Filed 10/20/16 In re N.B. CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re N.B. et al., Persons Coming Under the Juvenile Court Law.	B270598 (Los Angeles County Super. Ct. No. DK11134)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. S.B. et al., Defendants and Appellants.	

APPEAL from orders of the Superior Court of Los Angeles County, Veronica McBeth, Judge. (Retired judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part, reversed in part, and remanded.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant S.B.

Cristina Gabrielidis, under appointment by the Court of Appeal, for Defendant and Appellant N.B.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Stephen D. Watson, Deputy County Counsel, for Plaintiff and Respondent.

S.B. (father) appeals from the orders of the juvenile court finding jurisdiction over his six children and removing the children from his custody. N.B. (mother) appeals from the order of the juvenile court removing the six children from her custody and ordering monitored visitation. Both father and mother also contend we must reverse all the orders of the juvenile court because the court made no finding whether the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) (ICWA) applied. We affirm as to father, reverse as to mother, and remand for a finding as to father's ICWA status.

BACKGROUND

A. Initial petition

On May 6, 2015, the Los Angeles County Department of Children and Family Services (DCFS) filed a petition under Welfare and Institutions Code section 300, subdivisions (a), (b), (e), and (j),[1] alleging that mother and father's six children, N.B. (then age nine), Sh.B. (then age eight), St.B. (then age five), W.B. (then age four), E.B. (then age three), and D.B. (then age two), were at risk of harm because father had physically abused three-year-old E.B. The petition alleged that on April 30, 2015, father struck E.B.'s thigh with his fist and threw him on a bed, breaking E.B.'s left femur and requiring surgery. E.B. remained hospitalized, and the five other children resided in three different foster homes.

A referral reported that on April 30, 2015, E.B. arrived at Centinela Hospital (Centinela) with a displaced femur fracture of his left leg. Father said E.B. was jumping on the bed and doing flips when his leg started to hurt, so mother took E.B. to his primary doctor, who advised mother to take him to the emergency room. When the social worker arrived, mother said she was not there when the injury occurred. Father (who was outside in a police car) had told mother that E.B. was jumping on the bed and fell on his

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

knees, but mother knew little else. Her five other children were with a neighbor, but because she did not trust DCFS, mother would provide no additional information. E.B. was transferred to Miller Children's Hospital (Miller), where personnel reported mother was intense, agitated, and defensive about the details of E.B.'s injury.

The social worker interviewed father in the back seat of the patrol car. Father said E.B. fractured his leg by falling from the bed on which he was jumping, although the bed was on the floor. Both father and mother said they had no family members, and they were unemployed, on welfare, and receiving SSI benefits. The family had recently moved to California from Kentucky where they had an open case with Child Protective Services, and had received cash assistance to stay at a motel. Father disclosed that the youngest child, two-year-old D.B., had tested positive for marijuana after mother used it.

The other children were located and given medical examinations. None showed signs of abuse, and each was well-nourished and developing appropriately. S.B. and W.B. told the social worker that father punched E.B.'s thigh with a closed fist and threw him on the bed. When alone with the police and also at the hospital when father was not present, E.B. said, " 'I was playing and Daddy hit me in the leg.' " A hospital social worker told DCFS that the type of fracture E.B. had suffered required twisting the ligaments. Father's story that he noticed a "frog" or knot on E.B.'s leg after E.B. landed on his buttocks on the bed was inconsistent with E.B.'s injury and was " 'bizarre.' "

The petition also reported that father and mother stated they had no Indian ancestry, and the Indian Child Welfare Act (ICWA) did not apply.

At a hearing on May 6, 2015, with mother present, the trial court found father to be the presumed father, detained all six children, placed them in foster care, and ordered monitored visitation and family reunification services for both parents. Mother filed a notification of Indian status form, and the court ordered DCFS to give notice under ICWA as to mother.

B. Second amended petition

A second amended petition filed June 11, 2015 added allegations under section 300, subdivision (b) that mother had been diagnosed with bipolar disorder,

schizophrenia, and multiple personality disorder since the age of 11, rendering her incapable of caring for the children. Mother refused to take her psychotropic medication, saying that when she took her medication she was a danger to society. Further, father and mother engaged in verbal disputes and physical altercations, and father choked, pushed, and hit mother, all in front of the children. Finally, the home was filthy, unsanitary, hazardous, and infested with insects, and the children had multiple insect bites.

A jurisdiction/disposition report filed on June 8, 2015 confirmed that the children remained placed in four foster homes. Two of the children, N.B. and Sh.B., reported that father hit all the children, including with socks and slaps. St.B. also stated that father hit all the children, and added that father hit and choked mother. St.B. was behaving aggressively at school and displayed angry and violent behavior in foster care, requiring calls to law enforcement. W.B. stated that father hit mother, and father and mother hit St.B. when he was "acting crazy." E.B. stated, " 'My dad hit me with his fist. He broke my leg.' "

The dependency investigator interviewed mother at home, a house with three bedrooms and one bathroom, where the children reported infestations of cockroaches, ants, and bedbugs. Mother cooperated in the investigation, but her mood ranged from calm to very angry. She sometimes yelled at the investigator, who was afraid that mother would lose control. Mother said she was not there when E.B. was hurt, but recently father had admitted that he struck E.B. on his leg. She acknowledged her diagnoses of schizophrenia, bipolar disorder, and multiple personality disorder, but " '[m]y mental health has been just fine until [DCFS] came into my house and took my kids from me.' " She smoked "weed" while pregnant with D.H., but " 'marijuana don't affect the baby. It's not a drug.' " Mother denied that father hit her, denied that they used marijuana, and said the children had no behavioral problems. Sh.B. had a syndrome related to autism and mental retardation, and had been prescribed medications she didn't need. Mother also denied that she had any Indian ancestry.

