Filed 6/21/17 In re Jordan S. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re JORDAN S., a Person Coming Under the Juvenile Court Law.	B277894 (Los Angeles County Super. Ct. No. DK17360)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. H.F., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Philip L. Soto, Judge. Affirmed and remanded with directions.

Lori N. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Jessica S. Mitchell, Deputy County Counsel, for Plaintiff and Respondent.

In this juvenile dependency case, defendant and appellant H.F. (Father) challenges the juvenile court's September 1, 2016 dispositional order denying Father custody of his son Jordan S. Father also argues the juvenile court failed to ensure Indian Child Welfare Act, 25 United States Code section 1902 (ICWA) notice procedures were followed. We conclude substantial evidence supports the juvenile court's dispositional order, but nonetheless remand to the juvenile court so that proper ICWA notice may be made.

BACKGROUND

1. Events Preceding Welfare and Institutions Code Section 300 Petition[1]

On May 6, 2016, Jordan's mother (Mother) physically assaulted his maternal great-grandmother. The next day, as a result of her injuries from the attack, maternal great-grandmother died and Mother was arrested. At the time, Jordan was 20 months old and had been in his maternal grandmother's care since birth. He was not present when the attack occurred. Pending court proceedings, Jordan was released to maternal

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

grandmother because she had been his primary caregiver since birth and was a protective caregiver. Father's whereabouts were unknown and he had not had contact with Jordan for the past year.

2. Section 300 Petition

On May 11, 2016, the Los Angeles County Department of Children and Family Services (Department) filed a petition under section 300, subdivisions (a) and (b) on behalf of Jordan. The petition was based on Mother's violent conduct, emotional and mental problems, and substance abuse.

The juvenile court held the detention hearing the same day. At that time, the Department had been unable to locate Father. In its detention report filed with the court, the Department reported maternal grandmother said Father was "not involved in the life of Jordan and the baby [Jordan] does not have contact with him."

The Department also reported maternal grandmother had Apache ancestry, but was not currently registered with a tribe. At the detention hearing, however, Mother stated neither she nor Father had American Indian heritage, and the juvenile court stated, "It's not an ICWA case." In its minute order, the juvenile court stated it did not have reason to know Jordan was an Indian child and did not order notice to any tribe or the Bureau of Indian Affairs. The court ordered the parents to advise of any new information related to possible ICWA status.

At the conclusion of the detention hearing, the juvenile court ordered Jordan released to maternal grandmother.

3. Amended Petition, ICWA Notices, and Assessment of Father for Placement

On June 17, 2016, the Department filed an amended section 300 petition. The amended petition added one subdivision (b) count against Father, alleging Father had a history of illicit drug abuse and was a current user of methamphetamine. The Department alleged Father was unable to provide regular care for Jordan, thus putting the young child at risk of serious harm.

In its joint jurisdiction and disposition report filed with the court, the Department indicated it had located Father and, on June 6, 2016, a Department social worker had interviewed him. Father was cooperative, coherent, and engaged during his interview. Father indicated he was employed full time and lived in a one-bedroom apartment. He said Mother and Jordan lived with him for two weeks after Jordan was born. But, at the maternal grandmother's insistence, Mother and Jordan moved in with maternal grandmother when Jordan was two weeks old. Father reported it had been about eight months since he last had contact with Mother and about one year since he had contact with Jordan. Father was unsure whether he was the biological father of Jordan because Mother told him once he was not Jordan's father. Thus, Father requested a paternity test. Father indicated he was interested in visits with Jordan and, if it was determined he is Jordan's biological father, he would care for the child.

Although Father denied any past or current substance abuse, including any drug or alcohol use with Mother, others told the social worker that Father had a history of methamphetamine use, including with Mother. About a week after his initial

interview, the social worker asked Father about his alleged history of methamphetamine use. Father admitted he had used methamphetamine with Mother, but it was only one time three or four years earlier, and he said he never used it again. He said he never used drugs when Jordan was with him. On June 10, 2016, Father took an alcohol and drug test, the results of which were negative.

In early June 2016, the Department social worker also visited Jordan at his maternal grandmother's home. Jordan was happy, healthy, and comfortable with his grandmother. The maternal grandmother indicated she was Jordan's primary caregiver and was able and willing to adopt Jordan.[2] She also stated Father previously had given Mother methamphetamine. Maternal grandmother stated she had " 'concerns' " with Father because she knew he gave Mother drugs. A maternal aunt said Jordan was " 'doing well' " with maternal grandmother and the aunt supported having Jordan live with his maternal grandmother. The maternal aunt also reported that, although she did not know if Father used drugs, Father had given Mother methamphetamine in the past. With respect to Father, the maternal aunt said, " 'I worry about that guy. I am worried about him being around Jordan.' " A maternal great-aunt also supported having Jordan live with his maternal grandmother.

