Filed 3/8/18 In re M.W. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re M.W., a Person Coming Under the Juvenile Court Law.	B280580 (Los Angeles County Super. Ct. No. DK18332)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MICHAEL W. et al., Defendants and Appellants.	

APPEAL from orders of the Superior Court of Los Angeles County. Akemi Arakaki, Judge. Affirmed and conditionally remanded.

Jesse F. Rodriguez, under appointment by the Court of Appeal, for Defendant and Appellant Michael W.

Patricia K. Saucier, under appointment by the Court of Appeal, for Defendant and Appellant J.W.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel and Jacklyn K. Louie, Principal Deputy County Counsel, for Plaintiff and Appellant Los Angeles County Department of Children and Family Services.

No appearance for Minor.

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In this appeal, Michael W. (father) challenges the juvenile court's exertion of dependency jurisdiction over his daughter, M.W. J.W. (mother) challenges the court's failure to notify the Cherokee tribe after she reported possible Cherokee heritage, as required by the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.). We conclude that substantial evidence supports the court's jurisdictional and dispositional orders, but, as the Los Angeles County Department of Children and Family Services (Department) concedes must be done, order a limited remand to the juvenile court to give the notice required by ICWA.

FACTS AND PROCEDURAL BACKGROUND

I. Underlying Facts

In April 2015, mother and father had a daughter, M.W. Six months later, father had a child with mother's younger sister.[1]

Both before and after the birth of the children, mother and her sister worked as prostitutes, and father was their pimp. Father would wait in the car with both children while their

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[1] Father's other child, D.W., is the subject of a separate petition and a separate pending appeal. (See *In re D.W.*. (B280371, app. pending).)

mothers turned tricks. Sometimes, father and mother would drop off the children with the paternal grandmother, although it was unclear whether they left sufficient diapers and food.

Both mother and father are longtime users of marijuana. Mother and M.W. tested positive for marijuana and methamphetamines when M.W. was born. Father has a medical marijuana card; mother claimed she had one but never produced it.

Both mother and father have criminal histories. Mother has been arrested six times for disorderly conduct (prostitution) and loitering with intent to commit prostitution—once while she was eight months pregnant with M.W.—and most recently in October 2016. Father has 1990, 1991, and 1993 convictions for possessing narcotics; a 2004 conviction for grand theft from a person; 1994 and 2008 convictions for failing to appear; a 2008 conviction for transporting narcotics; a 2010 conviction for being under the influence of narcotics; and a 2011 conviction for driving on a suspended license. In 2010, father grabbed his then-girlfriend by the throat, pushed her off the bed, and strangled her. In July 2016, father either punched his uncle or pushed him with both hands in the chest, and then with mother's help (and while M.W. and D.W. were in the car nearby), vandalized the uncle's car by pouring sugar into the gas tank and slashing its tires. The uncle reported that father is "dangerous and violent."

II. Procedural Background

A. *Investigation and Operative Petition*

In July 2016, the Department received a referral regarding M.W.

The Department had great difficulty locating mother, father, and M.W. The Department made more than 15 attempts

to contact mother and father. In mid-July 2016, father spoke with the Department by phone twice—once he said he would come in for an interview when he returned from Las Vegas, but then called back later that day to declare that he was "the best dad ever" and warn that if the Department did not leave his family alone he "will come and get [his] kids, and you won't see us again." Around the same time, mother called and said she would try to come in for an interview with the Department, but never did.

A few days later, the juvenile court issued a protective custody warrant for M.W. and an arrest warrant for father. Nearly two months later, father was arrested on the bench warrant, and the court ordered him to remain in custody and cooperate with the Department to locate mother and M.W. By the next day, M.W. had been turned over to the Department for temporary placement with her paternal aunt, and mother appeared before the juvenile court.

Mother reported that she may have Cherokee ancestry. The court ordered that ICWA inquiries and notices be made, and released father from custody.

