Filed 1/22/13 In re S.L. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re S.L. et al., Persons Coming Under the Juvenile Court Law.	B240306 (Los Angeles County Super. Ct. No. CK52216)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ANTHONY C., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Albert J. Garcia, 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, and Kimberly Roura, Senior Associate County Counsel, for Plaintiff and Respondent.

Anthony C. (Father) appeals from the juvenile court's orders denying his Welfare and Institutions Code section 388 petitions with respect to D.C., A.C., and S.L.; denying his request to testify telephonically at a hearing; finding the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) did not apply; and giving the legal guardian of D.C. and A.C. discretion over the time, place, and manner of his visitation.[1] Father's children D.C. and A.C. were adjudged dependents of the court under section 300, subdivisions (b) (failure to protect); (g) (no provision for support); and (j) (abuse of sibling). S.L., the half sister of D.C. and A.C., was adjudged a dependent of the court under section 300, subdivisions (b) and (g). D.B. (Mother) and Larry L., the father of S.L., are not parties to this appeal.

We reverse the March 19, 2012 order granting legal guardianship over D.C. and A.C. and the February 1, 2012 order granting long-term foster care for S.L. and remand the case to the juvenile court with directions to order the Department of Children and Family Services (DCFS) to provide the Cherokee Nation with proper notice of the proceedings under the ICWA. If, after receiving proper notice, a tribe determines D.C., A.C., and S.L. are Indian children as defined by the ICWA, the juvenile court shall proceed in conformity with the provisions of the ICWA. If no tribe indicates D.C., A.C., and S.L. are Indian children within the meaning of the ICWA, the court shall reinstate the March 19, 2012 order of legal guardianship and the February 1, 2012 order of long-term foster care. The court shall then modify the visitation order to specify the frequency and duration of Father's visits with D.C. and A.C.

BACKGROUND

On November 23, 2009, DCFS filed a first amended petition on behalf of S.L., born in 1996, D.C., born in 1998, and A.C., born in 2000, against Mother, Father, and Larry L. (the petition). As sustained, paragraph b-1 of the petition alleged under section 300, subdivision (b) on behalf of S.L., D.C., and A.C. that on October 20, 2009, Mother physically abused S.L. by striking her arms, legs, and thighs, resulting in welts, marks,

[1] Undesignated statutory references are to the Welfare and Institutions Code.

and bruises to her arms, legs, and thighs. On numerous prior occasions, Mother had struck S.L.'s body with belts and cords. On October 20, 2009, Mother was arrested for willful cruelty to a child. As sustained, paragraph b-4 of the petition alleged under section 300, subdivision (b) on behalf of S.L., D.C., and A.C. that Mother has a history of substance abuse and is a current user of marijuana; Mother has allowed individuals in possession of marijuana access to her home. As sustained, paragraph g-1of the petition alleged under section 300, subdivision (g) that Larry L. has failed to provide S.L. with the necessities of life, including food, clothing, shelter and medical care. As sustained, paragraph g-2 of the petition alleged under section 300, subdivision (g) that Father has failed to provide D.C. and A.C. with the necessities of life, including food, clothing, shelter and medical care. As sustained, section 300, subdivision (j) alleged on behalf of D.C. and A.C. that Mother abused S.L. by striking her arms, legs, and thighs.

The events leading up to the filing of the petition are as follows. In 2003, a petition was sustained with respect to S.L., D.C., and A.C. against Mother and Father under section 300, subdivisions (b) and (g), arising out of Mother's failure to make an appropriate plan for the minors' care; violent altercations between Mother and Father; and Father's failure to provide. The juvenile court made a home of Mother order with family preservation services and terminated jurisdiction in May 2005.

