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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re ADRIAN D., a Person Coming Under  
the Juvenile Court Law.

B263298  
(Los Angeles County  
Super. Ct. No. CK97517)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

HUGO G.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Emma Castro, Juvenile Court Referee. Affirmed.

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent Los Angeles County Department of Children and Family Services.

Cameryn Schmidt, under appointment by the Court of Appeal, for Respondent Adrian D.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Respondent Angel R.

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Hugo G. (father) appeals from orders transferring primary physical custody of his son, Adrian D., to Angel R. (mother) and continuing dependency jurisdiction for 90 days at a hearing under Welfare and Institutions Code section 364.<sup>1</sup> Father argues the dependency court abused its discretion when it found a change in placement was in Adrian's best interests. He also contends the court erred in continuing jurisdiction, because it did so under section 364, rather than section 366, and because the decision was not supported by substantial evidence.

Respondent Adrian<sup>2</sup> contends the placement order was within the court's discretion. He further contends father forfeited the right to challenge the order continuing jurisdiction by failing to object to the court proceeding under section 364. He also contends any error was harmless, because the order is supported by substantial evidence. Lastly, Adrian contends that a later order terminating jurisdiction renders father's appeal moot. We affirm.

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

<sup>2</sup> Counsel for the Los Angeles County Department of Children and Family Services notified this court that the Department would not be filing a respondent's brief. Mother filed a respondent's brief joining in and incorporating the arguments made by Adrian's counsel.

## STATEMENT OF FACTS AND PROCEDURE<sup>3</sup>

In early 2013, when Adrian was seven years old, the Los Angeles County Department of Children and Family Services (Department) began dependency proceedings with respect to Adrian and his two younger stepbrothers.<sup>4</sup> Based on alleged domestic violence between mother and her then-husband, Aldo C., all three children were detained from parental custody and placed with Aldo C.'s parents. On May 13, 2013, the court found the three children to be minors described by section 300, subdivision (b), sustaining an allegation of domestic violence between mother and Aldo C. The court dismissed the remaining petition allegations, including allegations relating to domestic violence between mother and father.

Mother and father had separated when Adrian was two years old, and in February 2013, Adrian told a social worker he did not know who father was. Father had a number of criminal convictions, and had not visited Adrian in the past year. At disposition, the court found substantial risk of detriment<sup>5</sup> prevented placement with either parent, and ordered monitored visits and reunification services for mother and father.

Father began visiting Adrian regularly during the next year, and by March 2014, he began having overnight weekend visits. Father completed parenting, domestic violence, and anger management classes. Mother was attending domestic violence and parenting classes and was on a waiting list for a psychological evaluation. At a March

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<sup>3</sup> “In accord with the usual rules on appeal, we state the facts in the manner most favorable to the dependency court’s order.” (*In re Janee W.* (2006) 140 Cal.App.4th 1444, 1448, fn. 1.)

<sup>4</sup> Adrian’s stepbrothers are not party to this appeal, and the court has already terminated the portion of the dependency case involving them.

<sup>5</sup> Father appealed on June 11, 2013, and the Department cross-appealed. Our opinion dated August 12, 2014, affirmed the court’s orders, reasoning that father was estopped from claiming the detriment finding was made in error because father’s counsel prompted the court to make the finding.

21, 2014 six-month review hearing, the court placed Adrian in father's custody.

During the next reporting period, mother completed her domestic violence and parenting classes, and was in substantial compliance with her individual counseling and mental health assessments. Father was compliant with court-ordered services, but had not substantially participated in conjoint therapy with Adrian as recommended by Adrian's therapist. Father first forgot to request a letter from the therapist, and later only attended two sessions of conjoint counseling, claiming his two jobs made it difficult to arrange conjoint counseling.

Adrian consistently indicated he missed mother and wanted to continue to have a relationship with her. Mother complained that father was not making Adrian available for visits. An October 2014 report noted that "[f]ather appears to be questioning his commitment to Adrian in light of his frustrations in dealing with mother." The same report quoted father as saying, "I want Adrian to live with me, but if I have to share 50% [sic] percent custody with [mother], I will have no choice and close[] the case." Father claimed to have heard that mother was prostituting herself, but would not identify the source of his information. Mother testified father would not return her phone calls, and her only way of communicating with him about visitation was through text messaging. Text messages reveal significant hostility and disrespect between mother and father.

By February 2015, Adrian was expressing a desire to live with mother. Mother was employed and living with maternal grandmother, and the Department had conducted a home inspection. The Department permitted mother to have unmonitored overnight visits on weekends beginning February 21, 2015, but due to problems in communication between mother and father, visits did not occur on the following two weekends. Nonetheless, the Department recommended that the court terminate jurisdiction, granting joint legal custody to mother and father, with father retaining primary legal custody.

