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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Butte)

In re L.H., a Person Coming Under the Juvenile Court Law.

BUTTE COUNTY DEPARTMENT OF EMPLOYMENT AND SOCIAL SERVICES,

Plaintiff and Respondent,

v.

C.H. et al.,

Defendants and Appellants.

C075666

(Super. Ct. No. J36708)

C.H. (father) and N.F. (mother) appeal from the juvenile court’s jurisdictional findings and orders as to the infant minor, L.H. (Welf. & Inst. Code, § 395.)¹ They contend the court erred by applying the evidentiary presumption of section 355.1, subdivision (a) (Section 355.1(a)), to exercise jurisdiction under section 300, subdivision

¹ Undesignated statutory references are to the Welfare and Institutions Code.

(a) (Section 300(a)), and that no substantial evidence supported the court’s findings under that provision. We conclude the parents were on notice of the application of the evidentiary presumption of section 355.1(a). However, we agree with the parents that the court misapplied that presumption, and we cannot find the error harmless. Therefore, we reverse and remand for the court to reconsider the section 300(a) allegations using the proper application of the presumption and based on the evidence in the record.

As a preliminary matter, we requested supplemental briefing on whether this appeal is moot in light of the juvenile court’s termination of jurisdiction over the minor. As explained below, we conclude the appeal is not moot.

FACTUAL AND PROCEDURAL BACKGROUND

The Petition

On April 2, 2013, the Butte County Department of Employment and Social Services (Department) filed a petition as to L.H. (born in November 2012) under section 300, subdivisions (a) and (e). Under subdivision (a) (serious physical harm), the petition alleged: “a-1. On or about March 29, 2013, the child was found to have a spiral fracture to his left humerus. The child also had numerous rib fractures in various stages of healing on his left side that were approximately three to four weeks old. Biggs-Gridley [H]ospital found the rib fractures to be ‘ “chronic” ’ and noted that the child’s injuries appeared to be ‘ “non-accidental.” ’

“a-2. On or about April 1, 2013, the child was seen by Child Abuse Specialist Dr. [Angela] Rosas, who confirmed the presence of healing posterior rib fractures, which can only occur in cases of abuse. In addition, the child was found to have healing left femur, left tibia, right fibula and possible left ulna fractures.^[2]

² The juvenile court found the allegations in the second sentence of this paragraph and the first sentence of the following paragraph not true.

“a-3. In addition to the facts cited in a-2, Dr. Rosas noted that the metaphyseal fractures are also indicative of abuse, and that the child’s spiral fracture to his humerus would also be suspicious of abuse because of the other fractures. Dr. Rosas further noted that there is not any evidence of a bone condition that would cause the child’s injuries.

“a-4. *The injuries as cited in a-1 through 1-3 are of such a nature that they would not have ordinarily been sustained except as a result of the unreasonable or neglectful acts or omissions of either parent.*”³ (Italics added.)

Under section 300, subdivision (e) (Section 300(e)) (severe physical abuse; child under five), the petition incorporated all the subdivision (a) allegations by reference and further alleged the minor was in the parents’ exclusive care and control when the injuries occurred.

The Jurisdiction Report

The jurisdiction report alleged:

As to allegation a-1, Dr. Henry Starkes would testify the minor was brought into Biggs-Gridley Hospital in the early morning of March 29, 2013, with trauma to the left shoulder. X-rays disclosed a spiral fracture of the left arm and chronic fractures of the posterior ribs. No history of severe trauma had been given and nonaccidental trauma must be considered until proven otherwise. A four-month-old child could not move in any way that could cause that injury to himself.

³ This language tracks section 355.1(a), which provides in part: “Where the court finds, based upon competent professional evidence, that *an injury, injuries, or detrimental condition sustained by a minor is of such a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, the guardian, or other person who has the care or custody of the minor,* that finding shall be prima facie evidence that the minor is a person described by subdivision (a), (b), or (d) of Section 300.” (Italics added.)

Social worker Aisha Kamala would testify Dr. Starkes told her the parents' story of how the injury occurred was not consistent with the nature of the injury.

Social worker Melody Giles would testify mother said she was "always with her child" and "just wants to know who has hurt [her] baby." Mother told Giles that at around 11:30 p.m. on the previous evening the minor was lying next to father on the couch in the crook of father's arm and "must have bowed his back to get up." The parents heard a "pop noise" and the minor "fussed a little," but went back to sleep after she gave him his "binky." Sometime later, mother noticed the minor was "not sleeping with his arm up over his head as he normally does," so she called the hospital, and was told to bring the minor in.

Mother would testify she and father transported the minor to the hospital at the hospital's request after she called the hospital and said her "son's arm didn't look right." She was unaware of any other injuries to the minor before they took him in.

