hit her children." The DCFS attorney asked, "if she gets out of jail, you are okay with her moving in with you?" Father answered: "I am."

When questioned by the attorney for Baby Boy and his own attorney, Father testified that, if the court ordered that the mother could not reside in his home, he would comply with the order. He further testified that he would be okay with DCFS making unannounced visits to check if things were going well with Baby Boy or to check if the mother was living in his home after she was released.

CSW Sonia DeMoss testified that she was the DCFS investigator assigned to Baby Boy's case. She was aware Father had two visits with the child and had requested another visit. She testified that Father had stated to her that he was willing to take care of Baby Boy. She gave her opinion that if there were a risk to Baby Boy's well-being if returned to Father, one risk would be that initially, in the detention report, Father had said he was not the father and he did not have enough funds to provide for the child. She testified that she was not the CSW who interviewed Father for the detention report. The CSW stated that another concern was that Father had indicated that if the mother were released, he and the mother would be together. She testified that she also had concerns

about the fact that there were no live scan results for the adult couple Father lived with or the babysitter. The CSW stated that she had never spoken with the babysitter, that another CSW did that. CSW DeMoss said that she did not speak Spanish but took a Spanish-speaking CSW with her when she communicated with Father.

In closing argument, the attorney for Baby Boy said that the sole count against Father was not supported by substantial evidence and asked that it be dismissed. The attorney also asked that the court release Baby Boy to Father.<sup>5</sup> Father's attorney made a similar argument and request for release of Baby Boy to Father.

The juvenile court found to be true by a preponderance of the evidence the only count against Father in the petition, count b-5, amended as follows: "The child Baby Boy H[.]'s father Alexis G[.] is unable to provide appropriate care and supervision of the child. The father's inability to provide appropriate care and supervision of the child endangers the child's physical health and safety and places the child at risk of physical harm and damage."

The juvenile court found by a preponderance of the evidence that Baby Boy was a person described by section 300, subdivision (b), and declared the child a dependent of the court under subdivision (b).<sup>6</sup> The court found by clear and convincing evidence pursuant to section 361, subdivision (c), "that there is a substantial danger if this child were returned home, to the physical health, safety, protection or physical or emotional

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<sup>5</sup> The attorney for Baby Boy stated: "The father has come forward. He has now come to a number of hearings, and the court found him to be the presumed father. He has testified that he is willing and able to take care of his son. He has cooperated with the department and allowed them to come out to his home on two occasions to assess his home. He has belongings set up for his son . . . . He has come forward as soon as he could. He has had visits. He has gone to different locations to visit with his son." The attorney also argued: "The department can refer [Father] to day care. . . . [H]e has demonstrated that he is interested and able to take care of his son."

<sup>6</sup> The juvenile court made a similar finding under section 300, subdivision (j). All allegations under subdivision (j), however, were against the mother only.

well-being of the child, and there are no reasonable means by which the child's physical health can be protected without removing the child from the parents' physical custody."

The juvenile court stated that it was basing its findings as to Father on evidence that Father was given presumed father status at the very beginning of the case, the order was being made at a very early stage in the proceedings, and "he has enjoyed the highest level with respect to parentage." The court then cited several reasons for its findings. First, although the mother was in custody for conviction of a violent felony, the court stated that "it appears as if" Father would be willing to have the mother come "back to the home" after her release. The court also cited that the babysitter identified by Father admitted to lying to Father about her background information and wanted to speak with the CSW first. The court stated, "So it does not appear as if whatever arrangements that [Father] has made to provide care for this baby are appropriate, as well as whoever is to supervise this child while [Father] is at work. Again, they are not appropriate."

Further, according to the court, Father was residing with persons who had not live-scanned and the court did not have "a clean CLETS." Earlier in the proceedings, Father was residing in a different home with persons who refused to live scan "and so the father moved to this new residence." The court said, "[S]till we don't have the necessary clearances to have a young infant in this home."

