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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re N.O., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. R.F., Defendant and Appellant.	D070146 (Super. Ct. No. EJ4004)

APPEAL from an order of the Superior Court of San Diego County, Gary M. Bubis, Judge. Affirmed.

Elizabeth Klippi, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, Dana C. Shoffner, Senior Deputy County Counsel, for Plaintiff and Respondent.

R.F. (mother) appeals an order in the juvenile dependency case of her daughter, N.O., placing N.O. with her presumed father and noncustodial parent, A.O. (father) in Ohio. Mother contends there is not substantial evidence supporting the juvenile court's finding that N.O.'s placement with father would not be detrimental under Welfare and Institutions Code[1] section 361.2, subdivision (a). We conclude otherwise, and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2016, Agency filed a petition under section 300, subdivisions (b) and (j) in regard to then five-year-old N.O. Agency alleged N.O.'s mother was unable to protect N.O. and N.O. was at serious risk of physical harm, as mother's boyfriend had subjected mother's one-year-old son, N.O.'s brother, to physical abuse including excessive bruising, skull and other extremity fractures, subdural bleeding, scalp swelling and brain edema, causing his death. Mother claimed the boy had fallen from a couch while in her boyfriend's care; she denied her boyfriend was responsible, and continued contact with him after her son's death.

Detention

The juvenile court conducted a detention hearing and made a prima facie finding on the petition, ordering N.O. to be detained with an approved relative. It found father was N.O.'s presumed father under Family Code section 7573. Agency social worker Helen Solivan had earlier contacted father, who wanted N.O. to return to Ohio to live

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1 Statutory references are to the Welfare and Institutions Code.

with him. Father and mother had been together for 10 years and sporadically together for the last three years; they had lived together in both Ohio and San Diego. Father reported he was a registered sex offender but was to be taken off the registry in August 2016; Agency stated father at age 20 was convicted in 2006 in Ohio for unlawful sexual conduct with a minor due to he and a friend having anal and vaginal intercourse with an intoxicated 13-year-old girl. Agency put the parties on notice that it recommended services be denied to both parents. However, the court ordered services be provided to effectuate reunification, including crisis intervention, case management, counseling, transportation and random drug testing. It ordered liberal supervised visitation with both mother and father. Mother was later arrested and charged with felony child endangerment.

Jurisdiction and Disposition

In February 2016, N.O., who was placed with a maternal uncle and aunt, reported to social worker Solivan that she wanted to go home with mother and missed her a lot, but also that she wanted to go to Ohio and live with father as long as she could continue visiting with mother. In an interview with Solivan, father stated he was a cancer survivor with childhood diabetes, and admitted to smoking marijuana once in a while. He and mother had lived together for three or four years in San Diego where N.O. was born but eventually returned to Ohio; according to father, mother was good and attentive with the children. Father denied any domestic violence between them and stated mother moved back to San Diego after having an affair, which did not concern him as he expected to see his children every few months. He reported he took his role as a parent very seriously

and had a strong bond with his children, claiming parenting came naturally to him. Father was in a relationship with E.F. They lived together at his grandmother's house (actually father's stepmother's mother) with E.F.'s three children, who were eight, six, and two years old. Father worked at the same company for four years; he reported he liked his job and his supervisors would adjust his schedule to allow him to take N.O. to school and therapy appointments if she returned to Ohio to live with him. Father told Solivan he wanted N.O. with him in Ohio where he had family and friends, and she would be safe with him. He feared N.O.'s caregivers would not allow him to see N.O. or have a relationship with her. Father had already contacted a therapist for himself for grief counseling, and would arrange counseling for N.O. in Ohio. Father had three supervised visits with N.O.; Solivan observed one and found he was appropriate and able to use tools given to him to answer N.O.'s questions about her brother's death. She observed that N.O. was bonded to father and asked when she could go live with him in Ohio.

Father's grandmother reported that father had overcome many health-related difficulties and was always a good father, and she believed N.O. should return to Ohio to live with him. N.O.'s caregivers, her maternal aunt and uncle, reported their dislike of father due to his registered sex offender status. They did not want to facilitate telephone calls with him and N.O., but agreed to call him with a blocked telephone number, though they objected to giving him updates.

Social worker Solivan listed concerns that had been brought to Agency's attention as to why N.O. should not be placed with father: Mother had reported domestic violence between her and father, which father denied. Mother also reported that father used

cocaine, marijuana, mushrooms and ecstasy, which father denied. Though father failed to test on the day of the detention hearing, he did so the next day and tested negative. Solivan found no known reports as a result of a child welfare check on father's Ohio family, and aside from his sex offender status, there were no other known arrests for father, father was employed, and he had family support in Ohio. She acknowledged that Agency could deny father services, but because he had not reoffended and appeared to be able to safely parent N.O. with additional support, Agency recommended that father be offered reunification services and an evaluation of his home under the Interstate Compact on the Placement of Children (ICPC; Fam. Code, § 7900 et seq.) so as to have N.O. safely reunified there. It recommended no services be provided to mother.

After Agency filed an amended section 300 petition, the jurisdictional hearing took place. The court made a prima facie finding on the amended petition and set the matter for a settlement conference as well as a contested adjudication and disposition hearing. Thereafter, based on mother's arrest for felony child endangerment, father sought a no-contact order between mother and N.O., which the court denied given mother's supervised visits.

