Filed 9/5/19 In re T.A. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re T.A., a Person Coming Under the Juvenile Court Law.	B292266 (Los Angeles County Super. Ct. No. DK20950A)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.A., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Marguerite D. Downing, Judge. Conditionally affirmed, with directions.

Nancy R. Brucker, by appointment of the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

J.A., the presumed father (father) of seven–year–old T.A., appeals from the juvenile court's jurisdictional findings, and its dispositional order removing T.A. from his custody. He contends that reversal is in order because the jurisdictional findings lack sufficient evidentiary support, the disposition order was made in reliance on the wrong statute and, in any event, the order lacks sufficient evidentiary support. Father also contends that respondent Los Angeles County Department of Children and Family Services (DCFS) failed to properly investigate T.A.'s Indian heritage and to comply with the notice requirements of the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901 et seq.) DCFS agrees (as do we) that it failed to comply with the ICWA. Accordingly, we remand the case solely to ensure compliance with the ICWA. In all other respects, we affirm.

BACKGROUND

The Original Petition and Detention Hearing

On December 27, 2016, DCFS received a referral from someone concerned about mother's care and supervision of then five–year–old T.A., and her half–brother J.G. (who is a not a subject of this appeal). The children's mother had reportedly taken them with her to attend numerous "slumber parties," after which the children returned dirty and malodorous. The caller reported that, on December 22, after one such party, mother was very ill and unable to care for the children. Mother, who had suffered a stroke/brain aneurysm, was rushed to the hospital and placed in intensive care. Marshall G., mother's companion

and J.G.'s father, was temporarily caring for the children. He said he had been part of T.A.'s life since she was 18–months–old, knew nothing about her biological father, and that mother had no contact with father or any of the child's paternal or maternal relatives.

Mother had lived in the home of Kathryn H.–A. (Kathryn), her long–term friend and mentor, who agreed to care for the children. Kathryn had never seen father and did not believe mother maintained any involvement with him after T.A. was born. Father's whereabouts were unknown, and DCFS was unable to obtain any identifying information about him. On January 4, 2017, DCFS filed a petition pursuant to Welfare and Institutions Code section 300,[1] alleging that T.A. had no parent to provide care or the necessities of life for her. T.A. was detained and placed in Kathryn's care, and an adjudication hearing was scheduled for early February 2017.

Initial Jurisdiction/Disposition Hearings

DCFS never spoke with mother, who passed away in January 2017. Kathryn informed DCFS that, although father's name was on T.A.'s birth certificate, she did not think the child had ever seen him. Father's whereabouts remained unknown. At a February 6, 2017, adjudication hearing, the juvenile court found father to be T.A.'s presumed father. The court sustained the petition, declared T.A. a dependent of the court (§ 300, subd. (b)), and ordered her removed from

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[1] Subsequent statutory references are to this code.

parental custody. The court denied reunification services for father (§ 361.5, subd. (b)(1)), scheduled a permanency planning hearing, and placed T.A. temporarily in Kathryn's care.

The August 2017 Section 366.26 Hearing

In its report for a section 366.26 hearing on August 7, 2017, DCFS identified adoption as the most appropriate permanent plan, and identified Kathryn, whose home was being evaluated, as a potential adoptive parent. DCFS requested a continuance in order to complete its investigation and the home study. A declaration of publication of notice to father for the section 366.26 hearing was attached to DCFS's report.

Hearing and Order on DCFS's Ex Parte Application

In an October 4, 2017 ex parte application, DCFS reported that T.A.'s paternal grandmother (PGM) contacted the agency after notice to father was sent to her address. Father was then serving a 10–month prison sentence for a probation violation. PGM claimed she and father had been involved in T.A.'s life since the child's birth. Mother had let them see T.A. when she chose. They had lost contact with mother and T.A. for the past two years. PGM did not know mother had died, and was not herself physically able to care for T.A. However, PGM said that L.C., father's fiancée and the mother of T.A.'s half–sister, would do so and provided her contact information. DCFS informed the court that its initial due diligence report was inaccurate, and provided a new one that included father's social security number, potential addresses, Medi–Cal

and DMV information, and the location at which he was incarcerated. On October 4, 2017, DCFS sent its prior reports and the court's minute orders to father. In response, father requested that he be appointed counsel, and that his parental rights not be terminated.

