Filed 1/4/17 In re R.G. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 R. G. et al., Persons Coming Under the Juvenile Court Law.	B269978 (Los Angeles County Super. Ct. No. DK13579)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M. G. et al., Defendants and Appellants.	

APPEAL from orders of the Superior Court of Los Angeles County, Daniel Zeke Zeidler, Judge. Affirmed in part and remanded with directions.

Suzanne Davidson, under appointment by the Court of Appeal, for Defendant and Appellant M. G.

David A. Hamilton, under appointment by the Court of Appeal, for Defendant and Appellant P. G.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, William D. Thetford, Deputy County Counsel, for Plaintiff and Respondent.

Parents M.G. (mother) and P.G. (father) challenge orders adjudicating their toddler son, R.G. a dependent child under Welfare and Institutions Code section 300, subdivision (b),[1] removing him from their custody, placing him outside their home, and requiring them to participate in family reunification services. Father also contends that the Los Angeles County Department of Children and Family Services (DCFS) failed to comply with the notice requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA). DCFS concedes that ICWA notice was inadequate.

We agree that DCFS did not comply with ICWA and remand the matter, with directions to the juvenile court to ensure DCFS's compliance with ICWA notice requirements. We affirm the juvenile court's orders in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

R.G. (born April 2014) is the son of mother and father. Mother also has an older son, A.B. (born October 2005), over whom her parents, the maternal grandparents, had a legal guardianship. The petition at issue in this appeal did not include any allegations pertaining to A.B.; a separate petition filed on his

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

behalf ultimately was dismissed.

Initial Investigation and Detention

On September 25, 2015, DCFS received a report alleging that father was operating a drug lab in the backyard of the family's home. According to the reporter, the lab produced concentrated cannabis, or "butane honey oil," using a process that posed a "big risk" of explosion. The reporter further alleged that there was "a lot of cannabis" on the property, and that both parents regularly used and occasionally sold marijuana in the home.

A DCFS case social worker (CSW) visited the home the same day, accompanied by two police officers. The CSW observed a strong marijuana odor both outside and inside the home. Mother acknowledged the smell and explained that she had "just smoked a joint." Mother also stated that she began smoking marijuana "off and on" at the age of 12 but recently had been smoking daily. Mother was "adamant" that she smoked exclusively outside, notwithstanding the smell inside and her earlier comment about smoking a joint.

The CSW observed "several small clear containers with a green solid substance" and a bucket containing a green liquid substance in the dining room area. Mother explained that the clear containers held "Mrs. Excellence," a cannabis-containing lotion she produced and sold. Mother told the CSW that the THC[2] used in the lotion was manufactured offsite; at home, she mixed the THC with other ingredients and packaged the lotion for sale. After the CSW expressed concern that mother prepared the lotion in an area of the home that was accessible to the

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[2] THC is short for tetrahydrocannabinol, the active ingredient in marijuana.

children, mother told the CSW that she did not allow A.B. or R.G. to be near the lotion. Mother explained that she worked on the lotion while A.B. was at school and R.G. was supervised by a nanny in other areas of the house. Mother stated that she did not abuse her children, and denied having an arrest record. In a later interview, mother admitted having previous convictions; she suffered two misdemeanors, one for forgery and one for grand theft.

Mother consented to a "walk through" of the home. In the detached garage, the CSW "observed a box with approximately five butane cans and a coffee maker with a dark brown rim." Mother told the CSW that father used the butane cans to "light up a torch." She further told the CSW that the locked storage "pod" container on the driveway contained "household items."

Father arrived home with A.B. while the CSW and police officers were still at the house. Father denied that he manufactured butane honey oil on the property. He admitted to manufacturing the lotion, however, and told the CSW that he and mother obtained cannabis in liquid form, and mixed it with other ingredients in the home. Father echoed mother's claims that the children were not allowed near the product. Like mother, father admitted to daily marijuana use. He provided the CSW with a copy of his medical marijuana card and told the CSW he only smoked outside the home. Father stated that he was employed as a barbecue sauce maker; he and mother hired nannies to care for R.G. due to their work schedules. Father denied abusing R.G. in any way or having an arrest record. Later DCFS investigation revealed that father had a previous felony conviction for possessing concentrated cannabis.

The CSW also spoke to A.B. He told the CSW that he lived with mother and father (notwithstanding the guardianship) and that a nanny cared for him and R.G. while mother and father made lotion and barbecue sauce. A.B. told the CSW that both products were made in the home. He watched mother make the lotion but did not assist her. A.B. denied seeing either parent smoke marijuana. When the CSW asked him if he observed a "distinct odor" in the home, he told the CSW there was "'no smell'" in the house.