The juvenile court ordered reunification services for Father and ordered that he participate in DCFS-approved parent education and individual counseling to address case issues. The court granted Father unmonitored visits in placement, monitored outside of placement and gave DCFS discretion to liberalize visitation with DCFS to provide visitation a minimum of three times per week.

## **DISCUSSION**

Father and Baby Boy challenge the juvenile court's jurisdictional and dispositional orders on the basis that the prerequisite findings by the court were not supported by substantial evidence. Father and Baby Boy also contend that disposition as to Father was

not governed by the statute the court applied, section 361. They claim the applicable statute was section 361.2 and that Baby Boy should have been placed in Father's custody and care. We agree.

### **A. Standard of Review**

When an appellant challenges the sufficiency of the evidence supporting jurisdictional or dispositional findings, we review the findings under the substantial evidence standard. (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1433; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) If substantial evidence, contradicted or uncontradicted, supports the juvenile court's findings, we must affirm the court's decision. (*In re Rocco M.*, *supra*, at p. 820.) "Substantial evidence" is "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion; it is evidence which is reasonable in nature, credible, and of solid value." (*In re J.K.*, *supra*, at p. 1433.)

We review the entire record in the light most favorable to the juvenile court's decision, resolving conflicts in favor of the decision, and drawing reasonable inferences from the evidence to uphold the court's decision. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 450-451.) We do not "reassess the credibility of witnesses or reweigh the evidence." (*In re S.C.* (2006) 138 Cal.App.4th 396, 415.) "'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.' [Citation.]" (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1394.)

### **B. Jurisdiction**

In a dependency proceeding under section 300, the juvenile court first must determine whether the child is within any of the descriptions set forth in section 300 and, therefore, is subject to the court's jurisdiction. (*In re Stephen W.* (1990) 221 Cal.App.3d 629, 645.) If the court finds jurisdiction, the second determination by the court is the appropriate disposition for the child. (*Ibid.*)

Section 300, subdivision (b), provides that a child comes within the jurisdiction of the juvenile court if the "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 . . . to adequately supervise or protect the child, . . . or by the willful or negligent failure of the parent . . . to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent . . . to provide regular care for the child due to the parent's . . . mental illness, developmental disability, or substance abuse.” In order to sustain a petition pursuant to section 300, subdivision (b), the juvenile court must find three elements: “(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.*, *supra*, 1 Cal.App.4th at p. 820; accord, *In re James R.* (2009) 176 Cal.App.4th 129, 135.) “Subdivision (b) means what it says. Before courts and agencies can exert jurisdiction under . . . subdivision (b), there must be evidence indicating that the child is exposed to a *substantial risk of serious physical harm or illness*,” and that the risk exists “*at the time of the hearing*.” (*In re Rocco M.*, *supra*, at pp. 823, 824.)

Review of the record reveals no substantial evidence that Father had engaged in any conduct, neglectful or otherwise, demonstrating that, if Father had physical custody of Baby Boy, the child would be at “substantial risk” of suffering “serious physical harm or illness,” or that such a substantial risk existed because Father was unable “to adequately supervise or protect the child,” as required to establish jurisdiction under section 300, subdivision (b). Father had no part in the circumstances which brought Baby Boy to the attention of DCFS; the referral arose from the mother’s history of, and incarceration for, abusive conduct toward her other children. There was no allegation, and the record reveals no evidence, that Father ever harmed Baby Boy or placed him at a substantial risk of harm or that Father ever neglected Baby Boy. It was never alleged and no evidence was presented that Father had a substance abuse problem or mental or physical health condition that could affect his ability to care for Baby Boy. There was no evidence that, at the time of the jurisdictional hearing, Father engaged in any conduct that

showed he was unwilling or unable to care for Baby Boy himself or to provide appropriate care for his son when Father was at work.<sup>7</sup>

A juvenile court cannot assert jurisdiction over a child pursuant to section 300 where there is no evidence of abuse or neglect by a parent asserting his right to custody of his child. (*In re V.M.* (2010) 191 Cal.App.4th 245, 248.) The substantial risk of harm required for jurisdiction under section 300, subdivision (b), is risk which arises as the result of the conduct of the allegedly offending parent. (*In re V.M.*, *supra*, at p. 252.)