Father's Section 388 Petition and DCFS's Supplemental Section 366.26 Report

In late January 2018, father filed a section 388 petition requesting that the case be returned to the adjudication phase. Father said he had not received notice of the dependency proceeding, and pointed out that there were no allegations that he posed a risk to T.A. Father also requested that T.A. be placed in his care and custody or, in the event the allegations were sustained, that he be provided reunification services. The court set the section 388 petition for hearing.

In a February 15, 2018, supplemental section 366.26 report, DCFS reported T.A. had been placed with foster parents in late August 2017. The foster parents fully supported T.A.'s reunification with her family, but were interested in adopting T.A. in the event reunification was unsuccessful. DCFS also reported that, in November 2017, L.C. had expressed interest in caring for T.A. but did not want to adopt her. L.C. told DCFS that, if father was unable to reunify with T.A. and it was necessary for the child's safety, L.C. and father had agreed to end their romantic relationship after his release from prison. DCFS intended to evaluate L.C. as a possible placement.

DCFS reported that father had a criminal history dating back to October 2007 with numerous felony convictions, including: (1) a 2007 conviction for inflicting corporal injury on spouse/cohabitant; (2) two

felony convictions in 2009 (first in June 2009 for second degree burglary, and the second a month later for burglary, threatening a crime with intent to terrorize, and a felon using force to threaten a witness); (3) a felony conviction in 2012 for preventing or dissuading a victim/witness from testifying; and (4) an arrest in August 2017 on a warrant for inflicting corporal injury on a spouse/cohabitant, for which he was currently serving a three–year sentence.

DCFS also reported that T.A. was visiting PGM and L.C. at least once a month, and got along well with her half–sister. PGM and L.C. told DCFS that T.A. had adjusted well to visitation, and wanted her to come to live with her half–sister. In December 2017, L.C. informed DCFS that she and father had agreed that she should become T.A.'s legal guardian until he he could regain custody. T.A. had four visits with PGM and L.C., including a weekend overnight visit at L.C.'s home.

First Amended Petition

On March 26, 2018, DCFS filed the operative first amended petition (petition). (§ 300, subd. (b).) As ultimately interlineated and sustained, the petition alleged: "The child [T.A.] has no parent to provide care, supervision and the basic necessities of life including, but not limited to food, shelter, clothing and medical care for the child in that the mother [is deceased]. The child's [father] was located and is currently incarcerated with a sentence of 3 years in prison due to a violation of parole as well as inflicting corporal injury on spouse/cohab[itant]. As a result of father's 3–year incarceration, he [currently] is unable to provide care for the child's needs. Such an

absence of a parent endangers the child's physical health and safety and places the child at risk of serious physical and emotional harm and damage."

DCFS's interim report, filed contemporaneously with the petition, informed the court that L.C. claimed she had been close and in regular contact with mother until mother became involved with Marshall. After that, she communicated less frequently with mother and T.A. (by video chat). DCFS also reported that T.A. said she met father for the first time at a December 6, 2017, hearing and hoped to reunify with him sometime in the future. PGM and L.C. expected father to be released from prison by early July, 2018. L.C. said father had enrolled in parenting and anger management classes in prison to shorten his sentence. DCFS requested that the matter be continued so it could investigate the reasons for father's incarceration and verify his prospective release. The court vacated its prior adjudication findings and dispositional order, and set the matter for a new adjudication/disposition hearing.

Jurisdiction/Disposition Hearing on First Amended Petition

In its report for the July 10, 2018 jurisdiction/disposition hearing (originally scheduled for May 15, 2018), DCFS reported that it had conducted a telephonic interview with father, who did not want to attend the upcoming hearing. Doing so would delay his release, and he wanted an early release to reunify with T.A. Father and L.C. informed DCFS that they expected father to be released from prison in early

September 2018. Father informed DCFS that he was participating in parenting, anger management, rehabilitation substance abuse programs, and Alcoholics Anonymous. He said he had been sent to prison in August 2017 for a parole violation after he "put his hands" on L.C., and neighbors called the police. Father told DCFS that he wanted to care for T.A. after his release and, in the interim, wanted her placed with L.C.