On October 20, 2009, Mother was arrested for child cruelty, and an original and a first amended section 300 petition were filed. Mother denied to DCFS that she or the minors had Indian heritage, which was recorded on the Indian Child Inquiry Attachment to the section 300 petition and signed by DCFS under penalty of perjury. At an October 23, 2009 detention hearing at which Mother did not appear, maternal grandmother stated that her grandmother, Carrie J., who had been born in Louisiana, had Cherokee blood, but that no family member was enrolled in the tribe. The court ordered DCFS to "evaluate American Indian heritage, [specifically] the Cherokee Nation, focusing on the state of Louisiana." On October 27, 2009, under penalty of perjury, Mother signed a parental notification of Indian status form that indicated she did not have Indian ancestry as far as she knew. At a hearing on October 27, 2009, Mother stated that

she and Father did not have Indian ancestry, and the court found that "it has no reason to know that any of the children will be considered Indian children under the Indian Child Welfare Act. The court is not going to order notice under that Act." Mother also stated the last time she had seen Father was in 2007.

Meanwhile, Father, who had been incarcerated in Nevada for possession of a controlled substance for sale, was on parole as of July 2, 2009, with an expected parole release date of July 26, 2010. DCFS reported that in 2003 Father had been arrested for possession of cocaine; possession of drug paraphernalia; possession of cocaine with intent to sell; battery by a prisoner; possession of a stolen vehicle; and ex-felon in possession of a firearm. Later, DCFS reported that, as a juvenile, Father had been charged with grand theft, receiving stolen property, taking a vehicle without owner consent, and vehicle theft.

DCFS submitted a declaration of due diligence in December 2009, which reported that DCFS had spoken with the Nevada parole and probation department regarding Father's whereabouts but had not received a response.

At the adjudication hearing on December 21, 2009, the juvenile court considered the due diligence reports and ordered Father not to receive family reunification services, finding by clear and convincing evidence that Father came within section 361.5, subdivision (b)(12) in that he had been convicted of a violent felony.

On June 14, 2010, Father filed a section 388 petition on behalf of D.C. and A.C., and a section 388 petition on behalf of S.L. The first section 388 petition sought to change the order denying Father family reunification services and stated that D.C. and A.C. lived with Mother in California, but Father lived in Michigan and "was unaware of circumstances." The petition stated Father "will follow any and all rules imposed for betterment of my children." Father requested permanent custody of D.C., A.C., and S.L. The petition stated that the changes would be better for the children because "I [currently] live and work in Detroit Michigan where I don't have any ties to my past life and want to succeed. I'm in the process of buying a home for my children and want to provide for them."

At a status review hearing on June 21, 2010, the juvenile court denied Father's first section 388 petition, noting Father had been denied reunification services under section 361.5, subdivision (b)(12); Mother was receiving reunification services; and Mother was trying to reunify with the minors. The court noted that Father lives in Michigan with paternal great aunt, who was interested in having the minors placed with her. At that time, the court refused to order an interstate compact on the placement of children (ICPC) report on the paternal great aunt, but in August 2010 ordered an ICPC report on her.

The second section 388 petition stated that D.C., A.C., and S.L. have lived together their entire lives; Father did not want them to be separated; and Father had not had contact with the minors except by telephone from the time he separated with Mother. Father requested the minors to be placed in his custody and stated that he lived and worked in Michigan, where he was buying his first home. On June 18, 2010, the juvenile court denied Father's second section 388 petition regarding S.L. without a hearing because it would not promote S.L.'s best interest.

Meanwhile, Mother had not complied with the services ordered and was not visiting the minors regularly. On February 24, 2011, the juvenile court held a hearing regarding Mother's reunification services. The court declined the request of Father's counsel, who made a special appearance, that the matter be continued because Father's flight had been canceled. The court noted that Father had not received reunification services under section 361.5, subdivision (b)(12), and terminated Mother's reunification services.

S.L., D.C., and A.C. experienced change in placements, and ultimately S.L. was placed in the foster home of A.H., and D.C. and A.C. were placed with T.O. The minors reported that they did not want to be adopted but preferred that their current caregivers be appointed as legal guardians.