Father would testify the minor's injury happened as mother described it. After he heard the "pop," he moved the minor's arm out from behind the minor's back and the minor went back to sleep. He was unaware of any other injuries to the minor before they took him to the hospital.

As to allegation a-2, Dr. Rosas would testify she examined the minor on April 1, 2013, for suspected child abuse and ordered a bone survey. The bone survey showed the minor had a new left humerus fracture, oblique; healing rib fractures, left side ribs 3 and 7, posterior; left femur, distal healing metaphyseal fracture; left tibia, distal healing fracture, periosteal reaction; and a possible left ulna fracture, periosteal reaction.⁴ The rib

⁴ "Metaphyseal" means "[p]ertaining to, or involving a metaphysis A metaphysis is the zone of growth in a young long bone, situated between the end of the bone (epiphysis) and the shaft (diaphysis)." (4 Schmidt, Attorneys' Dict. of Medicine

fractures and metaphyseal fractures are indicative of abuse, and the humerus fracture would be suspicious for abuse because of the other fractures.

Dr. Nancy Laurence of Sutter Medical Center would testify she reviewed the bone survey of the minor performed on April 1, 2013, and provided her reading to Dr. Rosas. Dr. Laurence would further state the findings were highly suspicious for nonaccidental trauma.

Dr. James Crawford-Jakubiak would testify he examined the minor for “concerns of child abuse” on May 9, 2013, reviewed the films from Biggs-Gridley Memorial Hospital and Sutter Medical Center, and met with the parents to get a full medical history, review the previous findings, and provide a second opinion. On the same date, he ordered a second bone survey and a DNA blood draw to test for genetic causes or explanations for the minor’s injuries.

As to allegation a-3, Dr. Rosas would testify the minor’s bones appear otherwise healthy and there is no evidence of a medical condition to explain the fractures.

Dr. Crawford-Jakubiak would testify he found “no evidence of an underlying medical disorder that would cause or contribute to the fractures.” The different ages of the fractures indicate at least three traumatic events and cause great concern as to nonaccidental injury. The rest of the minor’s long bones demonstrate no healing fractures. Collagen Diagnostics Laboratory of the University of Washington had performed genetic testing for osteogenesis imperfecta (OI) and could not confirm an OI diagnosis.

(Matthew Bender 2011), p. M-163, col. 2.) “Periosteal” means “[p]ertaining to, involving, or derived from, the periosteum, the membrane surrounding a bone.” (*Id.* at p. P-178, col. 1.)

Dr. John Wilkinson would testify he examined the minor on April 11, 2013, for a follow-up on the arm injury. The parents reported no family members on either side with easily broken bones. Dr. Wilkinson had not examined the minor in the three to four weeks preceding the arm injury.

Butte County social worker Brian Giles would testify that on June 17, 2013, he accompanied the minor for a consultation with Dr. Jonathan Ducore, a pediatric hematologist at University of California at Davis. Dr. Ducore told Giles the minor probably did not have a bleeding disorder, but even if such a disorder were present it would not explain the multiple fractures.

As to allegation a-4, Dr. Rosas would testify the minor's injuries were traumatic and caused by force. Dr. Crawford-Jakubiak would testify the injuries occurred in at least three separate traumatic events.

The jurisdiction report asserted: "If the traumatic events that caused [the minor]'s injuries occurred while in the care of his parents, Children's Services is worried that the parents are not identifying a need for services to reduce the likelihood of additional injuries to their child. Further, Children's Services is concerned that because the parents were unable to identify [that] their child was seriously injured, or in pain, then this pattern could be repeated without intervention. If the traumatic injuries occurred when [the minor] was not in the care of his parents, Children's Services is worried that the parents will not be able to recognize the person(s) who are a risk to their son and respond to their child if he is injured again."

The Contested Jurisdictional Hearing

After the parents filed objections to hearsay in the jurisdictional report, the juvenile court set the matter for a contested jurisdictional hearing.

The contested jurisdictional hearing consumed five court days and runs to nearly 1,000 pages of reporter's transcript. The Department presented the expert testimony of Drs. Rosas and Crawford-Jakubiak. The parents did not testify, but presented the expert testimony of Dr. Douglas Benson, who opined the minor's injuries were caused by metabolic bone disease (possibly OI) and/or rickets stemming from vitamin deficiency. The parents also attempted to show a family history of bone disease.⁵

The Department's Case

1. Opening Statement

In county counsel's opening statement, he cited and quoted section 355.1(a), then stated the Department's experts would provide the evidence to meet the Department's burden under that provision. The parents' counsel did not object that they had not received notice of the Department's intent to rely on the section 355.1(a) presumption or request a continuance due to alleged lack of notice.