L.C. informed DCFS that father was present at T.A.'s birth, but had been incarcerated since the child was seven months old. L.C. and father had been together for eight years and she had two daughters (one of whom is T.A.'s half–sister), a 10–month–old and a seven–year–old. L.C. told DCFS that T.A. visited her home on alternate weekends and holidays, and that she and father had agreed she would raise T.A. L.C. informed DCFS that father was re–incarcerated in August 2017 for a parole violation in which he hit her and had aggressively punched a wall and other things. No child had been present. A neighbor called the police. L.C. acknowledged that father had anger management issues for which he needed counseling, and she said he would not be allowed back into her home until he proved he had completed counseling. L.C. wanted T.A. to be placed in her care and raised with her half–sister, because "her dad and her siblings are the only family she has." PGM reiterated that she and father had maintained intermittent contact with T.A. since her birth. She also said father had a warehouse job to which he could return following his release.

The adjudication/disposition hearing was conducted on July 10, 2018, and the court admitted DCFS's reports into evidence. Father (who appeared telephonically) requested dismissal of the petition, because he would soon be out of prison. DCFS, which had concluded that T.A. remained at "high" risk of danger, urged the court to sustain the petition. T.A.'s counsel agreed. The court sustained the petition as interlineated, and declared T.A. a dependent of the court.

Proceeding to disposition, the court found "pursuant to [section] 361—Excuse me. The court finds pursuant to [section] 319 the continuance in the home of the father is contrary to the child's welfare and a substantial danger exists to [T.A.'s] physical and emotional well–being and that there is no reasonable means by which she may be protected without removing her from her father's physical custody."[2]

Father was given monitored visitation, and the court ordered DCFS to provide reunification services, including parenting education, a 52–week domestic violence program, individual counseling to address issues related to this case, anger management, and joint counseling with [T.A.], if her therapist recommended it. This appeal ensued.

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[2] The minute order states that, pursuant to sections 361, subdivisions (a)(1), (c) and (d), and 362, the court found by clear and convincing evidence that it was necessary to remove T.A. from father's custody and that it would be detrimental for her to be returned to his custody.

DISCUSSION

1. *Substantial Evidence Supports the Jurisdictional Findings*

Father contends the juvenile court's jurisdictional findings were erroneous because they are premised on the mere fact of his incarceration, which is an insufficient evidentiary basis to support jurisdiction. He is mistaken.

A. *The Standard of Review and Controlling Law*

"'In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings . . . , we determine if substantial evidence, contradicted or uncontradicted, supports them. "In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations."'" (*In re I.J.* (2013) 56 Cal.4th 766, 773 (*I.J.).)* '"'We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.]'"' (*Ibid*.) It is the trial court's role to assess witness credibility and resolve evidentiary conflicts. We lack the power to weigh, judge the effect or value of, or to resolve conflicts in the evidence or the reasonable inferences which may be drawn therefrom. (*In re A.S.* (2011) 202 Cal.App.4th 237, 244; *I.J., supra*, at p. 773.)

Jurisdiction over a child is appropriately asserted under section 300, subdivision (b)(1), if: "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm . . . as a

result of the failure or inability of his or her parent . . . to adequately supervise or protect the child, or the willful or negligent failure of the child's parent . . . to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent . . . to provide the child with adequate food, clothing, shelter, or medical treatment." (§ 300, subd. (b)(1).)

