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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JOSEPH B., a Person Coming Under  
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JAMIE M.,

Defendant and Appellant.

D065833

(Super. Ct. No. CJ1118)

APPEAL from an order of the Superior Court of San Diego County, Laura J.

Birkmeyer, Judge. Reversed with directions.

Rosemary Bishop, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Lisa Maldonado, Deputy County Counsel, for Plaintiff and Respondent.

Jamie M., the mother of Joseph B., appeals the juvenile court's order from the combined six- and 12-month review hearing. Jamie contends the court erred by taking permanent jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement

Act (UCCJEA) (Fam. Code, § 3400 et seq.) without contacting authorities in Nevada and giving the court in that state the opportunity to exercise jurisdiction and commence a proceeding on Joseph's behalf.

We conclude the court erred by taking permanent jurisdiction without complying with the mandate of the UCCJEA. We conditionally reverse the order and remand the matter to the juvenile court for contact and notice to Nevada authorities. If a Nevada court does not take action after notice and contact, the juvenile court is directed to reinstate its order. (See *In re A.M.* (2014) 224 Cal.App.4th 593 (*A.M.*.)

Jamie also challenges the sufficiency of the evidence to support the placement of Joseph with his father, Angelo B., in Texas, given his history of substance abuse and domestic violence and the lack of a mental health assessment. We agree that Angelo's history is troubling. We conclude, however, that substantial evidence supports the court's ruling. The San Diego County Health and Human Services Agency (the Agency), which had the burden of showing placement with Angelo would be detrimental to Joseph's physical or emotional well-being, recommended placement with Angelo based on his cooperation and progress with his case plan, and neither minor's counsel nor Jamie objected to placement based on Angelo's conduct. Additionally, the Agency arranged for services and oversight by child protective services in Texas, and the court retained jurisdiction to protect Joseph's best interests. Thus, any problem associated with Angelo's conduct could be addressed during further proceedings.

## FACTUAL AND PROCEDURAL BACKGROUND

In February 2012, Joseph was born to Jamie in Las Vegas, Nevada. Angelo's name does not appear on the birth certificate, but a Nevada court has entered a judgment of paternity. Jamie and Joseph lived with Angelo in Pahrump, Nevada, until June 2012, when law enforcement escorted her from the property after she assaulted him. According to Jamie, Angelo would come home high on methamphetamines or alcohol, and physically abuse her and force her to have sex. On this occasion, she refused to have sex and struck him with a water bottle.

In late December 2012, Jamie came to California at the invitation of her cousin, Kelly K.<sup>1</sup> Jamie had left Joseph in Las Vegas, Nevada, with a friend, and Kelly traveled there to pick him up. Kelly observed that Jamie's moods fluctuated and she was not affectionate toward the baby. Jamie had been diagnosed with bipolar and borderline personality disorders, and she had not taken medication since October 2012.

In January 2013, the Agency removed Joseph from Jamie's custody and filed a petition on his behalf under section 300, subdivision (b). The petition alleged Jamie had checked herself into a mental health facility after having thoughts of harming Joseph, and the alleged father was unable to protect him.

At the detention hearing, the court was apprised of a possible UCCJEA issue. The court found emergency jurisdiction under the UCCJEA, noting it would "make inquiry with Nevada." Angelo was located and he sought placement of Joseph with him in Nevada.

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<sup>1</sup> The record provides two spellings for the cousin, Kelly and Kellie.

In March 2013, the court held two special hearings on the UCCJEA issue. At the first hearing, Jamie explained she and Joseph lived with Angelo in Nye County, Nevada, "in his paternal grandmother's home," from the date of his birth in January 2012 until that June, and they lived with her mother in Las Vegas, Clark County, Nevada, between June and October 2012. Jamie stated that at some point "we became homeless," but her mother's home has "always been our address." She advised the court there was no custody proceeding for Joseph in Nevada, but a child support action against Angelo was brought in Nye County to recoup financial assistance payments to her.