2. Social Workers' Testimony

Social worker Kamala testified that at the hospital on March 29, 2013, she overheard father tell the paternal grandmother the minor's arm was caught in a blanket, the parents heard a pop, and they took him to the hospital. The parents could not explain the minor's rib fractures, but said a few weeks ago he had fallen a short distance from a couch and landed in a pile of blankets. Mother said the minor was generally in good health. She was both breast-feeding him and giving him formula.

⁵ In addition, they presented evidence of their parenting skills and love for the minor. Dr. John Wilkinson, the minor's pediatrician since birth, who had examined the minor at least six times before March 29, 2013, had never seen any grounds for concern about child abuse; the parents were very attentive to the minor, who always seemed cheerful and contented. Gary Busse, who supervised the parents' visitation with the minor, praised their parenting.

Social worker Melody Giles testified mother said the minor was not in daycare and had not been babysat by anyone other than a grandparent. Normally at least one parent was always with the minor, but there had been a couple of occasions when he had been left with one of the grandparents. The paternal grandmother told Giles she had watched the minor for about three hours two weeks ago and for about an hour a few days ago; she did not let the other children in her home hold the minor.

Giles attended the minor's appointment with Dr. Rosas on April 1, 2013. Dr. Rosas indicated preliminarily that the arm injury could be accidental and advised Giles to treat the minor as if he had brittle bone disease, but Dr. Rosas did not consider that likely.

Giles later learned father's biological father, C.W., claimed to have suffered multiple fractures as a child and had a sister with "sclerosis."

3. Dr. Rosas's Testimony

Dr. Rosas, board-certified in general pediatrics and child abuse pediatrics, is medical director of the "BEAR" (Bridging Evidence Assessment and Resources) program at Sutter Medical Group in Sacramento. She regularly evaluates children for trauma. She has published numerous articles in her specialties. In her 20 years of practice, she has assessed 500 or more cases involving fractures like those in this case.

Dr. Rosas received a referral to evaluate the minor in late March 2013. She saw the minor in the company of the paternal grandmother and the social worker, who gave her some history as to the arm fracture. She also received the X-rays from Biggs-Gridley Hospital. She performed a complete physical examination of the minor, who looked healthy except for swelling in his left arm.

Dr. Rosas reviewed the X-rays and a CT scan of the minor's head. The CT scan and physical examination of the head did not reveal any abnormalities. The X-rays

showed a left humerus fracture and two healing rib fractures (ribs three and seven on the left side).

Dr. Rosas sent the minor to the hospital for laboratory tests, X-rays, and a bone survey. The testing did not identify any metabolic diseases. All results were normal except the vitamin D level that was “a little bit low” (probably in the mid-20s) but not cause for concern. Normal would be above 30; 20 to 30 would be “insufficient;” and less than 20 would be “deficient.” Dr. Rosas did not know the minor’s earlier vitamin D levels, but did not think they mattered because there was no evidence the minor had vitamin D rickets, which would take much longer to develop. She agreed all babies need vitamin D supplement.

The bone survey identified additional healing metaphyseal fractures in the left femur and on each end of the minor’s long bones, as well as periosteal reaction, “which are basically bruised bones.” Metaphyseal fractures “are very subtle” and “do not require casting or treating.” They are not seen except in cases of child abuse or bone disease.

Diseases that could cause metaphyseal fractures include kidney disease, vitamin D rickets, OI, and close to 100 others. But all could be excluded here. The minor’s renal function, calcium, and phosphorus were normal. His vitamin D level was “not that low.” Vitamin D rickets causes abnormalities throughout the bone that were not present here and that could not cause the “type of fracture pattern” found here.

OI (which Dr. Rosas had diagnosed in other cases) also shows a pattern of fractures and clinical findings on physical examination that were not present here; it does not produce rib fractures or metaphyseal fractures. The main forms of OI are genetically linked, and there is always at least one other family member who has the disease in severe form. Genetic testing can detect 80 percent of all cases. The remaining 20 percent

are more rare and severe forms of the disease that can only be detected by a bone biopsy. In the most severe cases, the disease is obvious on X-rays or physical examination.

All other diseases that can cause metaphyseal abnormalities are similarly associated with other clinical findings, other findings on the bones, or a different fracture pattern than in this case.

Vitamin D deficiency is a disease of the whole body, not of just one bone. When the deficiency becomes severe (i.e., less than 12), calcium and phosphorus are also abnormal. An X-ray would show very light-colored bones throughout the skeleton and “cupping and fraying in the metaphyses,” which were not found here. On physical examination, affected knees and elbows would feel “knobby”; the minor’s did not. Both sides of the body would be equally affected, unlike in this case. It would normally take at least a year for a child to develop all of these symptoms.