In the operative second amended petition, the Department asked the juvenile court to exert dependency jurisdiction over M.W. on five grounds: (1) father engaged in a violent altercation with his uncle and father vandalized his uncle's car in the presence of M.W., placing her at risk of serious physical harm or danger (justifying dependency jurisdiction under Welfare and Institutions Code section 300, subdivisions (a) and (b));[2]

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[2] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

(2) mother and father have history of substance abuse and are "current abuser[s] of marijuana" (justifying dependency jurisdiction under section 300, subdivision (b)); (3) mother and father leave M.W. with paternal grandmother "without making a plan for [her] ongoing care and supervision" (justifying dependency jurisdiction under section 300, subdivision (b)); (4) mother and father have a history of criminal arrests and convictions (justifying dependency jurisdiction under section 300, subdivision (b)); and (5) M.W. was born suffering from a positive toxicology screen for marijuana and methamphetamines, placing her at risk of serious physical harm (justifying dependency jurisdiction under section 300, subdivision (b)).

B. *Adjudication*

At a jurisdiction and disposition hearing in January 2017, the court exerted dependency jurisdiction over M.W. due to (1) father's violent altercation with his uncle, (2) mother's and father's drug abuse, and (3) M.W.'s positive toxicology screen at birth. With respect to father's violence, the court found sufficient evidence that M.W. was at risk after considering "all of the information provided by [father's family members], the violence and ongoing issues in the home." With respect to mother's and father's drug use, the court found sufficient evidence of substance abuse based on mother's and father's admissions of long-standing and continued use of marijuana as well as father's positive and missed drugs tests and mother's failure to provide any tests throughout the pendency of the proceedings. The court also found a "nexus" between the parents' "drug use," on the one hand, and the "poor decisionmaking [by mother and father]" and "their inability to appropriately care for the children clearly while under the influence [of] marijuana," on the other. The court also

took judicial notice of the companion case involving father's younger daughter, D.W., in which the court sustained allegations based on risk created by the parents' drug use (for a "child of tender years") and father's violence. The court dismissed the remaining allegations.

Proceeding to disposition, the court removed M.W. from mother and father and ordered the Department to find suitable placement. The court also ordered reunification services, including monitored visitation, housing and transportation assistance, individual and parenting counseling as well as weekly random drug testing, with the condition that if father's marijuana level spikes above his current average usage (in light of his medical marijuana card) or reflects any illicit drug use, or if mother tests positive for any drugs (because she never produced a medical marijuana card), the Department may require completion of a formal drug treatment program.

C. Appeals

Mother and father filed timely appeals.

DISCUSSION

I. Jurisdiction

Only father challenges the sufficiency of the evidence underlying the juvenile court's findings of dependency jurisdiction. We note that because a juvenile court's jurisdiction attaches to a child, not her parent(s), the uncontested grounds for jurisdiction based on mother's drug abuse and use of drugs while pregnant with M.W. are sufficient to uphold the court's jurisdictional orders. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1491-1492 ["a jurisdictional finding involving one parent is "'good against both [because] . . . the [child] is a dependant [of the court] if the actions of either parent bring [her] within one of the

statutory definitions,"'" and a reviewing court need not "address the evidentiary support for any remaining jurisdictional findings"]; *In re E.R.* (2016) 244 Cal.App.4th 866, 878-879 [same].) However, even if we exercise our discretion to consider the merits of father's arguments (*In re J.C.* (2014) 233 Cal.App.4th 1, 3-4), those arguments lack merit because when we view the record in the light most favorable to the court's rulings, substantial evidence supports the juvenile court's orders (*In re R.T.* (2017) 3 Cal.5th 622, 633).

Under section 300, subdivision (b)(1), a juvenile court may exert dependency jurisdiction if, as pertinent here, a "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness" due to (1) "the failure or inability of . . . her parent . . . to adequately supervise or protect" her, or (2) "the inability of the parent . . . to provide regular care for the child due to the parent's . . . substance abuse." (§ 300, subd. (b)(1).) *Risk* of harm means just that: The juvenile court "need not wait until a child is seriously abused or injured to assume jurisdiction." (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1383.) When it comes to assessing that risk, the juvenile court may look to a parent's past behavior as a "good predictor" of whether the child is currently at risk. (*Id.* at pp. 1383-1384; *In re T.V.* (2013) 217 Cal.App.4th 126, 133.)