The evidence amply demonstrated Father's willingness and ability to provide appropriate care and supervision of Baby Boy. During the approximately six weeks from Baby Boy's detention until the time of the jurisdiction hearing, Father diligently made multiple housing arrangements and child care arrangements in order to comply with DCFS's criteria for demonstrating his willingness and ability to care for Baby Boy. As Father asserts, it is undisputed that Father was an employed adult. He visited his healthy newborn son at the hospital and during his son's placement in foster care. It was the CSW's understanding through an unofficial interpreter that, after learning of Baby Boy's birth at the hospital, Father initially expressed reservations about whether he was the biological father and whether he could financially provide for Baby Boy. Within three days, however, Father claimed to be his son's father and signed a parentage statement requesting the court to find him to be Baby Boy's presumed father. According to the CSW, Father told her that he would provide for Baby Boy. When Father learned of the "failure to protect" allegation against him in the petition, he immediately denied its

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<sup>7</sup> Father asserts that the DCFS reports received into evidence repeated the CSW's understanding that initially Father was unwilling and said he was unable to provide for Baby Boy and, thereby, fostered a possible misunderstanding that Father had held the same views throughout the proceedings to the time of the jurisdictional hearing. As Father asserts, a father's initial hesitancy based upon being unsure of his actually being a child's father is not a sufficient justification to assert jurisdiction and detain the child from the father. (See *In re Janet T.* (2001) 93 Cal.App.4th 377, 392.) The evidence shows that, very shortly after his hospital visit, Father asserted that he thought he was the father, he wanted a DNA paternity test to prove it, and he wanted to care for Baby Boy.

veracity. Father regularly attended the juvenile court proceedings related to his son and cooperated with DCFS throughout the process.

Father provided a place and furnishings for Baby Boy to live with him. It is undisputed that Father rented a room for him and Baby Boy in a residence with other families. He obtained a bassinet, a car seat and a bouncy chair for Baby Boy. The residence was clean and tidy. When other occupants of the residence declined to live scan, Father promptly moved to another family's residence where he rented a room. He had a play pen, car seat, a bouncer and baby clothes in the room. The residence was clean and tidy. Father and the other adult occupants of the new residence agreed to be live scanned. DCFS failed to complete the CLETS live scan prior to the time the juvenile court made its jurisdictional and dispositional findings.

Father made arrangements for the care of Baby Boy during the time Father would be at work. Promptly after learning of Baby Boy's birth, Father arranged with Olga F., whom he considered to be his sibling, to care for his son upon the child's release to Father. When DCFS disqualified her as a caregiver based upon its background investigation, Father promptly found another caregiver, Edith Z. DCFS failed to complete the CLETS live scan for Edith Z. prior to the time the juvenile court made its jurisdictional and dispositional findings.

The absence of CLETS results for the other occupants of his new home and for his newly arranged caregiver is not a sufficient basis for any finding that Father was unable to provide for Baby Boy. Assuring the CLETS results were available to the court was not within Father's authority or responsibility. Father had cooperated in what DCFS had asked him to do with regard to CLETS clearances. DCFS, not Father, had the authority and the responsibility to obtain the CLETS results. (§ 16504.5, subd. (a)(1); see *In re X.S.* (2010) 190 Cal.App.4th 1154, 1159, 1161.) The juvenile court had discretion to continue the hearing until the CLETS results were known and Father had the opportunity to make any other arrangements required for Baby Boy's care. The absence of the CLETS results was not evidence of any inability of Father to care for Baby Boy.