Father, interviewed on the telephone, denied using corporal punishment except when the family lived in Kentucky, and denied any domestic violence against mother.

Father described the "frog" he gave E.B. as "you take your knuckle and you make a bump pop up," but not like socking or punching. (The social worker's Google search defined a "frog" as "a person hits another person using their knuckle of the middle finger extremely hard to create a bump in the muscle.") Hospital personnel were unanimous that E.B.'s broken femur was a non-accidental injury consistent with a strong blow to E.B.'s leg.

In March 2013 in Kentucky, child protective services had detained the children for a week due to mother's mental health issues and her positive test for marijuana at D.B.'s birth. The case would have been voluntary but mother and father did not agree to drug test. The Kentucky agency returned the children to mother and father because there was no evidence of abuse or neglect; mother and father appeared loving and took good care of the children. The family had moved to California before a scheduled hearing without notifying the court.

DCFS recognized that father and mother loved the children, who also loved their parents, and there was a strong bond. Nevertheless, DCFS believed the children's safety would be compromised if they were returned to their parents; father had committed physical abuse, and mother had been uncooperative with DCFS. Monitored visitation had not begun, as mother and father had been out of reach while they traveled to Kentucky to find a relative to live in their home, although they had contacted DCFS upon their return. DCFS also recommended psychiatric examinations for mother and father.

At a hearing on June 15, 2015, father filed a notification of Indian status indicating that his maternal grandmother was one-quarter Indian, although he was unsure of the tribe, and his mother should be asked. The court ordered DCFS to interview father's mother. Father told DCFS his mother was hospitalized in Kentucky and he would contact DCFS with information, but DCFS had heard nothing as of July 27, 2015.

A last minute information filed June 23, 2015 reported that five-year-old St.B. suffered violent outbursts, including when mother and father failed to appear for a scheduled monitored visit, when he kicked and spit, threw objects, and cursed. He had

been hospitalized four times. After a hearing that same date, the court ordered DCFS to make its best efforts to keep the children together.

During monitored visitation, mother became agitated and behaved inappropriately with the children, telling them not to trust DCFS or obey their caregivers. Father told the children "DCFS was trying to steal them away," and he yelled obscenities when excluded after arriving late for a visit. DCFS also reported that father and mother refused to provide ICWA information.

On July 29, 2015, DCFS filed an ex parte application requesting a no-contact order between the parents and the children because of mother and father's irate and aggressive behaviors during visitation, including tape recording as they shouted that the children were being abused. St.B.'s "severe high risk behaviors" had injured adults and caused damage in the foster home, resulting in placement in a group home. Mother and father had mental health issues and needed serious intervention to reduce their aggression and paranoia. In a teleconference, upper management of DCFS agreed that the children were "victims of an ongoing demonstration of violence in the home." The court granted the application and ordered no visitation until the parents' mental health had been evaluated under Evidence Code section 730.

A monitored visit on August 20, 2015 with the three younger children, W.B., E.B., and D.B., was of "high quality." Mother and father were attentive; father played music and danced, and the children showed "obvious strong attachment." The next day, however, father was arrested and jailed on a child abuse warrant related to E.B.'s injury, causing both mother and father to miss their mental health evaluations. Mother and father were now living in a homeless shelter.

On August 25, 2105, DCFS reported that three of the children had been placed in Lancaster, one child was in south L.A., another was in La Puente, and St.B. was on a psychiatric hold. Mother and father's outbursts had decreased, and mother was especially concerned about St.B. DCFS recommended three-hour monitored visitation once a week. The juvenile court ordered monitored visitation for mother twice a week for two to three hours. A report dated September 21, 2015 characterized the quality of the visits as

dependent on mother's mood. A mentor assigned to mother resigned because she felt mother was unstable and did not feel safe around her. St.B. reacted aggressively every time he was moved to a different placement, and during a visit, when mother talked to him and held him to make sure he did not hurt himself, he said "he will continue to act that way everytime they took him to a different location." St.B. was being tested at UCLA.

C. Letter regarding E.B.'s injuries

In a letter dated August 21, 2015, Dr. Thomas Grogan evaluated E.B.'s records, including records and x-rays from Centinela and Miller. The Centinela x-rays showed a transverse fracture of E.B.'s left femur and "some rarefication of the fracture, suggesting this may be a pathologic type fracture, perhaps related to a small unicameral bone cyst." E.B. had been transferred to Miller where he underwent surgery and remained hospitalized until May 15. Dr. Grogan believed E.B.'s fracture may be related to a bone cyst, but no additional testing was done to fully make that diagnosis. "In my professional opinion, the patient had a single solitary injury which occurred from a bending-type moment of force applied to the left proximal femur," which "certainly could occur with the patient jumping off a bed and landing . . . . I sincerely doubt that a single blow from a fist could break the femur bone given the size of that particular bone."