On March 12, 2015, the dependency court began a review hearing under section 364. The court received several Department reports into evidence and heard testimony from mother and father. Once the hearing concluded on March 20, 2015, the court awarded mother primary physical custody of Adrian during the week, with father to have

weekend visits three times a month. The court explained that it was not terminating jurisdiction and noted that Adrian's placement with father was not pursuant to section 361.2. Father and mother had both received social services, and the court was concerned about statements made by father, including a statement that he wanted Adrian to live with him, but if he had to share custody with mother, he would have no choice but to close the case. The court went on: "I strongly believe that Adrian's strongest bond with the two parents is with . . . mother, and that is because . . . mother had custody of Adrian for most of his life except for last year. . . . [¶] . . . [¶] I intend to only continue this order for 90 days."

Father objected to the court's order changing custody and continuing dependency jurisdiction. The court responded by stating continued jurisdiction was warranted "because conditions continue to exist which justified the court taking jurisdiction pursuant to [section] 300." It also found that placing Adrian with mother would not create a substantial risk of detriment, and described the factual basis for its finding as "child's close bond to his mother, the child's desire . . . to return to the custody of his mother, the mother's compliance with the case plan, and the mother's ongoing, unmonitored visitation with the child which has not demonstrated to the court any safety or health concerns for the child." The court ordered that father and mother both continue to receive family maintenance services.

Father filed a notice of appeal on March 25, 2015, and while the appeal was pending, the court terminated jurisdiction.<sup>6</sup>

## DISCUSSION

We first conclude the dependency court did not abuse its discretion in awarding to mother primary physical custody of Adrian. Second, because father never objected to the

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<sup>6</sup> Under Evidence Code section 452, subdivision (d), we judicially notice the minute orders of proceedings on July 23, 2015 and August 7, 2015, reflecting the court's orders terminating jurisdiction and entering custody and visitation orders.

court proceeding under section 364, the forfeiture doctrine prevents him from arguing on appeal that the court should have conducted the review hearing under a different code section. Even if father had objected, any error was harmless, and the question of whether the court erroneously applied an incorrect legal standard when it decided to continue dependency jurisdiction for 90 days is moot, because the court has since terminated jurisdiction.

### **Placement Order**

Father contends the court abused its discretion in deciding to place Adrian with mother. He argues that because Adrian had been safe and healthy while living with him for the past year, and mother had not yet completed her case plan and only recently began overnight visits, it was not in Adrian's best interests to live with mother. We affirm the court's custody order because father has not demonstrated that the court abused its discretion in finding it would be in Adrian's best interests to grant mother primary physical custody.

The juvenile court's custody order "should not be disturbed on appeal unless an abuse of discretion is clearly established." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Id.* at pp. 318-319.)

When two parents are both qualified to have primary physical custody of a child, "the court's focus and primary consideration must always be the best interests of the child. [Citations.]" (*In re Nicholas H.* (2003) 112 Cal.App.4th 251, 268.) The record contains evidence that would support a placement decision with either parent. Father focuses on the fact that Adrian had been living with him for a year, and was doing well. On the other hand, the dependency court instead focused on the fact that Adrian had lived most of his life with mother and had consistently expressed a desire to maintain a

relationship with his mother. This bonded relationship, when considered together with father's hostile attitude towards mother and the demeaning nature of father's text communications, supports the court's determination that it was in Adrian's best interests to be in mother's primary physical custody. Father has not demonstrated that the decision so exceeded the bounds of reason as to constitute an abuse of discretion. (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319.)

### **Order Continuing Jurisdiction**

Father contends the court continued jurisdiction under an incorrect legal standard, proceeding under section 364, rather than making its decision under section 366 as required by section 361.2.<sup>7</sup> Adrian contends that father's argument fails for three reasons: (1) father forfeited the argument by failing to bring the error to the court's attention; (2) any error was harmless; and (3) the question is moot because the court has since terminated jurisdiction over the matter. We agree with Adrian's contentions.

#### *Forfeiture*

A claim of error is forfeited on appeal if it is not raised in the trial court. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) "The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*Ibid.*) A claim of error is also forfeited if the objection raised is not specific enough to give the lower court an opportunity to correct the error. (*In re E.A.* (2012) 209 Cal.App.4th 787.) The rationale behind the forfeiture rule is that it would be "inappropriate to allow a party not to object to an error of which the party is or should be aware . . . ." (*In re Dakota S.*

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<sup>7</sup> Under subdivision (b)(3) of section 361.2, if services are provided to both the parent from whose home the minor was removed and the previously noncustodial parent, "the court shall determine, at review hearings held pursuant to Section 366, which parent, if either, shall have custody of the child."

(2000) 85 Cal.App.4th 494, 501.) The reviewing court retains discretion to consider questions of constitutional import, even where the parties have forfeited their right to raise the issue on appeal. (*In re Spencer S.* (2009) 176 Cal.App.4th 1315, 1323.)

