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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.A. et al, Persons Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

M.V.,

Defendant and Appellant.

E055794

(Super.Ct.No. INJ1200012)

OPINION

APPEAL from the Superior Court of Riverside County. Lawrence P. Best,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part, reversed in
part, remanded with directions.

Megan Turkat-Schirn, under appointment by the Court of Appeal, for Defendant
and Appellant.

Pamela J. Walls, County Counsel, and Prabhath D. Shettigar, Deputy County
Counsel, for Plaintiff and Respondent.

Although this dependency case involves two children, A.A. and L.V., this appeal concerns L.V. only. Defendant and appellant M.V. (Father) appeals from the trial court's jurisdictional and dispositional orders sustaining jurisdiction over L.V. and ordering her placed in foster care. He challenges the juvenile court's jurisdictional finding that he should not have allowed L.V. to reside with mother, even though mother refused his repeated requests to release the child to his care. He also challenges the court's dispositional order denying his request for placement of L.V. in his home on the grounds the court failed to make the required findings under Welfare and Institutions Code section 361.2.¹ We affirm the jurisdictional order but reverse the dispositional order and remand this case for a new dispositional hearing for purposes of the juvenile court reconsidering placement of L.V. with Father under section 361.2, subdivision (a).

I. PROCEDURAL BACKGROUND AND FACTS

At the time this dependency case was filed, L.V. (born in 2002) was living with her mother and half sister, A.A. (born in 1998). Father never married mother and lived with her for a very short period of time. L.V. never lived with Father. On December 2, 2011, the Riverside County Department of Public Social Services (Department) received a referral that mother was abusing alcohol and neglecting her daughters. A social worker made several visits to the home and interviewed the children and mother. Upon learning that mother had been evicted from her studio apartment and had no place to live, the

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

social worker took the children to the Indio Child Protective Services (CPS) office and they were placed in protective custody.

On January 11, 2012, the social worker contacted Father. He told the social worker he had given money to mother for a hotel room and encouraged her to stay with the maternal grandfather, and he admitted that he had limited contact with L.V. Father expressed concern about immigration when the social worker mentioned going to the dependency court. He “declined to provide an address where he can be contacted, stating he has no job and no stable home.” He stays with friends and relatives. Father claimed that his mother “would be willing to care for his child, but she lives in the State of Texas.”

On January 12, 2012, the Department filed a petition under section 300, subdivisions (b) and (g), alleging that mother had an unresolved history of alcohol abuse, had not maintained a stable and safe living environment for the children, and had failed to protect the children from sexual abuse from a maternal uncle. As for Father, the petition alleged he had failed to provide for L.V. and neglected her health and safety by allowing her to continue to reside with mother despite knowledge of mother’s alcohol use. On January 13, the court detained L.V. and authorized supervised visitation and reunification services for Father.

The jurisdiction/disposition report was filed on February 1, 2012. L.V. was doing well in her foster home; however, she wanted more contact with her half sister. Father agreed that mother had an unresolved history of abusing alcohol. He claimed that on several occasions, he had offered to take the child to live with the paternal grandmother

in another state, but mother refused. He stated that “he was raised by a single mother, and he knows that the best place for a child is with their mother.” Father denied any knowledge of possible sexual abuse or inappropriate physical discipline. He admitted being in the United States illegally, and thus “is not able to easily find a job and pay child support for [L.V.]” He also admitted there was a court order for child support but stated he had informed the “Child Support office” that he had no job. On February 6, Father requested a contested jurisdictional hearing.

At the contested jurisdictional/dispositional hearing on February 29, 2012, L.V. testified. She stated that visits with Father were presently good and she enjoyed them; however, he did not come and visit with her prior to the Department’s involvement. When he had called mother’s home, he would ask to speak to mother on the telephone. She acknowledged receiving some school clothes, shoes and a backpack from Father. She explained that she did not want to live with him until they developed more of a father-daughter relationship because she is not comfortable with him. She also testified that she had never met Father’s wife.

Father testified that he knew mother had a drinking problem and had been calling her to ensure she was going to her Alcoholics Anonymous (AA) meetings. He had observed beer containers outside her house and could smell alcohol on her person sometimes. He was aware that mother’s drinking had become an issue for the past six months, and agreed that L.V. was not attending school and was living in a chaotic living environment. Nonetheless, he saw nothing that would indicate mother could not care for L.V.

Father admitted he never spoke with L.V. about the condition of mother's residence. He explained that L.V. has always been protective of her mother and "she is always taking care of her mom." He said he offered mother \$200 to pay her rent, but he did not give the money to her because of his "situation." He never asked L.V. whether she was hungry at mother's home and never brought food because he saw food in the refrigerator. Although he had paid no child support, he claimed that he took L.V. out for food every time they went out together.

