Filed 10/16/19 In re C.C. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re C.C. et al., Persons Coming Under the Juvenile Court Law.	2d Juv. No. B296673 (Super. Ct. Nos. 18JV00488, 18JV00489, 18JV00490, 18JV00491) (Santa Barbara County)
SANTA BARBARA COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. L. L., Objector and Appellant.	

L.L., the biological mother of A.D., M.S., C.C., and J.S., appeals a February 27, 2019 order removing the children from appellant's physical custody. (Welf. & Inst. Code, §§ 361, subd. (c).)[1] The trial court found that appellant's drug abuse, domestic violence, and failure to protect posed a substantial risk

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

of harm to the children. Appellant contends that the trial court lacked home state jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA; Fam. Code, § 3400 et seq.), that the evidence does not support the removal order, and that the Santa Barbara County Child Welfare Services (CWS) and trial court did not comply with the inquiry and notice requirements of the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.).

We reverse as to J.S and remanded with directions. The jurisdiction and disposition orders are affirmed as to the three other children: A.D., M.S., and C.C. The trial court, however, is directed to amend the February 27, 2019 minute order and disposition orders to reflect that M.S. and C.C. were removed from the physical custody of their parents pursuant to section 361, subdivision (a) and section 362, subdivision (a). (See *In re Julien H.* (2016) 3 Cal.App.5th 1084, 1090.) As amended, the jurisdiction and disposition orders are affirmed as to A.D., M.S., and C.C.

Facts and Procedural History

On December 11, 2018, the Santa Maria Police Department arrested appellant for possession of methamphetamine and being under the influence. C.C. Sr., appellant's boyfriend and the presumed father of C.C., was arrested for possession of drug paraphernalia and an outstanding warrant. C.C. Sr. was a felon and had outstanding warrants in Kentucky for manufacturing and trafficking methamphetamine. Homeless, appellant refused to say where the children were. It was a safety concern; the children were seen on Facebook/Snapchat in possession of firearms, alcohol, and drugs. In August 2018, North Carolina authorities reported that

appellant abandoned a child (J.S.) and left Kentucky to avoid a child welfare investigation concerning the sexual abuse of M.S. and J.S. CWS detained all four children and filed a second amended petition for failure to protect (§ 300, subd. (b)) and abuse of a sibling (§ 300, subd. (j)).

At the jurisdiction hearing, appellant signed a waiver of rights, submitted on the jurisdiction report, and set the matter for a contested disposition hearing. Before the disposition hearing, appellant told a case worker "I [don't] have a home," and that she suffered from substance abuse and was "not used to having the four kids at the same time." Appellant said that C.C. had been in Vacaville with appellant's brother and sister in law, and that A.D. spent the summer with them and was living with appellant.

Appellant claimed that she was no longer seeing her boyfriend (C.C. Sr.) and had moved to Arizona for "stability" to reunify with the four children and two younger children. Appellant's short-term plan was to house all six children in the maternal grandmother's one bedroom apartment but conceded "[w]e'd be pretty squished in there." Appellant's only source of income was A.D.'s and J.S.'s survivor benefits whose fathers were deceased. Kentucky authorities reported that appellant was "drawing social security money for her kids and using the children's money to buy drugs." Appellant said that she was using methamphetamine "frequently" and was not in a drug program, but could still "show up" and "do what I have to do" to parent the children.

Appellant's trial counsel conceded that it was unlikely that the trial court would place the children in a one-bedroom apartment in Arizona, and asked the court "to keep an

eye on this case" and consider placement in Vacaville with relatives. CWS argued that the Vacaville placement was not acceptable due to child endangerment charges against a co-inhabitant. The trial court found that "it's not a close case" and "[t]his family needs help." It removed the children from appellant's custody (§ 361, subd. (c)) and ordered reunification services.

Home State Jurisdiction - UCCJEA

Appellant argues that the trial court lacked subject matter jurisdiction because California is not the children's home state under the UCCJEA (Fam. Code, § 3400 et seq.). The UCCJEA, as adopted in California (see *In re C. T.* (2002) 100 Cal.App.4th 101, 106), governs dependency proceedings and is the exclusive jurisdictional basis for making a child custody determination. (Fam. Code, § 3421, subd. (a); *In re Stephanie M.* (1994) 7 Cal.4th 295, 310.) "Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination." (Fam. Code, § 3421, subd. (c).) A child's home state is "the state in which [the] child [was] with a parent or person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." (Fam. Code, § 3402, subd. (g).)