D. Mother's psychological evaluation

A report dated September 16, 2015 by psychologist Dr. Stephen Ambrose evaluated mother's mental health status. He had also fully evaluated Sh.B., E.B., and D.B, and had observed St.B. during a visit. During his interview, mother emoted defensiveness and anger, and reported an unhappy childhood and a history of mental disorders and drug prescriptions, "all of which she claims made her feel worse." She expressed an unwillingness to see a psychologist or take medication, using " 'a strange power over mind control' " to cope. She had heard voices more than three or four years ago, and believed people were following her and talking about her. DCFS was out to get her, and " 'they are after my children to sell them into the sex industry.' " She used marijuana to help her with pain management until two years ago, but denied that use

during pregnancy could cause any harm. She had been with father for 20 years, loved him, and denied any history of domestic violence. He was an easy father, and they had stopped " 'whooping' " the children because they did not want any " 'backlash' " from DCFS, although she thought parents should be able to spank their children. E.B.'s injury was a " 'freak accident' " when father frogged E.B. without intending to hurt him. She loved her children very much and considered it an honor to take care of them. Mother described each of her six children. She explained that Sh.B. should have an IEP, and described N.B. and W.B. as being very upset by their separation from the family. St.B.'s behavior had deteriorated because he felt angry about what had happened. She would be willing to have cameras in her home 24 hours a day, but would not see a psychiatrist, take medication, or participate in individual counseling or parenting classes. Mother would participate in family counseling, and believed the children needed mental health services to help them recover from the trauma of separation from the family.

Mother displayed defensiveness when taking psychological tests. Her responses showed some delusional thinking and persecutory beliefs, suggesting that she suffered from a delusional disorder (paranoid type), perhaps brought about by her feeling mistreated by those she hoped would support her. She lacked insight, manifested touchiness and irritability, and made life choices under fear of public humiliation.

Dr. Ambrose observed mother for 90 minutes during a monitored visit with Sh.B, St.B., and D.B. Mother was cooperative but wary of the DCFS monitor, telling Dr. Ambrose he should have told her in advance that he would be observing. She focused her attention on the children and an adult cousin, and she seemed slightly hypomanic. She hugged St.B., who enjoyed the attention, was in good spirits, and presented no behavioral challenges. Mother exhibited a positive and upbeat demeanor with Sh.B., although she sternly told Sh.B. how to sit while wearing a dress, requiring a response of " 'yes, ma'am.' " D.B. presented shy but receptive to mother's affectionate greeting. In general, mother displayed affection and happiness to be in a parenting role. She interacted with intensity and a determination to be fully in charge. St.B. manifested

very close attachment to mother, and with mother present and affectionate, he managed his emotions and behavior during the brief observation.

Overall, mother displayed wariness, reluctance to participate, and quickness to take offense. She appeared to have average intellectual abilities and was quite perceptive at times, with relevant and coherent responses. Her mood appeared depressed and sullen, although she modulated her affect reasonably well. "[S]he is obviously very resentful and sad about her children having been taken away from her but has little insight into her role or her husband's role in the family problems that made their detention necessary." Her paranoia evidenced itself in her belief that others were following her and talking about her, and her conviction that DCFS captured her children to sell them into the sex trade. She acknowledged her mental health problems, but without a comprehensive psychiatric history Dr. Ambrose could not make a firm diagnosis, although delusional disorder seemed likely, for which supportive therapy was most helpful. Although such a disorder compromised the ability to care sensitively for children, "Ms. [B.] clearly does love her children and her identity as a woman is very much entwined with her parenting role." At least some of her children demonstrated a strong attachment to her, but it would be difficult for her to accept support and guidance.

E. Jurisdictional hearing

Mother and father were present (father in custody) and represented by counsel at the September 23, 2015 hearing. Father's arresting officer testified that on the day of E.B.'s injury, father spoke in an loud and agitated tone, and said he was playing with E.B. and struck E.B.'s leg with a " 'frog,' " using a fist with index and middle fingers protruding to cause a bump to pop out on the skin. E.B. did a flip landing on the bed and then could not get up. The emergency room doctor said E.B. had sustained a transverse fracture to his left femur, which would require a strong impact. Mother was not in the room when it happened, and said father told her E.B. had fallen off the bed while doing a flip. A couple of weeks before the hearing, E.B. said that father hit his leg and said "something about playing and breaking the rules and that his daddy was grumpy." The bed was a mattress on the floor and was about 10 inches thick. The officer spoke with a

Dr. Murray, who opined that the broken bone was a nonaccidental inflicted trauma. Police officers arrested father weeks later and charged him with felony child abuse.