Settlement Conference

In a March 7, 2016 addendum report for the settlement conference, Agency again recommended that jurisdiction be terminated and N.O. be placed with father in Ohio; finding that placement with him would not be detrimental to her. Father had reported to Agency social worker Leticia Abrego that N.O. had lived with him for four years, but left with her mother at the end of May 2015; that the past nine months after May were the

only time N.O. was away from him and he had regular phone contact with N.O. Both mother and E.F. were aware father was a registered sex offender; he reported he was with mother when the legal process started. E.F. stated she knew of father's criminal history, but never saw inappropriate behavior by father toward her children, two girls and a boy, who she said "love him to death." She said she would recognize signs of abuse as she was a victim herself and knew to be aware of behavioral changes in her children. E.F. denied any domestic violence with father, though there had been some with her own children's father.

N.O. told social worker Abrego that her mother and father did not live together because they started fighting. She could not remember when she lived with father but when asked what made her happy, she said sleeping in the bed with her mother and father, and when father pushed her high on a swing. N.O. told Abrego nothing made her sad or scared when she lived with father. N.O. expressed that she wanted to live with mother, but when asked, also said she would like to live with father and that she would be happy if she could live with either of them. Though N.O. was to participate in therapy, the caregivers reported that her last two sessions were cancelled. The caregivers were unwilling to supervise visits between N.O. and father but did supervise his calls, and one of the caregivers reported that N.O. wet the bed after father said he was preparing for her to come live with him.

Agency recommended that N.O. be placed with father for several reasons: Father's sex offense occurred 10 years ago and there were no restrictions; N.O. was very bonded to father and wanted to live with him; she lived with father and mother in Ohio

her entire life until May 2015 when mother moved to San Diego; mother was aware father was a registered sex offender and allowed N.O. to live with and also visit him; E.F. had three young children who lived with father and loved him, and E.F. had no concerns about them being around father despite knowing his sex offender status; father had no criminal, drug or child protective services history other than his sex offender status; he denied any domestic violence with mother or drug use except marijuana; the caregivers disliked father and interfered with his contact; N.O. was not afraid of father and had a good time playing with him; father's paternal relatives were in Ohio and were available to support him; and father had a job and he was willing and able to care for N.O. Social worker Abrego found no criminal history or child abuse history in Ohio for E.F., though E.F. had reported a social worker had visited her home due to a domestic violence incident with her children's father. The grandmother did not know father's sex assault criminal history; she denied he used drugs and suspected no drug use. The grandmother had no concerns about father as she had seen him interact with E.F.'s children.

Father by mid-March 2016 had moved from his grandmother's home and sent pictures of his new home to social worker Abrego. He reported again that he would be off the sex offender registry in August 2016; that in connection with that case he had been on probation for 15 days but it was cancelled, and never attended any classes and only had to inform the sheriff of his address change. Father reported using marijuana three weeks previously but did not have it at home, and when he did, he would keep it away from the children. He admitted his grandmother did not know the details of his arrest. Father set up therapy for N.O. in Ohio, and reported that an elementary school

was five minutes away from his home. Abrego scheduled a safety mapping with father, E.F. and father's grandmother via telephone.

At the settlement conference, the court confirmed the hearing dates for the contested adjudication and disposition hearing. Agency then conducted a safety mapping on March 21, 2016.

Contested Jurisdiction and Disposition Hearings

On March 22, 2016, the court conducted a jurisdictional trial. It proceeded on the section 300, subdivision (j) count, receiving certain reports and safety mapping notes into evidence, and found the petition true by clear and convincing evidence.

The contested disposition hearing took place on March 25, 2016. Agency filed an addendum report that day, reporting on N.O.'s visit with father and a January 6, 2016 Facebook conversation between father and mother forwarded by mother's attorney. Social worker Abrego reported that at the visit, N.O. seemed happy to see father, smiling and asking him to hold her. They ate pizza with N.O. sitting next to father. N.O. was very talkative and seemed happy, telling father about her school. They walked around a mall where father and N.O. took pictures in a booth and father purchased a dress and sweater for her. N.O. asked father and E.F. to hold her hands so she could swing between them, and N.O. asked father to walk her to the car and buckle her when it was time to leave. While driving to N.O.'s caregivers, Abrego told N.O. father would be returning to Ohio and N.O. responded, "Yeah," when asked if she would like to go with him. N.O. later showed the photo strip to her caregiver. Father had drug tested on March 21, 2016, and results were still pending.

Social worker Abrego spoke to father about his Facebook conversation in which he told mother he had separated from E.F.; that E.F. was fired at work for punching him in the face, stole from him and his grandmother, and left her three children with him. Father accused E.F.'s children's father of being a rapist. Father told Abrego he and E.F. had split up only for a couple of days because E.F. thought her involvement was keeping him from having contact with his children. As for the other matters, father said he had lied to mother so mother would allow him to talk to his children, which mother did the next day, and he admitted it was not a smart thing to do. Abrego spoke with father's boss at work, who confirmed father worked there for about two or three years, and that father took medication for diabetes. Father's boss never suspected father had been under the influence while at work. He denied there had been any incidents of violence or aggression between father and E.F., who worked with father for a time, and if any such incident had happened he would have terminated everyone involved. E.F. was aware of the Facebook conversation but denied to Abrego that she ever had any incident with father, and explained they had separated for about two days because mother would not allow father to have contact with his children because of her. E.F. told Abrego that she did not get along with her children's father, but as far as she knew, he was not a rapist and she permitted contact with him and their children at their grandmother's home. Father's grandmother denied that E.F. had ever stolen anything from her.

At the outset of the contested adjudication and disposition hearing, the court asked if there was a possibility of courtesy supervision in Ohio without an ICPC. Agency's counsel stated it was her understanding they could get one, and possibly more than one,

but there was no guarantee. The court then admitted the evidence from the jurisdictional hearing as well as the March 25, 2016 addendum report, and heard testimony from social workers Solivan and Abrego on Agency's behalf, and father and E.F. on father's behalf.

