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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re J.B. et al., Persons Coming Under the Juvenile Court Law.	
STANISLAUS COUNTY COMMUNITY SERVICES AGENCY, Plaintiff and Respondent, v. R.S.C., Defendant and Appellant.	F056765 (Super. Ct. Nos. 515312 & 515313) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Nancy B. Williamsen, Commissioner.

Neale B. Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County Counsel, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, only the Introduction, part III.B. of the Discussion, and the Disposition are certified for publication.

INTRODUCTION

Appellant R.S.C. (Mother) appeals from the jurisdictional findings and dispositional orders of the juvenile court regarding her two children, 16-year-old J.B. (J.) and 12-year-old L.K. (L.). Mother contends there was insufficient evidence to support the jurisdictional findings and the orders removing the children from her custody. We will affirm.

In the published portion of this opinion, we hold that a finding under Welfare and Institutions Code section 361, subdivision (c)(6),[1] which must be supported by expert testimony—that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child—is *not* required when an Indian child is removed from the custody of one parent and placed with the other parent.

PROCEDURAL AND FACTUAL SUMMARY[*]

On September 5, 2008, the Stanislaus County Community Services Agency (the Agency) received a referral regarding the children because L. reported that she, J. and Mother were homeless and L. did not feel safe where they were staying.

When the social worker interviewed J., he was wearing dirty clothes and appeared not to have showered in some time. J. said he and his family had been living in an apartment complex for two weeks. Mother was trying to get into a clean and sober house and the family received food and clothing from the Salvation Army.

When the social worker interviewed L., she explained that J. was lying about their circumstances because Mother had told them to lie so nothing would happen to them. In fact, they were not living in an apartment complex. They were sleeping on the streets in

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise noted.

[*] See footnote, *ante*, page 1. The facts of the case are irrelevant to the legal issue addressed in the published portion of this opinion and we omit them for brevity.

a lot near a supply store. About two days each week, they slept in a trailer behind a used car lot, where L. was afraid a certain man would come into the trailer and rape her and Mother. L. said she was always scared at night because they were on the streets; she never felt safe with Mother because of their living situation. According to L., they had been homeless for about three and one-half years. L. requested that she be removed from Mother's care.

L. also reported that Mother and her boyfriend smoked marijuana and drank alcohol every day, and used the substances in front of L. and J. Mother would roll the marijuana and smoke it from a pipe. Mother received welfare money, but spent it on her boyfriend and drugs. L. and J. did not have enough clothes and they had to wear the same clothes to school every day. Occasionally, Mother would buy them food from a taco truck, but they usually ate at a shelter.

When the social worker interviewed Mother, she denied neglecting the children's needs. She said they had a place to sleep every night in a friend's trailer. The children had clothes, food, showers and everything they needed. She denied that the family was sleeping in a lot and she denied using drugs. She said she wanted to go into a clean and sober home because she had been drinking more alcohol lately. She said J. functioned at the level of an eight-year-old.

On September 10, 2008, the children were detained and placed in temporary foster care.

On September 12, 2008, the social worker interviewed L.'s father (Father). He reported having a history of substance abuse. In the past, he and Mother used methamphetamine and marijuana together. He had been incarcerated in a drug treatment program for about one year in 2007, and had entered a residential program when he was released in December 2007. After that, he entered a clean and sober program, which he completed in March 2008. He said he had been drug free for several years.

Father stated that he would have been more involved in L.'s life if Mother had not kept L. from him. Father had known his current wife for about six years and they had been married for two years. They lived with the wife's two children in the wife's parents' home.

On September 12, 2008, the Agency filed a petition pursuant to section 300, subdivision (b), alleging that J. and L. were at substantial risk of serious physical harm due to Mother's failure to protect them; her failure to provide them with adequate food, clothing, shelter or medical treatment; and her inability to provide regular care for them due to her mental illness and substance abuse.