Father concedes his counsel made no objection to the court proceeding under section 364, but argues that an issue may be raised for the first time on appeal if it is a pure question of law that can be decided based on undisputed facts. (*In re Rebecca S.* (2010) 181 Cal.App.4th 1310, 1313-1314.) Because father did not bring the error to the court's attention, he forfeited the right to raise the matter on appeal. Even if father is raising a pure question of law, we are not required to consider the matter.

### *Harmless Error*

Even if the contention is not forfeited, and we were to consider father's substantive argument, we would find any error to be harmless. Father contends the court should have decided whether to continue jurisdiction under the standard identified in section 366, rather than section 364. Under section 364, the dispositive question is whether conditions still exist, or are likely to exist absent supervision, which would justify the initial assumption of jurisdiction under section 300. (§ 364, subd. (c); see *In re Janee W.*, *supra*, 140 Cal.App.4th at p. 1451.) Under section 366, which applies when a minor is placed with a noncustodial parent,<sup>8</sup> the inquiry focuses on whether there is a need for continued supervision. (See *In re Maya L.* (2014) 232 Cal.App.4th, 81, 98-100 [“. . . when a child is placed with a noncustodial parent and both parents are ordered to participate in services, review hearings ‘must be held pursuant to section 366’”].)

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<sup>8</sup> Although we recognize that Adrian was not placed with father under section 361.2, for purposes of this discussion only, we accept as correct case law concluding that section 361.2 is applicable when a minor is placed with a previously noncustodial parent, even if the placement occurs at a six-month review hearing. (*In re Jonathan P.* (2014) 226 Cal.App.4th 1240, 1253-1254; *In re Janee W.*, *supra*, 140 Cal.App.4th at p. 1451; but see *In re Liam L.* (2015) 240 Cal.App.4th 1068, 1083-1084 [concluding that a noncustodial parent who declines to seek custody at disposition may seek custody at a later hearing, but under section 388, not section 361.2].)

Assuming father is correct that the court should have made its decision to continue jurisdiction under section 366, rather than section 364, any error is harmless. There was ample evidence of ongoing communication breakdowns and challenges with visitation warranting continued supervision. As the court aptly stated, “this case is a bit disturbing in terms of the relationship between the mother and the father and how that may -- how that does impact Adrian in terms of his relationship with both.” Adrian’s most recent extended contact with mother was limited to only one overnight weekend visit, and so continued supervision was also warranted to make sure the new arrangement would be successful. The court ordered the Department to submit a supplemental report on visitation and how Adrian was doing in school. Since there was substantial evidence to support a determination that continued supervision was needed, any error the court may have committed by proceeding under section 364, rather than section 366, was harmless. (See *In re Janee W.*, *supra*, 140 Cal.App.4th at pp. 1450-1451 [finding harmless error where the court terminated jurisdiction under section 364, rather than section 366].)

### *Mootness*

Father’s challenge to the order continuing jurisdiction is moot, because the court terminated jurisdiction while father’s appeal was pending. “As a general rule, an order terminating juvenile court jurisdiction renders an appeal from a previous order in the dependency proceedings moot.” (*In re C.C.* (2009) 172 Cal.App.4th 1481, 1488.) “[N]o direct relief can be granted even were we to find reversible error, because the juvenile court no longer has jurisdiction and we are only reviewing that court’s ruling.” (*In re Michelle M.* (1992) 8 Cal.App.4th 326, 330.) “However, dismissal for mootness in such circumstances is not automatic, but ‘must be decided on a case-by-case basis.’ [Citations.]” (*In re C.C.*, *supra*, at p. 1488.)

Father argues we should reach the merits of his argument because the order continuing jurisdiction affected the outcome of the subsequent proceedings. According to father, the court would not have changed Adrian’s custody arrangement at the March

20, 2015 hearing had it not erroneously continued jurisdiction for 90 days, rather than terminating jurisdiction under section 366. Instead “the court’s jurisdictional error led directly to its order removing Adrian from father’s custody and ultimately set the stage for” an exit order terminating jurisdiction and granting custody to mother. Father’s argument ignores the fact the court reasonably exercised its discretion by transferring custody of Adrian from father to mother, and the change in placement itself would support a finding in favor of continued supervision under section 366. Because we have already concluded the court’s placement order was not an abuse of discretion, we decline to analyze the issue further, and agree with Adrian that the question of whether a court correctly continued jurisdiction is moot where, as here, the court terminates jurisdiction while the appeal is pending. We can no longer grant any effective relief to father, because there is no ongoing dependency proceeding. (*In re Michelle M.*, *supra*, 8 Cal.App.4th at p. 329.)

### **DISPOSITION**

The orders are affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

BAKER, J.