Social Worker Solivan's Testimony

Solivan had first informed father that his son's injuries were fatal and to come to San Diego as soon as possible; father cried and asked about N.O. and whether she had been hurt in any way. She observed father's interactions with N.O. after he came to California. N.O. was very happy to see him, ran into his arms and was "ecstatic," talking a lot to him. She was very comfortable with father, and father did well with her even though it was a difficult day for him; bringing N.O. a gift, interacting with her without crying as well as deflecting questions about her brother. E.F. was present and had very good interactions with N.O. in that she stepped aside to allow father and N.O. their time, but would speak with them and comment without interfering. N.O. wanted to leave with father to his hotel, surprising father, but Solivan interjected that the hotel would not allow young girls, and father responded, "Well, let's see," picking up on Solivan's comment. N.O. was very sad at the end of the visit. Solivan related some difficulty in getting the caregivers to permit regular phone calls with father and N.O., even though father tried to call N.O. and wanted to talk to her every day. Solivan never had been given information that father was inappropriate with N.O. during his phone calls. N.O. never told Solivan that she did not want to go home with father or that she would not feel safe in his care.

Solivan had confirmed with the Ohio sex offender registry that father was registered and would be off the registry in August of that year; the representative

confirmed father had been compliant with registering every year and there were no other conditions to his sex offender status beyond registering. She admitted she had initially recommended N.O. not be placed with father but an ICPC initiated because they needed to investigate and get to know father better including by observing visits and gathering information about E.F. as well as criminal and child welfare history. Based on her observations of father and N.O.'s interactions, Solivan agreed with Agency's recommendation to place N.O. with father even without an ICPC. She explained N.O. had lived with father for many years and Solivan had concerns about mother and the relative caregivers. Neither the January 2016 Facebook conversation nor mother's allegations of domestic violence changed her opinion because social worker Abrego had investigated it, mother was aware of father and E.F.'s visits with N.O. as well as Agency's recommendation to place N.O. with father with an ICPC, but mother did not raise her concerns at the outset of the case.

On cross-examination, Solivan testified that when mother reported she had left father because of domestic violence, Solivan checked with law enforcement for child abuse history in Ohio and found no police or child abuse reports due to domestic violence in their home. She admitted she originally wanted father to have a positive ICPC evaluation and undergo services, and that she did not ask father for the details as to why he was a registered sex offender because she was going to get a "CLETS" (Criminal Law Enforcement Telecommunications System) report and ask father about it. Solivan investigated and resolved father's sex offender registration issues favorably to him, meaning her investigation into CLETS or the Ohio sheriff was consistent with father's

explanation and she found father credible. Solivan testified that father had remorse for his crime and she believed he had taken responsibility for his actions. She had given father three drug tests, the last of which was positive for marijuana. On redirect examination, Solivan explained further that after she obtained the CLETS report she spoke with father again to ask him further details about his conviction, and his explanation matched that in the CLETS information. Solivan related that when he was 19 years old, father and a friend had sex with a 13-year-old girl against her will when she was drunk, and he engaged in "full penetration." Father did not undergo treatment because it was not required. On recross-examination, Solivan agreed father's registered sex offender status was a risk concern. She recalled father possibly did three months of jail time, then was required to register every year.

Social Worker Abrego's Testimony

Social worker Abrego testified that after Agency made its recommendations in its March 7, 2016 addendum report, Agency had conducted a positive safety mapping with father's grandmother, father and E.F. Father's grandmother, who had regularly provided care for the children when they lived in Ohio, was willing to have contact with N.O. and father and report any concerns; father was willing to drug test; father was employed; and E.F., who lived in the home and was a support for father and grandmother, had no criminal or child welfare history. Abrego had observed interactions between N.O. and father. Father reported to Abrego that he would permit contact between N.O. and mother, and mother could call every day if she desired but would have supervised visits; he wanted mother to take responsibility for what happened to their son. Father had concerns

that he was not having as much contact with N.O. as he desired, and he knew the caregivers did not like him, which factored into Abrego's recommendation. Abrego also considered N.O.'s wishes; N.O. had never said she did not want to be placed with her father. Abrego reiterated that N.O. seemed very comfortable with father and was very talkative with him; telling him stories and talking about school as well as everyday things. E.F.'s interactions with N.O. were appropriate and N.O. included E.F. in the conversation.

Abrego testified that father had been responsive to her communications, was forthcoming when she requested information and willing to participate in the case, which she considered in making her recommendation. She was concerned that father did not complete a therapeutic program relating to his conviction and asked him why, to which father responded it was not a requirement. However, given N.O. had lived with father before without any allegations of sexual abuse, and father currently lived with E.F. and her three children without concerns of sexual abuse, Abrego did not feel there was a high level of risk posed due to his registered sex offender status. Though it was standard practice to disapprove an ICPC when a registered sex offender is involved, she did request Ohio child welfare services conduct a courtesy visit to father's home, and if N.O. was placed with father and the case in California was closed, such a visit could occur in Ohio and Abrego would receive information about it.