The CSW interviewed the nanny, Au. B., who stated that she had been caring for the children since January 2015 and typically was in the home from 9:30 a.m. to 6:00 p.m. daily. Au. B. told the CSW that she spent the majority of her time in the living room or in the children's bedrooms; she and the children stayed in those areas when mother was packaging the Mrs. Excellence lotion. Au. B. knew that the lotion contained marijuana and praised its efficacy, telling the CSW that parents "are highly respected in the industry. Their stuff works." Au. B. also admitted to smoking marijuana in her own home. After being confronted with this information, mother told the CSW, "I know she smokes. She usually smokes outside and/or when the baby is taking a nap." When the CSW expressed concern that mother would allow the nanny to smoke marijuana while she was caring for the children, mother stated, "I can't deny her rights."

The CSW called the Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force—Group 12 (LA IMPACT) to consult about the referral allegations and findings made during the visit. LA IMPACT officers arrived on the scene and conducted an assessment. One of them, Detective Miles, reported the following. "In assessing the home, there is evidence that the

mother and father are involved with the manufacturing of butane honey oil. In the shed [the pod in the driveway], we recovered the following items containing concentrate [*sic*] cannabis: glass dishes, two vacuum ovens, vacuum pumps, extraction tubes, and marijuana. In the garage, we recovered butane, marijuana, and a blender with concentrated cannabis. In the backyard, a bag was found inside the trash can containing used coffee filters used to manufacture butane honey oil. . . . The product that was found inside the home [the lotion] is accessible to the children. It contains cannabis and the children could have accessed it, ingested it, looks kid friendly due to the color and resembles Play-doh or candy." Another LA IMPACT officer, Detective Saragueta, opined that "The children residing in the home were at risk of being injured due to the accessible chemicals, and an explosion could have occurred, resulting in the immediate death of the children." LA IMPACT officers arrested mother and father for manufacturing concentrated cannabis, and DCFS detained R.G. and A.B. and placed them with a maternal great aunt.

Section 300 Petition

DCFS filed a five-count petition seeking jurisdiction over R.G. pursuant to section 300, subdivision (b). Three of the counts alleged that mother and father placed R.G. at risk of physical harm, damage, and/or danger by creating a "detrimental and endangering home environment." Count b-1 cited their alleged possession of "toxic, explosive, flammable and hazardous chemicals used in the manufacture of butane honey oil in the child's home, within access of the child." Count b-2 cited parents' alleged possession of marijuana in a location accessible to R.G., and count b-5 cited parents' employment of a nanny whom they knew used marijuana while supervising R.G. The other two

counts alleged that mother (b-3) and father (b-4) had histories of substance abuse, used marijuana daily, and were thereby rendered incapable of providing regular care for R.G. while he was of such young age.

Detention Hearing

The court held a detention hearing on September 30, 2015, at which it concluded that DCFS established a prima facie case that R.G. was described by section 300, subdivision (b). The court nonetheless released R.G. to mother and father, and denied DCFS's request to stay that ruling. The court ordered family maintenance services for both parents. It further ordered both parents "to be testing clean for drugs and alcohol, with reduced levels of marijuana," to remove toxic chemicals aside from household cleaners from their home, and to cooperate with DCFS's provision of family preservation services. The court also issued a no-contact order for the children and nanny Au.B.; mother informed the court that the nanny had been fired.

Jurisdiction/Disposition Report

DCFS prepared a jurisdiction/disposition report in advance of the December 16, 2015 jurisdiction and disposition hearing. The report included an inventory of the items allegedly recovered during the LA IMPACT team's search of parents' home, garage, and storage pod, including marijuana, concentrated cannabis, 234 full cans of butane, and over $11,000 in cash. Mother disputed the accuracy of the LA IMPACT team's inventory of items, which included 100 pounds of marijuana, green plant material, and butane honey oil. Mother offered innocent explanations for the presence of items such as gloves, butane cans, and a blender, and claimed that "[n]obody with a brain" would manufacture concentrated cannabis "in a neighborhood

like this." Mother further told the CSW, "We're . . . painted as drug dealers, but I see it as healers." She added that marijuana had "done nothing but help" her, and was a "natural" alternative to prescription drugs like Xanax.

Father also denied manufacturing concentrated cannabis and further opined that it would be "stupid" to make it inside because "you would blow yourself up."[3] He claimed that he and mother possessed large quantities of butane cans because they sold them at various "cannabis related gatherings." He also stated that the butane cans, coffee filters, and parchment paper recovered by law enforcement were used for other, non-drug-related purposes, such as filling lighters and making candy. Mother and father both denied that R.G. (and A.B.) had access to any of the allegedly dangerous materials in the home, pod, or garage.