Father knew that L.V. was not in school in January 2012 and had been having attendance issues in the past year. Besides calling mother, Father took no further steps to ensure his daughter went to school because of his "situation" and because he thought "it would get better." By "situation," Father meant that neither he nor mother have "papers."

According to Father, prior to the dependency proceedings, he saw his daughter "on a special occasion . . . at least once a month" He acknowledged the bond between L.V. and her half sibling because they had lived together their whole lives. However, he wanted custody of L.V. He had just reconciled with his wife, and if L.V. did not want to live with him, then he would have her live with her paternal grandmother, who was coming to California. The paternal grandmother had seen L.V. about four times during the child's life.

In his closing argument, Father conceded allegation (b)(9) of the petition, that he is "not a member of the household, has failed to provide for his child with adequate food, clothing, shelter" Nonetheless, he challenged allegation (b)(3) that he had neglected L.V.'s health and safety by allowing her to continue to reside with mother. He argued

that he called mother all the time. He further disputed that L.V. would suffer detriment if she were placed with him. However, Father never cited section 361.2.

After listening to Father' argument, the court asked if Father really thought "it would not be emotionally detrimental to [L.V.] to be placed with somebody—they both testified there is minimal relationship at best—without going through reunification services that could allow them to build that relationship?" The court concluded it was not in L.V.'s best interest to live with Father until she has become more comfortable and they have developed "a true father-daughter bond." Also, the court recognized L.V.'s bond with her half sister.

Finding allegations (b)(1) through (b)(9) of the petition to be true by a preponderance of the evidence, the court removed L.V. from the physical custody of both parents under section 361, subdivision (c) and ordered family reunification services.

II. JURISDICTIONAL FINDINGS

Father contends the evidence is insufficient to support the trial court's jurisdictional finding that he "neglected the hea[l]th and safety of his child . . . in that [he] allowed the child to continue to reside with the mother despite knowledge of her chronic unresolved substance abuse." He asserts there is "no basis for a jurisdictional finding due to a parent being unable to care for a child when that parent has demonstrated ability and willingness to arrange for care." He argues that he frequently called mother and urged her to seek help; he offered financial assistance to her; and he offered to have L.V. live with either him or his mother.

“We review the findings and orders under the substantial evidence test. We affirm the rulings of the juvenile court if there is reasonable, credible evidence of solid value to support them. [Citations.]” (*In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1319.)

“Under section 300, subdivision (b), the Department had to show *that the minor has suffered, or there is a substantial risk that the minor will suffer, serious physical harm or illness*, as a result of the failure or inability of the parent to adequately supervise or protect the minor, or by the willful or negligent failure of the parent to provide the minor with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent to provide regular care for the minor due to the parent’s mental illness or substance abuse. [Citation.]” (*Ibid.*)

Here, the Department points out Father knew that mother’s substance abuse had become a significant issue for the past six months. He opined that her life was a “mess” because of her refusal to stop drinking. He knew his daughter was living in a chaotic environment, not attending school, and taking care of her mother. Nonetheless, he still did not believe L.V. was being neglected or that mother was unable to care for L.V. He did not pay child support. While he offered financial support on one occasion, he never provided the money to mother because he believed she would spend it on alcohol. He never sought outside assistance because he was illegally in the United States. Rather, he kept thinking that it would get better. When mother would not allow him to take L.V. to live with the paternal grandmother, he encouraged her to move in with the maternal grandfather without knowing who else was living in, or frequented, the home. Prior to

the detention, Father claimed ignorance that a maternal uncle had been inappropriate with either L.V. or her half-sister.

Here, there may be little risk of physical harm to L.V. in the future if she is placed with Father, but this had not yet occurred at the time of the jurisdictional hearing. Because L.V. was not living with Father, there remained a defined risk of harm that if L.V. reunited with mother or was placed with someone else other than Father, Father would neglect L.V. as he had before by not intervening if she was neglected by her caretakers. Because the Department's burden of proof establishing jurisdiction is low and there was evidence that father neglected L.V. in the past, we conclude there was sufficient evidence to support the juvenile court's jurisdictional findings as to Father. We recognize that the evidence in support of these allegations is minimal, but it is enough for purposes of jurisdiction. It was Father's responsibility to do all he could to make sure L.V. was properly cared for, even though mother may have impeded his efforts to assume care of L.V.