On cross-examination, Abrego explained that Agency had addressed father's sex offender status and drug use history with his grandmother. Father reported that his grandmother knew he had gotten in trouble but was not sure what his arrest was, and the

grandmother stated she had probably just forgotten about it. Abrego believed father had expressed remorse for his sexual offense, and he related he could be taken off the registry sooner if he requested, as he had had no other incidents. Abrego had no concerns about the stability of father's and E.F.'s relationship. E.F. had admitted to her that there was domestic violence with her children's father, a social worker had come to her home for follow-up, and E.F. had obtained a restraining order against him and followed all of the social worker's recommendations, but Abrego did not receive any CPS history when she requested it from Ohio. Abrego, however, did not conduct an investigation into CPS referrals for E.F.'s children's father or substantiate whether he was a rapist. Though a maternal family member had asked Abrego to share information she had sent via e-mail concerning N.O., Abrego did not do so because she did not see the information posing any risk to N.O.[2] Abrego stated that N.O. had never expressed a preference about living with her mother or father, but reiterated that N.O. had lived with father in a household for the first four years of her life, and there had been no documented CPS involvement, child abuse or domestic violence. It was only after N.O.'s brother's death that mother began making such claims about father. Abrego could not ask N.O. whether the fighting between her mother and father involved any physical fighting because N.O. got distracted. Abrego considered the communications from maternal family members in her

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[2] In part, the e-mail from a maternal relative related that N.O. did not want to speak with father on the phone and that she asked about calling, texting or seeing mother. The relative stated that when N.O. asked if her mother would be present if she were to live with father and the relative said no, N.O. responded that she did not want to visit father; that he "spanks her real hard and yells at her loud and tells her to go to her room all the time."

assessment, but they did not have much impact because Abrego observed the interactions between N.O. and father and N.O. was very happy, she liked to talk to father, and she told Abrego she wanted to live with him.

Social worker Abrego agreed that anyone would benefit from therapy and parenting classes. She testified that if the court were to keep the case open, Agency would recommend such things for a case plan, but not services to address sexual offending behavior because father was not requested to do that through probation, no incidents had happened, and therapy would be enough. Abrego stated that father told her he did not have sex with the girl, but he needed to take whatever deal they offered him and he was put on the sex offender registry. Abrego guessed it was oversight that she had not followed up on the discrepancy between father's story to her and the official criminal history, and agreed an ICPC would probably be a useful investigative tool. She stated that if father lived in San Diego, Agency would most likely keep his case open, and it was fair to say she recommended it be closed mostly because father resided out of state and could not pass an ICPC.

Abrego admitted she had not looked at father's Facebook page, but stated on redirect that it was not normal practice at Agency to look at such things when investigating cases, as they needed more evidence to substantiate allegations. She testified that another factor in her recommendation to close the case was that there was no risk; father had not reoffended and had no other known criminal record. Abrego was unable to identify risk based on the disclosure of domestic violence because she was

unable to substantiate it. The reports also stated that mother had left Ohio because she had cheated on father, which was what father told Abrego.

Father's Testimony

Father testified that N.O. had lived with him for four and a half years from when she was born until mother left. He admitted that when he was 19 years old and still in high school, he went to a party and made a mistake by having oral sex and intercourse with a 13-year-old girl. He was arrested a couple of months later and released on his own recognizance. He and the victim had both been drinking, and father's friend was a codefendant who also engaged in sex with the girl. Father's friend entered into a plea and went to prison. Father's attorney recommended father enter into the same plea. He received a 90-day sentence on work release, but served 45 days and was able to keep his job. Father testified he was sorry, it was a mistake and he had learned from it and took responsibility for it, complied with his sex offender registration every year, and revealed his status to people with whom he developed relationships.

Father testified he took insulin 12 times a day for his diabetes, which was diagnosed when he was eight years old. At age 16, a diagnosis of testicular and lung cancer resulted in removal of one testicle and part of his lung, and he usually used marijuana for pain because he had seen his mother addicted to pain medication and he did not like taking pills. Father denied ever using cocaine or mushrooms or using marijuana on a recreational basis, stating he never used marijuana in the presence of children or kept it in his home. He explained he had recently tested positive for marijuana because he was in bad pain and used it. Father admitted to lying in his Facebook post to make mother

believe he was no longer with E.F., but it worked because he was able to talk to his children. He denied any domestic violence with E.F. or mother, stating mother left Ohio after she cheated on him with a high school student. He admitted marijuana was illegal in Ohio but that he never bought it, just obtained it from friends. Father wanted N.O. to live with him and had a home for her.

The juvenile court examined father about his sex offense, eliciting from him that he had been invited to a party at his friend's house that was populated by high school kids, he had had 15 or 16 beers and ran into the girl, who was the sister of a 22-year-old person father knew. Father testified he had no reason to believe she was 13 years old, but he was drunk and she initiated the sexual contact. He denied there was any struggle or violence involved. Father was placed on probation for a year, underwent one drug test, and was let off before a year passed without any condition of sexual abuse treatment. Father was 31 years old at the time of the hearing.

E.F.'s Testimony

E.F. testified she lived with father and her children; she had known father three or four years and they had dated since late May of 2015. Father told her about his sex offender status, but she had absolutely no concerns about having him around her children since they loved him as a father, he was caring and attentive, and they showed no signs of fear or sheltering from him. She reported that N.O. loved father a lot and did not want him to leave, and if the court permitted, they would live together in their Ohio home with N.O. and her children. E.F. reported having a stable relationship with father despite two or three short breakups. She sought to be a positive influence and a good role model, and

did not intend to substitute herself as N.O.'s mother. She testified that father could absolutely provide a no risk environment for N.O. in Ohio; that her children were in a non-risk environment living with him. On cross-examination, E.F. stated she had been hospitalized due to the domestic violence incident with her children's father, but had no other domestic violence relationships. She denied using drugs and stated there were never drugs in her home.

Stipulated Testimony of N.O.

"If called to testify, [N.O.] would state she wants to live with mommy. Her other choices were aunt [V] and aunt [J.] When she was specifically asked about dad, she also said she would want to live with him. She is afraid she won't get to live with mommy. She said she loves both mommy and daddy and has no other fears about either."

In closing arguments, father's counsel pointed out in part that N.O. had not been told crucial facts about her brother's death; that she only knew he went to heaven and might have a different viewpoint about mother if she knew mother's involvement in his death. He asked the court to follow Agency's recommendation, which was made after a thorough investigation.