On August 24, 2011, Father filed a third section 388 petition on behalf of D.C. and A.C., requesting a change to the juvenile court's order of December 21, 2009, that Father not receive reunification services pursuant to section 361.5, subdivision (b)(12). The

petition stated that Father had "made great strides in a positive direction such as relocating to a safer area, away from old friends and neighborhoods, he has maintained gainful employment and has a house. He also completed domestic violence and substance abuse counseling." Father requested the court order D.C. and A.C. home of Father, or, in the alternative, six months of family reunification services with liberalized visitation. The petition also stated that Father "believes he should never have been denied reunification services pursuant to [section 361.5, subdivision (b)(12)], since he has never been convicted of a violent felony as defined under the [Penal] Code. Father loves his children and has shown determination even though he feels no one has been on his side. He has made vast lifestyle changes as noted above and the children deserve to reunify with their [father]."

Father also attached a declaration which stated that he had been incarcerated from November 2008 to October 6, 2009, and that the minors were detained on November 23, 2009. Father did not have contact information for the minors while he was incarcerated. He last saw the minors in 2007, before he was arrested. He had been unable to see the minors after he was released from prison due to his "relocation to Michigan" and "lack of financial stability." Father moved to Michigan immediately upon his release in order to get a "fresh start, away from old friends and neighborhoods and to create a stable home for my children." Father learned from his cousin that the minors were detained. Father told DCFS that he wanted to participate in the court proceedings concerning the minors. Father first received a hearing notice in June 2010. Father called DCFS "countless" times to regain custody of the minors; his section 388 petition was denied without a hearing; and he was finally appointed counsel after several requests. Father declared he maintained his bond with the minors by regular and frequent phone contact with them and he had completed a full substance abuse and domestic violence program in Las Vegas, Nevada. He declared that he had never been convicted of a violent felony as specified under Penal Code section 667.5, subdivision (c). He had secured gainful employment and completed parole in July 2010. He had drug tested as a condition of parole twice per week. Father also attached a letter dated January 6, 2010, requesting a

court-appointed attorney; a driver skills test certificate from Michigan; a resume; a property tax assessment notice; a parole agreement "for the crime of possession of controlled substance w/intent t/sell" dated August 13, 2009; a discharge from parole dated May 25, 2010; record of attendance at a two-part substance abuse treatment orientation meeting in November 2009; and employment attendance records as a forklift operator from April to December 2010.

On August 25, 2011, the juvenile court granted a hearing on the third section 388 petition to take place on September 22, 2011, and directed DCFS to prepare a report in response to the petition, including addressing Father's criminal record and interviewing the minors regarding their wishes.

DCFS reported that Father had stated he had been arrested twice in 1998 for selling drugs; he had been arrested for spousal abuse in 2007; he had been arrested for selling drugs in 2008; and he had been released from jail on October 2, 2009. DCFS reported that Father had not provided evidence that he had completed a domestic violence or drug abuse program; Father had failed to reunify with the minors during a previous DCFS case filed in 2003. DCFS could not assess whether Father's interaction or parenting skills were appropriate because he had not had visits with the minors. DCFS could not provide reunification services out of state. DCFS reported D.C. and A.C. had remained with T.O. from December 1, 2010, who was willing and able to provide a home for the minors. D.C. was willing to stay with Father because she had "no[t] seen him in 5 years." A.C. stated that although she wanted to live with Father because she had not "'seen him in a long time,'" she did not want to leave T.O. or her school and friends. S.L. did not want to move in with Father, but wanted to return to the home of her former foster parent A.K.

At the hearing on the third section 388 petition on September 22, 2011, at which Father's counsel appeared, the juvenile court agreed to allow Father to amend the third section 388 petition to add S.L. The court also requested further information on Father's programs; employment; financial and housing situations; and the wishes of the minors. Father's counsel mentioned the possibility of a telephonic hearing for the section 388

petition, and the court commented, "I think that's a good idea," and "So, yeah, you should make arrangements so that if we need to we could do a telephone conference, testify that way, because there may be questions that arise that I may have or counsel." DCFS stated it reserved objections to telephone testimony by Father.