On September 15, 2008, the juvenile court held a detention hearing. Father stated that L. previously had lived with him, but Mother took her away and he did not know where they went. Father requested custody of L. He said he was in the position to care for her and was ready to parent her. He had gone through drug treatment and had been clean and sober for three years. Although Mother objected to L.'s placement with Father, the court stated that the Agency had not identified a substantial risk of detriment if L. were placed with Father. The court removed L. from Mother's custody and placed her with her father (Father). Because Father was a registered member of an Indian tribe, the court ordered notice be given pursuant to the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.).

The same day, Father met with Camera Bonsack for a substance abuse assessment. Father denied using drugs, but tested positive for methamphetamine and marijuana. He admitted eating a marijuana brownie, but still denied using methamphetamine.

On September 17, 2008, Father met with the social worker to provide an explanation for his positive methamphetamine test. He explained that he accidentally sat in some kind of white powder at a restaurant. He tasted it and realized it was a drug.

On September 18, 2008, Father tested positive for methamphetamine again.

On September 29, 2008, Father met with Bonsack. This time, he admitted he had relapsed and was using methamphetamine. He was referred to a residential treatment program.

On October 9, 2008, the Agency filed a first amended petition.

On October 16, 2008, the juvenile court held the jurisdictional/dispositional hearing. Mother testified that on September 5, 2008, she was homeless. She did smoke marijuana and drink beer about once a week, but not to inebriation and only when the children were in the library. She did not use the substances in front of them and they were not affected. Although Mother had been employed for about 10 years, she had been homeless since about 2003 or 2004 when she lost her parents. But her homelessness had never prevented her from feeding the children or providing them clothing. They had never been in physical danger as a result of their homelessness. Mother provided food and shelter for them and they continued to attend school regularly. They never went without food. They had clean clothes to wear every two days, and they were able to shower two or three times per week. They received medical care through Medi-Cal.

Mother explained that she used her money to pay for hotel rooms for the first two weeks of the month. Then she and the children would find shelter somewhere else. For about one week of every month, they stayed in a trailer in a car lot. The night watchman who stayed in the trailer allowed them to sleep there. The remaining week, they usually stayed with friends. They could stay at the Gospel Mission for 30 days in a row, after which they could not return for 30 days. J., however, was too old to stay at the Gospel Mission, so when Mother and L. stayed there, J. stayed in the trailer. Mother explained that "there were places [she] could keep [J.]" so she and L. could stay at the Gospel Mission.

Mother admitted she had mental health issues, including depression, agoraphobia, panic attacks and anxiety attacks. She was attempting to get into a program to address those issues.

Mother said she was no longer using drugs. Her first drug test after the children were detained was positive for marijuana, but the second test was negative for all drugs.

Mother disagreed with the Agency's recommendation to place L. with Father and thought L. should be placed with her.

On cross-examination, Mother explained that although she wanted L. back in her custody, she was not ready because she was still homeless and because she and L. required mother-daughter counseling. In Mother's opinion, there were many things she and L. had to work out and "it might not be in either one of [their] best interests to be together today."

Mother had once rented an apartment, but the atmosphere, including the cockroaches, made her ill. The friends that she and the children stayed with still lived in that apartment building. Mother refused to name the friends. Mother could not rent another apartment because she had been evicted from apartments three times.

Mother said the trailer they stayed in did not initially have running water and toilet facilities, but it did now. She refused to name the person with whom they stayed in the trailer because she did not want him to lose his job.

Mother washed the family's clothes at the Salvation Army Shelter and she and the children took showers at a friend's home. The children had not seen a dentist in three years.

Mother received money for the children from TANF (Temporary Assistance for Needy Families) and she received food stamps for all three of them. Since the children had been removed, she no longer received any money. Mother inherited about $98,000 in 2004 when her parents died, but she spent the money on vehicles, clothes and "silly things." She was grieving and was not in the right state of mind. The loss of her parents affected her and the children horribly. The children missed school because of their grief.

Mother explained that she did not spend money on marijuana but just shared what other people offered her. She refused to identify the people with whom she smoked

marijuana. She also got beer from homeless friends. Mother did not believe she currently had a substance abuse problem; she was able to abstain. Mother said she had not used marijuana for 30 days. She had not used it since her children had been detained. In the past, the children would ask her about the marijuana smell on her person. They would ask her what she had been smoking.