At the second hearing, the court advised that it had spoken with a law clerk at the court in Clark County and he reported there were "no family or juvenile cases regarding Joseph." Angelo's counsel stated, "I'm just unclear on if we actually need the [Nevada] court to say that they do not want to assume jurisdiction." The court responded "that's a matter of interpretation," and "at this point in time, the information that I have is there are no open cases [pending] anywhere and no court has made any determination regarding custody of Joseph. So with that, I think we proceed."

At a March 2013 hearing, the court assumed jurisdiction over Joseph, placed him with Kelly, and ordered an expedited evaluation of Angelo's home in Nevada under the Interstate Compact on the Placement of Children (ICPC; Fam. Code, § 7900 et seq.). The court noted UCCJEA "issues have been resolved."

The disposition hearing was continued because the court wanted more information on Angelo's criminal history and DUI (driving under the influence) convictions, the parents' claims of domestic violence, and Jamie's recent suggestions she intended to

commit suicide. The court wanted to review the ICPC before deciding the placement issue.

By May 2013, Jamie had returned to Las Vegas for good. She was no longer participating in services, and she advised the court she hoped Joseph would be placed with Angelo.

The disposition hearing began in June 2013, at which time both parents requested placement. The court removed Joseph's custody from Jamie and found detriment based on her move to Las Vegas and discontinuation of services "when she clearly is dealing with some very significant mental health issues." The court also found it would be detrimental to place Joseph with Angelo based on the current information, including his significant substance abuse history, his admission that he still drank socially<sup>2</sup>, and his denial of any culpability in domestic violence.

The disposition hearing was continued to July 2013, at which time Angelo was living in Texas with his former wife, Tina, and their three children. He had recently participated in a substance abuse assessment, which diagnosed polysubstance dependence and alcohol abuse "in sustained remission," presumably based at least in part on his denial of alcohol use for the preceding six months and drugs for the preceding three

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<sup>2</sup> An email from Nevada states Angelo told a social worker he had been sober since 2010, but he also "admitted to drinking at least a 6-pack/week and has at least 5 DUI's between Texas and Nevada." At the disposition hearing, he was asked whether he drank a six-pack per week. He testified: "In reality, no. I only drink when I go to Karaoke. I didn't want to lie and say I don't drink at all. She [the social worker] was, like, how much would you say you drank? I said, 'a six-pack a week.'" He was asked how many drinks he had per occasion, and he testified, "I think we end up having probably three, three to four, at the most."

years<sup>3</sup>, and his claim he was attending AA meetings about three times a week. He was tested for drugs and alcohol in June 2013 and for drugs in July 2013, and all results were negative. He was enrolled in a domestic violence program, but had not yet begun classes.

Angelo had not undergone a mental health evaluation, as required by Nevada for the ICPC. Nevada advised that he "has [a] mental health history in which he has not been treated . . . since 2005." Specifically, he reported "that he suffers from anxiety and was previously treated for [b]ipolar disorder," and "he was prescribed [medication] but [had not taken it] since 2005." Nevada recommended that Angelo be denied placement at that time, but a final evaluation was pending. Jamie was opposed to placement with Angelo because he was no longer living in Nevada.

The court found by clear and convincing evidence that placement with Angelo would be detrimental to Joseph. The court continued Joseph in Kelly's care. The court directed the Agency to prepare an updated case plan for Angelo, to include random testing for drugs and alcohol, attendance in at least two AA or equivalent meetings per week, and participation in a domestic violence program and a mental health evaluation. The parents appealed, and this court affirmed the judgment. (*In re Joseph B.* (Jan. 9, 2014, D064328 [nonpub. opn.].)

In September 2013, the court ordered the initiation of an ICPC for Angelo's home in Texas. Thus, the Nevada ICPC became moot.

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<sup>3</sup> The denial of alcohol use was contrary to his admission at the disposition hearing that he still drank alcohol socially, and the record indicates the court caught the discrepancy.

The six-month review hearing was continued to February 2014, at which time the Agency recommended placement with Angelo. The Texas ICPC recommended "placement with concerns" about substance abuse, domestic violence, and finances; Angelo "consistently tested negative since being required to do so"; he successfully completed a domestic violence program; he was employed full time at Amazon; he was cooperative with the Agency's requests, and he understood "that he needs to provide a safe, supportive and nurturing home for his son," and "to do that he must refrain from alcohol and drugs." Texas recommended that Angelo comply with his case plan and attend AA meetings, and based on past conduct the Agency believed he would comply.