The posterior rib fractures shown on the X-rays could come only from an adult squeezing the chest with “a vice grip,” “holding the child’s chest very forcefully.” Even blunt force trauma or CPR would not cause fractures in that location.

The combination of fractures in this case reinforced the suspicion of child abuse. The lack of clinical features of disease in the minor, family history, and positive results from the medical evaluation, ruled out any explanation of the injuries based on disease. Dr. Rosas opined to a reasonable medical certainty that child abuse caused the injuries.

On cross-examination, Dr. Rosas was presented with follow-up X-rays taken by Dr. Robert Huberman on April 11, 2013, that she had not seen before. She acknowledged Dr. Huberman found negative results for fractures on the femurs, tibias, and fibulas. She conceded the X-rays appeared to show no metaphyseal fracture of the femur or the distal fibula, but opined they did not clearly disclose whether there was such a fracture on the distal tibia.

4. Dr. Crawford-Jakubiak's Testimony

Dr. Crawford-Jakubiak, who was board-certified in general pediatrics and child abuse pediatrics and served as medical director of the Center for Child Protection at Children's Hospital in Oakland, had testified in hundreds of cases involving broken bones in infants and had seen dozens of rickets cases. The Department asked him to meet with the family and provide a second opinion after the minor had initially been diagnosed and seen at different facilities. He also reviewed the minor's medical records.

Dr. Crawford-Jakubiak observed the minor was developmentally normal, showing the capacity for movement to be expected in a five-month-old baby.

The first films taken of the minor at Biggs-Gridley Hospital showed a humerus fracture, an oblique spiral fracture (i.e., a "bending, twisting kind of event") that could have been caused by accident or abuse. Father said the minor rolled over his own arm while it was in a fixed position between father's left arm and torso. "[I]f an arm were fixed in just the wrong way, . . . the weight could break the arm."

Those initial films also showed healing fractures to the third and seventh ribs on the left side. Those injuries were not inflicted on the same date as the humerus fracture. The most common trauma that produces rib fractures in infants is "a squeeze or blow of some sort." Although such fractures can happen accidentally in infants, most are "absolutely not" accidental.

The parents' claim that the minor fell off a couch onto blankets could not account for the rib fractures. If it happened only a few days before the minor's hospitalization, the ribs could not have healed as far as they had done. But even if it happened a month before (as mother recalled), Dr. Crawford-Jakubiak had never heard of such a fall producing rib fractures. Furthermore, a baby with rib fractures would appear to be in

distress (even if the cause were not obvious), but mother told law enforcement officers the minor seemed fine after the fall.

The combination of the rib fractures and the arm fracture showed “a child who is well off the curve,” since most babies have no fractures and very few have multiple fractures. Either there was some undiagnosed medical condition, “a series of unusually severe unaccounted for accidental events that no one is sharing,” or some form of inflicted trauma. The medical evaluation had included investigating “some pretty unusual conditions,” but none appeared to exist.

Dr. Crawford-Jakubiak asked the parents about the family history. Mother did not report any bone problems in her family, but father reported cases of alleged brittle bone disease in his family, including the paternal grandfather, who had multiple fractures in early childhood, and numerous family members who had “terrible teeth,” which can be an indicator for OI or Dentinogenesis Imperfecta (DI). However, father was adopted at age 10 and did not have extensive information about his biological relatives.

OI is usually hereditary, though it can also arise by spontaneous mutation. The parents did not have OI; they appeared healthy with good teeth.

To make sure no possible medical cause of the injuries was missed, Dr. Crawford-Jakubiak ordered additional tests, including further X-rays. He referred the minor to a pediatric hematologist because a history of bruising and nosebleeds had been reported. He ordered a second bone survey, done about five weeks after the first, to see if additional fractures could be visualized. He ordered studies of copper and vitamin levels in the minor’s body, along with hormone testing for rickets; the results were within the normal range (except for calcium, which was slightly high -- an unproblematic finding).

Dr. Crawford-Jakubiak also ordered DNA testing for OI that he sent to a laboratory in Washington. It showed “[n]o mutations. Normal.” The DNA testing done

in this case captures about 90 percent of OI cases; that is, 90 percent of OI victims will show one of the two mutations this testing is designed to detect. No commercially available tests exist for the other 10 percent of cases. In those, however, abnormalities are apparent to the eye, and the condition can also be diagnosed through clinical exams, family history, and X-rays. Dr. Crawford-Jakubiak did “not believe [the minor] had [OI].”