There is no merit to father's contention that the court's jurisdictional findings were based *solely* on the fact of his incarceration. The petition was sustained, in part, based on the finding that father's three–year incarceration rendered him "currently . . . unable to provide care for [T.A.'s basic] needs[,]" and that parental absence endangered T.A.'s "physical health and safety and place[d] the child at risk of serious physical and emotional harm and damage." Importantly, the court also found that father, who had a lengthy history of violent crime, including other acts of domestic violence, was serving his current lengthy prison sentence after having "*inflict[ed] corporal injury on spouse/cohab[itant].*" (Italics added.) Viewing the record in totality, we find that substantial evidence supports a conclusion that father's physical violence against his long–term companion and his inability to control his anger, which resulted in his re–incarceration, left T.A. with no parent able to provide adequate care or supervision. The jurisdictional findings were not made in error. (See *In re Alexis H.* (2005) 132 Cal.App.4th 11, 16 [concluding that substantial evidence supported jurisdictional findings under section 300, subd. (b), where

parent's incarceration rendered him unable to care for or supervise his children]; cf., *In re James C.* (2002) 104 Cal.App.4th 470, 483–484 [finding sufficient evidence to support jurisdictional findings under § 300, subd. (b), where father acknowledged his inability to care for or supervise his children while in prison.)

Father's reliance on *In re Noe F.* (2013) 213 Cal.App.4th 358, is misplaced. Unlike that case, the juvenile court did not sustain the allegations against father because he failed to make an appropriate plan for T.A.'s care at the time of his arrest. (*Id.* at pp. 364–365.) Rather, the court here concluded that father's lengthy imprisonment arising from his acknowledged acts of corporal injury against a spouse or cohabitant, rendered him unable to provide care, supervision or the basic necessities of life for T.A.

2. *Father Forfeited Appeal from the Dispositional Order*

Father contends that the juvenile court erred in basing its dispositional order on section 319, a statute applicable only at the detention hearing. First, it is not clear from the record that the juvenile court's dispositional order was premised on section 319. The court initially stated that its conclusion was based on section 361, a statement supported by the minute order from the hearing, which indicates the order was made under sections 361 and 362, based on clear and convincing evidence.

Second, it has long been the general rule that, on appeal, "a party . . . cannot successfully complain because the trial court failed to do

something which it was not asked to do and which was not before the court." (*State Comp. Ins. Fund v. Maloney* (1953) 121 Cal.App.2d 33, 42.) Father did not seek clarification of, or object to, the court's inadvertent citation to the wrong statute. Indeed, father did not raise any objection to the dispositional orders, let alone question the statutory basis for those orders. This, even after the court specifically asked father's counsel at the disposition hearing whether there was "[a]nything further" he wanted to address "on behalf of [father.]" In dependency proceedings, as elsewhere, a litigant forfeits an appellate argument by failing to raise it before the trial court. (See *People v. Saunders* (1993) 5 Cal.4th 580, 589–590; *In re John M.* (2013) 217 Cal.App.4th 410, 419, abrogated on another ground in *In re R.T.* (2017) 3 Cal.5th 622, 628 [applying forfeiture rule in dependency action where parent failed to object to placement orders]; *In re A.A.* (2012) 203 Cal.App.4th 597, 605 [same].) Having failed to object to the statutory basis for the court's order (assuming, for the moment, that the court did rely on section 319), father cannot succeed on his assertion here that the juvenile court erred. (*In re John M.*, at p. 419; *In re A.A.,* at p. 605.)[3]

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[3] Had the argument not been forfeited, we would find the juvenile court's citation to the wrong statute harmless error. (See *In re Anthony Q.* (2016) 5 Cal.App.5th 336, 339, 352–353.) In *Anthony Q.* the appellate court found the juvenile court relied on the wrong statute in ordering a child removed from a noncustodial parent. (*Id.* at p. 339.) Nevertheless, the error was deemed harmless considering the juvenile court's broad discretion as to dispositional (custody) orders and, under section 361, subdivision (a)(1), may "limit the control to be exercised over the dependent child by any parent." (*Id.* at p. 346.) Further, section 362, subdivision (a), vests the juvenile court with

3. *Limited Remand to Ensure Compliance with the ICWA is in Order*

Congress enacted ICWA "to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children 'in foster or adoptive homes which will reflect the unique values of Indian culture.'" (*In re Levi U.* (2000) 78 Cal.App.4th 191, 195; see also 25 U.S.C. § 1902.) The "ICWA recognizes that '"the tribe has an interest in the child which is distinct from . . . the interest of the parents."'" (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 253 (*Dwayne P.*).)