Both parents admitted to smoking marijuana, but claimed they only did so outside or in the garage. Mother also stated that she smoked inside only on "the rarest" occasions, and never when the children were home. Mother stated that she used marijuana to treat anxiety and post-traumatic stress disorder. She admitted that she abused methamphetamine in the past, but denied ever abusing marijuana, which she "see[s] as medicine, not as a drug to be abused." Father stated that he used marijuana daily to treat "tremors, familial tremors, nerve damage"; mother stated that father used marijuana "[a] couple times a day" to treat

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[3] Detective Miles stated that he believed the manufacturing occurred in the backyard, and the pod in the driveway was used for storing the related materials. He also reported that 60 percent of the calls the LA IMPACT team received about butane honey oil labs "were fires, or explosions of some type."

Tourette syndrome. Both parents had valid physician's recommendations for medical marijuana.

Both parents admitted that they cared for R.G. after smoking marijuana. They claimed they would only "smoke a little hit" and "do not get high to get stoned" or "sit around and get high all day." They denied that their marijuana use affected their ability to care for R.G. in any way. They likewise denied that the nanny's use of marijuana on the job affected her ability to care for R.G. Mother explained that the nanny smoked when R.G. went to sleep, and that was fine because the nanny had "rights" as a medical marijuana patient and R.G. "would be asleep for three hours." Father also stated that "[i]t was no problem" that the nanny used marijuana while caring for R.G. and opined that a prescription drug like Xanax would impair the nanny more than "a couple hits of weed" would. Mother and father reported that they fired the nanny because the court ordered them to.

Mother and father each submitted to four random on-demand drug tests during the pendency of the case. All of the tests were positive for cannabinoids. Mother's cannabinoid concentration levels ranged from a high of 1066 ng/mL on October 30, 2015 to a low of 534 ng/mL on November 17, 2015. Her most recent reading, from November 23, 2015, was 632 ng/mL. Father's levels ranged from a high of 4033 ng/mL on November 12, 2015 to a low of 577 ng/mL in a diluted sample submitted on November 23, 2015. Neither parent tested positive for alcohol or any other drugs.

DCFS interviewed A.B. and the maternal grandparents for its report. A.B. reported that he had been inside both the storage pod and the garage. A.B. also claimed that neither location "had

anything bad in it," and stated that the pod contained some of his "stuff." A.B. told the dependency investigator that he knew what marijuana looked like but had never smelled it. When the investigator told him that it could "smell awful and like a skunk," A.B. responded, "No, cuz we have an air freshener that smells like apple and cinnamon. It doesn't smell bad, but it smells good." He further stated that marijuana "could be used for good or bad," and cited mother's lotion as an example of the former. A.B. stated that he had used mother's lotion, that "it works," and that it smelled "of fruit loops." A.B. acknowledged seeing the lotion in the home, but denied seeing any other marijuana. He also denied that mother and father smoked marijuana. A.B. felt safe with mother and father and had never been fearful of them. He also did not have any worries about mother and father caring for R.G. Maternal grandmother likewise described father as a "good father," and both she and the maternal grandfather believed R.G. would be safe in the home "given that the father is present in the home." The maternal grandfather added that he would be concerned for R.G.'s safety if the report about butane honey oil manufacturing were true.

R.G. was too young to converse with DCFS social workers. DCFS opined that he should be declared a dependent and detained from mother and father because he remained at risk "should [parents] continue to engage in the extraction of [THC], the manufacturing of butane honey oil, and the packaging of cannabis infused lotion (the mother's product), in and around the family home." DCFS also expressed concern that parents were minimizing and denying the existence and gravity of their involvement in the production of marijuana products, and opined that "their stance on this very significant situation will

compromise [R.G.]'s future safety without continued Court jurisdiction and Department supervision." DCFS further expressed concern "that the parties will continue to use marijuana within close proximity to the family home, and that the smoke will enter the home as it did previously," and that R.G. "could access the cannabis infused lotion." However, DCFS acknowledged that "[a]t this time, the parents have ceased any illegal activity and are maintaining [R.G.] in their care." It further noted that R.G. "appears to be well taken care of at this time," and was "physically healthy," "developmentally on target" and up-to-date on his immunizations. DCFS also reported that parents' "clean and organized" home had appropriate furniture, appliances, amenities, and child safety gates and locks.