5. Closing Argument

In closing argument, county counsel again cited the prima facie presumption of section 355.1(a). He asserted the testimony of Drs. Rosas and Crawford-Jakubiak met the Department’s burden to establish the presumption by competent medical evidence and shifted the burden to the parents to rebut it, and Dr. Benson’s testimony failed to do so because he lacked the requisite expertise and his opinions about the X-rays contradicted those of all the other doctors.

The parents’ counsel did not object to county counsel’s citation of section 355.1(a). County counsel, in rebuttal, pointed out opposing counsel’s failure to discuss that presumption.

The Parents’ Case

Dr. Benson’s Testimony

The parents relied mainly on the expert testimony of Dr. Benson, a board-certified orthopedic surgeon and the Director of Orthopedic Trauma at Enloe Medical Center. Dr. Benson had longstanding interests in bones, metabolic bone diseases (including those of infants), and vitamin D, going back to his internship in the 1970s. He had treated infants for bone issues and traumatic fractures. He had also seen multiple examples of “radiographic [r]ickets” (i.e., rickets as manifested in X-rays).

Based on his review of the minor's and mother's medical records, Dr. Benson rejected the diagnosis of child abuse and opined with medical certainty that all of the alleged fractures were non-traumatic.

The minor's humerus fracture was in the wrong place on the bone for either parent to have caused it by gripping and immobilizing the upper arm. The alleged rib fractures were "metabolic fractures" that could be called "pseudofractures" because no force was needed to inflict them; they stemmed from "metabolic weakness of the bone and just a collapse of the structure." Contrary to the Department's expert opinions, these fractures could not have been caused by an adult exerting a "vice-like grip" on the minor's chest. There was no scientific evidence as to the force needed to cause such injuries, and it would have been extremely difficult to break only the third and seventh ribs that way without breaking any ribs in between.

As to the rib fractures, Dr. Benson saw an "attempted" but "failed" healing consistent with a metabolic spontaneous fracture, not a traumatic fracture. Babies' bones normally heal very quickly, but that did not happen here.

Four-month-old infants cannot be active enough to fracture their own ribs or long bones. If a child is well nourished and well cared for, and there is no evidence of violent behavior by others in the child's life, only metabolic bone disease could account for the kind of rib fractures found here.

The most common type of metabolic bone disease stems from a deficiency of vitamin D, a powerful hormone essential for a growing infant. Testing for vitamin D levels at the time of a reported injury is insufficient because it does not show what the child's system absorbed earlier. The medical literature showed children with "clinical classical [r]ickets" sometimes had normal vitamin D levels when tested.

Dr. Benson opined the minor's vitamin D level of 26 on April 1, 2013, was low. The testing laboratory calls 30 "low normal," but "[s]ome researchers" think the "low normal" cutoff point should be 50. In any event, the minor's tested level did not show what it had been in the second or third month of life, when metabolic activity in the bone is highest. A recent study showed that in a large group of mothers and infants, the vitamin D level at four months was twice what it was at birth. The evidence indicated the minor "was in dire straits in terms of [v]itamin D. He had . . . a not insufficient level, but a very low deficient level which would be expected to have real consequences in terms of development of his musculoskeletal system." Contrary to the opinions of the Department's experts, the "healthy" appearance of the minor's bones in the X-rays was not inconsistent with a vitamin D deficiency, because such a deficiency is very hard to detect on X-rays.

A single X-ray cannot differentiate rickets from child abuse. There is no type of fracture that, without other evidence, proves child abuse. The April 1, 2013, X-rays showed evidence of healing rickets. The April 11 follow-up X-rays confirmed the healing process, which was consistent with rickets. Dr. Benson saw no evidence of fractures in these X-rays.

In addition to rickets, OI could not be ruled out. The genetic testing done in this case could not eliminate OI. Different labs claim confirmation rates ranging from 85 to 95 percent, but all acknowledge no single genetic test can rule out OI. There were "many cases" of confirmed OI diagnoses based on family history and "the clinical picture" where standard DNA testing would have shown negative results.

The fact the minor had suffered no known injuries since his detention did not rule out OI or other bone disease. If OI is not involved, children with metabolic bone disease often have no further injuries after one year of age. If OI is involved, children commonly

have long spans of time between fractures. The literature showed metabolic or pathologic fractures spike between the ages of three and five months, then decline.

The Juvenile Court's Findings

The juvenile court found and ruled as follows:

“It’s an obviously extremely serious allegation to make against a parent that they have abused their child. And as everyone notices and concedes, no one has seen the parents inflict any trauma to [the minor]. No one testified that the parents or either of them allowed another to inflict injury to [the minor]. The evidence that was presented to the Court is that since detention the parents have been completely devoted to [the minor] and appropriate in their contact with [the minor]. Even before detention, the parents took [the minor] religiously to medical appointments and no observed misconduct was testified to. There was nothing in the doctor’s notes to that effect, no history of misconduct.