To protect this interest, the ICWA and California law "confer[] on tribes the right to intervene at any point in state court dependency proceedings. [Citations.]" (*Dwayne P., supra*, 103 Cal.App.4th at p. 253; 25 U.S.C. § 1911(c).) That right to intervene "'is meaningless if the tribe has no notice that the action is pending.' [Citation.]" (*Ibid.*) Both

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authority to make "any and all reasonable orders for the care, supervision, custody [and] conduct . . . of the child[.]" (*Ibid.*; see also § 245.5 [juvenile court may make all orders "to the parent . . . [it] deems necessary and proper for the best interests of . . . the minor"].) In short, the juvenile court has broad authority to make a dispositional order it deems reasonably necessary to protect the child's well–being, including an order limiting a parent's control of the child, and determining her placement. (*Id.* at p. 354.)

Applying these principles here, the juvenile court had broad authority to enter the dispositional orders it deemed reasonably necessary to protect T.A. (§§ 361, 362; *Anthony Q., supra*, 5 Cal.App.5th at p. 353.) Given father's unresolved anger management issues, history of violence and most recent acts of violence against his fiancée, with whom he wished T.A. to be placed, the court did not err in concluding that limitations on father's control over the seven–year–old (who had met father just once), were necessary to protect the child's well–being. (*Id.* at pp. 353–354.)

the court and DCFS have an affirmative duty to inquire whether a child is or may be an Indian child for ICWA purposes. (§ 224.3, subd. (a)(3)(A); Cal. Rules of Court, rule 5.481(a); *In re W.B.* (2012) 55 Cal.4th 30, 53.) The juvenile court also has the obligation to receive evidence of DCFS's notice efforts and determine if they satisfy ICWA requirements. (*In re Glorianna K.* (2005) 125 Cal.App.4th 1443, 1449.) DCFS concedes that it failed to make the proper inquiry and notice requirements under the ICWA as to T.A.'s Indian status, and the juvenile court made no inquiries or findings regarding Indian heritage at the only hearing father attended.[4] (§ 224.3, subd. (a).)

Because DCFS did not adequately investigate T.A.'s potential Indian ancestry, we conditionally remand the matter for the juvenile court to order compliance with inquiry and notice provisions in the ICWA and related state law. If that investigation produces any information that T.A. is or is eligible to be a member or any tribe, notice must be provided to any identified tribe or, if the tribe cannot be determined, to the Bureau of Indian Affairs and Secretary of the Interior. Thereafter, DCFS shall notify the court of its actions and file the requisite evidence to the juvenile court. (See *In re Breanna S.*

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[4] PGM was asked about and denied any Indian ancestry in her family, and denied any knowledge of such heritage as T.A.'s paternal grandfather. The record does not reflect whether DCFS made efforts to contact other paternal relatives or any maternal relative regarding mother's lineage.

(2017) 8 Cal.App.5th 636, 654–655.)[5] The juvenile court shall then determine on an adequate evidentiary record whether the ICWA inquiry and notice requirements have been satisfied and whether T.A. is an Indian child, within the meaning of that statute. If the court finds T.A. is not an Indian child, it shall reinstate the original orders. If the court finds that she is an Indian child, it shall set a new adjudication hearing and conduct that proceeding, and all further proceedings, in compliance with ICWA. (*Ibid.*; *In re Damian C., supra,* 178 Cal.App.4th at p. 200.)

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[5] Reversal is not necessary because this appeal does not involve termination of parental rights. Rather, only limited remand is required to permit compliance with the ICWA. (*In re Brooke C.* (2005) 127 Cal.App.4th 377; *In re Damian C.* (2009) 178 Cal.App.4th 192, 199–200 [A violation of the ICWA notice requirements does not constitute jurisdictional error and reversal of the jurisdiction findings and disposition orders unrelated to ICWA notice is not required].)

DISPOSITION

The jurisdictional findings are affirmed. The disposition order is remanded for the sole purpose of ensuring compliance with the inquiry and notice provisions of the ICWA. If a tribe indicates T.A. is an Indian child, the court shall proceed as required by the ICWA. If the court determines the child is not an Indian child, it shall reinstate the disposition order. In all other respects, the orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.