Dr. Grogan testified as an expert on pediatric orthopedics. He had reviewed E.B.'s medical records but had not spoken to any of the treating doctors. He believed the broken femur was caused by "a bending moment to the leg," consistent with E.B. flipping on the bed and landing on a fulcrum, which could possibly be the edge of a mattress if the child landed at the correct angle. The x-ray taken at Centinela showed a scalloping around the fracture that was probably a small cyst in the bone which would make the bone slightly weaker, by perhaps ten percent. The follow-up x-rays at Miller did not show signs of the bone cyst. He was not surprised that there was no mention of a cyst in the records because it was "a fairly subtle finding." To fracture the bone with a fist would take tremendous force and would result in a bruise, and the records did not mention any bruises. It was more likely that E.B. broke his femur by landing on the edge of the bed, including if father pushed him into that fall.

The court repeated that mother was to have two visits a week for at least two hours, which was more than she had received to date, and wanted information about the quality and quantity of visits. The court discussed the possibility of releasing the children to relatives, calling the children's different placements all over the county "just awful," although given the allegations they could not go home with the parents. Mother agreed to sign documents to procure regional center services for Sh.B. All the children wanted the court to know they wanted more time with their parents. The court stated, "Everything I have read has said that mother has been supportive, loving and not having a problem with any of the visits." The court ordered DCFS to provide a monitor so mother could attend any appointments involving the children as well as visitation. If mother did not get her visitation, the court would order the children into court every week so the visits could occur.

DCFS submitted a last minute information for the continued hearing on October 13, 2015, reporting that mother appeared inebriated when she appeared for a visit on October 6. She appeared unable to engage the children and giggled while she

stared out the window. The children ran around the room while mother did not respond, and she did not acknowledge the Regional Center consent forms for Sh.B. which were presented for her signature. The children did not seem upset, but DCFS requested that mother be required to drug test.

When the hearing resumed on October 13 and 14 with both father and mother present, Dr. Sandra Murray, a pediatrician and director of the child abuse and prevention team at Miller, testified she was on vacation when E.B. was admitted, but had spoken about the case to the resident, the attending physician, the pediatric orthopedist, and the pediatric radiologist at Miller. She reviewed E.B.'s medical records and x-rays, including a review of the original x-rays taken at Miller with the pediatric radiologist. The fracture to E.B.'s femur was close to the hip and could have been caused by a direct blow to the bone, or a very forceful bend. A high energy blow from an adult could cause this kind of injury. Dr. Murray had not seen the x-rays from the emergency room at Centinela, which had been taken the day before the Miller x-rays. She saw no cysts on the bone in the Miller x-rays, and it was "extraordinarily unlikely" that a cyst could disappear in a day. A forceful blow with a frog concentrating the force in a smaller area could have fractured the femur. The edge of a mattress without a frame would absorb a fall and would not break a leg. She had seen other femur fractures caused by direct blows by other objects, but this was the first she had seen in a child or from a fist.

The juvenile court asked Dr. Murray if she would have preferred to see the Centinela x-rays, and she responded that she would be happy to review them with the pediatric radiologist. Dr. Murray explained that what broke E.B.'s femur "would have to be a very forceful hit [with a fist], but I can see where that is far more likely than jumping and landing on anything that would break to cause this type of fracture."

When the hearing resumed on October 13, father's attorney argued that there was no substantial evidence of domestic violence; the parents had been in the process of moving out (and were now homeless), and so the allegation about the filthy home should be stricken; Dr. Murray's opinion was not reliable because she had not seen the Centinela x-rays; father had been playing around; and E.B.'s injury was an "accident." The court

interjected that father "wanted the boy to stop and he wouldn't and [father] punched him. I don't think that was rough housing and playing around." Mother's attorney agreed with father's attorney, and argued that Dr. Grogan's opinion was more credible because he had reviewed both sets of x-rays. Mother's mental diagnosis did not render her unable to care for the children. Minors' counsel argued, "I don't know that any of the explanations [for the injury] entirely work for me," but DCFS had not shown "that it was intentional, that that kind of injury would occur, nor that mother was involved." DCFS argued that father hit E.B. on purpose and the evidence was sufficient to sustain all the allegations.

The juvenile court stated that she believed mother and father really loved their children, but she sustained the physical abuse allegation against father under section 300, subdivision (a). Nobody had said E.B. fell off the bed, E.B. himself said father hit him, and she believed father hit E.B. to make him stop jumping, without wanting to hurt his child. To break a femur the blow would have had to be forceful. The testimony was that a cyst would make the break easier, and the court was disappointed that Dr. Murray had not reviewed the initial x-rays. Nevertheless, father's and E.B.'s testimony convinced the court that father lost it that day, and father also hit, slapped, or socked all the children but the youngest. E.B.'s injury "was done by father in anger because he was trying to control these kids who really need a lot of help." It was possible "especially if he punched in the way he indicated and there was a cyst there as has been admitted in the testimony and is not controverted, as far as I can see." Also as to father, the court sustained the failure to protect allegation; dismissed the domestic violence allegation; dismissed the allegation that the home was filthy; sustained the allegation of severe physical abuse of a child under five years old; and struck the abuse of sibling allegations under subdivision (j).