Since the children's detention, Mother had been visiting the children every week and she thought the visits had gone well. She was not surprised, however, that L. reported the visits had not gone well at all. L. thought Mother ignored her and "talk[ed] bad about her" to J. in her presence. Mother explained that L. had not been very nice to her on the first visit, so she did ignore her. But she did not use one child to get to the other one.

J. testified that Mother never drank or was inebriated in his presence. He did not feel unsafe when he was living with Mother. He attended school, was always fed, had clean clothes and was able to take showers two or three times per week.

On cross-examination, J. testified he was in special education classes in high school. After school, he would take the bus to the library. Mother would be across the street in the Rose Garden. J. stayed at the library until it was time to walk to the Gospel Mission for devotions and dinner. About 50 percent of the time, he walked there alone.

J. said he took showers at friends' homes. He did not know where the friends lived and he was not supposed to reveal their names. Mother told him not to talk about it.

After J. turned 13 years old, he was no longer allowed to stay overnight at the Gospel Mission. He stayed at the Hutton House, and recently he stayed in the trailer with the night watchman about three weeks out of the month. Sometimes Mother would rent a hotel room and sometimes they would stay with friends in their former apartment building. Counsel asked J., "The man that lives in the trailer, is his name Jarrell?" J. did not answer. Counsel asked J. if that was a question he was not supposed to answer, and J.

said, "Yeah, exactly." But J. said he knew the person counsel was talking about. The person was someone who helped take care of J. and lived with him in the trailer.

J. said he had clean clothes every day. Mother washed their clothes at the Salvation Army about three times per week. J. never had trouble at school because of dirty clothes. J. agreed that when the social worker detained him, it appeared that he had not showered or worn clean clothes in a while. He also agreed that when he and L. were detained, they had only the clothes they were wearing. They did have other clothes somewhere else, but he was not allowed to say where. The clothes were kept at the same place that they washed their clothes.

J. knew the smell of marijuana and had smelled it on Mother, but the smell did not make him think Mother was smoking marijuana. When J. smelled marijuana on Mother's clothing, he did not know where she had picked up the smell. Mother never told him where it came from and he did not think about it. Mother's boyfriend, Jeff, did not smoke marijuana or drink alcohol around J. and L., and he did not live with them in the trailer. When counsel asked J. what Jeff did with them, J. answered that he was not allowed to answer that. He was not allowed to talk about Jarrell or Jeff.

J. said he was telling the truth. He had no idea why L. would say Mother smoked marijuana in their presence. Counsel asked, "So [L.] is lying?" J. did not respond until the court requested an answer. J. said, "Yes, Your Honor. Yes." He said L. was lying about sleeping on the streets and about Jeff's using drugs in their presence. When counsel asked J. how he knew the smell of marijuana, J. said, "Well, I—" and paused. The court asked him if this was another thing he was not supposed to talk about and he answered, "Yes, Your Honor. I'm sorry."

J. said he was comfortable with his current placement with his father.

On redirect examination, J. said Mother had not specifically told him not to talk about marijuana. He said he was afraid because he thought either Mother or L. would get upset. L. did not like being homeless. It was upsetting to her.

Pursuant to an offer of proof, it was established that L. would testify that the statements attributed to her in the social worker's report were correct. She would testify that she feared Jarrell, the man who lived in the trailer, and that she told this to Mother three or four times.[2] L. would also testify that her visits with Mother had not gone well, and that at first Mother ignored her and talked ill about her to J. More recently, Mother made her feel guilty throughout the visits. L. did not wish to continue the visits under these conditions.

The court stated that it found Mother's testimony not credible and was concerned that Mother was more worried about keeping family secrets than keeping her children safe and demonstrating that they were safe. The court found that Mother's lifestyle, substance abuse and mental health issues posed a significant threat to the children's safety. The court declared both J. and L. dependents of the court, and found by clear and convincing evidence that there would be a significant risk of danger if the children remained in Mother's custody. The court found that reasonable efforts had been made to prevent the children's removal. The court placed J. with his father and dismissed jurisdiction over him, and placed L. with Father under a plan of family maintenance.