A. *Drug Abuse*

Substantial evidence supports the juvenile court's determination that M.W. faces "substantial risk . . . [of] serious physical harm" due to father's "inability" to care for her due to his substance abuse. (§ 300, subd. (b)(1).) Father has been using drugs for years; has several drug-related convictions; and is not gainfully (or at least lawfully) employed. Further, father's drug

tests during the pendency of this petition continued to exhibit "very high levels" of marijuana. This constitutes "substance abuse." (See *In re Rebecca C.* (2014) 228 Cal.App.4th 720, 726-727 (*Rebecca C.*) [use of drugs over several years, resulting in criminal convictions or dependency proceedings constitutes "abuse"].) Risk to a child from substance abuse can be established either by (1) proof of "'an identified, specific hazard in the child's environment,'" or (2) proof that the child is of "tender years," in which case "the finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 766-767 (*Drake M.*), italics omitted.) M.W.'s young age (she was not yet two when the jurisdictional hearing occurred) makes her a child of tender years and establishes such risk.

Father resists this conclusion on several grounds.

First, drawing upon *Drake M.*, father argues that a parent is engaged in "substance *abuse*" only if (1) a medical professional has diagnosed the parent as having a substance abuse problem, or (2) the parent's substance abuse meets the definition of a substance abuse problem as defined by the Diagnostic and Statistical Manual of Mental Disorders (DSM). (*Drake M.*, *supra*, 211 Cal.App.4th at p. 766.) As have several other courts, we decline to follow *Drake M.* to the extent it purports to require such a showing in all cases. (*Rebecca C.*, *supra*, 228 Cal.App.4th at p. 726; *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1218.) However, even if we applied *Drake M.*, the most recent version of the DSM defines "substance abuse" to include drug use resulting in interpersonal problems (such as physical fights) and failure to fulfill major obligations (such as unemployment and

transient living). (*In re Natalie A.* (2015) 243 Cal.App.4th 178, 185-186; cf. *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1345-1346 [parent gainfully employed].) Although father protests—arguing that no evidence links these deficient behaviors to his drug use—"the juvenile court could reasonably have inferred a nexus between father's drug use and his failure to ensure his young children were safely cared for and supervised." (*In re Natalie A.*, at pp. 185-186.)

Second, father contends that the lawfulness of his marijuana use precludes it from constituting "substance abuse." He is wrong. (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 452 ["even legal use of marijuana can be abuse if it presents a risk of harm to minors"].)

Third, father argues that the Department did not prove that M.W. had suffered any actual harm as a result of his substance abuse (e.g., no proof of malnutrition, illness, or that father smoked marijuana while M.W. was in the room), and as such any harm was speculative and inadequate to justify dependency jurisdiction. We disagree. The fact that M.W. was born with methamphetamines and marijuana in her body during a time that mother and father were living together is cognizable harm that may be properly viewed as evincing father's failure to protect M.W. from mother's known drug abuse. In any event, as noted above, because M.W. is of "tender years," the risk to her is presumed and the Department was not required to show "'an identified, specific hazard'" resulting from father's substance abuse. (*Drake M.*, *supra*, 211 Cal.App.4th at pp. 766-767, italics omitted.)

Lastly, father argues that he has not had any drug-related convictions in the last few years. While commendable, this

progress is insufficient to rebut the presumption of risk arising from his long-standing and unceasing marijuana use.