Joseph's counsel asked that the six-month review hearing be set for trial. He wanted to ensure "a smooth transition to Texas," particularly given Joseph's therapy to address emotional and social issues.

On March 18, 2014, the court held a combined six- and 12-month review hearing. Joseph's counsel withdrew his trial setting because he learned services available to Joseph in Texas were equivalent to services here. Jamie's counsel stated, "Mother is submitting, your honor. And Mother's only request from here on out is that the Agency make [the] best efforts to facilitate visitation between her and her son."

The court ordered placement with Angelo on the conditions that he comply with his case plan, attain services for Joseph in Texas, and make the child available on request to the Agency's social worker, the Texas social worker, and minor's counsel and investigator. The court continued Joseph as a dependent, explaining "we want to make sure that we know where [he] is and how things are going. I do find that conditions are

likely to exist if supervision is withdrawn." The court found the Agency had offered Jamie reasonable services and she had not made substantive progress. The court scheduled a "family maintenance review hearing" six months hence.

## DISCUSSION

### I. UCCJEA

#### A

In California, the UCCJEA (Fam. Code, § 3400 et seq.) is the exclusive means of determining subject matter jurisdiction in a custody dispute involving another jurisdiction. (*In re Marriage of Fernandez-Abin & Sanchez* (2011) 191 Cal.App.4th 1015, 1037; Fam. Code, § 3400 et seq.) "A dependency action is a 'child custody proceeding' subject to the UCCJEA. [Citations.] The purposes of the UCCJEA in the context of dependency proceedings include avoiding jurisdictional competition and conflict, promoting interstate cooperation, litigating custody where child and family have closest connections, avoiding relitigation of another state's custody decisions, and promoting exchange of information and other mutual assistance between courts of other states." (*In re Jaheim B.* (2008) 169 Cal.App.4th 1343, 1348.)

" 'Subject matter jurisdiction either exists or does not exist at the time an action is commenced. [Citation.] There is no provision in the UCCJEA for jurisdiction by reason of the presence of the parties or by stipulation, consent, waiver, or estoppel. [Citations.]' " (*Brewer v. Carter* (2013) 218 Cal.App.4th 1312, 1316-1317.) "We are not bound by the juvenile court's findings regarding subject matter jurisdiction, but rather

'independently reweigh the jurisdictional facts.' " (*In re A.C.* (2005) 130 Cal.App.4th 854, 860.)

## B

Jamie concedes that at the detention hearing the court properly exercised temporary emergency jurisdiction over Joseph under the UCCJEA. "A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, . . . is subjected to, or threatened with, mistreatment or abuse." (Fam. Code, § 3424, subd. (a).) She contends, however, that the court erred by exercising permanent jurisdiction, and placing Joseph with Angelo at the combined six- and 12-month hearing, without contacting authorities in Joseph's home state of Nevada and giving the court there the opportunity to exercise jurisdiction and commence proceedings on his behalf. We agree.

Under the UCCJEA, "temporary emergency jurisdiction does not confer authority to make a permanent child custody determination." (*In re Gino C.* (2014) 224 Cal.App.4th 959, 965-966 (*Gino C.*)) "Under certain circumstances, a court may address the merits of a dependency petition after determining an emergency exists. [Citation.] However, to do so under the [UCCJEA], the court must assert jurisdiction under [Family Code] section 3421 or 3423, which are not emergency jurisdiction provisions." (*In re C.T.* (2002) 100 Cal.App.4th 101, 113.)

Under Family Code section 3421, subdivision (a), the juvenile court has jurisdiction to make a child custody determination only under the following

circumstances: "(1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state. [¶] (2) A court of another state does not have jurisdiction under paragraph (1), or a court of the home state of the child has declined to exercise jurisdiction on the grounds that this state is the more appropriate forum under [Family Code] Section 3427 or 3428. . . . [¶] . . . [¶] (3) All courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under [Family Code] Section 3427 or 3428. [¶] (4) No court or any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3)." (Fam. Code, § 3421, subd. (a).)