Essentially, the court found that Father *might* allow the mother to live with him and Baby Boy *if* she were released. That is far from evidence that a substantial risk of harm existed at the time of the jurisdictional hearing. (*In re Rocco M.*, *supra*, 1 Cal.App.4th at pp. 823, 824.) Any inference that the juvenile court drew that Father would have the mother living with him and Baby Boy after her release was based on speculation, not evidence. Speculation does not constitute substantial evidence which supports a finding of jurisdiction. (*In re Precious D.* (2010) 189 Cal.App.4th 1251, 1259; *In re Savannah M.*, *supra*, 131 Cal.App.4th at pp. 1393-1394.) The court mentioned Father's testimony about *thinking about* living with the mother after her release from incarceration and that he would be okay with her moving in with him *if* she were released. The court stated that "it *appears as if*" Father *would be* willing to have the mother "come back to the home" after her release. (Italics added.) The court did not mention the non-speculative testimony by Father that he would comply, if the court ordered that the mother not reside with Father. He also testified that he would agree to unannounced visits by DCFS in his home.

Notably also, there was no evidence that Father had recently resided in the same home with the mother. There was no evidence that Father had been adequately informed, through use of a qualified interpreter, about the seriousness of the charges of child abuse against the mother. His response to the question about his knowledge of the reason for the mother's incarceration indicated his lack of understanding. He testified: "*Supposedly* because she hit her children." (Italics added.) There was no evidence that the mother's release was imminent or of any possible date for her release. In sum, the evidence did not support a finding of the three necessary elements under section 300, subdivision (b): "(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.*, *supra*, 1 Cal.App.4th at p. 820.)

"One of the goals of dependency is to protect a child before the harm takes place." (*In re Cole C.* (2009) 174 Cal.App.4th 900, 918.) But there must be evidence, not mere speculation, that there is a risk of harm. Substantial evidence did not support the

requisite finding of harm or risk of harm to child attributable to Father. The sole count against Father in the petition, count b-5, must be dismissed and the jurisdictional order reversed.

### *C. Disposition*

When we reverse a juvenile court's jurisdictional finding against a parent such as Father, any subsequent dispositional order with regard to the parent must be vacated, in that the court has no jurisdiction to make a dispositional order. Further consideration is required with respect to Baby Boy, however, in that the juvenile court sustained the jurisdictional allegations against the mother. If a child comes within the court's jurisdiction based upon findings against only one parent, the child remains a dependent child of the court. (*In re X.S.*, *supra*, 190 Cal.App.4th at p.1161.) Thus, Baby Boy remained a dependent child within the jurisdiction of the juvenile court even though substantial evidence did not support sustaining the jurisdictional allegation in the petition against Father.

Where the offending parent was the custodial parent at the time of the child's detention, as was the case with the mother, the juvenile court must make dispositional findings and orders as to that offending parent pursuant to section 361. Here, however, the juvenile court made a dispositional finding under section 361, subdivision (c), as to Father that by clear and convincing evidence, "there is a substantial danger if this child were returned home, to the physical health, safety, protection or physical or emotional well-being of the child, and there are no reasonable means by which the child's physical health can be protected without removing the child from the parents' physical custody."<sup>8</sup>

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<sup>8</sup> Section 361, subdivision (c), provides: "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 of any of the following circumstances . . . :

"(1) There 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

The “substantial danger” standard expressly applies only to the child’s parent “with whom the child resides at the time the petition was initiated.” (§ 361, subd. (c).)

Arguably the finding could have applied to the mother as the custodial parent. It cannot apply with respect to Father. Father never had had physical custody of Baby Boy or resided with him.