“[The minor] has been placed eventually with the parents of the mother. And, as I understand their position, they believe their child and in-law are very appropriate with [the minor] and should have the child back.

“I go back to what my job is, which is to rule on the evidence sufficiency and to make findings regarding the petition that was filed on April 2nd, 2013. The allegation is under (a) and under (e) of . . . Section 300. In terms of the allegations that are contained in the petition, it is true that the child was found to have a spiral fracture to his left humerus. The child was also found to have two rib fractures in various stages of healing. The Court also finds not true that the child had any other fractures or . . . any inflicted trauma on bones as alleged in A-2 and A-3. So we’re talking -- and everyone is focused on this. We are talking about the arm injury and the two rib injuries.

“In this situation, the legislature has put forth the [primary] safety of the child over the strict elements of proof of misconduct by the parents by enacting 355.1. And as Counsel have indicated and read into the record by [county counsel], when competent, professional evidence [shows] there is an indication that injury was sustained by a child [of] such a nature as would ordinarily not be sustained except for [the] unreasonable or neglectful acts or omissions of the parents, then that person falls within either 300(a), (b) or (d) of the Welfare and Institutions Code. What that does is it creates a presumption.

“I think the person that the Court found to be compelling in their testimony was Dr. Crawford. And the evidence from Dr. Crawford, I thought, was very evenhanded. And he indicated that although the injury to the arm might be or might not be accidental, when you combine it with the other two fractures of the ribs, it leads to a conclusion that the child has suffered physical abuse.

“This presumption affects the burden of producing evidence. I’ve considered the testimony of Dr. Benson and Dr. Wilkinson [the minor’s pediatrician]. Dr. Wilkinson’s testimony, in my view, doesn’t contradict the presumption. It does not contradict the evidence presented by Dr. Crawford. Dr. Benson’s testimony provides a road map of steps that might be taken in future investigations, but I do not find that his testimony compels the conclusion that [the minor] has a metabolic bone disease. I found his testimony to be very instructive and his concerns about misdiagnosis of child abuse are, I believe, sincerely held and are [real] and it reminds me of the very serious duty I have in ruling on these cases. *But I do not find his testimony or the testimony of Dr. Wilkinson to contradict or overcome the presumption.*

“*Accordingly, using the presumption of 355.1(a) I sustain the petition as to . . . the (a) count. I do not find sufficient evidence as to . . . section . . . 300(e). And the Court finds that to be not true.*” (Italics added.)

Father's Motion to Reopen

After the juvenile court entered its jurisdictional orders, father filed a “motion to reopen the case for further proceedings and the introduction of additional evidence . . . and reconsideration . . . and modify order.” Father asserted the Department never gave notice “before the [j]urisdictional hearing or during the hearing” it planned to rely on the section 355.1(a) presumption, and because of this due process violation the juvenile court could not properly rely on the presumption to sustain the petition. Father also asserted the Department failed to meet its burden under section 300(a), because it did not show either parent committed a “volitional act” to harm the minor.

The Department responded it pleaded the section 355.1(a) presumption in the petition by using the language of the presumption therein. Moreover, county counsel cited the statute specifically in his opening and closing statements at the jurisdictional hearing.

Relying on *In re A.S.* (2011) 202 Cal.App.4th 237, 244 (A.S.), father asserted in his reply brief that incorporating the language of section 355.1(a) in the petition is insufficient to give notice: the petition must expressly cite the statute. Father said nothing about county counsel’s opening and closing statements at the jurisdictional hearing.

At the hearing on the motion, father’s counsel requested additional time “to prepare a defense to the 355.1(a).” Counsel asserted the testimony of father and of another expert (to be funded by the juvenile court) would be needed to meet father’s burden under the presumption. Counsel further asserted the evidence was insufficient to support the court’s findings under section 300(a), because the court had found the parents did not purposely or intentionally inflict injury on the minor; if anything, the evidence

would support a finding only under section 300(b). Mother's counsel joined in all of father's arguments.

County counsel replied the parents were confusing the "volitional act" required under section 300(a), with specific intent to injure, which the statute does not require. He pointed out, despite the parents' counsel's alleged surprise at the Department's reliance on section 355.1(a), they did not object or request a continuance during the jurisdictional hearing. He also observed they could have called their clients to testify at any time.

Finding the parents received due notice of the Department's reliance on the presumption and had put on Dr. Benson and other witnesses to rebut it, the juvenile court denied father's motion.