Given the above, we find substantial evidence to support the trial court's true finding of the section 300, subdivision (b)(3) allegation. Father's attempt to analogize this case to *In re Aaron S.* (1991) 228 Cal.App.3d 202 is misplaced. In *Aaron S.*, an incarcerated father appealed from an order declaring his son a dependent of the court. (*Id.* at p. 204.) The juvenile court had sustained the petition as to the father under section 300, subdivision (g). (*In re Aaron S., supra*, at p. 207.) The appellate court held that the lower court had misinterpreted that subdivision, in that it failed to find that the conditions of dependency existed at the time of the court hearing, i.e., it did not find that the father

was incarcerated and unable to arrange for the care of the minor at the time of the hearing. (*Id.* at pp. 208-209.) There was no evidence before the juvenile court showing a present inability to arrange for Aaron’s care. (*Id.* at p. 210.) The appellate court concluded that the allegations of the petition were unsupported by the evidence: “The language of section 300, subdivision (g), demonstrates that the Legislature did not intend dependencies to be established under this statute where the incarcerated parent is able to make suitable arrangements for his or her children’s care.” (*Id.* at p. 212.) Accordingly, the case was remanded for a determination as to whether the father was able to arrange for care: “If appellant is able to arrange for his son’s care, however, the allegation under section 300, subdivision (g) must be stricken.” (*Ibid.*) While an incarcerated parent can avoid jurisdiction under section 300, subdivision (g), by arranging for his or her child’s care (*In re Aaron S., supra*, at p. 212), the same is not true of a parent whose acts or omissions have led to jurisdictional findings under section 300, subdivision (b).

III. FAILURE TO GRANT CUSTODY UNDER SECTION 361.2

Father contends the juvenile court’s dispositional order must be reversed because the court improperly proceeded under section 361, subdivision (c)(1) in ordering L.V. placed in foster care rather than with Father or the paternal grandmother. Father argues that because he was a noncustodial parent at the time of L.V.’s detention, the court should have made findings under section 361.2.

Section 361, subdivision (c) provides: “A dependent child may not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and

convincing evidence of any of the following circumstances listed in paragraphs (1) to (5), inclusive [¶] (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be protected without removing the minor from the minor’s parent’s or guardian’s physical custody. . . .” This provision applies to custodial parents, such as mother. In the instant case, L.V. was removed from mother and Father’s custody under section 361.

Section 361.2, subdivision (a) provides: “When a court orders removal of a child pursuant to Section 361, *the court shall first determine whether there is a parent of the child, with whom the child was not residing* at the time that the events or conditions arose that brought the child within the provisions of Section 300, 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.*” (Italics added.) A juvenile court’s determination under section 361.2, subdivision (a) not to place a child with a noncustodial parent requires a finding of detriment by clear and convincing evidence. (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1827 (*Marquis D.*); *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426.)

Additionally, section 361.2, subdivision (c) requires the juvenile court to “make a finding either in writing or on the record of the basis for its determination under subdivisions (a) and (b).” “[T]he noncustodial parent is presumptively entitled to custody,” when a request is made under section 361.2, subdivision (a). [Citation.]” (*In re*

Austin P. (2004) 118 Cal.App.4th 1124, 1133.) “Unlike section 361.5, section 361.2 does not distinguish between an offending and nonoffending parent, and the court applies section 361.2 without regard to the characterization of the parent as offending or nonoffending.” (*In re V.F.* (2007) 157 Cal.App.4th 962, 966 (*V.F.*), superseded on other grounds as stated in *In re Adrianna P.* (2008) 166 Cal.App.4th 44, 57-58.)

Under section 361.2, if the juvenile court places the child with the noncustodial parent, “it may either: (1) order that the parent become legal and physical custodian of the child and terminate jurisdiction; or (2) order that the parent assume custody subject to the supervision of the juvenile court with services provided to either one or both of the parents. (§ 361.2, subd. (b).) The court is specifically required to make either written or oral findings setting forth its basis for its determinations under subdivisions (a) and (b). (§ 361.2, subd. (c).)” (*Marquis D.*, *supra*, 38 Cal.App.4th at p. 1821.)

As in the instant case, in *V.F.*, *supra*, 157 Cal.App.4th at pages 965 through 966, and *Marquis D.*, *supra*, 38 Cal.App.4th at page 1816, the juvenile court ordered the children removed from the parents without making factual findings under section 361.2 regarding the noncustodial father’s request for placement. The reviewing court in both cases held that such findings under section 361.2 were required and implied findings on review were inappropriate. (See *Marquis D.*, *supra*, at pp. 1825-1827; *V.F.*, *supra*, at pp. 969, 973 [“Although this record arguably would support a finding that placement with [the noncustodial, incarcerated father] would be detrimental to the children, we believe the better practice is to remand the matter to the trial court where that court has not considered the facts within the appropriate statutory provision.”].) In *Marquis D.*, the

reviewing court also declined to imply findings of detriment. The court stated that it could not determine from the record whether the juvenile court considered that placing the children with the father would be detrimental to them within the meaning of section 361.2, subdivision (a) and questioned whether the evidence supported a finding of detriment since the children were doing well in the care of their noncustodial father. (*Marquis D.*, *supra*, at pp. 1824-1827.) The court concluded, “this is certainly not the clear-cut case in which an appellate court may imply such a finding.” (*Id.* at p. 1827, fn. omitted.)