In a last-minute information filed December 16, 2015, DCFS reported that both parents had taken and failed a fifth drug test. Mother tested positive for cannabinoids on December 3, with a reading of 580 ng/mL. Father also tested positive for cannabinoids the same day, with a reading of 3298 ng/mL. The record does not contain any information about the meaning of these readings in terms of impairment or ability to supervise a child. Mother's levels were generally on a downward trajectory, with some deviation; father's were not.

Jurisdiction/Disposition Hearing and Rulings

The court held a jurisdiction and disposition hearing on December 16, 2015. The court admitted into evidence DCFS's jurisdiction/disposition report, the last-minute information, and a supplemental report assessing potential placements for R.G. Mother's counsel offered stipulated testimony that, if mother were called and sworn, she "would confirm the statements she made in the [jurisdiction/disposition] report." All counsel agreed

to the stipulation, and the court admitted the statements as mother's testimony. No other evidence was admitted.

Mother's counsel urged the court to dismiss the petition. She informed the court that all the items allegedly used to manufacture butane honey oil had been removed from the property, as had mother's lotion and "any marijuana," and reminded the court that the nanny had been fired. She also argued that DCFS failed to prove a nexus between mother's marijuana use and an inability to properly care for R.G. Father's counsel made similar arguments. She contended that the parents had addressed the issues presented in the joint counts (b-1, b-2, b-5) by removing the allegedly dangerous items from their home and firing the nanny, and that there was "no evidence that there is improper care of [R.G.]."

Counsel for R.G. and DCFS argued that the allegations in the petition should be sustained. R.G.'s counsel emphasized the "dangerous and highly combustible" nature of the items removed from the parents' home. She further argued that "there needs to be someone who's not under the influence should something arise" while R.G. was in parents' care. Counsel for DCFS joined these arguments and further contended that R.G. was at risk due to the presence of combustible materials outside the home and cannabis-containing products within it, "within easy access to the children." She also claimed that the parents were "still in denial that any of this was going on," and that mother specifically "still doesn't" acknowledge "there was anything wrong with her being under the influence while taking care of her child."

The court found "by a preponderance of the evidence counts (b)(1), (2), (3), (4) and (5) are true." No party offered any additional evidence for the court to consider at the disposition

phase.

Counsel for DCFS argued that R.G. should be placed in DCFS custody, with family reunification services for parents. She contended that both parents were still testing positive for marijuana, though mother's levels were reducing, and "we have the added issue of the 100 percent denial regarding any concerns or issues on the mother's part." She further asserted, "It's just appalling to me that they would continue to use marijuana knowing that their child is in jeopardy of being detained from them." Counsel for R.G. and counsel for mother both argued that R.G. should be placed with mother, contending that although "mother may be in somewhat of denial," she was "taking this case very seriously" and was likely to do what was necessary to keep R.G. in her home. Father's counsel requested a home of parents order. She argued that father was "more than willing to continue testing and to participate in services," notwithstanding his "unfortunate" drug test results.

The court concluded that clear and convincing evidence demonstrated that placement with mother or father would pose substantial danger to R.G.'s physical health, safety, protection, or physical or emotional well-being. It explained that "mother is just not showing any protective capacity in her total denial of practically everything that was going on in the home, whether it was the honey oil production, the home, according to the social worker, having a strong smell of marijuana, the child being at any risk in the care of anyone under the influence of marijuana. The mother today is just still not - - more so than the detention hearing really, showing no protective capacity whatsoever." The court also commented, "I was the cheerleader on the case, and that was not successful." The court ordered R.G. removed from

parents and placed him under the supervision of DCFS for suitable placement.

The court also ordered DCFS to provide and parents to participate in reunification services. Specifically, it ordered "[w]eekly random and on-demand testing for drugs, 12-step program with court card and sponsor. If they have any missed test or dirty test without reducing levels starting now, they are to do a full and complete drug rehabilitation program. They are to do parenting education, individual counseling to address the case issues. Their visits are monitored by a DCFS-approved monitor at least one hour, at least twice per week. The department has the discretion to liberalize in writing." The court also gave DCFS discretion "to walk on a home of parent order with proper notice to all parties and counsel."

Mother and father timely appealed.

DISCUSSION

I. *The jurisdictional findings were supported by substantial evidence*

Mother and father both contend that the court's jurisdictional findings were not supported by substantial evidence. They argue that, by the time of the hearing, they had remedied the conditions underlying the three counts alleging an endangering home environment due to the alleged butane honey oil lab, accessible marijuana, and intoxicated nanny (counts b-1, b-2, and b-5). They further contend that DCFS failed to present substantial evidence that their use of marijuana adversely affected their ability to care for R.G. or placed him at any risk of harm, as alleged in counts b-3 and b-4. We are not persuaded by these contentions.

