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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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

BUTTE COUNTY DEPARTMENT OF EMPLOYMENT  
AND SOCIAL SERVICES,

Plaintiff and Respondent,

v.

D.C.,

Defendant and Appellant.

C069969

(Super. Ct. No.  
J35966)

Father, David C., appeals the dispositional order in which the juvenile court did not place his son David (the minor) with him as the noncustodial parent. Father contends he was entitled to custody under Welfare and Institutions Code section 361.2 and the court's failure to make a "proper" finding of detriment and state the basis for that finding was reversible error.

(Undesignated statutory references are to the Welfare and

Institutions Code.) We agree the court erred, but find the error harmless. Alternatively, father contends if the court acted under section 361, there was insufficient evidence to support removal. The record does not support this claim. We affirm the juvenile court's order.

### FACTUAL BACKGROUND

In July 2011, mother left father's home with the one-year-old minor in a stroller. She stopped at a store and because she appeared seriously intoxicated, a store employee called the sheriff's department to conduct a welfare check on the minor. Mother was found in possession of hydrocodone pills and marijuana. The sheriff also concluded based on her level of intoxication, mother could not care for the minor. Mother was arrested and the minor was detained.

Butte County Children's Services Division (CSD) of the Butte County Department of Employment and Social Services filed a petition seeking to have the minor declared a dependent of the court based on mother and father's failure to protect the minor. (§ 300, subd. (b).) In addition to the allegations against mother, the petition alleged father had a lengthy criminal history and was not available to take custody of the minor at the time of mother's arrest.

At the detention hearing, father requested custody of the minor under section 361.2, as a noncustodial parent. The court ordered the minor detained and indicated it would consider placing the child with father as the nonoffending parent. Two

weeks later at the jurisdiction hearing, the court found the allegations of the petition true and sustained the petition. Father again requested placement of the minor under section 361.2 as the noncustodial parent and the court ordered CSD to "look into that for Dad."

A contested disposition hearing was held on November 17, 2011. The social worker recommended the minor remain in foster care and both parents be offered reunification services. The social worker noted father had a substantial criminal and substance abuse history, had not provided adequate supervision of the minor and had not protected the minor from mother's neglect. This failure on father's part contributed to the minor being declared a dependent. Father acknowledged having a significant substance abuse problem. He had first used drugs and alcohol at age 12. Father's criminal history extended from 1991 to 2009 and included multiple felony convictions and violations of parole. Many of the offenses were drug or alcohol related.

The social worker concluded returning the minor to mother or placing him with father would create a substantial risk of detriment to the minor's safety, protection or well-being. As to father, the social worker based this conclusion on father's criminal and substance abuse history, his lack of a current source of stable income and his related inability to provide evidence he could pay rent. As recently as August 15, 2011, father had shown up at the mother's home under the influence of alcohol, he was very upset, refused to leave and caused "a

considerable disturbance." The social worker also noted that father had been in a personal injury accident and had suffered injuries which required prescription narcotics. It appeared he had been taking 30 percent more pills than prescribed. Father, however, identified his problem substance as alcohol.

Father had unsupervised visits with the minor and participated in services. He attended an Alcohol and Other Drugs assessment and an Assessment Outcome meeting and had scheduled a meeting with the Family Treatment Court. He had also participated in three of five scheduled drug tests. Only one of the tests was negative. Reunification services were recommended for both parents.

Father also has an autistic daughter with Shannon F. Shannon testified father has unsupervised weekend visits with their daughter, and Shannon does not have any concerns about the daughter's safety when visiting father.

Father acknowledged his history of substance abuse, and testified that other than the incident on August 15, 2001, he has been clean and sober. He had been working part-time doing maintenance and yard work, had received some money from General Assistance and was following up on receiving disability. He had completed a parent support group, was starting another parenting class and was attending Alcoholics Anonymous meetings. He was willing to follow CSD's directions, cooperate with further services and believed he could adequately care for the minor.

After the court considered the testimony and the social worker's report, the court adopted the findings as recommended

by the social worker and ordered reunification services for father. The court also directed the social worker to consider extended visits, overnight visits and weekend visits. The court found “[p]lacement with the parent with whom the child did not reside at the time the conditions or events arose that brought the child within the provisions of Section 300 would be detrimental to the child.” The court did not state the basis for that finding on the record or in writing.

## DISCUSSION

### I

Father contends the court’s failure to make a “proper” finding of detriment under section 361.2 was reversible error and the minor should have been placed with him. While the court made an express finding of detriment, it did not state the basis for that finding on the record, as required by statute. (§ 361.2, subd. (c).) However, we find this error harmless.

“When a child has been removed from the physical custody of his or her parents under section 361, subdivision (c), the court must place the child in a safe home or setting, free from abuse or neglect. [Citation.] The safe placement of the child is governed by various provisions in the statutory scheme.