Appellant moved the children out of Kentucky in June 2018 and relocated to California. California is the home state for A.D., M.S., and C.C. who, from June through December, lived in California with either appellant or a relative acting as a parent.

J.S. poses a jurisdictional problem because it is unclear whether California, North Carolina, or Kentucky is the

home state.[2] In June 2018, appellant moved J.S. from Kentucky to North Carolina. For the six month period immediately preceding the filing of the dependency petition, J.S. lived in North Carolina (two months) and then California (four months).

Family Code section 3424, however, provides that a California court may exercise "temporary emergency jurisdiction" when a "child is present in this state and . . . it is necessary in an emergency to protect the child because the child . . . is subjected to, or threatened with, mistreatment or abuse." (Fam. Code, § 3424, subd. (a).) If the law was otherwise, a parent could move the abused child from state to state every few months so that no state could assert dependency jurisdiction. That cannot be. "Although emergency jurisdiction is generally intended to be short term and limited, the juvenile court may continue to exercise its authority as long as the reasons underlying the dependency exist. [Citations.]" (*In re Jaheim B.* (2008) 169 Cal.App.4th 1343, 1349–1350.) "The finding of an emergency 'should not be made "in a rush to judgment" but rather "after a full and fair evidentiary hearing." [Citation.]' [Citations.]" (*In re C.T.*, *supra*, 100 Cal.App.4th at p. 107.)

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[2] The record includes an October 25, 2018 order by the District Court in North Carolina, Wake County dismissing a dependency proceeding. (*In the Matter of J.S. etc.*, Case No. 18 JA 160.) The order states that "Kentucky is the home state of [J.S.] in that she lived in Franklin County, Kentucky at all times since her birth until June 2018 when she came to stay with a family member of North Carolina." "The Franklin County, Kentucky Court elected to keep jurisdiction over the child and declined to transfer jurisdiction to North Carolina. [¶] . . . As a result, North Carolina does not have subject matter jurisdiction to adjudicate the petition" and "Kentucky retains jurisdiction over the minor child."

If a California court asserts emergency jurisdiction and believes a child custody determination may have been made by another jurisdiction, the California court "shall immediately communicate with the other court." (Fam. Code, § 3424, subd. (d).) "To make an appropriate order under the [UCCJEA], the California court needs to know whether the sister state court wishes to continue its jurisdiction and how much time it requires to take appropriate steps to consider further child custody orders." (*In re C.T.*, *supra*, 100 Cal.App.4th at pp. 110–111.) Additionally, a record must be made of substantive communications between the courts, and the parties granted access to the record. (Fam. Code, § 3410, subds. (c)-(d); *In re Cristian I.* (2014) 224 Cal.App.4th 1088, 1097-1098.)

The trial court did not say it was exercising temporary emergency jurisdiction or determine whether the North Carolina or Kentucky courts have declined to exercise home state jurisdiction over J.S. (Fam. Code, § 3421, subd. (a)(3).) We, accordingly, reverse the jurisdiction and disposition orders as to J.S. and remand with directions for the trial court to take temporary emergency jurisdiction. (*Id.*, § 3424, subd. (a).) The trial court is directed to communicate with the North Carolina and Kentucky courts and determine a period for duration of the temporary order (*id.*, § 3424, subd. (d)) before taking permanent jurisdiction. "[A] child custody determination made by a [trial] court with temporary emergency jurisdiction remains in effect until an order is obtained from the home state. ([Fam. Code,] § 3424, subd. (b).) If no child custody proceeding is initiated in the home state, the determination becomes final '*if it so provides and this state becomes the home state of the child*.'

(*Ibid.*, italics added.)" (*In re Gino C.* (2014) 224 Cal.App.4th 959, 966.)

Jurisdictional Findings

Appellant contends that the evidence does not support the trial court's decision to take jurisdiction based on appellant's drug abuse, domestic violence, and failure to protect. Appellant forfeited the issue by not appealing from the February 2, 2019 jurisdiction order. The notice of appeal states that appellant appeals the "DENIAL OF FAMILY MAINTENANCE AT CONTESTED DISPOSITION HEARING ON 2/27/2019." On the merits, it is uncontroverted that appellant suffers from methamphetamine addiction, still uses methamphetamine, and the drug abuse poses a substantial risk of harm to the children. (§ 300, subd. (b); see, e.g., *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1218-1219.) That is more than sufficient to support the jurisdictional order and is consistent with section 300.2 which provides: "Notwithstanding any other provision of law, the purpose of this chapter relating to dependent children is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm. . . . The provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child."