A. *General principles and standard of review*

Section 300, subdivision (b)(1) allows a child to be adjudged a dependent of the juvenile court when "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse." "[DCFS] has the burden to prove the jurisdictional facts by a preponderance of the evidence. [Citations.]" (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1014.)

"'We review the juvenile court's jurisdictional findings for sufficiency of the evidence. [Citations.] We review the record to determine whether there is any substantial evidence to support the juvenile court's conclusions, and we resolve all conflicts and make all reasonable inferences from the evidence to uphold the court's orders, if possible. [Citation.] "However, substantial evidence is not synonymous with any evidence. [Citations.] A decision supported by a mere scintilla of evidence need not be affirmed on appeal. [Citation.] Furthermore, '[w]hile substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations].' [Citation.] 'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.' [Citation.]" [Citation.]' [Citation.]" (*In re Drake M.* (2012) 211 Cal.App.4th 754, 763 (*Drake M.*)) "The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support

the findings or order." (*In re R.V.* (2012) 208 Cal.App.4th 837, 843.)

B. *"Endangering home environment" allegations (b-1, b-2, b-5)*

"'The basic question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm.' [Citation.]" (*In re A.S.* (2011) 202 Cal.App.4th 237, 244; see also *In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1396.) The court may consider past events in deciding whether a child presently requires the court's protection. (*In re N.M.* (2011) 197 Cal.App.4th 159, 165.) "A parent's '"[p]ast conduct may be probative of current conditions" if there is reason to believe that the conduct will continue.' [Citation.]" (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1216 (*Christopher R.*).) "[A] juvenile court should consider the nature of the conduct and all surrounding circumstances. It should also consider the present circumstances, which might include, among other things, evidence of the parent's current understanding of and attitude toward the past conduct that endangered a child, or participation in educational programs, or other steps taken, by the parent to address the problematic conduct in the interim, and probationary support and supervision already being provided through the criminal courts that would help a parent avoid a recurrence of such an incident. The nature and circumstances of a single incident of harmful or potentially harmful conduct may be sufficient, in a particular case, to establish current risk depending upon present circumstances." (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1025-1026.) "[T]he court need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child." (*Christopher R.*, *supra*, 225 Cal.App.4th at p. 1216.)

Here, the court found true the allegations (b-1, b-2, and b-5) that R.G. was at risk of substantial physical harm due to the presence of the butane honey oil manufacturing operation and accessible marijuana in the home, as well as being under the care of an intoxicated nanny. Mother and father both contend that these findings were not supported by substantial evidence because all of the allegedly dangerous conditions had been remedied by the time of the jurisdiction hearing.

DCFS acknowledged in its jurisdiction/disposition report that mother and father "have ceased the manufacturing of any items in and around the home currently, and [R.G.] appears to be well taken care of at this time." Likewise, there is no dispute that parents promptly fired the nanny. However, the court's implicit conclusion that there was a danger the conduct underlying the b-1, b-2, and b-5 allegations would recur and place R.G. at risk was supported by substantial evidence in the record. Neither mother nor father ever accepted any responsibility for their actions. Both parents denied manufacturing butane honey oil despite ample evidence to the contrary. They also denied that the marijuana in their home was accessible to the children; these denials were contrary to the social worker's observations and A.B.'s statements that he had access to the garage and pod, and had used the Mrs. Excellence lotion. Additionally, both parents minimized the potential harms associated with marijuana and their participation in plying it. Mother believed marijuana was a medicine, not a drug, and characterized herself as a "healer," while both parents opined that marijuana carried less risk than pharmaceutical drugs.

Mother and father also failed to appreciate the severe risks associated with flammable manufacturing processes, accessible

THC-containing lotion that looked like Play-Doh and smelled like fruit loops, and leaving their toddler in the care of an intoxicated person. While father acknowledged that it would be "stupid" to manufacture concentrated cannabis indoors, and mother stated that "[n]obody with a brain" would manufacture butane honey oil in their neighborhood, neither parent appeared to appreciate that similar danger arose from storing hundreds of cans of flammable butane in the garage and pod. They likewise failed to appreciate that a child's ingestion of illegal drugs constitutes serious physical harm (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 825), or the danger that a curious toddler would be drawn to a product that looked like a toy and smelled like food. Instead, there was evidence that they smoked marijuana in the home, prepared the Mrs. Excellence using accessible containers in an unsecured room, and allowed A.B. to use the lotion. Both parents freely admitted that they saw no problem with either of them (or the nanny) supervising R.G. while under the influence of marijuana. Instead, they espoused the belief that their (and the nanny's) "rights" to smoke marijuana trumped the need to ensure that their child was adequately supervised. They also demonstrated this belief continued after the disposition hearing by failing to consistently reduce their marijuana usage levels. Even if they (like the nanny) restricted their drug use to times when R.G. was asleep, children regularly wake up at inopportune times, and their needs do not always conform to a predictable sleep schedule.