" 'Home state' means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. . . . A period of temporary absence of any of the mentioned persons is part of the period." (Fam. Code, § 3402, subd. (g).)

The court did not expressly determine whether Nevada was Joseph's home state, although it presumably made the finding since it contacted a court in Nye County. The Agency asserts the record is unclear as to whether Joseph had a home state because it does not show exactly when or where Jamie was homeless. In our view, however, the record unquestionably establishes Nevada as the home state. Joseph lived there from his birth in February 2012 until late December 2012, when Kelly picked him up and brought

him to California to be with Jamie. Jamie referred to a period of homelessness, but she advised the court her address was always her mother's home in Las Vegas. The record does not suggest Joseph ever left Nevada until late December 2012, and the Agency's position is sheer speculation. In any event, Nevada was the home state even if Joseph was temporarily absent since Angelo remained in that state. (Fam. Code, §§ 3421, subd. (a)(1); 3402, subd. (g).)

In two recent opinions, this court held the juvenile court violated the UCCJEA by not contacting and noticing authorities in Mexico, the children's home state, of dependency proceedings and giving Mexico the opportunity to exercise jurisdiction. (*Gino C.*, *supra*, 224 Cal.App.4th 959; *A.M.*, *supra*, 224 Cal.App.4th 593.) In *Gino C.*, we reversed a judgment declaring minor children dependents and denying placement with the father. The Agency conceded the court did not comply with the UCCJEA before assuming permanent subject matter jurisdiction, and we agreed. (*Gino C.*, at p. 964.) We explained: "The court's efforts to comply with the UCCJEA fell short because the court misinterpreted [Family Code] section 3424, subdivision (b), as allowing the court's temporary emergency jurisdiction to automatically convert to permanent jurisdiction if the parents did not initiate child custody proceedings in Mexico. Instead, the statute precludes a child custody determination by a court exercising temporary emergency jurisdiction from becoming final *until this state becomes the child's home state.*" (*Id.* at p. 966.)

In *A.M.*, we affirmed jurisdictional and dispositional orders on the ground of harmless error, despite violation of the UCCJEA's notice provision, because they were

properly issued under the court's temporary emergency jurisdiction. We explained, "A court's custody determination remains in effect under the court's emergency jurisdiction until a child custody proceeding has begun in the state with subject matter jurisdiction (§ 3424, subd. (b)) or until the state of emergency no longer exists." (*A.M.*, *supra*, 224 Cal.App.4th at p. 598.) In *A.M.*, the jurisdictional and dispositional hearing was held two weeks after the Agency filed the petition. (*Id.* at pp. 596-597.) We remanded for the limited purpose of contacting and notifying Mexican authorities of the proceedings. If a Mexican court assumed jurisdiction and commenced proceedings, we directed the juvenile court to void its jurisdictional and dispositional orders in conformity with the UCCJEA. (*Id.* at pp. 599-600.)<sup>4</sup>

We conclude the court violated the UCCJEA by making orders of a permanent nature without contacting Nevada authorities to inquire whether that state wished to assert its home state jurisdiction and commence a proceeding to protect Joseph's interests. (Fam. Code, § 3421, subd. (a).) The court's contact with a law clerk at a court in Nevada was insufficient to satisfy its duty. By the time of the combined six- and 12-month review hearing, the court's temporary emergency jurisdiction had long expired, but it continued to act under that umbrella. The court erroneously believed that under the UCCJEA, a court of this state should not discuss jurisdiction with another state unless a custody proceeding is pending in that state.

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<sup>4</sup> *A.M.*, *supra*, 224 Cal.App.4th 593, but not *Gino C.*, *supra*, 224 Cal.App.4th 959, was decided before the combined six- and 12-month review hearing in Joseph's case.

## C

The Agency contends any error is subject to a harmless error analysis, and there is no harm "based on [Joseph's] current circumstances." The Agency asserts that since Joseph was placed with Angelo in Texas in March 2014, "any attempts at further involving the state of Nevada . . . would be impractical at best." We agree that under the circumstances, Nevada may likely be uninterested in exercising jurisdiction.