When the juvenile court orders removal from an offending custodial parent (§ 361, subd. (c)), the statutory preference for placement, under section 361.2, subdivision (a), is with the “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 the noncustodial 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 minor.’ ([§ 361.2, subd. (a)].) If the court places the child with that parent it may either: (1) order that the parent become legal and physical custodian of the child and terminate jurisdiction; or (2) order that the parent assume custody subject to the supervision of the juvenile court with services provided to either one or both of the parents. (§ 361.2, subd. (b).) The court is specifically required to make either written or oral findings setting forth its basis for its determinations under subdivisions (a) and (b). (§ 361.2, subd. (c).)” (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1820-1821.) The standard of proof for detriment to the child is clear and convincing evidence. (*Id.* at p. 1827.) The juvenile court, however, did not make a finding against Father, by clear and convincing evidence, of “detriment.” (§ 361.2, subd. (a).) Rather, it made a finding of “substantial danger.” (§ 361, subd. (c).)

If any statutory standard and process were required with respect to placing Baby Boy in Father’s physical custody and care, even though the juvenile court had no

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protected without removing the minor from the minor’s parent’s . . . physical custody. . . . The court shall also consider, as a reasonable means to protect the minor, allowing a nonoffending parent . . . to retain physical custody as long as that parent . . . presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm.”

jurisdiction over him, the statute would be section 361.2. (*In re Marquis D.*, *supra*, 38 Cal.App.4th at p. 1820; cf. *In re Janee W.* (2006) 140 Cal.App.4th 1444, 1450-1451.) As we previously concluded, Father was Baby Boy's non-offending and non-custodial parent and had made it clear that he wanted to assume custody of Baby Boy.

As we previously noted, review of the record reveals no evidence of any neglect or harm by Father or evidence that placing Baby Boy with Father would create a risk of harm to the child. Thus, there could be no substantial evidence to support a finding, by clear and convincing evidence, either of "substantial danger" under section 361, subdivision (c), or of "detriment" under section 361.2, subdivision (a).

That is not to say that the juvenile court had no reason to be concerned whether Father would be able to provide adequate care for Baby Boy while Father was at work. Section 361.2, subdivision (b), gives the court authority, however, to make orders to resolve the problem. The court has authority to order family maintenance services or reunification services for Father. The authority includes referring Father to acceptable sources of child care for Baby Boy.

DCFS asserts that even if the court erred in using the "substantial danger" standard rather than the "detriment" standard, any such error was harmless. We disagree. "Here, the error cannot be deemed harmless because there were less drastic alternatives to removal. . . . [T]his is not an extreme case of parental abuse or neglect . . . ." (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 171-172.)

"The nature of the dependency statutory scheme from the parent's perspective was explained as follows in *In re Meranda P.* (1997) 56 Cal.App.4th 1143 . . . : 'The dependency scheme is a "remarkable system of checks and balances" [citation] designed to "preserve the parent-child relationship and to reduce the risk of erroneous fact-finding in . . . many different ways . . . ." [Citation.] Until permanency planning, the parent's interest in having a child returned to the parent is the paramount concern of the law. [Citations.]'" (*In re Precious D.*, *supra*, 189 Cal.App.4th at p. 1260.) The court's erroneous findings run afoul of Father's constitutionally protected parental rights. "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.]”” (*In re Basilio T.*, *supra*, 4 Cal.App.4th at p. 169.) Similarly, a child such as Baby Boy has fundamental rights in his family relationships. (*In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1504.) Thus, the court’s dispositional order denying Father custody of Baby Boy must be reversed and the matter must be remanded to the juvenile court for making a disposition order placing baby Boy in Father’s physical custody, with the juvenile court having discretion to make the order subject to terms as authorized by section 361.2, subdivision (b).

### **DISPOSITION**

The jurisdictional order is reversed and count b-5 of the petition is dismissed. The disposition order is vacated. The matter is remanded to the juvenile court to issue an order consistent with this opinion in accordance with section 361.2 for placement with Father unless the court finds that, in the interim, there have been such changes in Father’s ability or willingness to care for Baby Boy that placement with Father would be detrimental to the child under section 361.2, subdivision (a).

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.