N.O.'s counsel asked the court to find there was detriment to place N.O. with father, suggesting it should look to his sex offender status for detriment as it would for a jurisdictional presumption under section 355.1 or the reunification bypass provision of section 361.5, subdivision (b)(16). She pointed out there was no police report or follow-up with anyone else involved, and the evidence showed father told inconsistent statements about the matter, including by not admitting to it. Counsel sought to apply a

presumption in the law that being a registered sex offender was dangerous to the child. She argued the domestic violence was downplayed and mother's statements discounted, while father's and E.F.'s statements believed. She argued that father had characteristics of domestic violence, power and control issues, and that there was evidence of relationship instability with E.F. N.O.'s counsel also pointed to father's drug use as evidence of detriment, as well as the caregiver's statement that N.O. wet her bed when hearing about father's plans to have her live with him. She argued the evidence constituted clear and convincing evidence it would be detrimental to N.O. to place her with father, and alternatively that the court should act under section 361.5, subdivision (b)(3) and place her with father subject to the court's supervision.

Agency's counsel emphasized that it took Agency two months to decide whether it was appropriate to place N.O. with father, and the social workers did not take the recommendation lightly or without thought. She stated that after investigating several sources of information, they could not find clear and convincing evidence of detriment. They looked at father's responsiveness and willingness to provide information, his interactions with N.O. and efforts to prepare for her to live with him, N.O.'s wishes, the inability to substantiate mother's relatives' concerns or domestic violence in father's home, the contacts with the Ohio sheriff's registry, the fact father had no criminal history and had not reoffended but had mitigated risks, and the fact father had N.O. in his care for four years without problems. Agency pointed out father was willing to drug test and provided mitigating answers for his marijuana use. Agency stated there was no indication E.F.'s children's father would be around father's home or that N.O. would be

placed in his care, and there would be courtesy checks on father's home regardless of whether the case remained open.

The Court's Dispositional Findings

The juvenile court found the matter to be a difficult and close case requiring credibility assessments. It declared N.O. a dependent child, removed custody from mother, and placed N.O. with father under section 361.2, subdivision (b)(2). It found mother's failure was egregious; that her son "seemed to be tortured" while the boyfriend gave her assurances not to worry as he "slowly kill[ed him]." The court stated it was making clear findings based on the evidence as to detriment, addressing father's registered sex offender status, his current living situation and behavior, the domestic violence allegations, and the Facebook conversation.

The court pointed out father admitted to his sex offender status; it acknowledged father was convicted of felony unlawful sexual contact with a minor, "which is essentially statutory rape. Statutory rape can occur as long as a male has sex with someone under the age of 18, even if that person under the age of 18 is absolutely willing to have sex. By his own testimony—and it is uncontroverted, that's what happened here. [¶] I'm not saying that was a great idea or that he should be excused from it, but that appears to be what happened. When I combine his testimony to what the criminal law consequences were, that supports the father's testimony. What criminal judge in his right mind would have a registered sex offender not go to some type of therapy if, in fact, that judge determined that this was some kind of a sexual issue that needed to be addressed in therapy. If that judge perhaps determined that this was a drunken guy who had sex with a

girl who was willing, he didn't feel that therapy was something that had to be addressed. That's the state of the evidence before me. So I'm not discounting that that's a bad thing. But it certainly appears that father is telling me the truth as to what happened."

The juvenile court also pointed out that the father lived with young children for a long period of time without any problems, whether involving alcohol or allegations of improper sexual conduct. As for the domestic violence charges, the court stated father's Facebook post merely demonstrated he was a "bad liar" and did so to visit with his children. It found no independent evidence to corroborate the truth of what father said in the Facebook post about E.F.

Acknowledging things would be difficult for N.O., it found no evidence of detriment to keep her from being placed with father, observing children were resilient and N.O. was going to a familiar place to father, who she "loves clearly." The court ordered services for both father and mother, including a psychiatric evaluation of mother as well as a plan for random drug testing of father for the next few months given the allegations of cocaine and mushroom use. As for father's marijuana use, the court acknowledged it was an issue; it remarked that some people used it for pain and it was "probably better than using oxy[codone]"[3] given the news of pain-killer abuse. However, it cautioned father that he would have to deal with Ohio's laws against such use. As for father's relationship with E.F., the court stated it might not be the most stable, but it was placing

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[3] As the People point out, the court was likely referring to oxycodone, otherwise known by its brand name OxyContin, which is a narcotic analgesic taken for pain. (See Stedman's Med. Dict. (28th ed. 2006) p. 1400, col. 2.)

N.O. with father, not E.F., and there was nothing to indicate father could not care for N.O. without E.F.

Mother timely appealed.

DISCUSSION

I. *Standard of Review*

Section 361.2 governs placement of a child after the juvenile court has acquired jurisdiction and guides both the court and Agency in determining the child's placement after removal from the custodial parent. (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1420 1422.) It provides: "When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a [noncustodial] parent . . . who desires to assume custody of the child. If that 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), italics added.) The statute evidences " 'the Legislative preference for placement with [the noncustodial] parent.' " (*In re John M.* (2006) 141 Cal.App.4th 1564, 1569; see *In re K.B.* (2015) 239 Cal.App.4th 972, 979.)

The party opposing placement with the noncustodial parent bears the burden of showing detriment under section 361.2, subdivision (a) "by clear and convincing evidence that the child will be harmed if [father were] given custody." (*In re C.M.* (2014) 232 Cal.App.4th 1394, 1402; see *In re Isayah C.* (2004) 118 Cal.App.4th 684, 700; *In re John M.*, *supra*, 141 Cal.App.4th at pp. 1569-1570.) It is not the noncustodial parent's burden to show the lack of detriment. (*In re C.M.*, at p. 1402.) "Clear and convincing

evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt." (*In re Luke M.*, *supra*, 107 Cal.App.4th at p. 1426; see also *In re Patrick S.* (2013) 218 Cal.App.4th 1254, 1262.)