In short, both parents demonstrated a lack of protective capacity by prioritizing their substance use, storage, and production over the safety of their young son. The court was entitled to infer that parents' continued denials and minimizations placed R.G. at risk at the time of the hearing. The

court was not required to refrain from exercising its jurisdiction until one or more of the potential dangers actually came to pass.

C. *"Substance abuse" allegations (b-3 & b-4)*

Counts b-3 and b-4 alleged, respectively, that mother's and father's substance abuse problems posed a substantial risk of harm to R.G. Parents contend that DCFS failed to demonstrate that their use of marijuana exposed R.G. to any risk of physical harm. We disagree.

"It is undisputed that a parent's use of marijuana 'without more,' does not bring a minor within the jurisdiction of the dependency court." (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 453.) DCFS must demonstrate both that a parent has a "substance abuse" problem *and* that the problem "means the parent or guardian at issue is unable to provide regular care resulting in a substantial risk of physical harm to the child." (*Drake M.*, *supra*, 211 Cal.App.4th at p. 766.) DCFS accurately points out in its brief that parents do not challenge the court's findings on the "substance abuse" prong of the inquiry. Although parents characterize their marijuana consumption as "use" rather than "abuse," and assert that "[n]o evidence showed mother and father abused marijuana" and "the parents did not abuse medical marijuana," they do not present any legal argument contesting the court's findings that the allegations pertaining to their substance abuse were true. For instance, they do not contend that their daily use of marijuana does not meet the medical definition of substance abuse (see *Drake M.*, *supra*, 211 Cal.App.4th at pp. 765-766), or that there was a lack of evidence that their drug use had "life-impacting effects" (*In re Rebecca C.* (2014) 228 Cal.App.4th 720, 726), or otherwise dispute DCFS's characterization of their arguments in their reply briefs.

We accordingly focus our attention on the second prong of the inquiry, the risk of substantial physical harm to R.G.

"Cases finding a substantial physical danger tend to fall into two factual patterns. One group involves an *identified, specific hazard* in the child's environment — typically an adult with a proven record of abusiveness. [Citations.] The second group involves children of such tender years that the absence of adequate supervision and care poses an inherent risk to their physical health and safety. [Citations.]" (*In re Rocco M.*, *supra*, 1 Cal.App.4th at p. 824 [emphasis in original].) "[I]n cases involving the second group, the finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm." (*Drake M.*, *supra*, 211 Cal.App.4th at p. 767.)

Children aged six or younger at the time of the jurisdiction hearing are considered to be of "'tender years'" and therefore within the second group. (*Christopher R.*, *supra*, 225 Cal.App.4th at p. 1219.) R.G. was 19 months old at the time of the hearing. Accordingly, "DCFS needed only to produce sufficient evidence that father [and/or mother] was a substance abuser in order for dependency jurisdiction to be properly found." (*Drake M.*, *supra*, 211 Cal.App.4th at p. 767.) Parents do not contest that DCFS carried this burden.

Instead, they contend that they rebutted the "tender years" presumption by "ably" caring for R.G. between the detention hearing and the jurisdictional hearing. They assert that *Christopher R.* supports this proposition because it stated that the mother in that case "did not adequately rebut that evidence." (See *Christopher R.*, *supra*, 225 Cal.App.4th at p. 1219.) Although prima facie evidence indeed may be rebutted (*see*

Maganini v. Quinn (1950) 99 Cal.App.2d 1, 8), parents' interpretation of *Christopher R.* does not account for the standard of review this court employs. When reviewing a record for substantial evidence, as we do when evaluating a juvenile court's jurisdictional findings, we do not reweigh evidence or substitute our judgment for that of the fact finder. The court was entitled to give greater weight to R.G.'s tender age and consequent heightened need for attentive supervision than to parents' evidence that they cared for R.G. during the pendency of the case without incident. This is particularly true where parents evinced a "cavalier attitude toward childcare" (*Christopher R.*, *supra*, 225 Cal.App.4th at p. 1217) by maintaining that marijuana did not affect caregivers' ability to care for children and did not obey the court's order to reduce their marijuana levels.