DISCUSSION

I. Standard of Review[*]

In reviewing the jurisdictional findings and the dispositional orders of the juvenile court, we determine whether any substantial evidence, contradicted or uncontradicted, supports them. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.) In making this determination, we review the record in the light most favorable to the juvenile court's findings and orders. We draw all reasonable inferences from the evidence to support the

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[2] This corrected the report's statement that L. was afraid of a homeless man who stayed around the trailer.

[*] See footnote, *ante*, page 1.

findings and orders, and we resolve all conflicts in the evidence and in the reasonable inferences from the evidence in favor of the findings and orders. Issues of fact, weight and credibility are the province of the juvenile court. (*Ibid.*; *In re Shelley J.* (1998) 68 Cal.App.4th 322, 329.) The party challenging the juvenile court's findings or orders has the burden of showing there is no evidence of a sufficiently substantial nature to support them. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

II. Jurisdiction*

Mother contends the evidence was insufficient to support the juvenile court's jurisdictional findings. She asserts that neither poverty nor unconventional housing caused serious physical harm or a risk of serious physical harm to the children. We conclude sufficient evidence supported the jurisdictional findings.

"At the jurisdictional hearing, the court shall first consider only the question whether the minor is a person described by Section 300. Any legally admissible evidence that is relevant to the circumstances or acts that are alleged to bring the minor within the jurisdiction of the juvenile court is admissible and may be received in evidence. Proof by a preponderance of evidence must be adduced to support a finding that the minor is a person described by Section 300." (§ 355, subd. (a).)

Here, the basis for dependency jurisdiction was an amended allegation under section 300, subdivision (b), which provides that a child may be adjudged a dependent if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child …, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or

* See footnote, *ante*, page 1.

substance abuse…. The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness."

Mother asserts that she was meeting the children's needs despite their homelessness because the children went to school, had clean clothes to wear, got showers, had food to eat, and stayed in housing rather than on the streets. She claims her marijuana and alcohol use did not affect her ability to provide for the children or keep them reasonably safe.

But Mother cites only to evidence that advances her position, minimizing L.'s statements to the contrary and attributing them to L.'s "distaste for the family's lifestyle and their poverty …." As we have explained, we uphold the juvenile court's orders if substantial evidence, *even if contradicted*, supports them. Here, the risk of harm to both children was plainly established, even if contradicted. The children were living a high-risk lifestyle due to Mother's homelessness, substance abuse and mental health issues. They had been homeless for three and one-half years. L. said she was always scared and never felt safe. She feared being raped by the person with whom they regularly shared sleeping quarters—the same person who was solely responsible for J. when Mother and L. stayed at the Gospel Mission. The children were dirty and they wore dirty clothes. They spent their afternoons alone in the library while Mother smoked marijuana and drank beer in the Rose Garden. J. walked the streets alone between the library and the Gospel Mission so he could eat dinner. Mother squandered the money intended for the children's care, and refused to reveal the identities of people with whom she associated and entrusted her children. The record established a substantial risk that the children would suffer serious physical harm or illness as a result of Mother's homeless lifestyle and her failure to protect and provide for the children.

Mother's urging that we rely on testimony favorable to her position amounts to nothing more than a request that we reweigh the evidence presented in the juvenile court

and substitute our judgment for that of the juvenile court. This we cannot do. (*In re Laura F.* (1983) 33 Cal.3d 826, 833.) Instead, we must defer to the juvenile court's fact and credibility assessments, which were expressly unfavorable to Mother and J., and amply supported by Mother's repeated refusal to divulge information to the juvenile court and her instruction to J. that he do the same. The court concluded that Mother cared more about protecting her secrets than protecting her children.

III. Removal

A. Sufficiency of the Evidence[*]

Mother maintains that the evidence was insufficient to support the juvenile court's dispositional orders, in part due to the court's failure to make a finding that there were no reasonable means by which the children could be protected without removing them from Mother's custody.