On October 17, 2011, Father filed a fourth section 388 petition, which included S.L., requesting a change to the juvenile court's order of December 21, 2009, that Father not receive reunification services pursuant to section 361.5, subdivision (b)(12). The petition stated that "Father was only ordered to do a substance abuse assessment to satisfy one of the requirements of parole in 2009, but was not ordered into a full substance abuse program, since the 'assessment of drug or alcohol use' was marked as 'low.' Additionally, Father attaches further proof of home ownership." Father requested a home of Father order, or, in the alternative, six months of family reunification services with liberalized visitation. He also requested an order that S.L. reside with him or that he be given an opportunity to reunify with her. The petition stated that Father should never have been denied reunification services pursuant to section 361.5, subdivision (b)(12) because he had never been convicted of a violent felony. Father attached a letter of support from paternal second cousin; documents, including a tax statement, regarding his home; a land installment contract signed on September 29, 2010; an installment note; and pictures of his home.

At an October 27, 2011 hearing, the court ordered an ICPC report for Father in Michigan and an update on the minors' wishes. The court gave DCFS discretion to liberalize Father's visits with the minors in California and continued the section 388 hearing to February 1, 2012.

DCFS reported in a "last minute information" on February 1, 2012, that it had received Michigan's ICPC report on Father, which recommended that Father "be given the opportunity to provide a stable and loving home for his children. [Father] does not want to be referred for licensure." The ICPC report indicated that Father owns his own home, is employed full-time, has family support, and "appears to be passionate about his children." DCFS disagreed with the ICPC report based on Father's past attempt at

suicide; depression; lack of visits; DCFS's inability to assess interaction between Father and the minors; the minors' vacillation on whether they wanted to live with Father; the minors were thriving in current placement; D.C.'s and A.C.'s bond with T.O.; S.L.'s lack of interest in living with Father; and the inability of DCFS to provide reunification services for Father out of state. D.C. stated she did not want to have to make a decision about living with Father and would be happy to stay with T.O. A.C. indicated that although she wished to live with Father, she would be willing to live under legal guardianship with T.O. D.C. and A.C. were happy and comfortable with T.O., who provided a structured and supportive home environment that met all their needs. D.C. and A.C. had put down roots in the community and had been in foster care for over two years. S.L. wanted to live with Father only to avoid separation from D.C. and A.C. and said that Mother had told her to tell DCFS that she wanted to live with Father in Michigan.

On February 1, 2012, the hearing on the fourth section 388 petition was held. The juvenile court admitted the last-minute information and the Michigan ICPC report. DCFS objected to the telephone testimony by Father, arguing that DCFS had not received prior notice and that the court would not be able to judge Father's credibility, whether the testimony was scripted, the identity of the person speaking, and cross-examination would be impaired. The court, which was not the same hearing officer at the previous hearing, denied Father's request for telephonic testimony. The court sustained DCFS's objection to Father's counsel's offer of proof, which was solely that Father would testify that Michigan social workers had "suggested to him that it's a positive ICPC." Counsel stipulated that the three minors would testify they wanted to go home of Father and Father had sent them cellular telephones through counsel so they could talk to him. Father's counsel stated she had submitted evidence of Father's compliance with parole but had not been able to obtain paperwork to confirm that Father had completed domestic violence counseling. DCFS argued that Father had a past history of domestic violence; Father had not completed violence counseling; Father had mental health issues which

remained untreated; and there was evidence that Mother pressured the minors to say they wanted to live with Father so that Mother could move to Michigan and bypass DCFS.