In its report to the court, the Department also indicated ICWA may apply because, although both Father and Mother denied American Indian ancestry, maternal grandmother said her father, Jordan's maternal great-grandfather, was of Apache

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[2] The maternal grandmother is also the legal guardian of Jordan's five-year-old half sibling.

ancestry. The Department mailed hearing notices to all nine Apache tribes, the Secretary of the Interior, and the Bureau of Indian Affairs. The Department attached copies of those notices to its report. The notices do not include Mother's date or place of birth, or any information whatsoever about Jordan's maternal grandmother or his maternal great-grandparents. The notices also incorrectly listed Jordan's maternal great-grandfather, the family member maternal grandmother stated was of Apache ancestry, as his maternal grandfather.

Pending adjudication, Jordan remained placed with his maternal grandmother.

The juvenile court continued the adjudication hearing twice because neither parent appeared for the hearings, despite receiving notice for both hearings. When a Department social worker questioned Father about his nonappearances, Father stated he did not understand the notices he had received because he does not speak or read English. He said he tried to call the Department social worker to ask about the meaning of the notices, but he could not get through on the phone number he had. The social worker stated she had not received any missed calls or messages from Father.

On August 2, 2016, although Father and Mother were present, the juvenile court continued the adjudication hearing a third time so that the nine noticed Indian tribes each had 60 days to respond to the ICWA notices as well as to allow Father's attorney to prepare. Before continuing the hearing, however, the juvenile court found Father to be Jordan's presumed father, thus obviating the need for a paternity test. Father's counsel then requested that Jordan be placed with Father or at the least have unmonitored visits with Father. Although Mother did not oppose

placement with Father, the Department opposed both immediate placement with Father as well as unmonitored visits. The juvenile court ordered the Department to investigate Father's living situation as well as his childcare plans for Jordan. The court also ordered Father to do further drug testing. The Department was given discretion to liberalize visits as well as potentially to release Jordan to Father.

Immediately following the August 2 hearing, a Department social worker visited Father's home. Father lived in a studio apartment with a kitchen, bathroom, and working utilities. Although Father did not have a stove, he had access to a hot plate for cooking. Father's landlord said Father appeared to be " 'hard working' " and " 'respectful.' " Father had a full time job, working Monday through Saturday, 7:00 a.m. to 4:30 p.m. Father told the social worker he would obtain a bed for Jordan, but three weeks later he still did not have one. Within three weeks, however, Father had agreed with maternal grandmother to a childcare plan for Jordan if he were released to Father. Namely, Jordan's current daycare provider would continue to care for Jordan and maternal grandmother would assist Father by transporting Jordan to the caregiver.

Prior to adjudication, Father had three or four visits with Jordan. The first two visits were five hours long, took place at a playground, and were monitored by a Department social worker. During both, Father was appropriate and Jordan appeared comfortable with him. During the second visit, however, Jordan called out for his maternal grandmother and appeared to miss her. The maternal grandmother was scheduled to monitor Father's third visit, but she allowed Father to have an unmonitored visit with Jordan instead. The maternal

grandmother later told the Department social worker that her aunt had passed away, she had been overwhelmed, and she did not realize she was supposed to monitor the visit. The Department reported that, overall, Father's visits with Jordan "have been consistent and appropriate without incident."

Father also took one additional drug test prior to the adjudication hearing. On August 10, 2016, Father tested negative for all substances, but the test was "diluted" and, therefore, the Department social worker asked Father to test again a few days later at a different testing facility. Father failed to show for that test. He later explained to a Department social worker that he had been given the wrong address for the new facility and, by the time he had located it, the facility was closed for the day. He denied any recent alcohol or drug abuse.

During its assessment of Father for placement, the Department discovered Father had been arrested seven years earlier in 2009 for driving under the influence. Although he was not convicted of that offense, he was convicted of aiding and abetting in exhibition of speed. Father explained to the social worker that, although on that occasion he had been drinking prior to driving, he was not legally intoxicated. He stated he did not currently own a vehicle and again denied abusing alcohol. When the Department social worker had interviewed Father initially, he did not disclose his 2009 arrest.

With respect to the ICWA notices, only two tribes responded to the Department's hearing notices. Both indicated Jordan was neither enrolled nor eligible for enrollment with the tribe.

4. Adjudication and Disposition

A combined adjudication and disposition hearing was held September 1, 2016. The juvenile court sustained the allegations of the petition with respect to Mother, but dismissed the one count against Father.