Once the juvenile court finds a child to be within its jurisdiction, the court must conduct a dispositional hearing. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248.) At the dispositional hearing, the court may declare the child to be a dependent of the court and must decide where that child will live while under the court's supervision. (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1082.) In this determination, the child's best interests are paramount. (*In re Corey A.* (1991) 227 Cal.App.3d 339, 346.) "The juvenile court has broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order in accordance with this discretion." (*In re Jose M.* (1988) 206 Cal.App.3d 1098, 1103-1104.)

Under section 361, subdivision (c)(1), before removing a child from a parent's physical custody, the juvenile court must find by clear and convincing evidence that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there

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[*] See footnote, *ante*, page 1.

are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's … physical custody." "A removal order is proper if it is based on proof of parental inability to provide proper care for the minor and proof of a potential detriment to the minor if he or she remains with the parent. [Citation.] The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on *averting harm to the child*. [Citation.]" (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, italics added, overruled on other grounds in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) The court may consider a parent's past conduct as well as present circumstances. (*In re Troy D.* (1989) 215 Cal.App.3d 889, 900.)

We have already determined that substantial evidence supported the jurisdictional allegations found true under section 300, subdivision (b)—namely, that there was a substantial risk of serious physical harm to the children. For the same reasons discussed above, we conclude the record contained sufficient evidence of a substantial danger to the children's physical health and safety if the children were returned to Mother's custody.

Mother also asserts that the juvenile court failed to make a finding, required by section 361, subdivision (c), that there were no reasonable means by which the children could be protected without removing them from her custody. The record, however, supports such a finding. Mother's problems consisted of more than a single incident of neglect or a readily correctable situation. This was not a case of a filthy house, for example, that might have been corrected with supervision and guidance. (See, e.g., *In re Jeannette S.* (1979) 94 Cal.App.3d 52, 60-61.) Here, the circumstances that put the children at risk had existed for at least three and one-half years and were not the type that could be eliminated by guidance and supervision. The children required a stable and safe home and rational parental care and protection. Something far more than supervision was required to assure the children's safety in Mother's care. Providing Mother with services for her substance abuse and mental health issues would not have adequately protected the

children from the risks presented by Mother's homeless lifestyle, her poor judgment and her misconception that the children were safe in their living arrangements.

When, as here, the juvenile court fails to make a specific finding that there were no less drastic means to protect the children, the error is harmless "where 'it is not reasonably probable such finding, if made, would have been in favor of continued parental custody.' [Citations.]" (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1218.) In this case, we are confident the juvenile court would not have made a finding in favor of Mother. Any error was harmless.

B. ICWA Finding

Mother contends that before the juvenile court could remove her daughter L., an Indian child, from her custody and place her in Father's custody, the court was required to make a finding, supported by expert testimony, that continued custody of L. by Mother was likely to result in serious emotional or physical damage to L. We disagree.

According to section 361, subdivision (c)(1), before the juvenile court can remove a child from a parent's physical custody, it must find by clear and convincing evidence that "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's … physical custody." This finding must be made to remove a dependent child "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*." (§ 361, subd. (c), italics added.) In other words, this finding is required even when the child is removed from one parent and placed with the other, noncustodial parent. (See *In re Katrina C.* (1988) 201 Cal.App.3d 540, 548-549.)

A second finding is required in "an Indian child custody proceeding"—section 361, subdivision (c)(6), requires that the juvenile court must also find by clear and convincing evidence that "continued custody of the child by the parent or Indian

custodian is likely to result in serious emotional or physical damage to the child …." Furthermore, "that finding [must be] supported by testimony of a 'qualified expert witness' as described in Section 224.6." (*Ibid.*) Mother asserts that the plain language of this provision requires that the juvenile court make this finding even when an Indian child is placed with a noncustodial *parent* rather than in foster care, and thus the juvenile court in this case was required to make this finding, supported by expert testimony, before it could remove L. from Mother's custody. We disagree.