Likewise, in the instant case, the juvenile court was required to proceed as to Father’s placement request under section 361.2, subdivision (a), rather than section 361, subdivision (c), because L.V. was not residing with Father when the section 300 petition was filed. However, the court failed to make any express findings of detriment under section 361.2 when ruling on the disposition. The record indicates the court considered L.V.’s placement with Father but was reluctant to order such placement because it did “not see it in any way being in [L.V.’s] well-being . . . to go live with her father.” We are therefore not satisfied on this record that the trial court adequately explored whether placing L.V. with Father would be detrimental to L.V. within the meaning of section 361.2, subdivision (a). Under such circumstances, implied findings are not warranted. (*Marquis D.*, *supra*, 38 Cal.App.4th at p. 1825.)

Even assuming the court considered placement of L.V. with Father under section 361.2, subdivision (a), “we would be reluctant to imply the court made a finding of detriment based on the evidence presented. Where insufficiency of the evidence is an

issue, an appellate court reviews the entire record in the light most favorable to the order and determines whether any substantial evidence supports the conclusion of the trier of fact. [Citations.] However, where the trial court has failed to make express findings the appellate court generally implies such findings only where the evidence is clear. [Citations.]” (*Marquis D., supra*, 38 Cal.App.4th at p. 1825.)

Here, there was not ample evidence of detriment and the result is not obvious from the record. The juvenile court was required to apply a clear and convincing evidence standard of proof in determining whether placement with a noncustodial parent would be detrimental. (*Marquis D., supra*, 38 Cal.App.4th at p. 1827.) We question whether, viewing the record as a whole, a trial court could reasonably find there was clear and convincing evidence demonstrating that placement with Father would be detrimental to L.V. (*Ibid.*) “In any event, this is certainly not the clear-cut case in which an appellate court may imply such a finding.” (*Ibid.*)

We understand the juvenile court’s reluctance to place L.V. with a noncustodial parent such as Father, who had failed to intervene in mother’s neglect of L.V. Nonetheless, we conclude the juvenile court erred in failing to make express findings under section 361.2, subdivision (a), regarding Father’s request for placement. The court was required to place L.V. with Father, as a noncustodial parent, unless it found that placement with him would be detrimental to L.V.’s safety, protection, or physical or emotional well-being. (§ 361.2, subd. (a).) At the time of the dispositional hearing there was insufficient evidence to support such a finding. Although there was sufficient evidence to support the jurisdictional allegations against Father, those findings were

based on the lower preponderance of evidence burden of proof, as opposed to the clear and convincing evidence burden applicable to the dispositional findings. Furthermore, the jurisdictional findings concern Father's neglect while L.V. was in mother's custody and do not establish that Father would neglect L.V. if she were placed with him.

Based on our review of the record, we conclude substantial evidence simply does not support a finding that L.V.'s placement with Father would be detrimental to her safety, protection, or physical or emotional well-being. (§ 361.2, subd. (a).)

Furthermore, the juvenile court's dispositional order denying placement of L.V. with Father is not harmless error. Even though "we do not deal with the termination of parental rights but rather with the initial denial of placement with a noncustodial parent[,] . . . the trial court's decision at the dispositional stage is critical to all further proceedings. Should the court fail to place the child with the noncustodial parent, the stage is set for the court to ultimately terminate parental rights. At all later review hearings, the court may deny return of the child to the parent's physical custody based on a finding supported only by a preponderance of the evidence that return would create a substantial risk of detriment to the child's physical or emotional well-being.

(§[§] 366.21, subds. (e) & (f), 366.22, subd. (a).)" (*Marquis D.*, *supra*, 38 Cal.App.4th at p. 1829.)

IV. DISPOSITION

The jurisdictional findings and order declaring L.V. a dependent of the juvenile court are affirmed, but the dispositional order is reversed with regard to L.V. and Father. The dispositional order is affirmed in all other regards as to the other child and mother.

Upon remand, the juvenile court is directed to conduct a new dispositional hearing to consider and make findings as to Father's request for placement of L.V. in his home under section 361.2.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

MILLER

J.