Subject matter jurisdiction, however, is not subject to a harmless error analysis, and thus any lack of prejudice is immaterial. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 199, fn. 10.) "[J]urisdiction 'over the subject matter is given by law' and 'nothing but an additional grant from the legislative authority can extend that power over a class of cases formerly excepted.'" (*Ibid.*) The harmless error rule "is inapplicable if the trial court has acted in excess of its jurisdiction in granting the relief being challenged: If jurisdictional error has occurred, the resulting judgment or order is 'voidable and reversible on appeal even where . . . it is clear from the record [that no prejudice resulted].'" (*In re Marriage of Jackson* (2006) 136 Cal.App.4th 980, 997.)

The Agency's reliance on *In re Cristian I.* (2014) 224 Cal.App.4th 1088 (*Cristian I.*) is misplaced. *Cristian I.* applied a harmless error analysis to the juvenile court's failure to *immediately* contact the Arizona court after taking temporary emergency jurisdiction at the detention hearing. "When a California court asserting temporary emergency jurisdiction is aware that a child custody determination has been made by another jurisdiction, the California court 'shall immediately communicate with the other court.'" (*Cristian I., supra*, at p. 1097, citing Fam. Code, § 3424, subd. (d).) *Cristian I.*

found the procedural flaw harmless because the timing requirement was directory rather than mandatory, and "by the time the Arizona court ceded jurisdiction . . . and well before the juvenile court conducted the jurisdictional hearing on the dependency petition, each court was fully advised of what had transpired in the other. It is not reasonably probable the delay and indirect method of communication had any impact on the outcome of the case." (*Cristian I.*, *supra*, at p. 1101.) *Cristian I.* explains, "[w]e typically apply a harmless-error analysis when a statutory mandate is disobeyed, except in a narrow category of circumstances when we deem the error reversible per se." (*Id.* at p. 1098; *In re C.T.*, *supra*, 100 Cal.App.4th at pp. 110-111 [this court applied harmless error analysis to subdivision (d) of Fam. Code, § 3424].) An error resulting in the lack of subject matter jurisdiction is in the category of errors reversible per se. (*Varian Medical Systems, Inc. v. Delfino*, *supra*, 35 Cal.4th at p. 199, fn. 10.)<sup>5</sup>

In *Gino C.*, *supra*, 224 Cal.App.4th at p. 968, we unconditionally reversed the judgment and remanded the case to the juvenile court for further proceedings consistent with the opinion. We declined to reach the merits of the court's placement decision. (*Id.* at p. 961.) To avoid unnecessary delay here, we reach the substantive merits of the placement issue and conditionally reverse the order with directions to reinstate it if Nevada does not exercise jurisdiction.

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<sup>5</sup> Indeed, *Cristian I.* explains: "To be sure, if the juvenile court had attempted to exercise something beyond temporary emergency jurisdiction—if it had proceeded to adjudicate the dependency petition and to enter disposition orders without the Arizona court first ceding jurisdiction—a further evidentiary hearing would have been required to determine the basis on which the California court had jurisdiction to modify the Arizona court's custody order." (*Cristian I.*, *supra*, 224 Cal.App.4th at p. 1100.)

## II. Placement with Angelo

### A

Welfare and Institution's Code<sup>6</sup> section 361.2, subdivision (a) "evinces the legislative preference for placement with the noncustodial parent when safe for the child." (*In re Patrick S.* (2013) 218 Cal.App.4th 1254, 1262.) The statute provides that 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 safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a).) "A court's ruling under section 361.2, subdivision (a) that a child should *not* be placed with a noncustodial, nonoffending parent requires a finding of detriment by clear and convincing evidence." (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426, italics added.)

In her briefing, Jamie cited section 361.2 on the standard of proof applicable at the combined six- and 12-month hearing, and in our original opinion we discussed the clear and convincing standard of section 361.2, subdivision (a). In a petition for rehearing, however, Jamie advised us that her citation to section 361.2 was inadvertent, and she intended to cite section 366.21, subdivisions (e) and (f). These subdivisions provide, respectively, that at the six- and 12-month hearings, "the court shall order the *return of the child* to the physical custody of his or her parent or legal guardian unless the court finds, by a *preponderance of the evidence*, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or

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<sup>6</sup> Future undesignated statutory references are to the Welfare and Institutions Code.

physical or emotional well-being of the child." (§ 366.21, subds. (e), (f), italics added.)

