

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re DAVID R., a Person Coming Under
the Juvenile Court Law.

B239629

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. CK89136)

Plaintiff and Respondent,

v.

E.R.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County. Donna Levin, Juvenile Court Referee. Reversed with directions.

Michael A. Salazar, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

E.R. (Father) appeals from orders declaring his son David a dependent of the court and removing him from Father's custody. We hold that the court applied an incorrect standard in finding that Father's two-year old son is at "substantial risk" of being molested by Father. (Welf. & Inst. Code, § 300, subds. (d) & (j).)¹ Accordingly, the jurisdictional and dispositional orders are reversed and the matter remanded for retrial if the Department of Children and Family Services (DCFS) wishes to proceed with the matter.

FACTS AND PROCEEDINGS BELOW

At the time of the filing of the petition in this case the family consisted of Father, his two-year-old son David, David's mother A.C. and A.C.'s six-year-old daughter, S.G.

The court found jurisdiction over S.G. under section 300, subdivision (d), based on evidence that on a single occasion Father forced S.G. to masturbate him to ejaculation and fondled her breasts. This incident took place away from the family home at an apartment that Father was painting. No one else was present.²

The court found jurisdiction over David under section 300, subdivisions (d) and (j), based solely on its view that: "It's long been established that both sexes are at risk when this type of sexual abuse occurs."³ For the reasons explained below, the court committed reversible error.

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

² The court took jurisdiction of S.G. as a result of Father sexually abusing her and her mother's failure to protect her from that abuse. Father does not appeal that order.

³ Section 300, subdivision (d), states in relevant part that jurisdiction over a child arises when "[t]he child has been sexually abused, or there is a substantial risk that the child will be sexually abused . . . by his or her parent . . . or a member of his or her household, or the parent . . . has failed to adequately protect the child from sexual abuse when the parent . . . knew or reasonably should have known that the child was in danger of sexual abuse." Section 300, subdivision (j), provides that jurisdiction over a child arises when "[t]he child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions. The court shall consider the circumstances

DISCUSSION

The only justification the court gave for removing David from his father's custody and making him a dependent child of the court was the court's mistaken understanding of the law: because Father molested S.G. that alone constituted sufficient evidence to conclude that David was at substantial risk of being sexually abused by Father.

As of this writing, the California appellate courts are divided on the question whether a man's sexual molestation of his minor daughter or stepdaughter is sufficient by itself to support a finding that the victim's male siblings are also at substantial risk of sexual abuse.⁴

The better reasoned view was expressed in *In re Maria R., supra*. There the court concluded that a father's sexual abuse of his female daughters was, standing alone, insufficient to establish a substantial risk of sexual abuse of their male sibling. The evidence showed that father had sexually abused his 12- and 14-year-old daughters, as well as two adult female children from a previous marriage. The Department of Children and Family Services (DCFS) sought jurisdiction over the father's eight-year-old son under section 300, subdivision (j), which applies where the child's sibling has been sexually abused and there is a "substantial risk" that the child will also be abused. (See, *ante*, pp. 2-3, fn. 3.) DCFS argued that "a court may conclude, in the absence of any supporting evidence, that a male child is at substantial risk of being sexually abused

surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent . . . and any other factors the court considers probative in determining whether there is a substantial risk to the child."

⁴ The cases that hold the sexual abuse of a female child alone is sufficient to put a male child at risk include: *In re P.A.* (2006) 144 Cal.App.4th 1339, 1347; *In re Andy G.* (2010) 183 Cal.App.4th 1405, 1414; *In re Ana C.* (2012) 204 Cal.App.4th 1317, 1332. The cases that hold the sexual abuse of a female child by itself is insufficient to put a male child at risk include: *In re Rubisela E.* (2000) 85 Cal.App.4th 177, 199; *In re Maria R.* (2010) 185 Cal.App.4th 48, 68; *In re Jordan R.* (2012) 205 Cal.App.4th 111, 137-138; *In re Alexis S.* (2012) 205 Cal.App.4th 48, 54-55.

by a parent who has sexually abused that child's sisters.” (*In re Maria R., supra*, 185 Cal.App.4th at p. 62.)

The court began its analysis by considering whether “a parent’s sexual abuse of a daughter, either alone or in combination with a factor or factors that have no established correlation with sexual abuse, is sufficient to establish that the parent’s son is at risk of sexual abuse by that parent within the meaning of subdivision (d).” (*In re Maria R., supra*, 185 Cal.App.4th at p. 63.) The court held the answer is no. The court explained that “[i]n addition to the lack of support in the relevant statutory provisions for the proposition that a brother of a girl who has been sexually abused by a parent is at risk of *sexual* abuse, there is a lack of evidentiary support for this general assertion in the case law as well. None of the courts that have held or impliedly concluded that a child, regardless of gender, whose sibling was sexually abused, may be found to be at risk of *sexual abuse* under subdivision (d), either directly or under subdivision (j), has cited any scientific authority or empirical evidence to support the conclusion that a person who sexually abuses a female child is likely to sexually abuse a male child. [Citations.] In the absence of evidence demonstrating that a perpetrator of sexual abuse of a female child is in fact likely to sexually abuse a male child, we are not persuaded that the rule of general applicability enunciated in *P.A.*, and repeated by the *Andy G.* court, is grounded in fact. For this reason, we decline to adopt the reasoning of *P.A.* and *Andy G.*” (*In re Maria R., supra*, 185 Cal.App.4th at p. 68.)