"In construing a statute, our task is to determine the Legislature's intent and purpose for the enactment. [Citation.] We look first to the plain meaning of the statutory language, giving the words their usual and ordinary meaning. [Citation.]" (*People v. Garcia* (2002) 28 Cal.4th 1166, 1172.) Our first and most important responsibility in interpreting statutes is to consider the words employed; in the absence of ambiguity or conflict, the words employed by the Legislature control, and there is no need to search for indicia of legislative intent. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) "[W]e presume the Legislature meant what it said. [Citation.] 'However, if the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute.' [Citations.]" (*People v. Garcia, supra*, at p. 1172.) "To resolve [an] ambiguity, we rely upon well-settled rules. 'The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute…. An interpretation that renders related provisions nugatory must be avoided [citation]; each sentence must be read not in isolation but in light of the statutory scheme [citation]; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation].' [Citations.]" (*People v.*

Shabazz (2006) 38 Cal.4th 55, 67-68; see also *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 903 [statutory language should not be interpreted in isolation, but must be construed in the context of the entire statute of which it is a part, in order to achieve harmony among the parts].) We must interpret a statute in accord with its legislative intent and where the Legislature expressly declares its intent, we must accept that declaration. (*Tyrone v. Kelley* (1973) 9 Cal.3d 1, 10-11.) Absurd or unjust results will never be ascribed to the Legislature, and a literal construction of a statute will not be followed if it is opposed to its legislative intent. (*Webster v. Superior Court* (1988) 46 Cal.3d 338, 344; *Lungren v. Deukmejian*, *supra*, 45 Cal.3d at p. 735.)

Thus, we begin by examining the plain language of section 361, the relevant portion of which was enacted to incorporate the requirements of ICWA into California's statutes:

> "(c) 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, *and, in an Indian child custody proceeding, paragraph (6)*:
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> "(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…. [¶] … [¶]
>
> "(6) *In an Indian child custody proceeding*, continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child, and that finding is supported by testimony of a 'qualified expert witness' as described in Section 224.6." (§ 361, subd. (c)(1) & (6), italics added.)

An "Indian child custody proceeding" in turn is defined by section 224.1, subdivision (c), as "a 'child custody proceeding' within the meaning of Section 1903 of [ICWA], including a proceeding for temporary or long-term foster care or guardianship

placement, termination of parental rights, preadoptive placement after termination of parental rights, or adoptive placement." This list does not include a proceeding in which a dependent child is removed from one parent and placed with the other. Similarly, the ICWA definition referenced in section 224.1 (section 1903 of ICWA) does not refer to placement with a noncustodial parent.[3] By expressly including certain placements, the Legislature impliedly excluded others, such as placement with a parent. (See *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 389 [citing the rule of statutory construction, *expressio unius est exclusio alterius*—to express or include one thing implies the exclusion of the other].) If the Legislature intended to include placement with a parent, we assume it would have expressly done so by adding it to the list.

Furthermore, the plain language of the statute cannot be said to include placement with a parent as a type of foster care placement. Placement with a parent is *not* foster care. (See 25 U.S.C. § 1903(1)(i); see also, e.g., *In re Nicholas H.* (2003) 112 Cal.App.4th 251, 262-265 [discussing different considerations for juvenile court and different schemes when child is placed with noncustodial parent rather than in foster care].) Section 1903 of ICWA defines "foster care placement" as "any action *removing*

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3 Section 1903 of ICWA (25 U.S.C. § 1903) provides: "**(1)** 'child custody proceeding' shall mean and include—[¶] **(i)** 'foster care placement' which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated; [¶] **(ii)** 'termination of parental rights' which shall mean any action resulting in the termination of the parent-child relationship; [¶] **(iii)** 'preadoptive placement' which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and [¶] **(iv)** 'adoptive placement' which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption. [¶] Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents." (See also 25 C.F.R. § 23.2, reiterating this provision.)

an Indian child from its parent or Indian custodian *for temporary placement in a foster home* or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated …." (25 U.S.C. § 1903(1)(i), italics added.)

Thus, the plain language of section 361, subdivision (c)(6), establishes that the statute applies only in an "Indian child custody proceeding," the definition of which expressly includes various proceedings, but *not* a proceeding for placement with a *parent*. (§ 224.1, subd. (c); 25 U.S.C. § 1903.) Accordingly, the finding under that provision and the expert testimony to support it are not required when an Indian child is placed with a parent.