DISCUSSION

I

Mootness

We granted father's request for judicial notice that the juvenile court subsequently returned the minor to the parents' custody and dismissed the dependency. In light of this fact, we requested supplemental briefing as to whether the parents' appeal was moot. Having read and considered the parties' supplemental briefs, we conclude the appeal is not moot. The juvenile court's finding the parents nonaccidentally inflicted serious physical harm upon the minor entails potential adverse consequences for the parents that the dismissal of the dependency does not expunge.

Under the Child Abuse and Neglect Reporting Act (Pen. Code, § 11164 et seq.), once the juvenile court has sustained an allegation against parents under section 300(a), the Department must report that finding to the California Department of Justice for the parents to be placed on the Child Abuse Central Index (CACI). (Pen. Code, §§ 11165.2, subd. (b), 11169, subds. (a), (e).) The court's jurisdictional order bars the parents from

petitioning to have the report removed from the CACI. (Pen. Code, § 11169, subs. (e), (f).) Persons on the CACI may not supervise children in any capacity outside their home. (Pen. Code, § 11170, subd. (b)(4).)

Since a determination the juvenile court's finding was erroneous could give the parents effectual relief, the appeal is not moot. (See *Saraswati v. County of San Diego* (2011) 202 Cal.App.4th 917, 924-926; see generally *In re I.A.* (2011) 201 Cal.App.4th 1484.)

II

Notice of Section 355.1(a)

The parents contend the juvenile court erred by finding they received adequate notice of the Department's reliance on section 355.1(a). This contention has no merit.

It is undisputed that allegation a-4 of the section 300 petition incorporates the language of section 355.1(a). The parents continue to assert, however, quoting the language of section 355.1(a) in the petition is insufficient to give due notice the Department is relying on the statute's evidentiary presumption. They are wrong.

In *A.S., supra*, 202 Cal.App.4th 237, on which the parents rely, the appellate court found the agency had not given sufficient notice of intent to rely on the section 355.1(a) presumption in a case brought under section 300, subdivision (b). First, the agency did not cite the presumption in the section 300 petition *or at the jurisdiction and disposition hearing*; second, it did not allege in the petition a person other than the parents might have inflicted the minor's injuries (though it so asserted on appeal), and third, it did not argue at the hearing any rebuttable presumption had arisen that shifted the burden of production to the parents; furthermore, the juvenile court did not address section 355.1(a) or make any finding that related to it. (*A.S., supra*, 202 Cal.App.4th at pp. 242-243.) The appellate court added: "We conclude the Agency has forfeited the matter by not giving

the parents or the court sufficient notice of its reliance on section [355.1(a)]. When the Agency intends to rely on the statute to shift the burden of production to the parents to show that neither they *nor other caretakers* caused the child's injuries, it must do so in a clear-cut manner. *It should, of course, cite section 355.1[(a) in the petition along with the applicable subdivision of section 300. (See, e.g., In re James B. [1985] 166 Cal.App.3d [934,] 936-937.)*" (A.S., *supra*, 202 Cal.App.4th at p. 243; first italics in original, later italics added.)

As the parents acknowledge, however, a more recent appellate decision, *In re D.P.* (2014) 225 Cal.App.4th 898 (*D.P.*), disagrees with A.S. We agree with *D.P.*

In *D.P.* (brought under section 300(a), like the present case), the mother contended, as here, she did not receive notice of the Department's intent to rely on section 355.1. (*D.P.*, *supra*, 225 Cal.App.4th at pp. 901, 904.) The appellate court replied: "[T]he petition alleged that *D.P.*'s injuries "would not ordinarily occur except as the result of deliberate[,] unreasonable and neglectful acts by the mother." " Those allegations adequately gave mother notice that the Department was relying, at least in part, on the presumption created by section 355.1. (See *Seiser & Kumli*, Cal. Juvenile Courts Practice and Procedure (2013) § 2.110[6], p. 2-287 [notice that the Department is relying on § 355.1 "can be accomplished by including the applicable language of [] § 355.1 in the petition" '].)" (*D.P.*, *supra*, 225 Cal.App.4th at p. 904; italics added.)

D.P. declined to follow A.S., stating: "Here, mother does not deny that she was represented by an attorney at all stages of the proceeding. The Department invoked section 355.1 by wording the petition's charging allegations in the language of section 355.1. Mother was informed of the petition's allegations and the evidence the Department intended to rely upon, including that multiple doctors had concluded that

D.P.'s trauma was nonaccidental. Thus, mother was given adequate notice that the Department intended to rely on section 355.1." (*D.P.*, *supra*, 225 Cal.App.4th at p. 904.)