The juvenile court stated, "I've read and considered all of the documents. By the way, I went back to all of the volumes . . . , the whole picture on this thing." The court noted, "[I]t is nice that [Father] is stepping up," but denied Father's fourth section 388 petition, determining that Father had not met his burden to show a change of circumstances and it was not in the best interests of the minors to grant the petition. The court recognized that the minors' best interests were the focus at that stage of the proceedings, stating, "We know he needs to get himself together, but my job is to protect the children from themselves sometimes too. That's paramount in here too. Sure, the children want to go back. I understand that. There's a lot of promises being made somewhere, left and right, around here. And what we need to do is get it all straightened out for them. And, if you go back to this file — you can go back in depth — you can see the problems in this case from way back. This is nothing new. And so far I do not have the evidence that shows a change in circumstances that he meets the burden at this point. [¶] However, that doesn't mean that he has to give up, nor does it mean the children can't see him. It doesn't mean he can't come out and see them." The court recognized that it would be difficult for Father to visit the minors but that it was necessary for Father to "step up" his visitation with the minors and that DCFS could assist with arrangements to have the minors visit Father in Michigan.

The court ordered long-term foster care for S.L. The court ordered the ICPC report to be continued and monitored, "reasonable" visits for Father.

On March 15, 2012, Father filed a fifth section 388 petition with respect to D.C., A.C., and S.L., stating that Michigan had approved the ICPC report for Father as of January 10, 2012. It stated, "Father is also enrolled in and is attending classes/counseling as ordered by the ICPC division," and "Father has made vast lifestyle changes as evidenced by his approved home study by the state of [Michigan]." An investigator affiliated with Father's counsel stated that she had confirmed the ICPC approval with Michigan on February 1, 2012. DCFS argued that "all you have before you is an

approved ICPC which was pending anyway at that time and was not the basis for the court's finding at the last hearing. These issues have been dealt with by the court and there's nothing new, your Honor."

On March 19, 2012, the juvenile court summarily denied the fifth section 388 petition, stating that it presented no new evidence or change of circumstances. With respect to the minors' requests for specific visitation orders, the court stated, "You can set out a schedule on it. I'm amenable to that," and "It all depends on what he's going to be able to — phone contact he can have as much as he wants basically. I don't have a problem with that at all. It's his real contact in life that is another additional problem other than the fact that he hasn't stated new evidence anyway." Father's counsel requested daily visitation for three hours a day if Father were to fly in from Michigan. In response to the court's query, T.O. stated that she would not have a problem with Father visiting the minors. The court commented that Father had a purely telephonic relationship with the minors; that he had not complied with "all the court orders and case plan"; and that it was encouraging Father to visit the minors to establish a "real" relationship with them. The court granted T.O. legal guardianship over D.C. and A.C. and ordered monitored visits for Mother and Father, "time, place and manner to be determined by the legal guardian." Father appealed.

DISCUSSION

A. The juvenile court erred in failing to direct DCFS to give ICWA notice

Father contends that ICWA notice was required to be sent to the Cherokee tribes because the juvenile court had reason to know that an Indian child was involved based on maternal grandmother's statement. We agree.

"Congress passed the ICWA in 1978 'to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children "in foster or adoptive homes which will reflect the unique values of Indian culture . . . ."' [Citations.]" (*In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1164.) If the court "knows or has reason to know that

an Indian child is involved" in a dependency proceeding, the social worker or probation officer shall provide notice to the child's tribe. (§§ 224.2, subd. (a), 224.3, subd. (d).)

"If the court or the Department 'knows or has reason to know that an Indian child is involved, the social worker . . . is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members . . . , contacting the Bureau of Indian Affairs . . . [,] the tribes and any other person that reasonably can be expected to have information regarding the child's membership status or eligibility.' (§ 224.3, subd. (c); see Cal. Rules of Court, rule 5.481(a)(4).) The circumstances that may provide reason to know the child is an Indian child include, but are not limited to, 'A person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe.' (§ 224.3, subd. (b)(1).)" (*In re Gabriel G., supra,* 206 Cal.App.4th at pp. 1165–1166 [court failed duty of further inquiry and requiring ICWA notice where mother denied Indian heritage but father filed unsigned form that paternal grandfather was member of Cherokee tribe even though father later denied Indian heritage].) "'The determination of a child's Indian status is up to the tribe; therefore, the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement.'" (*In re Gabriel G.*, at p. 1165; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1408 [finding father's suggestion that child "might" be an Indian child because paternal great-grandparents had unspecified Native American ancestry was enough to trigger notice].)