"We review the juvenile court's finding that [a child] would not suffer detriment for substantial evidence. [Citation.] 'The issue of sufficiency of the evidence in dependency cases is governed by the same rules that apply to other appeals. If there is substantial evidence to support the findings of the juvenile court, we uphold those findings. [Citation.] We do not evaluate the credibility of witnesses, reweigh the evidence, or resolve evidentiary conflicts. Rather, we draw all reasonable inferences in support of the findings, consider the record most favorably to the juvenile court's order, and affirm the order if supported by substantial evidence even if other evidence supports a contrary conclusion. [Citation.] The appellant has the burden of showing the finding or order is not supported by substantial evidence.' " (*In re Liam L.* (2015) 240 Cal.App.4th 1068, 1087; see also *In re Luke M.*, *supra*, 107 Cal.App.4th at p. 1426.)

II. *Sufficiency of Evidence*

Mother contends the juvenile court reversibly erred by concluding she and N.O. failed to meet their burden to establish detriment. She argues the court "overlooked, discounted, minimized and made unreasonable and illogical inferences" from five pieces of evidence that she claims collectively show clear and convincing evidence of detriment warranting denial of placement with father, and that the court should have kept N.O. in San Diego with her maternal caregivers. She asks us to look to *In re B.S.* (2012) 209 Cal.App.4th 246 as instructive on the issue of detriment when a registered sex offender

parent seeks placement of a child, as well as *In re Luke M.*, *supra*, 107 Cal.App.4th 1412 and *In re D'Anthony D.* (2014) 230 Cal.App.4th 292. She argues based on these cases that this court should err on the side of protecting N.O.'s welfare and best interests. Finally, mother urges us to consider section 355.1, subdivision (d), under which a parent's legal obligation to register as a sex offender is prima facie evidence that a child is at substantial risk of abuse or neglect. (See *In re Quentin H.* (2014) 230 Cal.App.4th 608, 614.) As we explain, we are not persuaded by mother's arguments.

A. *The Evidence Supports the Court's Finding That N.O.'s Placement With Father Would Not be Detrimental to N.O.'s Physical or Emotional Well-Being*

Here, the juvenile court applied the appropriate standard, which was to assess based on all of the evidence whether it would be detrimental to place N.O. with father. And the record contains evidence from which the court was entitled to conclude N.O. would be safe and not suffer physical or emotional detriment, primarily, the social workers' observation of father and N.O.'s close bond, in part arising from the fact N.O. lived with him without incident from when she was born to when she was four and half years old, until mother moved to California approximately eight months before N.O.'s brother's death. There was no evidence of any discomfort or inappropriate conduct between father and N.O. while she was in his care; N.O. was "ecstatic" to see him and they engaged in appropriate conversation and play. Indeed, mother permitted visits knowing of father's past conviction and registered sex offender status, and father was already living with E.F.'s young children, who by all accounts loved him. The social workers found no child protective services or domestic violence reports or history in

Ohio for father or E.F. Father was employed and had a place for N.O. to live in Ohio, he had the support of his grandmother who also knew N.O., and he had arranged for schooling and counseling for N.O. as well as for himself. Father showed a strong interest in parenting N.O. When asked, N.O. stated she would be happy to live with father.

Mother's claim that the record contains evidence establishing detriment does not convince us to reach a different conclusion. She points to (1) father's conviction for unlawful sexual conduct with a minor, which occurred in July 2005, and for which he did not undergo sex offender therapy or rehabilitation; (2) the absence of an ICPC and lack of any formal supervision of N.O. in father's home; (3) N.O.'s wishes, which mother characterizes as wanting to live with her, and N.O.'s complaint that father spanked her "hard"; (4) father's marijuana use, which mother claims shows his "propensity to consume substances in excess clouding his decision-making process"; and (5) father's home and relationship with E.F., which mother characterizes as volatile. According to mother, the juvenile court either discounted this evidence or made inferences from it not based on logic or reason in contravention of the substantial evidence standard.

As a threshold matter, mother's arguments are misplaced, as they urge us to consider the evidence in the light most favorable to her, and to draw inferences from it that could support a finding of detriment to N.O. Our role is not to decide whether the record demonstrates clear and convincing evidence of detriment, but whether the juvenile court's decision—that N.O.'s placement with father would not be detrimental to her safety, protection, emotional or physical well-being—is supported by evidence of reasonable, credible and solid value. (*In re K.B.* (2015) 239 Cal.App.4th 972, 979.) On

appeal, the " ' " 'clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.' " ' " (*In re K.A.* (2011) 201 Cal.App.4th 905, 909.) We will not reweigh the evidence on the issue of detriment or draw inferences in mother's favor. (See *In re Liam L.*, *supra*, 240 Cal.App.4th at pp. 1087 [on substantial evidence standard of review " '[w]e do not evaluate the credibility of witnesses, reweigh the evidence, or resolve evidentiary conflicts' "], 1088; see also *In re Stephanie M.* (1994) 7 Cal.4th 295, 318 [" 'When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court' "].)