These provisions do not differentiate between custodial and noncustodial parents.

In her petition, Jamie contended the clear and convincing standard of section 361.2, subdivision (a) is applicable only at the disposition hearing, and at subsequent review hearings a noncustodial parent seeking placement is "in the same position as the other parent, and subject to the 'preponderance of the evidence' standard of sections 366.21, [subdivisions] (e) and (f)." She asserted that since Angelo "was recently provided with a detriment analysis under the 'clear and convincing' standard, [he] should not be entitled to another determination under this higher standard of proof."<sup>7</sup> Jamie conceded she "has not found a case directly on point on this issue." She also conceded the use of the word "return" in section 366.21, subdivisions (e) and (f) "could suggest these provisions only apply to the previously custodial parent," and "the provisions of section 361.2 might continue to apply to the non-custodial parent at all later stages of the dependency proceeding."

We granted the petition and vacated our original opinion to acknowledge Jamie's intention to cite section 366.21, subdivisions (e) and (f) rather than section 361.2. We decline to resolve the statutory issue, however, because even assuming the clear and convincing standard of section 361.2, subdivision (a) was inapplicable to Angelo's

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<sup>7</sup> "Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt." (*In re Patrick S.*, *supra*, 218 Cal.App.4th at p. 1262.) " 'Preponderance of the evidence' is usually defined in terms of 'probability of truth,' for example as evidence that, ' "when weighed with that opposed to it, has more convincing force and the greater probability of truth." ' " (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 482-483.)

request for placement at the combined six- and 12-month hearing, the outcome on appeal is the same.<sup>8</sup>

We may reverse an order when the record shows the court failed to apply the correct standard of proof (*Ian J. v. Peter M.* (2013) 213 Cal.App.4th 189, 208), but there is no suggestion that occurred here. Neither the court's minute order nor the reporter's transcript from the hearing suggests the court applied a clear and convincing standard to the issue of Joseph's placement with Angelo. Thus, we presume it applied a preponderance of the evidence standard. (*In re C.W.* (2012) 208 Cal.App.4th 654, 660 ["lower court's orders are presumed correct as to matters on which the record is silent"].) In her petition, Jamie did not assert the juvenile court applied the wrong standard.

Further, regardless of the evidentiary standard applicable below, the appellate court reviews the ruling for substantial evidence. "The 'clear and convincing' standard . . . is for the edification and guidance of the trial court and not a standard for appellate review." (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880.) "The judge may reject a showing as not measuring up to the standard, but, if the judge decides in favor of the party with this heavy burden, the clear and convincing test disappears. On appeal, the usual rule of conflicting evidence is applied." (*Ian J. v. Peter M., supra*, 213 Cal.App.4th at p. 208.) "It is elementary that an appellate court cannot examine evidence to determine where the preponderance of the evidence lies. [Citations.] Our function is to determine whether the record contains any substantial evidence tending to support the finding of the

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<sup>8</sup> For the same reason, we did not ask the Agency to respond to the petition for rehearing. In its respondent's brief, the Agency asserted a preponderance of evidence standard applied.

trial court." (*In re Corey* (1964) 230 Cal.App.2d 813, 823-824.) "[O]ur review of the sufficiency of the evidence is unaffected by the standard of proof employed in the [juvenile] court." (*Ian J. v. Peter M., supra*, 213 Cal.App.4th at p. 209.)

"The term "substantial evidence" means 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. [Citation.]" (*In re A.B.* (2014) 225 Cal.App.4th 1358, 1363.) We "review the evidence in the light most favorable to the dependency court's findings and draw all reasonable inferences in support of those findings." (*In re John M.* (2013) 217 Cal.App.4th 410, 418.) "'We have no power to judge the effect or value of the evidence, to weigh the evidence [or] to consider the credibility of witnesses. . . .'" (*In re Mark L.* (2001) 94 Cal.App.4th 573, 581.)