The court dismissed all of the allegations against mother. First, under section 300, subdivision (a), mother was not present when E.B. was hurt and did not know what happened. Second, mother had not failed to protect E.B. under subdivision (b). Third, also as to subdivision (b), mother had self-reported her mental health diagnoses, the older children had been going to school, and mother had been involved. Mother "has boundary issues and she makes life harder for herself. That doesn't mean she's got mental issues

that interfere with her raising the children." The court dismissed the remaining allegations against mother: "I'm taking mother out of the petition as I indicated. The mother . . . didn't have any idea. I think that mother is fiercely loyal and protective of her husband, as she is with her children. But I don't think she in any way would have allowed this to happen and she had anything to do with it. . . . [¶] . . . [¶] Mother is nonoffending in the petition."

The court continued: "Obviously, if mother is non offending, one of the things that I am strongly considering is return the children to the mother. . . . I need some information about where mother is going to be living and what kind of backup she's going to need." Mother needed support from DCFS, especially for Sh.B. and St.B. "I want to place the children with the mother, but I got to know there's a safe place and she's got back up." Mother's counsel offered to submit a housing motion referral for mother and the court ordered DCFS to help with housing referrals. The children had been doing fine and had suffered when taken from mother and father, "[s]o what I want is for them to go back to their mother, get their services, and see if everything is OK." It had been appropriate to remove them given the abuse allegation, but "I don't believe mother had anything to do with it. And it's up to [DCFS] to bend over backwards to help Mother," who had been taking care of everything before the children were removed.

A housing assessment referral order filed October 27, 2015 stated that mother was in substantial compliance with the court-ordered case plan, and "[t]he only barrier to return of the children is the parent's homelessness." The court ordered mother to arrange a housing assessment appointment, and ordered DCFS to release the children to mother within five court days of her receipt of appropriate emergency, transitional, or permanent housing.

F. Disposition hearing

DCFS filed a subsequent petition under section 342 on November 4, 2015. The petition alleged that under subdivision (b) mother had mental and emotional problems for which she failed to take prescribed medication, and also that she had a history of substance abuse, both of which made her unable to provide regular care for the children.

DCFS reported that mother had enrolled in mental health services on October 23, and was looking for a shelter to accommodate her and the six children. DCFS was providing her with information, but was not sure she would be able to manage. DCFS opposed release of the children to mother, because each child had various mental health and emotional and developmental issues, including sadness and acting out after visitations. For Sh.B. and N.B., "trauma exposure occurred as a result of being removed from [their] parent and siblings." (Italics omitted.) DCFS had attempted to find housing or shelter care without success, and opposed release because of the children's multiple issues, the continuing search for housing, and mother's lack of preparation to take care of the needs of all six children.

DCFS also submitted a letter from Dr. Ambrose dated October 26, 2015, repeating his evaluation of mother and explaining that scheduling individual evaluations of the children had been "extremely challenging," given their placements in six different locations throughout Los Angeles. After interviewing all the children except St.B., Dr. Ambrose reported all had experienced separation and multiple placements, and despite any dysfunction or stress they experienced in the care of mother and father, all the verbal children wanted to return home. Dr. Ambrose believed that if the children returned home there would be future encounters with DCFS. If father could be kept out of the home, there would be less risk of physical abuse, but it was unclear that mother would be able to care for the children on her own or be willing to keep father out of the home, as she tended to defend him. She might also interfere with any mental health services for the children, and such services would benefit each of the five children he interviewed. Before reunification of the family, Dr. Ambrose recommended that the entire family participate in mental health services and family therapy (if mother could cooperate) and wraparound services for in-home support. "Obviously, too, appropriate housing needs to be found." He recommended that visitation continue to be monitored with discretion to liberalize "if there is positive progress toward reunification."

At the hearing (also on November 4), the juvenile court stated it intended to place the children with mother and would put over disposition for 45 days "so we can see

where we are." Mother was cooperating and had signed for regional center services for Sh.B. and IEP's for three other children. "[O]ne of the biggest problems the kids are having is adjusting to being apart from each other," and getting the children back to mother "is going to be our number one priority." Counsel for the minors requested services now to transition with the children when they returned home; all six were now in separate placements. Counsel for mother requested unmonitored visits. The court agreed that a transitional plan was appropriate, and she wanted the unmonitored visitation to begin, twice a week for three hours with three children at a time, after three clean tests. "I want to place the children with their mother," and "we're going to have to try to find a shelter." Mother was doing everything she could to work on it, and the court stated, "I want the Department to make sure they're doing everything they can to help her." The court also directed that each child be in individual therapy.

DCFS reported that both mother and father said "maybe" at detention regarding ICWA, but had provided no more information. Father confirmed that he had Indian heritage on his mother's side, and the person to contact was his cousin Tamika on his mother's side. Counsel for father stated, "The wife should have the number," and the court stated that DCFS was to contact Tamika. Mother stated that although she had been told that she had native American heritage, a test had proved otherwise. The court made a finding that ICWA did not apply for mother.

On December 3, 2015, a letter from Mary Marroquin, a social worker, confirmed that mother failed to call or show for her first therapy appointment on November 26, 2015. She met with a housing coordinator on November 5, was given community resources, and was encouraged to attend a housing ready group, which she did not attend.