Neither Agency nor the juvenile court took lightly or excused father's conviction for which he was a registered sex offender. But father's past is not one of continuous criminal conduct or sexual misbehavior; he had no other criminal history, and he complied with all of the conditions of his registration, which did not include sex offender treatment, classes, rehabilitation or therapy. Nothing in the record indicates that father stipulated to a factual basis for his sex offense in Ohio that contradicted father's sworn account to the juvenile court; the record shows it occurred on July 1, 2005, and constituted a violation of Ohio Revised Code section 2907.04, describing the offense of unlawful sexual conduct with a minor, which permits conviction where the offender

knows or is "reckless" in determining the victim's age.[4] It was for the trial court to draw inferences from the evidence before it, including father's testimony and Abrego's opinion that father's registered status did not pose a high level of risk, and it inferred based on that evidence as well as the penal consequences of father's guilty plea that the Ohio court concluded father's conduct was not deserving of sex offender treatment, and that father's account of events was true. We will not disturb the juvenile court's credibility assessment, which we conclude is supported by an inference reasonably drawn from the evidence. Mother did not present any evidence to contradict father's account, and on our substantial evidence review we disregard inconsistencies or other inferences that would have permitted the juvenile court to draw a different conclusion.

The absence of an ICPC does not compel reversal, as placement with an out-of-state parent need not follow ICPC procedure. (*In re Patrick S. III*, *supra*, 218 Cal.App.4th at p. 1264; *In re John M.*, *supra*, 141 Cal.App.4th at p. 1575.) The Agency ultimately concluded N.O.'s placement with father would not cause her detriment regardless of an ICPC; this conclusion was based in part on evidence that N.O. lived with father and was parented by him for many years and their relationship was strong and bonded, with no indication that father had ever reoffended or engaged in dangerous or inappropriate behavior toward N.O. Father's grandmother was willing to remain in

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4 That statute, a copy of which is contained in the record and has a "received" stamp, provides in part: "No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard." (Ohio Rev. Code Ann. § 2907.04.)

contact with N.O. and father, cooperate with Agency and report any concerns. Agency endeavored to have courtesy checks conducted by the state of Ohio and reported back to Abrego. There is no evidence N.O. would be unsafe, or suffer emotional or physical detriment, based on the absence of formal supervision.

As for N.O.'s wishes, social worker Abrego made clear N.O. had not expressed a preference for either parent, but when asked had expressed a desire to live with father and would be "happy" to live with him. Though N.O.'s stipulated testimony suggested a preference to remain with mother, a five-year old's preference is not clear and convincing evidence of emotional detriment, nor is it the deciding factor in a placement decision, even when the child is a teenager. (Accord, *In re K.B.*, *supra*, 239 Cal.App.4th at p. 980; *In re Patrick S.*, *supra*, 218 Cal.App.4th at p. 1265.) Mother points to N.O.'s statements in a forensic interview and to a maternal relative that father spanked her "hard" on her "butt." Mother admitted that she herself engaged in spanking "on the butt" as a form of discipline, and based on the absence of any child protective services history the juvenile court was entitled to conclude that father's spanking was likewise discipline that did not rise to the level of detriment to N.O.'s physical safety.

Mother presented no evidence suggesting father's marijuana use was anything but strictly medicinal and for pain as a result of father's significant health issues, as the juvenile court implicitly found. The undisputed evidence is that father never used marijuana recreationally and kept it away from the children, and the social workers could not substantiate mother's claim of cocaine or mushroom use, which father denied. To the extent Mother asks us to draw an inference that father's medical marijuana use parallels

his night of excessive drinking at a party more than ten years earlier at age 19 or 20, any such inference is unreasonable. There is no evidence that since that time, father has abused alcohol or that he had any substance abuse issues. There is no evidence N.O. was ever exposed to father's marijuana, drug paraphernalia or even secondhand marijuana smoke. The juvenile court reasonably concluded on this record that father's marijuana use was not of a level or character to cause detriment to N.O.'s safety, protection, physical or emotional well-being, and it ordered random drug testing solely to rule out mother's unsubstantiated claims of cocaine or mushroom use.

Mother's characterization of father and E.F.'s home or relationship as volatile likewise ignores the court's finding that father manufactured the Facebook statements for the purpose of convincing mother to permit contact with his children, and the testimony of social worker Abrego, who confirmed with knowledgeable persons (father's boss and grandmother) they did not occur. No domestic violence between them was substantiated. Though father and E.F. reported separating two or three times, this fact alone does not demonstrate or suggest N.O. would suffer detriment by living in their home, and the juvenile court found nothing in E.F.'s life posed any detriment, and father was in any event capable of parenting N.O. regardless of E.F.'s presence in his life. These findings are amply supported by evidence that father had an established and strong relationship with N.O.; he parented N.O. in his home for the majority of her life and the social workers observed his positive and loving interactions with N.O., even in the extremely difficult time immediately after his son's death.

We conclude, viewing the evidence and drawing all inferences in father's favor, that mother has not demonstrated the evidence on which the juvenile court relied was insufficient to support its no detriment finding.

B. *Mother's Cited Authorities Do Not Compel Reversal*

The authorities relied upon by mother do not compel us to change our conclusion. In *In re B.S.*, *supra*, 209 Cal.App.4th 246, the father, a registered sex offender, claimed the juvenile court had erred by denying his request to have his son placed with him in Texas. (*Id*. at p. 247.) The father had had no involvement in his son's life and no contact with him in three years. (*Id*. at p. 248.) He admitted he had once fondled his own daughter's breasts and between her legs when she was 12 years old, but the daughter reported ongoing abuse and in 2007 he had pleaded guilty to *two* counts of indecency. (*Ibid*.) A Texas court hearing the evidence found it substantiated his guilt, and he was required to register as a sex offender *for life*. (*Ibid*.) In 2010, he was ordered not to reside in a household with children under the age of 18 with the exception of his biological children, without a designated supervisor present. (*Ibid*.)