In reviewing the findings of the trial court made pursuant to the ICWA, we are governed by the substantial evidence test. (*In re Michael G.* (1998) 63 Cal.App.4th 700, 715.)

Here, maternal grandmother stated that her grandmother, who had been born in Louisiana, had Cherokee heritage. Mother, on the other hand, testified and stated under

penalty of perjury that she did not have Indian heritage, as far as she was aware. There is no evidence in the record that DCFS evaluated Mother's Indian heritage, focusing on the Cherokee Nation in Louisiana, as the juvenile court ordered at the October 23, 2009 hearing. Based on the information obtained from maternal grandmother, the court and DCFS should have made further inquiry. In the absence of further inquiry or rebuttal evidence of maternal grandmother's representation that her grandmother had Cherokee heritage, notice was required to be sent to the Cherokee tribes.

As discussed below, we conclude that the juvenile court did not err in making the other orders of which Father complains. Therefore, we conditionally reverse the court's guardianship orders. (*In re Gabriel G.*, *supra*, 206 Cal.App.4th at p. 1168 [limited reversal appropriate to ensure ICWA requirements are met].) If, after proper notice, the court finds that D.C. and A.C. are Indian children, the court shall proceed in conformity with the ICWA. If it is determined on remand that the minors are not Indian children, the orders shall be affirmed.

B. The juvenile court's denial of Father's request to testify by telephone, if in error, was not prejudicial

Father contends the juvenile court abused its discretion when it denied Father's request to testify by telephone at the February 1, 2012 hearing on his fourth section 388 petition.

"[I]n dependency proceedings, a parent's right to due process is limited by the need to balance the 'interest in regaining custody of the minors against the state's desire to conclude dependency matters expeditiously and . . . exercise broad control over the proceedings . . . .' [Citation.] Trial courts are afforded discretion to work within existing guidelines to determine the admissibility of evidence. [Citation.] The reviewing court will not disturb their findings absent an '"""arbitrary, capricious, or patently absurd determination. . . .'"""" [Citation.]" (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1176 [exclusion of telephonic testimony by expert witnesses in Saudi Arabia was not abuse of discretion where court balanced minimal importance of testimony with state's interest in

expeditious resolution, other parties did not have notice of expert's testimony, and continuance would be required to rebut expert testimony].)

We need not decide if the juvenile court abused its discretion in denying Father's request to testify by telephone because any error was not prejudicial. Father's counsel's offer of proof was that Father would testify that the Michigan social worker had "suggested to him that it's a positive ICPC." Although the court sustained DCFS's objection to Father's telephonic testimony, the evidence Father would have presented was admitted nonetheless into evidence in the form of the ICPC report from Michigan.

We conclude the juvenile court did not commit prejudicial error in denying Father's request to testify by telephone.

C. The juvenile court did not abuse its discretion in denying Father's fourth section 388 petition at the hearing on February 1, 2012

Father contends because he showed that he had made significant changes in his life the juvenile court abused its discretion in denying Father's fourth section 388 petition at the hearing on February 1, 2012. We disagree.

Section 388, subdivision (a) provides, "Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court . . . to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court."

"At a hearing on a motion for change of placement, the burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make a change of placement in the best interests of the child." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) "After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability' [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. [Citation.] A court hearing a motion for change of placement at this stage of the

proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child." (*Ibid*.) "This determination [is] committed to the sound discretion of the juvenile court, and the trial court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established." (*Id*. at p. 318.)