An interim review report dated December 16, 2015 (and filed December 18, 2015) reported that when St.B. was asked "if he knew what weed was," he said that father and mother smoked it every day, although he did not know what it smelled or looked like, and drugs were "bad." None of the other children reported marijuana use by either parent. When DCFS interviewed father in jail, he said he knew nothing about a new petition. He had taken mother to a psychiatrist, who said there was nothing wrong with her. Father

had never seen her talking to herself or acting bizarrely and believed she could care for the children. Mother used to have a marijuana card but smoked only outside the home, stopping about a year ago. A last minute information reported that as of December 14, mother had tested negative for drugs three times as required for unmonitored visitation (although mother had also failed to show for two tests). DCFS had met with the parents (father was out of jail) to explain that father's visits were still monitored; DCFS requested that mother be required to sign an affidavit that "she will not have father around the children" at the unmonitored visits.

At the continued disposition hearing on December 16, 2015, mother's counsel argued that the subsequent petition should be dismissed, as there was no new information following the court's earlier dismissal of the drug and mental health counts against mother. The juvenile court agreed and dismissed the subsequent petition, noting "mother has taken care of the children. . . . They've been going to school, they go to the doctor, they're not missing anything. [¶] If mother had a mental and emotional problem that was a significant risk of harm to her children, I would see some evidence that this is caused by mother's mental or emotional problems. Now, I will grant that mother is an extremely difficult person to work with. . . . But what I have to find is whether or not her behavior is a risk to her children, and it is not there . . . ." Mother needed assistance with the six children, and there was no proof she now was using drugs: "The children need a lot of services, but they were in school. One of them was getting great grades. They weren't tardy or absent. They were eating, they weren't dirty going to school. So how in the world is there any nexus even if it was true?" "[S]o that we can return the children," the court wanted eight random clean drug tests and a full panoply of services in place, with a gradual plan for the children's return "in twos together, maybe." "I know mother's got to have housing, so we got to talk about that."

Father, who had a second arraignment coming up (his first criminal case was dismissed), requested that the children be returned to him "today" because there was not clear and convincing evidence for removal, as E.B.'s injury "was a one-time thing." Mother's counsel also requested release of the children. The court responded, "Let me

tell you this. I'm not going to release the children today. The parents don't have a home. I believe this was a one-time occurrence with father. I think the six children—I have read the reports. They have a lot of needs. And it is a lot for two people. And I think [father] lost it one day and did something that he didn't intend to happen, but it did. [¶] And that's what I think happened and so I cannot return the children today." Mother protested that E.B.'s fracture was caused by a bone cyst and denied she had ever called the court any names.

The court ordered the children removed under section 300: "Continuance in home of parents is contrary to the children's welfare. No reasonable means that they may be protected without removal, they're ordered removed." DCFS was getting a plan together to send them back, and "[p]ursuant to that, I wish mother to take eight random on demand tests." Mother protested that she already had three clean tests, and stated that St.B. was being bullied and beaten up in his facility. The court continued, ordering for mother eight on demand tests, parenting classes, individual counseling, and monitored visitation with discretion to liberalize. The court ordered for father anger management and parenting classes, individual counseling, and monitored visitation. The court directed the children's therapist and Dr. Ambrose to generate a list of necessary programs for reunification, and "I want the department to investigate what housing mother may have. If the children were to be released, where it would be and to—we're going to eventually develop a plan to send the children home with the least needy first, maybe in pairs and over the course of time." The court further directed that housing assistance be provided to mother, and that mother see the children at least twice a week, with transportation assistance.

Father told the court, "I'm not doing anything that this court orders," and he planned to appeal: "That lady was not even qualified to even talk about an x-ray or a bone." The court responded that in its opinion the criminal case was weak, "[b]ut you have got to follow the court's orders to get your kids back." As to housing assistance, there was a wait list but even with priority for children, "it's almost impossible. The housing is very difficult, that's why I've asked the department to help." The court did not

want the children separated, and was looking into sending them back to Kentucky with a relative, "[b]ut there's no way I can put them together. The parents don't even have a place for them to live. And I need mother to give me those eight clean tests, so that as soon as we can find a place, I can start returning them to her." If a family member could get an apartment with enough room, the court would consider it. Mother interjected again that she had already tested clean three times, and she had a letter saying the children would be returned five days after she had housing. Father said that his name had been slandered with lies about abuse; mother added that DCFS should never have been called, and DCFS was lying. The court responded, "And with your behavior, you will never get your children back because of your behavior." Mother continued to argue that she had not been given promised phone calls with the children, they should never have been removed, she had no animus against the judge, and E.B.'s leg was going to break anyway because of the cyst: "Oh, because I'm not respecting you that I'm not going to get my kids back?" The court answered, "The cyst never existed. It was improper use of inappropriate physical conduct by father which caused the broken leg."

The court ordered an investigation into St.B.'s treatment at his group home before the next hearing in a few months. Mother stated, "In about a few months when we come back, what about his safety now?"

The minute order dismissed the section 342 petition, found clear and convincing evidence under section 361, subdivision (c) that the children could not be protected without removal, declared the children dependents in the care of DCFS, and allowed mother and father monitored visitation twice a week for four hours, with discretion to liberalize. The court made no ICWA finding as to father.

Mother and father filed timely appeals.