Although we believe the statutory language is unambiguous, we note for good measure that this reading comports with the remainder of the ICWA statutory scheme and the express purpose of ICWA. We briefly note some examples supporting the conclusion that ICWA does not apply to a proceeding to place an Indian child with a *parent*.

First, section 1912(e) of ICWA—the federal counterpart to section 361, subdivision (c)(6)—addresses only foster care in this context: "No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (25 U.S.C. § 1912(e).)

Likewise, the California Rule of Court that implements section 361, subdivision (c)(6), also notes the foster care context, providing that "[i]n any child custody proceeding listed in rule 5.480, the court may not order placement of an Indian child unless it finds by clear and convincing evidence that continued custody with the parent or Indian custodian is likely to cause the Indian child serious emotional or physical damage and it considers evidence regarding prevailing social and cultural standards of the child's tribe, including that tribe's family organization and child-rearing practices. [¶]

(1) Testimony by a 'qualified expert witness,' as defined in … section 224.6 … is required before a court orders a child placed *in foster care* or terminates parental rights." (Cal. Rules of Court, rule 5.484(a), italics added.)[4]

The notice provision of ICWA also reflects the same purpose, coming into play when the Agency seeks foster care placement and the juvenile court has reason to believe the child is an Indian child. (25 U.S.C. § 1912(a) ["In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, *the party seeking the foster care placement of … an Indian child* shall notify the parent or Indian custodian and the Indian child's tribe …."]; 25 C.F.R. § 23.11(a); see, e.g., *In re Alexis H.* (2005) 132 Cal.App.4th 11, 15 [because agency sought neither foster care nor adoption, ICWA seemingly did not apply]; *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 699-701 [although child ultimately placed with father, ICWA applied where child was initially in foster care and agency sought continued foster care placement]; see also *In Interest of J.R.H.* (Iowa 1984) 358 N.W.2d 311, 321-322.)

Finally, the legislative intent behind ICWA expressly focuses on the removal of Indian children from their *homes and parents*, and placement in *foster or adoptive homes*. In establishing ICWA, Congress found "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by

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4 California Rules of Court, rule 5.480 states that the rules "addressing [ICWA] as codified in various sections of the California Family, Probate, and Welfare and Institutions Codes, appl[y] to all proceedings involving Indian children *that may result in an involuntary foster care placement*; guardianship or conservatorship placement; custody placement under Family Code section 3041; declaration freeing a child from the custody and control of one or both parents; termination of parental rights; or adoptive placement, including: [¶] (1) Proceedings under Welfare and Institutions Code section 300 et seq., and sections 601 and 602 et seq. *in which the child is at risk of entering foster care or is in foster care*, including detention hearings, jurisdiction hearings, disposition hearings, review hearings, hearings under section 366.26, and subsequent hearings affecting the status of the Indian child …."

nontribal public and private agencies and that an alarmingly high percentage of such children are placed in *non-Indian foster and adoptive homes and institutions* …." (25 U.S.C. § 1901, italics added.) Thus, Congress declared its policy "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children *from their families* and the placement of such children *in foster or adoptive homes* which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs." (25 U.S.C. § 1902, italics added; 25 C.F.R. § 23.3.) Following suit, the California Legislature declared that "[t]he state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with [ICWA] (25 U.S.C. Sec. 1901 et seq.) and other applicable law, designed to prevent the child's involuntary *out-of-home placement* and, whenever that placement is necessary or ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child's tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community." (§ 224, subd. (a)(1), italics added.)

In sum, the plain language of section 361, subdivision (c)(6), demonstrates that it does not apply to placement of an Indian child with a *parent*, and this conclusion comports with the Legislature's intent and the purpose of ICWA. Thus, a finding under section 361, subdivision (c)(6), and the expert testimony to support it were not required to remove L. from Mother and place her in Father's custody. If the Agency seeks foster care placement of L. in the future, the requirements under ICWA will again become an issue.[5]

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[5] Accordingly, the Cherokee Nation responded to the placement of L. with Father, as follows:

C. Arrangement for L.'s Care with Grandparents[*]

Mother asserts that even if we conclude placement with a parent does not require the additional finding under section 361, subdivision (c)(6), in this case, L.'s placement with Father was in effect a *foster care* placement because L. stayed with the grandparents while Father attended a residential treatment program. This is simply not the law. First, L. was placed in the custody of Father, not a foster parent. Second, once L. was placed in Father's custody, Father was permitted to arrange for L.'s care if he was not available to care for her during his relatively short absence.[6] (See *In re Isayah C.* (2004) 118 Cal.App.4th 684, 700 [incarcerated parent may have custody "even while delegating the day-to-day care of that child to a third party for a limited period of time" where parent is able to make appropriate arrangements for child's care during the parent's relatively short incarceration]; *In re S.D.* (2002) 99 Cal.App.4th 1068, 1077 [juvenile dependency system has no jurisdiction to intervene when incarcerated parent delegates care of his or her child to a suitable caretaker and there is no other basis for jurisdiction under section 300]; *In re Brittany S.* (1993) 17 Cal.App.4th 1399, 1402 [no go-to-prison, lose-your-child rule].) Here, Father arranged for L. to be in the grandparents' care—an arrangement made known to the juvenile court. This was not a foster care placement and a finding under section 361, subdivision (c)(6), was not required on that basis.[7]

"The child, [L.], is currently placed back in the home of [Father]. The Cherokee Nation has staffed the case detailed in the above stated action and have determined to **not** intervene at this time due to the child's in home placement. If the child is removed from the home and the department seeks foster care placement or termination of parental rights, the Cherokee Nation requests to be notified in accordance with 25 U.S.C. § 1901 et seq."

[*] See footnote, *ante*, page 1.

[6] The social worker predicted the treatment would last about 60 days.

[7] We also reject any other arguments made by Mother based on the premise that L. was placed in foster care.

D. L.'s Best Interest[*]

Mother also contends that L.'s placement with Father was not in L.'s best interest because Father had a substance abuse problem and an extensive criminal history. Mother suggests a maternal aunt was a possible and more appropriate placement than Father. Mother states she "would have been happier with [L.] in foster care than placed with [Father]" and "[e]ven the maternal aunt was irate" about the placement.

At the detention hearing, the court stated that the Agency had not presented any evidence to show that L.'s placement with Father would be detrimental or dangerous. At that time, Father claimed he was clean and sober. By the time of the dispositional hearing, Father had admitted relapsing and was planning to attend a residential treatment. At this point, the court had "real concerns" about Father's drug abuse, but was pleased that he had decided to seek recovery treatment. The court stated that it would probably remove L. from Father's custody at that time, except that L. was most likely an Indian child and, without the requisite expert testimony, the court's "hands [were] tied for removal."

Placement with the noncustodial parent is the statutorily preferred placement. (*In re Austin P.* (2004) 118 Cal.App.4th 1124, 1132.) 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.)

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[*] See footnote, *ante*, page 1.

Thus, the juvenile court in this case was *required* to place L. with Father *unless* it found that doing so "would be detrimental to the safety, protection, or physical or emotional well-being of [L.]" (§ 361.2, subd. (a).) Furthermore, as we have explained, before the court could place L. with someone *other than Father* (i.e., in foster care), the court required expert testimony to support a finding under section 361, subdivision (c)(6), that "continued custody of the child by [Mother] … [was] likely to result in serious emotional or physical damage to [L.] …." (§ 361, subd. (c)(6).) Here, no such expert testimony was presented and, as the court understood, it was therefore precluded from placing L. in foster care.

Nevertheless, we believe substantial evidence supported a finding that placing L. with Father would not be detrimental to L.'s safety, protection, or physical or emotional well-being. The Agency continued to recommend placement with Father even after his relapse was discovered. Father was providing L. a stable home. L. reported feeling safe and secure in Father's home, and she expressed no concerns. She would be in the care of the grandparents while Father received treatment for his substance abuse. She had been cared for by the grandparents in the past and had a good relationship with them. The social worker deemed this a reasonable plan because of L.'s older age, her willingness to remain in the care of Father, and the grandparents' supportiveness and willingness to provide a home for L. during Father's absence.

DISPOSITION

The juvenile court's findings and orders are affirmed.

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Kane, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Levy, J.