"[I]n dependency proceedings, a trial court's determination will not be disturbed unless it exceeds the bounds of reason. [Citation.]" (*In re A.B., supra*, 225 Cal.App.4th at p. 1363.) "The substantial evidence standard of review is generally considered the most difficult standard of review to meet, as it should be, because it is not the function of the reviewing court to determine the facts." (*In re Michael G.* (2012) 203 Cal.App.4th 580, 589.)

## B

We agree with Jamie that "there were many red flags" pertaining to Angelo's conduct.<sup>9</sup> His history of substance abuse and domestic violence does not instill confidence, and that is why the court followed the Agency's recommendation at the disposition hearing to deny placement based on detriment. In affirming the judgment, we explained: "The record supports the court's concern about Angelo's long history of substance abuse, going back to his teens, and dependency upon multiple substances, which led to criminal behavior and interfered with his ability to maintain employment. The court had justifiable concerns that even after three DUI convictions, Angelo violated his probation by testing positive for methamphetamine. Then, after serving time in prison for the violation, he again tested positive for driving under the influence of marijuana. While Angelo claims he has been sober since 2010, he disclosed to a Nevada social worker that he still engages in social drinking every week while playing games or going to bars." (*In re Joseph B.*, *supra*, D064328, at p. \*8.)

We added: "The record also supports the court's finding based upon concerns about domestic violence. While Angelo suggested that the incidents of domestic violence with Jamie were due to her mental health issues and that he was the victim, the court did

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<sup>9</sup> The Agency asserts Jamie forfeited her sufficiency of the evidence challenge by submitting on the Agency's placement recommendation. It is unclear, however, whether she submitted on the Agency's recommendation or on its reports. "[A] parent who submits on the reports in evidence does not forfeit the right to appeal the juvenile court's orders. . . . Only when a parent submits on a social worker's recommendation does he or she forfeit the right to contest the juvenile court's decision if it coincides with that recommendation." (*In re T.V.* (2013) 217 Cal.App.4th 126, 136.)

not find his testimony credible. Even if his testimony were to be believed, the court found it troubling that Angelo would continue to engage with Jamie, particularly while he is seeking placement of the child. In addition, there was evidence that Angelo's ex-wife left him after an incident where Angelo became physical and it scared her enough to call the police. At the time of the continued disposition hearing in July 2013, Angelo had not yet started a domestic violence program." (*In re Joseph B.*, *supra*, D064328, at p. \*8.)

At the combined six- and 12-month review hearing, however, the Agency did not attempt to meet its burden to show detriment, either by a clear and convincing standard or by the preponderance of the evidence. To the contrary, it recommended that Joseph be placed with Angelo. The Agency reported Angelo had made reasonable progress on his case plan and he "continues to be compliant and cooperative with all Agency requests." The Agency explained "Texas recommends that [Angelo] comply with services and attend AA meetings. Based on his compliance with Agency requests throughout the case there is no reason to believe that [he] won't continue to do so."

After the disposition hearing, Angelo attended a domestic violence program for several months, completing it in January 2014. He missed only two classes, once because of illness and once because of icy streets. Angelo's counselor advised the court that he was "highly motivated to work through this program." The counselor also wrote: "Over the last several months and weeks I have had the benefit of learning a few things about [Angelo]. Some of those things are very revealing, showing positive things regarding who he is. First he is a very caring and nurturing father. Carrying his children to school, social and sporting activities (and enjoying doing them). . . . [Angelo] does not

know I am writing this. He never requested me to do so. I hope the court gives him his son."

Jamie asserts the domestic violence program was ineffective as evidenced by "the current instability of [his] relationship with Tina." Jamie cites information in the clerk's transcript from a special hearing in April 2014, several weeks after the combined six- and 12-month review hearing under review. The record, however, should not include postjudgment evidence. The California Supreme Court disapproves of "an appellate court's use of new evidence outside the record to second-guess the trial court's resolution of issues properly committed to it by the statutory scheme." (*In re Josiah Z.* (2005) 36 Cal.4th 664, 676.) We do not assess the court's ruling with hindsight. Postjudgment events are the subject of further proceedings.