[Citations.] Section 361.2 governs placement when the child has a parent *‘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.’* [Citation.]” (*In re Adrianna P.* (2008) 166 Cal.App.4th 44, 55, fns. omitted.) The court must

place the child with the noncustodial parent who requests custody, unless the placement would be detrimental to the child's safety, protection, or physical or emotional well-being. (§ 361.2, subd. (a).) "In making a finding of detriment, the court may consider any jurisdictional findings that may relate to the noncustodial parent under section 300, as well as any other evidence showing there would be a protective risk to the child if placed with that parent." (*In re V.F.* (2007) 157 Cal.App.4th 962, 970.) The juvenile court must make its finding of detriment by clear and convincing evidence and must state the basis of that finding either in writing or on the record. (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426; § 361.2, subd. (c).)

Here, in its dispositional order, the court expressly found there would be detriment to the minor in placing him with father. The court did not, however, state the basis of that finding either in writing or on the record. The general appellate rule is that we indulge all reasonable inferences favorable to the judgment. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) But, where the Legislature has required an express finding or statement of reasons, this "doctrine becomes potentially subversive" in that it deprives the legislative requirement of force. Thus, where the court is required to make express findings or an express statement of reasons, "the doctrine of implied findings may be given limited scope." (*In re J.S.* (2011) 196 Cal.App.4th 1069, 1078.) Accordingly, in this case, we will not imply a statement of

reasons. The juvenile court's failure to state the basis of its finding of detriment on the record or in writing was error.

Finding error, however, does not end the inquiry. Rather, before we reverse a judgment, "it must appear that the error complained of 'has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.) Reversal is justified 'only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' (*People v. Watson* (1956) 46 Cal.2d 818, 836; see 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 7, p. 450.) A reasonable probability for these purposes does not mean an *absolute* probability; the likelihood that the error affected the outcome need not be greater than the likelihood that it did not.

[Citation.] The test is satisfied, and prejudice appears, if the case presents 'an equal balance of reasonable probabilities.' (*People v. Watson, supra*, 46 Cal.2d at p. 837.)" (*In re J.S., supra*, 196 Cal.App.4th at pp. 1078-1079.)

Here, there were jurisdictional findings related to father, that he failed to protect the minor under section 300, subdivision (b). The minor was taken from mother's custody because of her extreme level of intoxication. A level of intoxication which was obvious to store employees. Mother stated she was coming from father's home at the time, but father denied any accountability for allowing mother to leave his home

so obviously impaired that she could not care for the minor. In that, father failed to protect the minor from mother's neglect. Father himself had a significant history of substance abuse, involving both pain pills and alcohol. While he has begun services to address those issues, there is evidence he has not resolved these issues. A few months before the disposition hearing, he showed up at mother's home drunk, refused to leave, and created a disturbance. He has been taking 30 percent more medication than prescribed and he has had only one negative drug test. His criminal history suggests drugs and alcohol have been a long-standing and ongoing problem for father, resulting in a variety of drug and alcohol related criminal convictions between 1991 and 2009. Given father's history, the intractable nature of substance abuse problems and the circumstances which led to dependency jurisdiction, there is an ample basis supporting a finding of detriment. It is true that a statement of reasons for a decision can improve the adjudicatory process by influencing the court's actual reasoning. However, based on this record, we see no reasonable probability that compliance with the statutory requirement to state the basis for the finding of detriment would have yielded a different result. (*In re J.S.*, *supra*, 196 Cal.App.4th at p. 1079.)

## II

Alternatively, father contends "[t]o the extent the juvenile court's action in denying Father custody of his son could be construed as having proceeded under section 361, it

nevertheless acted in error when it did not release [the minor] to his father at disposition." He contends the court erred in this regard, as there were reasonable means to ensure the minor's well-being, short of removal. The record does not support the conclusion that the juvenile court acted under section 361 in not placing the minor with father.

"A dependent child may 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 . . . [¶] . . . [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 or guardian's physical custody." (§ 361, subd. (c) (1), italics added.)

The record here indicates father repeatedly requested placement of the minor, under section 361.2, as the noncustodial parent. The court expressly found under section 361.2 that placement with father, as the parent with whom the child did not reside when the petition was initiated, would be detrimental to the minor. As the noncustodial parent, section 361 does not apply to father. Because of father's repeated requests, and the court's findings, under section 361.2, we cannot find the court acted under section 361 in refusing to place the minor with father.

DISPOSITION

The juvenile court's order is affirmed.

\_\_\_\_\_ HULL \_\_\_\_\_, Acting P. J.

We concur:

\_\_\_\_\_ MAURO \_\_\_\_\_, J.

\_\_\_\_\_ HOCH \_\_\_\_\_, J.