In our view, the juvenile court acted within its discretion in determining that a change of placement was not in the minors' best interests. Our review shows the court properly evaluated the evidence and requested further information as to Father's circumstances at the hearings. With respect to Father's changed circumstances, Father provided evidence he was employed and owned a home in Michigan. At the September 22, 2011 hearing, the court requested verification of Father's claims that he was employed; proof of home ownership; information regarding other residents in Father's home, if any; and a report on the minors' wishes. At the October 27, 2011 hearing, the court ordered an ICPC report on Father in Michigan; an update on the minors' wishes; and gave DCFS discretion to liberalize Father's visits with the minors in California before continuing the matter to February 1, 2002. At that hearing, Father's counsel stated that she had been able to obtain documentation that Father had completed his parole but had not been able to obtain paperwork to confirm that Father had completed domestic violence counseling. The court commented that it had reviewed carefully all the documentation in the case and noted the long history of DCFS involvement in the family. While the court noted that "it is nice that [Father] is stepping up," it concluded that Father had not demonstrated the necessary change in circumstances. The court noted that the minors' best interests were the focus at that stage of the proceedings, stating that its job was to protect the minors. The court recognized that it would be difficult for Father to visit the minors but that it was necessary for Father to "step up" his visitation with the minors.

We conclude the juvenile court did not abuse its discretion in determining that there did not exist new evidence or changed circumstances that made a change of placement in the best interests of the minors. In addition to the above, we note Father had not seen the minors in the past five years because he was incarcerated and thereafter

chose to move to Michigan. The minors had bonded with their caregivers, who were willing to provide a permanent home for them. And D.C. and A.C. had indicated that although they wished to live with Father, they would be willing to live under legal guardianship with T.O.; they were happy and comfortable with T.O.; had put down roots in the community; and had been in foster care for over two years. S.L. wanted to live with Father only to avoid separation from D.C. and A.C. and said that Mother told her to tell DCFS that she wanted to live with Father. Father also argued that he had not been convicted of a violent felony and should not have been denied reunification services under section 361.5, subdivision (b)(12), and the record does not show otherwise. But, although it appears the court erred in denying reunification services based on Father's alleged conviction for a violent felony, provision of services would not have changed the result. Father had not taken advantage of opportunities to establish a relationship with the minors through visitation. Thus, DCFS had not been able to observe whether Father's relationship and parenting skills were appropriate. And DCFS would not be able to provide reunification services in Michigan.

We conclude the juvenile court did not abuse its discretion in denying Father's fourth section 388 petition at the hearing on February 1, 2012.

D. The juvenile court did not abuse its discretion when it denied Father's fifth section 388 petition without a hearing on March 19, 2012

Father contends that the juvenile court abused its discretion when it denied Father's fifth section 388 petition without a hearing on March 19, 2012. We disagree.

Section 388, subdivision (d) provides: "If it appears that the best interests of the child may be promoted by the proposed change of order, recognition of a sibling relationship, termination of jurisdiction, or clear and convincing evidence supports revocation or termination of court-ordered reunification services, the court shall order that a hearing be held and shall give prior notice . . . ."

"[I]f the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition." (*In re Zachary*

G. (1999) 77 Cal.App.4th 799, 806.) "The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*Ibid*.) We review the juvenile court's order for abuse of discretion. (*Id*. at p. 808.)

We conclude the juvenile court did not abuse its discretion by summarily denying Father's section 388 petition without a hearing. Our review of Father's fifth section 388 petition shows that he merely alleged general, conclusory allegations, which fail to establish a prima facie showing. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) The petition alleged he had made "vast lifestyle changes as evidenced by his approved home study by the state of [Michigan]." Although Father maintained telephonic contact, had a job, and had purchased a house, he had not visited the minors for five years and did not provide evidence that he had attended a domestic violence class.