Here, not only did all the conditions enumerated in *D.P.* apply, but at the start of the jurisdictional hearing county counsel stated the Department's intent to rely on section 355.1(a), and at the end of the hearing explained how the evidence had met that presumption. The parents' counsel did not object or request a continuance. Although we agree it is a better practice to expressly cite section 355.1(a) in the petition, on this record, as in *D.P.*, we reject the parents' assertion they lacked notice of the Department's intent to rely on section 355.1(a).

III

The Juvenile Court Misapplied Section 355.1(a)

The parents contend the juvenile court prejudicially misapplied the section 355.1(a) presumption. According to the parents, once they presented evidence to rebut the presumption, it dropped away as a matter of law and the court was required to weigh the evidence without regard to the presumption; instead, the court expressly relied on the presumption to sustain the section 300(a) allegations. This contention has merit.

Section 355.1(a) provides: "Where the court finds, based upon competent professional evidence, that an injury . . . sustained by a minor is of such a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, . . . that evidence shall be prima facie evidence that the minor is a person described by subdivision (a), (b), or (d) of Section 300."

The section 355.1(a) presumption "is not one which affects the burden of proof, but only the burden of producing evidence (§ 355.1, subd. (c); *In re James B.* (1985) 166 Cal.App.3d 934, 937) and only survives until there is rebuttal evidence submitted." (*In re Esmeralda B.* (1992) 11 Cal.App.4th 1036, 1041.)

“Once the petitioner establishes a prima facie case under section 355.1, the burden of producing evidence ‘ “shifts to the parents the obligation of raising an issue *as to the actual cause of the injury* or the fitness of the home.” ’ [Citation.] ‘ “The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption.” ’ (Evid. Code, § 604.)” (*D.P., supra*, 225 Cal.App.4th at pp. 903-904; italics added.)

The juvenile court properly noted the section 355.1(a) presumption went to the burden of producing evidence. But then, instead of finding that the presumption disappeared once the parents had produced evidence, the court found the testimony of the parents’ experts did not “contradict or overcome the presumption.” Finally, the court stated: “Accordingly, using the presumption of 355.1(a) I sustain the petition as to . . . the (a) count.” In effect, the court appears to have treated the presumption as if it shifted the burden of proof and found the parents failed to meet that burden. This was error.

Error in applying the section 355.1(a) presumption may be harmless if it appears that despite the error the trier of fact properly weighed the evidence. (*D.P., supra*, 225 Cal.App.4th at pp. 904-905.) But here, we cannot conclude the juvenile court necessarily did so. Although the court weighed the evidence in its ruling, its weighing process may have been improperly skewed by its misunderstanding of the effect of the presumption. In its ruling, the juvenile court explicitly stated it used the presumption of section 355.1(a) to sustain the section 300(a) allegations.

In contrast to sustaining the section 300(a) allegations, the juvenile court did not find sufficient evidence as to the section 300(e) allegations. The juvenile court's rejection of the section 300(e) allegations as unsupported by the evidence, even though they were substantively identical to the section 300(a) allegations the court sustained, may indicate the court's misapplication of the presumption made a difference in the rulings. We recognize the elements of section 300(e) differ from those of section 300(a) (e.g., section 300(e), unlike section 300(a), requires proof of more than one act of physical abuse). But because the court did not explain its ruling as to the section 300(e) allegations, we cannot exclude the possibility the court ruled differently on the section 300(a) and section 300(e) allegations based on the misapplication of the section 355.1(a) presumption.

For all the above reasons, we cannot uphold the juvenile court's ruling sustaining the section 300(a) allegations. However, we have not found the ruling was wrong on the merits because it is possible the court might have sustained the section 300(a) allegations based on the evidence in the record had it properly applied the section 355.1(a) presumption. Therefore, we reverse and remand with directions that the court reopen jurisdiction to reconsider the section 300(a) allegations properly applying the section 355.1(a) presumption based on the evidence in the record. If the court finds the allegations should be sustained, the court is directed to enter a new ruling sustaining the allegations. If the court finds the allegations should not be sustained, the court is directed to enter a new ruling dismissing the allegations.

DISPOSITION

The order sustaining the Welfare and Institutions Code section 300, subdivision (a) allegations is reversed. The matter is remanded to the juvenile court to reopen jurisdiction to (1) reconsider the Welfare and Institutions Code section 300,

subdivision (a) allegations properly applying the Welfare and Institutions Code section 355.1, subdivision (a) presumption and based on the evidence in the record and (2) enter a new ruling sustaining or dismissing the allegations.

_____/s/
HOCH, J.

We concur:

_____/s/
MAURO, Acting P. J.

_____/s/
DUARTE, J.