With respect to Father, the juvenile court denied his request that Jordan be placed with him. After hearing argument, the court stated: "I'm not convinced. This is a non-custodial father. He had really no relationship with this child until very recently. Yes, I acknowledge that the child seems to be warming up to him but that does not mean that the child is ready to go home to this man, or he's ready to have him in his home as the custodial parent. [¶] I will definitely agree that he's somebody that needs to be worked with. We could make a good placement with him in the future, I think. But we need to have some things done first." Thus, the court found a detriment existed under section 361.2 and, therefore, refused to release Jordan to Father.

The juvenile court ordered reunification services for Father, including monitored visits and parenting classes. The court further ordered that, if Father had six consecutive, negative drug tests, he could have unmonitored visits with Jordan, and the Department would have discretion to permit overnight visits with Father. The juvenile court indicated it had almost released Jordan to Father that day, and that Father "is about as good as it gets." Nonetheless, the court decided there was still a detriment and the parties should take things one step at a time. The court addressed Father directly, encouraging him to get the six clean drug tests done, to take a parenting class, and to take the path the court had given him to get his child back.

The juvenile court did not address ICWA issues at the September 2016 hearing.

5. Appeal and Subsequent Juvenile Court Proceedings

Father timely appealed the juvenile court's September 1, 2016 order denying his request for custody of Jordan.

While this appeal was pending, we granted the Department's unopposed motion to take judicial notice of the juvenile court's minute order from its March 3, 2017 review hearing. At the March 3 hearing, the juvenile court ordered its previous placement order to remain in full force and effect. The court also found Father was not in compliance with the court-ordered case plan and Jordan could not be returned to Mother's custody or placed with Father. The juvenile court terminated family reunification services for both parents and ordered the Department to provide Father with drug and alcohol program referrals within seven days.

DISCUSSION

Father argues the juvenile court's finding of detriment under section 361.2 is not supported by substantial evidence. He argues, therefore, we must reverse the court's order denying Father's request for custody of Jordan. Father also argues the juvenile court failed to ensure the Department followed proper ICWA notice procedures. Although we disagree with Father's substantial evidence argument, we agree that this case must be remanded to allow for proper ICWA notice.

1. Placement

a. Applicable Law

In a case such as this where the juvenile court has removed a child from one parent's custody and the noncustodial parent then requests custody of that child, the juvenile court "shall place

the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a).) Section 361.2 applies here because Father requested custody of Jordan after the juvenile court had removed Jordan from Mother's custody. The juvenile court refused to grant father's request, however, because the court found a "detriment" existed.

We review the juvenile court's section 361.2 detriment finding for substantial evidence. The juvenile court's "ruling under section 361.2, subdivision (a) that a child should not be placed with a noncustodial, nonoffending parent requires a finding of detriment by clear and convincing evidence." (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426.) In making its ruling, the juvenile court considers all the evidence, both for and against placement with the noncustodial parent. (See *In re Liam L.* (2015) 240 Cal.App.4th 1068, 1088; *In re Patrick S.* (2013) 218 Cal.App.4th 1254, 1262–1263.) "We review the record in the light most favorable to the court's order to determine whether there is substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that the children would suffer such detriment. [Citations.] Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt." (*In re Luke M.*, *supra*, 107 Cal.App.4th at p. 1426.) " 'Issues of fact and credibility are questions for the trial court and not the reviewing court. The power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trier of fact.' " (*In re A.F.* (2016) 3 Cal.App.5th 283, 289.)

b. Substantial evidence supports the juvenile court's section 361.2 detriment finding and refusal to place Jordan with Father.

As Father points out, there is evidence in the record supporting his request for custody of Jordan. Father had a few visits with Jordan, including one unmonitored visit, which the Department reported were "consistent and appropriate without incident." In addition, with maternal grandmother's assistance, Father had a childcare plan in place were he to receive custody of Jordan. Father was fully employed and his landlord stated Father appeared to be " 'hard working' " and " 'respectful.' " Indeed, the juvenile court stated Father "is about as good as it gets" and noted Jordan was "warming up" to Father.

On the other hand, however, there is also ample evidence supporting the juvenile court's finding of detriment and refusal to grant Father custody. Initially, Jordan is very young and requires constant care and supervision. As the juvenile court noted, Father had "no relationship" with Jordan until these dependency proceedings began. Other than the first two weeks of Jordan's life, when he and Mother lived with Father, there was no evidence showing Father tried to have a relationship with or otherwise support Jordan until recently. And it is undisputed Jordan has a close relationship with his maternal grandmother. In addition, the record reveals Father had used drugs in the past and, at least according to the maternal grandmother and maternal aunt, had supplied Mother with drugs. Father had taken only two drug tests during the three months he was involved in these proceedings prior to disposition. Moreover, although both of his two drug tests were negative, one was "diluted" and Father had been unable to retake the test properly.