The court held that DCFS had failed to establish the son was at substantial risk of sexual abuse: “Since there is no evidence in the record that would tend to support a finding that [father] has an interest in engaging in sexual activity with a male child, we cannot, despite the Agency’s urging, conclude that [father’s] sexual abuse of his daughters—as aberrant as it is—establishes that [the male sibling] is at substantial risk of *sexual abuse* within the meaning of subdivision (j), as defined in subdivision (d)[.]” (*In re Maria R., supra*, 185 Cal.App.4th at p. 68.)

Although father's behavior in this case is abhorrent, the purpose of the dependency law is not to punish the parent but to further the best interest of the child. Here the court applied the wrong standard and DCFS failed to introduce any evidence, including expert testimony, to support the court's conclusion that David was at substantial risk of sexual abuse.

The studies that have been done on siblings' risk of sexual abuse by their fathers show that in cases of a father's incest with a daughter, in the absence of other indicators of risk, "the male child is not likely to be victimized." (Wilson, *The Cradle of Abuse: Evaluating The Danger Posed By A Sexually Predatory Parent To The Victim's Siblings* (2002) 51 Emory L.J. 241, 263-264.) Thus, where a female child is the initial victim of abuse, "the abuser likely will prey upon other female children in the household, while leaving the male children alone." (*Id.* at p. 287.) A study published in the *Journal of Child Sexual Abuse* found that in 157 cases of sexual abuse within a family, 135 of the male perpetrators abused only female children (86%), 13 abused only male children (8.3%) and nine victimized both male and female victims (5.7%). (Proeve, *A Preliminary Examination of Specific Risk Assessment for Sexual Offenders Against Children* (2009) vol. 18, issue 6, *Journal of Child Sexual Abuse* 583, 585 (hereafter Proeve).)

"Other indicators of risk" may include the sexual proclivity of the molester. Is he an indiscriminately promiscuous adult; a pedophile; a pure incest offender? (Cavallin, *Incestuous Fathers: A Clinical Report* (1966) vol. 122, No. 10, *American Journal of Psychiatry* 122, 1132-1138.) Has he molested unrelated boys? (Wilson, *Recognizing The Threat Posed by an Incestuous Parent to the Victim's Siblings: Part I: Appraising the Risk* (June 2004) vol. 13, No. 2, *Journal of Child and Family Studies* 143, 153). One study found that the father's age when he abuses the minor female and his own sexual abuse as a minor affected the probability that the father would cross the gender boundary. (Proeve, *supra*, at p. 586.) Finally, the comparative sexual development of the molested female and a male sibling may be a factor affecting

the male's risk of molestation. (See § 300, subd. (j), quoted at pp. 2-3, fn. 3, *ante.*) No evidence of these risk factors was introduced in this case nor does the record show that the court considered any of the factors listed in section 300, subdivision (j). No expert witness testified in support of the required "substantial risk." (See pp. 2-3, fn. 3, *ante.*)

Because the court applied the wrong legal standard, the jurisdictional and dispositional orders with respect to David are vacated and the matter is remanded for further proceedings consistent with this opinion. (*In re Maria R.*, *supra*, 185 Cal.App.4th at p. 71.)

DISPOSITION

The jurisdictional and dispositional orders with respect to David are reversed and the matter is remanded for the court to try the matter applying the correct standard.

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ROTHSCHILD, J.

I concur:

CHANEY, J.

MALLANO, P. J., Dissenting.

E.R. (Father) molested his six-year-old stepdaughter. In my view, that places his two-year-old son at “substantial risk” of being molested by Father.

As the majority opinion observes, the courts of appeal are divided on the issue, which is before our Supreme Court in *In re I.J.* (review granted Sept. 19, 2012, S204622). I believe that the better-reasoned view is expressed in *In re P.A.* (2006) 144 Cal.App.4th 1339. There, a father molested his nine-year-old daughter, and the issue presented was whether her two younger male siblings, ages five and eight, were at risk. In concluding they were, the court stated: “[W]e are convinced that where, as here, a child has been sexually abused, any younger sibling who is approaching the age at which the child was abused, may be found to be at risk of sexual abuse. . . . [A]berrant sexual behavior by a parent places the victim’s siblings who remain in the home at risk of aberrant sexual behavior.” (*In re P.A.*, at p. 1347, fn. omitted.) The court determined that Welfare and Institutions Code section 355.1, subdivision (d) “evinces a legislative determination that siblings of sexually abused children are at substantial risk of harm and are entitled to protection by the juvenile courts,” by providing in pertinent part that: ““(d) Where the court finds that either a parent, a guardian, or any other person who resides with . . . a minor who is currently the subject of the petition filed under Section 300 . . . (3) has been found in a prior dependency hearing . . . to have committed an act of sexual abuse, . . . 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.”” (*In re P.A.*, at p. 1347.) Here, Father offered no evidence that he was not a risk to his son. (See Evid. Code, § 604.)

Accordingly, I would affirm.

MALLANO, P. J.