II. *The dispositional orders were supported by substantial evidence*

Before a juvenile court may order a child removed from parental custody, it must find by clear and convincing evidence that there is, or would be, substantial danger to the "physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home." (§ 361, subd. (c)(1).) Parents contend that the record did not contain substantial evidence supportive of this finding.

The standard of review of a dispositional order on appeal is the substantial evidence test. (*In re Hailey T.* (2012) 212 Cal.App.4th 139, 146 (*Hailey T.*).) We consider the entire record to determine whether substantial evidence supports the juvenile court's findings. (*Ibid.*) However, jurisdictional findings are prima facie evidence the child cannot safely remain in the home. (*Ibid.*; § 361, subd. (c)(1).) "The parent need not be dangerous and the child need not have been actually harmed before removal

is appropriate." (*Hailey T.*, *supra*, 212 Cal.App.4th at p. 146.) "Also, we do not pass on the credibility of witnesses, resolve conflicts in the evidence or weigh the evidence. Instead, we review the record in the light most favorable to the juvenile court's order to decide whether substantial evidence supports the order. [Citation.] The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the court's findings or orders. [Citation.]" (*Id.* at pp. 146-147.)

The same reasons which led us to conclude that substantial evidence supports the jurisdictional findings also support the dispositional order removing R.G. from mother's and father's custody. Mother and father continue to deny and minimize the sustained allegations, and have not yet fully addressed or completed any educational or treatment programs to address the behaviors that place R.G. at risk of substantial danger. (*In re Gabriel K.* (2012) 203 Cal.App.4th 188, 197.) Parents' failure to acknowledge, address, or accept responsibility for the conduct that led to dependency jurisdiction here endangers R.G.'s safety and necessitates an out-of-home placement.

Parents additionally contend that the court did not consider "reasonable protective measures and services that could be put into place to prevent removal," such as a safety plan or unannounced visits. They rely on *Hailey T.*, *supra*, 212 Cal.App.4th at p. 148, and *In re Ashly F.* (2014) 225 Cal.App.4th 803, 809-811 (*Ashly F.*). Both cases are distinguishable.

In *Hailey T.*, social services became involved with a family after Nathan, a four-month-old infant, sustained a hemorrhage to his right eye that emergency room doctors concluded was nonaccidental. (*Hailey T.*, *supra*, 212 Cal.App.4th at p. 142.) Hailey was Nathan's three-year-old sister. (*Ibid.*) The juvenile

court exercised jurisdiction over Nathan pursuant to section 300, subdivision (a) and Hailey under section 300, subdivision (j). (*Hailey T.*, *supra*, 212 Cal.App.4th at p. 144.) In doing so, the court credited the testimony of witnesses who opined Nathan's injury was nonaccidental over that of parents' expert who opined that Hailey could have accidentally injured Nathan. (See *ibid.*) The court issued dispositional orders removing the children from parents' custody after concluding that no alternative to removal was available given the young ages of the children and the unknown identity of the perpetrator of Nathan's injury. (*Id.* at p. 145.) The appellate court reversed the dispositional orders pertaining to Hailey. (*Id.* at p. 147.) The appellate court emphasized that Hailey was a vocal preschooler who had not suffered any harm and "attended school where she had regular contact with teachers and other mandated reporters of any suspected abuse." (*Ibid.*) It also noted "abundant evidence that [parents] were good parents who enjoyed a healthy relationship," did not engage in domestic violence, and, unlike parents in this case, did not suffer from substance abuse problems. (*Ibid.*) The record also reflected that parents engaged in services and that father was willing to move out of the home if it meant that Hailey could be returned. (*Hailey T.*, *supra*, 212 Cal.App.4th at p. 148.)

R.G. is not similarly situated to Hailey. He is a toddler supervised at home who lacks the capacity to recognize safety hazards or report mistreatment. Parents likewise are not similarly situated to the parents in *Hailey T.* Notwithstanding their denials that they abused Nathan, the *Hailey T.* parents demonstrated both an appreciation for the seriousness of the allegations and a willingness to fully ameliorate any concerns posed by their conduct. Not only did they actively participate in

services, they also demonstrated a protective capacity to the point that the father was willing to move out of the home. Here, in contrast, parents did not appreciate the risks associated with their behavior or exhibit protective capacity toward R.G. They appear to have participated in family maintenance services, but continued to test positive for non-reducing levels of marijuana despite the nature of the allegations and the court's orders in the case. As the *Hailey T.* court observed, "less drastic alternatives to removal may be available *in a given case*." (*Hailey T.*, *supra*, 212 Cal.App.4th at p. 148 [emphasis added].) This is not that case.