During juvenile court proceedings in California, the father reportedly denied the abuse had occurred on more than one occasion and blamed one of the incidents on his intoxication. (*In re B.S.*, *supra*, 209 Cal.App.4th at p. 249.) The state of Texas denied two requests by the juvenile court for ICPC's to assess placement of the father's son with him there, stating placement was not recommended in part due to the father's CPS and criminal history dating back to age 16, which was a " 'major concern due to the nature of the offenses committed' " as well as father's alcoholism. (*Id*. at pp. 250-251.) The Texas

liaison observed that father would be released from probation in 2010 without further counseling, sex offender therapy, court-ordered supervision, or involvement of professional who could continue to assess the son's safety in father's home, and though the father stated he attended Alcoholics Anonymous, he did not attend on a regular basis and had not talked to his sponsor in quite a while. (*Id*. at p. 251.) The liaison had never met the father's fiancée and had no documentation of any criminal or California CPS history for her. (*Ibid*.) With this background, the juvenile court found under a preponderance of evidence standard (§ 366.21, subd. (f)), that return of the son to his father's physical custody would create a substantial risk of detriment to his safety, protection, or physical or emotional well-being; there was clear and convincing evidence that the father had made only partial progress in his programs and did not demonstrate the capacity and ability to meet the treatment plan or provide for his son's needs, nor was the court able to ensure the son was safe in father's home. (*Id*. at pp. 251-252.) The appellate court affirmed, reasoning that though the juvenile court was not required to comply with the notice provisions of the ICPC to place a California child with an out-of-state parent, it was not required to ignore the fact that the Texas authorities had recommended against and refused to supervise the son's placement with his father, and it had based its decision on the proper criteria. (*Id*. at pp. 248, 254.) It found the court's finding supported by the evidence and well within its discretion. (*Id*. at pp. 253, 254-255.)

In re B.S., supra, 209 Cal.App.4th 246 does not convince us to reverse the juvenile court's no-detriment finding in this case. The case is highly dependent on its facts, which

are significantly more egregious than those involving father in this case. Here, father's sexual offender status was the result of an act he engaged in 10 years earlier; though it was a felony offense, there were far less penal consequences to father and his sex offender status was set to expire. Father has no other criminal history or alcoholism. Significantly, he and N.O. lived together for four and a half years, the majority of her life, and they were clearly bonded as observed by the Agency social workers in this case.

Nor are we convinced by mother's reliance on *In re Luke M.*, *supra*, 107 Cal.App.4th 1412. In *Luke M.*, a noncustodial, nonoffending father challenged the placement of his 10- and eight-year-old children with paternal relatives rather than with him in Ohio. The juvenile court found moving the children to Ohio would cause detriment to their emotional well-being, in part relying on a social worker's observation of the "extremely strong bond" they had with their siblings and her opinion they would suffer detriment. (*Id*. at pp. 1417-1419, 1426-1427.) This court upheld that finding, concluding there was ample evidence that moving the children to Ohio would have a "devastating emotional impact" on them, including the emotional testimony of one of the children. (*Id*. at p. 1427.) We see little factual similarity between *Luke M.* and the circumstances here; there is no sibling situation and the evidence of N.O.'s relationship with father was strong, with nothing indicating N.O's bond with mother was significantly greater than her bond with father.

Likewise, *In re D'Anthony D.*, is apposite, where the juvenile court there denied a father's custody request under section 361, finding by clear and convincing evidence there was a substantial danger to his children's health based in part on evidence the father

had physically abused his son, striking him in the face for no apparent reason and hitting him with a belt multiple times. (*In re D'Anthony D.*, *supra*, 230 Cal.App.4th at p. 297.) The father's other child reported she had seen her father " 'hitting [D'Anthony] a lot, a lot, a lot of times' " resulting in her seeing marks on D'Anthony that were " 'purple then all the colors of the rainbow.' " (*Id*. at p. 296.) There was no such testimony from N.O. here.

C. *The Section 355.1, Subdivision (d) Presumption Does Not Compel Reversal*

In a cursory argument, mother suggests that section 355.1, subdivision (d) should compel us to reverse the juvenile court's decision. Under that statute, a parent's status as a registered sex offender is prima facie evidence that a child is a person described by subdivisions (a) through (d) of section 300 at substantial risk of abuse or neglect, creating a rebuttable evidentiary presumption. (§ 355.1, subd. (d);[5] *In re Quentin H.*, *supra*, 230 Cal.App.4th at pp. 614-615.) The People point out that the statute is not controlling, as N.O. was found by the juvenile court to be a child described by section 300, *subdivision* (*j*)—that N.O.'s sibling was abused or neglected and there is a substantial risk N.O. will be abused or neglected—based on mother's conduct or lack thereof, and mother does not challenge that finding. Even if the jurisdictional presumption somehow applied here, we

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[5] Section 355.1, subdivision (d) provides: "Where the court finds that . . . a parent . . . of . . . a minor who is currently the subject of the petition filed under Section 300 . . . has been previously convicted of sexual abuse . . . or . . . is required, as the result of a felony conviction, to register as a sex offender . . . , that finding shall be prima facie evidence in any proceeding that the subject minor is a person described by subdivision (a), (b), (c), or (d) of Section 300 and is at substantial risk of abuse or neglect. The prima facie evidence constitutes a presumption affecting the burden of producing evidence."

reject the premise of mother's argument: that the passage of time since father's statutory rape conviction is "the only evidence supporting [N.O.'s] placement with [him] . . . ." That premise is not supported by the record, which contains substantial evidence in father's favor supporting the juvenile court's no-detriment finding as we have recounted above. This evidence is " ' "evidence sufficient to sustain a finding of the nonexistence of the presumed fact" ' " (*In re Quentin H.*, at p. 614) for purposes of rebutting the presumption. Operation of the evidentiary presumption, even if somehow pertinent here, does not compel reversal.

DISPOSITION

The order is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.