Appellant's oldest child, A.D., said that appellant "is always high on meth," uses "every day," and "I have never seen her sober so I didn't know what that looks like." M.S. reported: "'I tell [appellant] all the time she needs to stop using drugs and

grow up and take care of her children.'" "'I don't think [appellant] knows how to be a parent. She has never had all of us kids at once.' . . . 'I don't look at [appellant] as a mom, she has never been there for me.'"

Appellant admitted that she uses frequently, was not in a drug program, and used methamphetamine two days before the disposition hearing. The evidence clearly supports the finding that the substance abuse created a substantial risk of harm to the children.

Domestic Violence

Appellant's assertion that the domestic violence did not create a substantial risk of harm is equally without merit. A.D. reported that appellant and the boyfriend fought every day, that appellant hit the boyfriend all the time, and that A.D. had to protect his sister (M.S.). On one occasion, the boyfriend hit appellant and the children tried to push him out the house. On another occasion, A.D. stepped in and pushed the boyfriend when he assaulted appellant. After the children were placed in protective custody, appellant threatened to "'pop [M.S.] in the mouth.'"

Failure to Protect

Appellant argues that the trial court erred in finding that appellant failed to protect J.S. and M.S. from the grandfather's sexual abuse. (§ 300, subds. (b) & (j).) J.S. and M.S. were sexually abused for approximately two years while appellant was living in the house. After Kentucky authorities substantiated the sexual abuse, appellant continued to leave the children with grandfather. Appellant took J.S. to North Carolina when the sexual abuse case was closed and left J.S. with a relative without medical or school authorization. The relative

was unable to enroll J.S. in school or provide J.S. treatment for sexual abuse trauma. Ample evidence supported the finding that appellant's failure to protect J.S. posed a risk of substantial harm to the children.

Removal of Children from Parental Custody

Appellant argues that the evidence does not support the finding that there is no reasonable means of protecting the children without removing the children from appellant's custody. (§ 361, subd. (c)(1); *In re Ashly F.* (2014) 225 Cal.App.4th 803, 805.) Appellant claims that A.D. wants to remain in appellant's care but A.D. asked the case worker if he could stay in foster care. A.D. "liked living in [the] home because his [sister M.S.], is there and . . . he is hoping to get to know the resource parent better."

In *In re Ashly F.*, *supra*, 225 Cal.App.4th 803, the trial court failed to consider placement with a non-offending parent or consider the possibility that the offending parent (an abusive mother) could be removed from the family home. (*Id.* at p. 810.) Those options are not available here. Appellant argues that she was not provided adequate services after she relocated. CWS provided appellant a phone number to get services in Arizona where appellant lived. There is no evidence that appellant called to inquire about services or sought drug abuse treatment. CWS was not required or authorized to force appellant to participate in those services.

Statutory Authority to Remove Children

Appellant contends that the removal order should be amended to reflect that it was made pursuant to section 361, subdivision (a) rather than section 361, subdivision (c) because not all the children were living with her when the dependency

petition was filed. Section 361, subdivision (c) authorizes a child's removal "from the physical custody of his or her parents, guardian or guardians, . . . *with whom the child resides at the time the petition was initiated* . . . ." (§ 361, subd. (c), italics added.) Appellant argues that a section 361, subdivision (a) removal order applies to a minor who has not lived with the parent. (See, e.g., *In re Dakota J.* (2015) 242 Cal.App.4th 619, 627.)

When appellant left Kentucky in June 2018, she took C.C. to live with relatives in Vacaville, and took M.S. to live with relatives in Santa Maria. Assuming, arguendo, that C.C. and M.S. did not reside with appellant at the time of detention, the trial court's reliance on section 361, subdivision (c) is harmless. (*In re Julien H.*, *supra*, 3 Cal.App.5th at pp. 1089-1090.) "[T]he dependency court has the power under section 361, subdivision (a) and section 362, subdivision (a) to limit the access of a parent with whom the child does not reside and thus effectively remove the child from the noncustodial parent." (*Id.* at p. 1090.) Specifically, section 361, subdivision (a)(1) grants the court authority to "limit the control to be exercised over the dependent child by any parent [or] guardian . . . ." Unlike subdivision (c), section 361, subdivision (a)(1) applies to "any parent," not solely to parents with whom the child resides. (*In re Julien H.*, at p. 1090.) Section 362, subdivision (a) further authorizes the trial court to make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child. For purposes of clarification, the trial court is directed to amend the February 27, 2019 minute order and disposition orders to reflect that M.S. and C.C. were removed from the

physical custody of their parents pursuant to section 361, subdivision (a) and section 362, subdivision (a). (*Ibid.*)