Finally, Father had not been entirely forthright with the Department. Only when the Department confronted him with specific details did Father disclose his past drug use and prior arrest.

Given this record, we conclude substantial evidence supports the juvenile court's finding of detriment under section 361.2.

Father relies on *In re Patrick S.*, *supra*, 218 Cal.App.4th 1254. In that case, the Court of Appeal reversed the juvenile court's finding of detriment where it was shown the father had "paid child support every month for 11 years without knowing where his son was[;] . . . searched for him for years[; and w]hen he learned of his son's whereabouts, [the father] immediately came forward and requested placement, attended all significant hearings in the dependency proceedings, visited and contacted his son whenever possible, looked into obtaining recommended services for [his son] and his family through the Navy and his church, and participated in recommended services." (*Id.* at p. 1263; *id*. at p. 1265.) The father there also had no criminal history and there was no indication of substance abuse. (*Id.* at p. 1263.)

The facts of this case are very different. Here, Father did not support Jordan during most of his young life and there was no indication Father was unaware of Jordan's location or unable to find him. Father also questioned whether he was Jordan's biological father. In addition, Father has a criminal history, albeit relatively minor. There is also evidence of substance abuse and only one reliable negative drug test during these proceedings. Accordingly, we conclude *In re Patrick S.* is factually distinguishable and does not require reversal here.

Similarly, the remaining cases on which Father relies do not require reversal.

2. ICWA

Father argues the juvenile court erred in failing to ensure the Department complied with ICWA notice requirements. He argues we must remand the case to the juvenile court so proper ICWA notice can be made. The Department does not oppose remand so that proper ICWA notice may be made.

The ICWA seeks "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." (25 U.S.C. § 1902.) When the juvenile court knows or has reason to know that an Indian child is involved in the proceedings before the court, ICWA requires that notice of the proceedings and the right to intervene be given to the Indian child's tribe. (25 U.S.C. § 1912(a).) " '[T]he juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement.' " (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703.) " '[O]rdinarily failure in the juvenile court to secure compliance with the [ICWA's] notice provisions is prejudicial error.' " (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 653.)

The required ICWA notice "must contain enough information to be meaningful. [Citation.] The notice must include: if known, (1) the Indian child's name, birthplace, and birth date; (2) the name of the tribe in which the Indian child is enrolled or may be eligible for enrollment; (3) names and addresses of the child's parents, grandparents, great grandparents, and other identifying information; and (4) a copy of the dependency petition." (*In re Francisco W.*, *supra*, 139 Cal.App.4th at p. 703.) Notice must include "available information about the maternal and paternal grandparents and

great-grandparents, including maiden, married and former names or aliases; birthdates; place of birth and death; current and former addresses; tribal enrollment numbers; and other identifying data." (*Ibid.*)

Here, it is undisputed Jordan has Apache ancestry. His maternal grandmother reported her father, Jordan's great-grandfather, was of Apache ancestry. Thus, the mandatory ICWA notice requirements were triggered. Although the Department sent notices to nine Apache tribes, the Secretary of the Interior, and the Bureau of Indian Affairs, it is undisputed those notices were inadequate. As noted above, the notices did not include the required identifying information for either Mother or her relatives. The notices did not include Mother's date or place of birth, or any information whatsoever about Jordan's maternal grandmother or his maternal great-grandparents. The notices also incorrectly listed Jordan's maternal great-grandfather, the family member maternal grandmother stated was of Apache ancestry, as his maternal grandfather.

Clearly, as the Department concedes, the notices were deficient. The Department easily could have asked Mother or the maternal grandmother, both of whom the Department was in contact with during the entirety of these proceedings, for most if not all of the missing information. In addition, only two of the nine noticed tribes responded to the Department's notices and both responded in the negative. However, had the required identifying information been included in the notices, a different result cannot be ruled out. Accordingly, we agree with Father and remand the case to the juvenile court so that proper ICWA notice may be made.

DISPOSITION

The September 1, 2016 order denying H.F.'s request for custody of Jordan is affirmed. The case is remanded to the juvenile court with directions to order the Los Angeles County Department of Children and Family Services to comply with the notice provisions of the Indian Child Welfare Act (ICWA). If, after proper notice, a tribe claims Jordan S. as an Indian child, the juvenile court shall proceed in accordance with all provisions of the ICWA.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.