B. *Father's Violence*

Substantial evidence also supports the juvenile court's finding that M.W. was at "substantial risk [of] . . . serious physical harm or illness" due to father's "inability . . . to . . . protect" her from his violent tendencies. (§ 300, subd. (b)(1).) A child's exposure to domestic violence places a child at risk within the meaning of subdivision (b)(1) of section 300 (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194-195), particularly where there is a likelihood of recurrence (*In re Daisy H.* (2011) 192 Cal.App.4th 713, 717; cf. *In re J.N.* (2010) 181 Cal.App.4th 1010, 1025-1027 [single incident insufficient]). In this case, father has a history of violent behavior towards family members and loved ones, as recently as July 2016. Based on this history, father's uncle's statement that father is "dangerous and violent" is apt.

Father responds with four arguments. First, he says that his altercation with his uncle is an isolated incident. It is not. Second, father says that domestic violence presents a risk to a child only if it is between people in a romantic relationship—violence against a blood relative does not count. Again, he is wrong. Third, father says his prior acts of violence against his ex-girlfriend should not count because they happened several years ago and do not independently support a basis for dependency jurisdiction. What matters, however, is whether those acts, as part of the evidence as a whole, are indicative of a continued resort to violence—which they are in light of father's attack on his uncle in 2016, and his proclamation that, despite his violent behavior, he is still "the best dad ever." Lastly, father

asserts that his uncle's report is not credible because, just a few days before father pushed or punched him, his uncle told social workers that father was a fine parent. Father is inviting us to reweigh the juvenile court's credibility findings; this is something we cannot do. (*People v. Prunty* (2015) 62 Cal.4th 59, 89 [except in narrow circumstances, courts may not reweigh credibility findings].)

II. ICWA Compliance

Mother's sole argument on appeal is that the juvenile court violated ICWA when it failed to issue notice to the Cherokee tribe. We review the factual question of whether ICWA notice is required for substantial evidence. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467 (*Hunter W.*).)

ICWA was enacted to curtail the "separation of large numbers of Indian children from their families and tribes through adoption or foster care placement." (*Mississippi Choctaw Indian Band v. Holyfield* (1989) 490 U.S. 30, 32.) To accomplish this objective, ICWA, and the California statutes that implement it, impose several duties on juvenile dependency courts. One of these duties requires a court that "knows or has reason to know that an Indian child is involved" in a dependency proceeding before it to notify (1) "the parent or Indian custodian," and (2) either (a) "the Indian child's tribe," if known, or (b) the Secretary of the Interior and the Bureau of Indian Affairs, if the tribe is unknown. (25 U.S.C. § 1912(a); see also 25 U.S.C. § 1903(11); §§ 224.2, subd (a)(4) & 224.3, subd. (d).) For the purposes of this notice, a child is an Indian child if she is either "a member of an Indian tribe" or "is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. §1903(4); § 224.1, subd. (a).)

Here, the juvenile court violated its duty to notify. The duty to notify is triggered when a court "knows or has reason to know that an Indian child is involved" (25 U.S.C. § 1912(a)), and this standard is met if a parent reports possible Indian heritage (*In re D.C.* (2015) 243 Cal.App.4th 41, 60; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 257-258). Accordingly, mother's indication that she may have Cherokee heritage was sufficient to require notice to that tribe, and the court's subsequent conclusion that there was "no reason to know that this is an ICWA case" when no notice was given was erroneous.

Because "[t]horough compliance with ICWA is required" (*In re J.M.* (2012) 206 Cal.App.4th 375, 381), the court's failure to issue the required notice compels a conditional remand. The court is ordered to give notice to the Cherokee tribe while leaving all remaining orders intact unless and until that tribe determines that M.W. is an Indian child, and is thereafter invited to participate in the proceedings. (*Hunter W.*, *supra*, 200 Cal.App.4th at p. 1467.)

DISPOSITION

The juvenile court's jurisdictional and dispositional orders are conditionally remanded, and the court is directed to properly comply with the inquiry and notice provisions of ICWA. If, after proper inquiry and notice, the court finds M.W. is an Indian child, the court shall proceed in conformity with ICWA. Otherwise, the court's jurisdictional and dispositional orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