DISCUSSION

I. Substantial evidence supports jurisdiction over the children.

Father challenges the juvenile court's jurisdiction over the six children (mother does not). We review to determine if substantial evidence, contradicted or uncontradicted, supports the juvenile court's finding of jurisdiction. We must resolve any

evidentiary disputes in favor of the court's decision and draw all reasonable inferences to support its decision. We cannot reweigh the evidence and we leave to the trial court credibility determinations and issues of fact. (*In re I.J.* (2013) 56 Cal.4th 766, 773.) We merely determine whether sufficient facts support the finding of the trial court. (*Ibid.*) Under this standard, we easily conclude that substantial evidence supported the jurisdictional finding.

Two expert witnesses testified regarding E.B.'s broken femur. Dr. Grogan testified that the Centinela x-rays showed a possible bone cyst that would weaken E.B.'s femur by up to 10 percent, and it was more likely that the fracture was caused by landing on the edge of the mattress rather than by the blow from father's fist. Dr. Murray, who did not review the Centinela x-rays, testified that she saw no cysts in the x-rays taken the next day at Miller, it was unlikely that a cyst would disappear in a day, and a forceful "frog" blow by father was more likely to have fractured the three-year-old's femur. The juvenile court believed Dr. Grogan's testimony that the Centinela x-rays showed a possible cyst, but accepted Dr. Murray's conclusion that it was more likely that E.B.'s possibly weakened bone was broken by father's blow. Each of these possible explanations (falling on the edge of the bed, and a blow from father) was more likely in the presence of a bone cyst weakening the femur. Deferring as we must to the trial court's weighing of the evidence and to the court's decision to believe Dr. Murray's conclusion regarding the cause of the fracture, we affirm the jurisdictional finding that all six children were at risk of physical harm under subdivision (a). We need not consider whether the other grounds for jurisdiction are supported by substantial evidence. (*In re I.J.*, *supra*, 56 Cal.4th at p. 773.)

Father argues that even if the blow from his fist fractured E.B.'s femur, the injury was accidental because he did not intend to cause the fracture. First, father admitted he intended to give E.B. a "frog" with his knuckle to stop E.B. from flipping on the bed, and therefore the blow was not accidental. "Any harm [E.B.] suffered would have resulted from [father's] nonaccidental conduct. . . . His assertion that he did not intend to hurt [E.B.] is immaterial." (*In re Giovanni F.* (2010) 184 Cal.App.4th 594, 600–601.) And

father also stated he intended to "make a bump pop up" by hitting E.B. with a "frog," which certainly indicates an intent to hurt E.B. to a lesser extent. Father's blow to E.B.'s leg and the resulting fracture were "inflicted nonaccidentally" under section 300, subdivision (a).

II. Substantial evidence supports removal from father.

Father argues that substantial evidence did not support removal of the six children from his custody. We review a removal order for substantial evidence, "keeping in mind that the trial court was required to make its order based on the higher standard of clear and convincing evidence." (*In re Ashly F.* (2014) 225 Cal.App.4th 803, 809.)

Removal from parental custody under section 361, subdivision (c)(1), requires that the juvenile court find "clear and convincing evidence" that there would be a substantial danger to the minors' physical health, safety, protection, or physical or emotional well-being if returned home, "and there are no reasonable means" to protect them without removal. (*In re Ashly F.*, *supra*, 225 Cal.App.4th at p. 809.) "This is a heightened standard of proof from the required preponderance of evidence standard for taking jurisdiction over a child." (*In re A.E.* (2014) 228 Cal.App.4th 820, 825.)

Father argues that his blow breaking E.B.'s femur was an accident that did not justify removal. As we conclude above, substantial evidence supported a conclusion that father's blow to E.B.'s femur was not accidental. The juvenile court did state that the blow was "a one-time occurrence." But the evidence also showed that three of the children reported that father hit all of the children, including socks (punches) and slaps, and W.B. stated that father would hit St.B. In sustaining jurisdiction over father, the court correctly stated that there was evidence that father hit all the children but the youngest. Father admitted he used corporal punishment when the family lived in Kentucky, and none of the children stated that he stopped hitting them when the family came to California. Father did not think "frogging" was physical abuse like socking or punching, yet a "frog" was intended to raise a bump on the victim's skin, and father admitted he gave E.B. a frog to stop him from jumping on the bed. These facts were "conduct or circumstances shown at the disposition hearing [that] tend to explain the

conduct or circumstances alleged in the sustained petition" against father, and as they went to "the basis of the same ultimate fact(s) as have been alleged in a sustained petition," they may properly serve as a basis for removal of the children from father. (*In re Rodger H.* (1991) 228 Cal.App.3d 1174, 1183.)

Further, Father stated at the disposition hearing that he would not comply with any court orders, that DCFS had lied about the abuse from the start, and Dr. Murray was not qualified to testify. This was substantial evidence to support the court's conclusion that removal was necessary to protect the children from father, who had physically abused all but the youngest children and continued to deny that what he admitted he did to E.B. was abuse. (Compare *In re A.E.*, *supra*, 228 Cal.App.4th at pp. 826–827 [both father & mother expressed remorse for father's hitting minor with belt].) As father still did not agree that the blow to E.B.'s femur constituted abuse and had a history of physical abuse of the other children, substantial evidence supported a conclusion that father was abusive and unrepentant, and the only reasonable means to protect the children was removal from his custody.