Additionally, there is no evidence of Angelo's drug or alcohol use or dishonesty about the issue after the disposition hearing. He submitted to random drug testing in October 2013, and to random drug and alcohol testing in November and December 2013, and all results were negative. Further, he reported attending AA meetings. The Agency advised the court "he understands that he needs to provide a safe, supportive and nurturing home for his son," and he "is also cognizant that in order to do that he must refrain from alcohol and drugs."

Given the duration of Angelo's substance abuse problem, it is puzzling that the Agency did not require more frequent testing and independent proof of attendance at AA meetings. This is a difficult case, but we conclude that regardless of the standard or proof applicable below, substantial evidence supports the court's ruling. The record shows the

court took a measured approach. It did not place Joseph with Angelo for more than a year after he came forward, until it was satisfied he would not pose a threat. Notably, Joseph's counsel had no objection to placement insofar as Angelo's conduct is concerned. Counsel's only concern was whether Joseph could receive adequate services in Texas for his social and emotional problems. Once counsel was satisfied Texas services were equivalent to those here, he withdrew any objection to placement. Likewise, Jamie did not object to placement based on Angelo's conduct. She objected only because Joseph's move to Texas would make her visitation onerous.

Further, the Texas ICPC recommended "placement with concerns," and the court implemented a system of checks and balances. When the court places a child with a noncustodial parent, it may terminate jurisdiction, order that the parent assume custody subject to the jurisdiction of the juvenile court and require a home visit be conducted within three months, or order that the parent assume custody subject to the supervision of the juvenile court. (§ 361.2, subd. (b)(1) - (3).) The court retained jurisdiction for the specific purpose of monitoring Angelo's conduct. The court ordered Angelo to continue to comply with his case plan, and to make Joseph available to the Agency's social worker, the Texas social worker, minor's counsel and minor's investigator, on request. Texas is well aware of Angelo's history and required him to attend AA meetings. Additionally, the court ordered Angelo not to supervise any visits between Joseph and Jamie to avoid potential conflict between the parents. Without continued supervision we would likely reverse, but that is not the situation.

It is true that at the time of the six- and 12-month review hearing, Angelo had not undergone a mental health evaluation. This was not through his reticence, but because the Agency did not make a referral sooner. The evaluation requirement arose from information he volunteered to a Nevada social worker, and no party raised any concern over Angelo's mental health. The evaluation was scheduled for shortly after the six- and 12-month review hearing, and because the court retained jurisdiction any concern raised in it could be swiftly addressed.<sup>10</sup>

Jamie's reliance on *Michael G.*, *supra*, 203 Cal.App.4th 580, is misplaced. In *Michael G.*, this court concluded the juvenile court abused its discretion by denying the father's request for a brief continuance of a permanency planning hearing (§ 366.26) to allow time to receive the child's psychological evaluation, which had been completed, as it was pertinent to adoptability. (*Michael G.*, *supra*, at p. 590.) We found the error was harmless, however, "in view of the strength of the other evidence in the record supporting the adoptability findings." (*Id.* at p. 591.) Jamie asserts *Michael G.* shows that "[w]here a medical evaluation has been ordered to inform a court's decision, the better practice is to wait for the report before making that decision." Here, however, no party requested a continuance or even mentioned a psychological evaluation. While it would have been preferable to have the evaluation, we do not fault the court for not continuing the hearing on its own motion.

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<sup>10</sup> The Agency moves for augmentation of the appellate record with postjudgment evidence, its June 11, 2014 addendum report and an attached April 25, 2014 psychological evaluation of Angelo, and for partial dismissal of the appeal. Jamie opposes the motion and we deny it.

## DISPOSITION

The March 18, 2014 order from the combined six- and 12-month hearing is reversed. The case is remanded to the juvenile court for the limited purpose of contacting and providing notice to Nevada authorities to determine whether that state wishes to assume jurisdiction and to commence a proceeding on Joseph's behalf. If a Nevada court does not take action after contact and notice, the court is directed to reinstate its order.

HALLER, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.