Nevertheless, Father contends he established a prima facie case of a change of circumstances and that the parties and the court were unaware of Michigan's completed ICPC report at the February 1, 2012 hearing. But the court admitted the last-minute information of the ICPC report into evidence at the February 1, 2012 hearing. In the last-minute information, DCFS reported its concerns with Michigan's completed ICPC report, disagreeing with the report's favorable assessment because of Father's attempted suicide; depression; lack of visits; DCFS's inability to assess interaction between Father and the minors; the minors' vacillation on whether they wanted to live with Father; the minors' current placement where all their needs were being met; D.C.'s and A.C.'s bond with T.O.; S.L.'s lack of interest in living with Father; and the inability of DCFS to provide reunification services for Father out of state. Even if, as Father argues, the court and counsel were unaware of the ICPC report at the February 1, 2012 hearing, in our view the court did not abuse its discretion in refusing to grant Father a hearing on his fifth section 388 petition. Between the February 1, 2012 hearing and the March 19, 2012 hearing, Father had not visited the minors; nor had he completed a domestic violence class. The ICPC report indicated, as had been reported previously, that Father is employed full-time, owns a home, and has family support. Other than recommending that Father "be given

the opportunity to provide a stable and loving home for his children" and that he "appears to be passionate about his children," the ICPC report did not provide new information. For the same reasons set forth in part C, *ante*, the court did not abuse its discretion in determining that there did not exist new evidence or changed circumstances that made a change of placement in the best interests of the minors. We conclude that Father did not establish a prima facie showing of change of circumstances and that a change of order would be in the best interests of A.C., D.C., and S.L.

Accordingly, we conclude that the juvenile court did not err in denying Father a hearing on his fifth section 388 petition.

E. The juvenile court abused its discretion when it granted D.C.'s and A.C.'s legal guardian discretion over the frequency and duration of Father's visits

Father contends that the juvenile court abused its discretion by delegating Father's visitation rights to D.C.'s and A.C.'s legal guardian, without providing guidelines regarding the frequency of visits. We agree.

Section 366.26, subdivision (c)(4)(C), requires the juvenile court to make an order for visitation with the parents or guardians unless the court finds that visitation would be detrimental to the physical or emotional well-being of the child. While the court may not delegate authority to the legal guardian to decide whether visitation will occur, it may delegate authority to the legal guardian to decide the time, place, and manner in which visitation will take place. (*In re M.R.* (2005) 132 Cal.App.4th 269, 272–274 [order stating "[v]isitation between the child and parents shall be supervised and arranged by the legal guardians at their discretion" improper, and on remand, court ordered to specify frequency and duration of visits]; *In re Rebecca S.* (2010) 181 Cal.App.4th 1310, 1313, 1314 [visitation order that parents to have "monitored visits . . . guardian is to arrange the frequency, location, duration, et cetera, taking into consideration the children'[s] well-being" improperly allowed guardian to decide whether visitation will actually occur].) We review the court's order for abuse of discretion. (*In re M.R.*, at p. 274.)

Here, the visitation order provided for monitored visits — with time, place, and manner to be determined by D.C.'s and A.C.'s legal guardian — but did not specify the

frequency and duration of visits. The order essentially delegated to the legal guardian the discretion to determine the visitation by Father. The court had already determined that visitation with Father was warranted and appropriate and, therefore, the court abused its discretion in failing to schedule the frequency or duration of the visits in order to ensure the court's goal of maintaining and encouraging a parental relationship between Father and the minors.

DISPOSITION

The March 19, 2012 order granting T.O. legal guardianship over D.C. and A.C. and the February 1, 2012 order granting long-term foster care for S.L. are reversed and the case is remanded to the juvenile court with directions to order DCFS to provide the Cherokee Nation with proper notice of the proceedings under the ICWA. If, after receiving proper notice, a tribe determines D.C., A.C., and S.L. are Indian children as defined by the ICWA, the juvenile court shall proceed in conformity with the provisions of the ICWA. If no tribe indicates D.C., A.C., and S.L. are Native American children within the meaning of the ICWA, the juvenile court shall reinstate the orders of legal guardianship for D.C. and A.C. and long-term foster care for S.L. The juvenile court shall then modify D.C.'s and A.C.'s visitation order to specify the frequency and duration of Father's visits with D.C. and A.C.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON , J.