III. Substantial evidence does not support removal from mother.

Mother challenges the removal of the children from her custody, arguing that the only basis for the court's decision was her homelessness, which is an improper consideration. We agree that substantial evidence did not support removal from mother.

The allegations of a petition afford notice of facts on which a removal order may be based, and "where the conduct or circumstances shown at the disposition hearing tend to explain the conduct or circumstances alleged in the sustained petition, the conduct or circumstances are not 'new' and no new petition need be filed. Due process is satisfied if the child is removed from parental custody on the basis of the same ultimate fact(s) as have been alleged in a sustained petition." (*In re Rodger H.*, *supra*, 228 Cal.App.3d at p. 1183.)

The second amended petition contained allegations against mother of failure to protect under section 300 subdivision (b), including an allegation that mother's mental problems made her incapable of caring for the children. The court dismissed all the

allegations against mother at the jurisdictional hearing, describing mother as "nonoffending in the petition." DCFS subsequently filed a supplemental petition including similar allegations under subdivision (b), one regarding mother's mental problems, and another alleging that her history of substance abuse made her incapable of caring for the children. The trial court dismissed those allegations as well, and mother remained a nonoffending parent. DCFS argues that we should nevertheless consider mother's comments at the disposition hearing, Dr. Ambrose's concerns, her past drug use, her missed tests (although she never tested positive), and her mental health as sufficient to justify removal. This ignores that the court had all those facts before it and dismissed all the allegations against mother. As a result, there was *no sustained petition against mother*, despite DCFS's filing of a subsequent petition after the court dismissed the second amended petition. Conduct and circumstances that the court twice found insufficient to support the allegations against mother do not justify removing the children from her custody. "Out-of-home placement is not a proper means of hedging against the possibility of failed reunification efforts, or of securing parental cooperation with those efforts. It is a last resort, to be considered only when the child would be in danger if allowed to reside with the parent." (*In re Henry V.* (2004) 119 Cal.App.4th 522, 525.) In this case, the court made no findings at all against mother, which certainly does not satisfy the clear and convincing evidence standard. (*Id.* at p. 529.) The court put it best at the disposition hearing: "[W]hat I have to find is whether or not her behavior is a risk to her children, and it is not there." Mother's vocal frustration and intransigence cannot serve as a substitute for clear and convincing evidence that she presented a serious risk of harm to the children.

The court's concern that mother was homeless could not justify removal of the children from her custody. Homelessness alone does not justify jurisdiction: "A child shall not be found to be a person described by this subdivision solely due to the lack of an emergency shelter for the family." (§ 300, subd. (b).) Mother's lack of housing alone is not a legitimate ground for removing the children. (*In re G.S.R.* (2008) 159 Cal.App.4th

1202, 1213 [nonoffending parent]; *In re P.C.* (2008) 165 Cal.App.4th 98, 105 [offending parent].)

As we conclude that there was no substantial evidence to support a conclusion that clear and convincing evidence showed a substantial danger to the children, we need not consider whether the court met its obligation to find that there were no reasonable means to protect them without removal. We note that apart from a rote recital in the disposition, the court made no findings regarding reasonable means, and DCFS did not submit a social study including a discussion of the reasonable efforts made. (See *In re Ashly F.*, *supra*, 225 Cal.App.4th at pp. 809–810.)

IV. The court abused its discretion in ordering monitored visitation.

Inexplicably, after ordering at the November 4, 2015 disposition hearing that mother be given unmonitored visitation twice a week after three clean tests (which mother completed), at the December 16, 2015 continued hearing the trial court ordered monitored visitation even after dismissing the supplemental petition. This unexplained change was an abuse of discretion. As mother points out, if the children could return home to mother but for her lack of housing, no judge could reasonably order monitored visitation. Monitored visitation limited the frequency of contact, as with the six children in six far-flung placements, mother's visitation was difficult to arrange as required for monitoring by DCFS. Some of mother's expressed frustration is therefore understandable, as even the juvenile court acknowledged that the children suffered from not seeing their family more often. We review to determine whether any rational trier of fact could conclude that the monitored visitation order advanced the children's best interests. (*In re Julie M.* (1999) 69 Cal.App.4th 41, 50.) The court advanced no reasons that returning to monitored visitation was in the children's best interests, and we can perceive none.

V. On remand, the juvenile court must make an ICWA finding as to father.

Although at the November 4, 2015 hearing, the court ordered DCFS to contact father's cousin Tamika regarding ICWA, the court never subsequently raised or ruled on

father's ICWA status. We therefore remand for a finding whether ICWA applies regarding father. (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 385–386.)

DISPOSITION

The December 16, 2015 order removing the minors from mother's custody and ordering supervised visitation for mother is reversed. As to father, the matter is remanded to the juvenile court with directions to comply with the notice requirements of the Indian Child Welfare Act. If, after proper notice, a tribe asserts its right under the Indian Child Welfare Act to intervene in the state court, or to obtain jurisdiction over the proceedings by transfer to the tribal court, the cause shall proceed in accordance with the tribe's election. If there is no intervention or assertion of jurisdiction by any tribe after proper notice, then the juvenile court's order shall be reinstated. In all other respects, the juvenile court's orders are affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.