ICWA

Appellant complains that ICWA notice was not provided and that no ICWA findings were made at the disposition hearing.[3] CWS is required to comply with the ICWA inquiry provisions (§ 224.2; Cal. Rules of Court, rule 5.481(a); see Cal. Rules of Court, rule 5.480 [ICWA applies to proceedings involving Indian child that may result in an involuntary foster care placement].) If, as a result of that inquiry, there is reason to believe that a child is an Indian child, CWS must comply with the notice provisions of ICWA. (§ 224.3, subd. (a); Cal. Rules of Court, rule 5.481(b)(1).) "The purpose of the ICWA notice provisions is to enable the tribe or the [Bureau of Indian Affairs] to investigate and determine whether the child is in fact an

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[3] At the December 14, 2018 detention hearing, appellant was asked about Native American Indian heritage and signed an ICWA-020 Parental Notification of Indian Status. (§ 224.3.) Appellant said "she had Native American Indian heritage through her mother's side, Cherokee or Blackfoot, 'or something like that.' [Appellant] indicated that her deceased mother always said they were Native American, but the maternal grandmother's sister, maternal great aunt, denied any Native American heritage so [appellant] did not know for sure." Appellant believed that A.D.'s father "likely had" Native American Indian Heritage but did not know the tribe and refused to provide family information. "'I don't need everyone in my business and telling me I'm a shitty mom.'" C.C. Sr., C.C.'s father, reported Indian ancestry on his maternal side and gave CWS the name of his deceased paternal grandmother.

Indian child." (*In re Cheyanne F.* (2008) 164 Cal.App.4th 571, 576.)

CWS did not send out ICWA notices before the February 27, 2019 disposition hearing. Instead, CWS reported that ICWA "does or may apply" and was still investigating. Appellant cites no authority, and we have found none, that an ICWA notice must be sent to an unidentified tribe or the Bureau of Indian Affairs (BIA) before a disposition hearing where the parent provides scant information about possible Indian heritage. (See, e.g., *In re O.K.* (2003) 106 Cal.App.4th 152, 155–157 [father said he "'may have Indian in him'"; too vague and speculative to give the juvenile court reason to believe minors might be Indian children]; *In re Z.N.* (2009) 181 Cal.App.4th 282, 297- 298 [mother's belief that grandmother "was Cherokee" and another grandmother "part Apache" (tribe unidentified) did not trigger an ICWA duty to notify tribes].) CWS is still investigating the parents' Indian heritage. If Indian ancestry is discovered, CWS is required to send ICWA notice and wait at least 60 days for the affected tribe or the BIA to respond (Cal. Rules of Court, rule 5.482(c)(1)), at which time the trial court determines whether ICWA is applicable. It would be premature to rule on the issue at this point in time. "Wise adjudication has its own time for ripening." (*Maryland v. Baltimore Radio Show, Inc.* (1950) 338 U.S. 912, 918.)

Disposition

The trial court is directed to amend the February 27, 2019 minute order and disposition orders to reflect that M.S. and C.C. were removed from the physical custody of their parents pursuant to section 361, subdivision (a) and section 362,

subdivision (a). As amended, the jurisdiction and disposition orders are affirmed as to A.D., M.S., and C.C.

We reverse the jurisdiction and disposition orders with respect to J.S. and direct the trial court to take temporary emergency jurisdiction to protect J.S. from actual or threatened abuse or harm. (Fam. Code, § 3424, subd. (a).) The trial court is directed to communicate with the Kentucky and North Carolina Courts about UCCJEA home state jurisdiction and determine a period for duration of the temporary order (Fam. Code, § 3424, subd. (d)) before taking permanent jurisdiction. (See, e.g., *In re Jaheim B.*, *supra*, 169 Cal.App.4th at p. 1351.)

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Arthur A. Garcia, Judge

Superior Court County of Santa Barbara

Emery El Habiby, under appointment by the Court of Appeal for Objector and Appellant.

Michael C. Ghizzoni, County Counsel, Lisa A. Rothstein, Deputy Counsel for Plaintiff and Respondent.