Ashly F. also is distinguishable. There, DCFS did not adhere to court rules requiring it to discuss the reasonable efforts it made to prevent removal. Instead, it merely "stated in conclusory fashion" that it had undertaken the requisite efforts. (*Ashly F.*, *supra*, 225 Cal.App.4th at p. 809.) The juvenile court also failed to articulate the evidence it considered, and appeared to have ignored evidence that mother, who physically abused Ashly and her sister, had expressed remorse for her actions and moved out of the family home, while father, who remained with the girls, completed a parenting class. (See *id.* at pp. 809-810.) Here, DCFS's jurisdiction/disposition report outlined its efforts to keep R.G. in the home, including providing continuing and family maintenance services and drug testing referrals. The court demonstrated a familiarity with the relevant evidence and noted that it was "the one who released to parents and who gave them a chance and who had concerns about either nexus or services available to prevent removal." Despite the court's leniency at the detention stage, parents continued to minimize the existence and severity of their conduct and did not demonstrate the protective

capacity of the sort exhibited by the parents in *Ashly F.* or *Hailey T.*

III. *Limited remand is required to provide ICWA notice*

Early on in the case, father informed the court that he "may have" Cherokee ancestry. The court accordingly ordered DCFS to perform an ICWA investigation and "to notice Cherokee tribes, Bureau of Indian Affairs, and Secretary of Interior regarding possible ICWA issues as to . . . father." DCFS investigated by pursuing the issue with father and obtaining contact information for his mother, from whom he believed he inherited Cherokee ancestry. DCFS contacted father's mother on December 3, 2015 "and left a detailed voice message requesting a return call inquiring about the family's purported American Indian heritage." Father's mother returned the call with the following message: "It's very little to none. We have no papers, no registration, with the Cherokee Nation or any other that [*sic*]. My grandmother, was I believe maybe uh half to a quarter, I didn't know her very well . . . I didn't know her at all. She died when my mother was three years old." DCFS did not conduct any further investigation, or provide notice to any tribe, upon receiving this information.

Father contends—and DCFS concedes—that DCFS did not fulfill its statutory obligation to provide proper notice of the proceedings to the Cherokee Tribes. We agree.

ICWA "protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions." (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1197.) "When a court 'knows or has reason to know that an Indian child is involved' in a juvenile dependency

proceeding, a duty arises under ICWA to give the Indian child's tribe notice of the pending proceedings and its right to intervene." (*In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538, quoting 25 U.S.C. § 1912(a).) Once there is "reason to know that an Indian child is involved," the required notices "shall be sent . . . unless it is determined that [ICWA] does not apply. . . ." (§ 224.2, subd. (b).) In California, the dependency court and DCFS have "an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . has been filed is or may be an Indian child in all dependency proceedings. . . ." (§ 224.3, subd. (a); see also *In re L.S.*, *supra*, 230 Cal.App.4th at p. 1197; Cal. Rules of Court, rule 5.481(a).)

"'The determination of a child's Indian status is up to the tribe; therefore, the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement.' [Citations.] 'Given the interests protected by the [ICWA], the recommendations of the [federal] guidelines, and the requirements of our court rules, the bar is indeed very low to trigger ICWA notice.' (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1408 [finding father's suggestion that child 'might' be an Indian child because paternal great-grandparents had unspecified Native American ancestry was enough to trigger notice].)" (*In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1165.) As DCFS concedes, father's disclosure that he "may have" Cherokee heritage was sufficient to trigger DCFS's duty to provide notice to the Cherokee Tribes. Indeed, the court recognized this and ordered DCFS to do so. DCFS did not comply, and the court did not make any findings regarding R.G.'s Indian heritage. These omissions were error.

This court generally follows the rule that where, as here, there is a failure to comply with ICWA procedures before disposition, all jurisdictional and dispositional orders remain in effect while there is a limited remand to the juvenile court for DCFS to give ICWA notice. (See *In re Damian C.* (2009) 178 Cal.App.4th 192, 199-200; *In re Veronica G.* (2007) 157 Cal.App.4th 179, 187-188; *In re Brooke C.* (2005) 127 Cal.App.4th 377, 385.) Father and DCFS agree this is an appropriate remedy in this case.

DISPOSITION

We affirm the jurisdictional and dispositional orders of the juvenile court. The matter is remanded to the court with directions to order DCFS to comply with the inquiry and notice provisions of ICWA. If, after proper notice, it is determined that R.G. is an Indian child and ICWA applies to these proceedings, a party or tribe may petition the juvenile court to invalidate orders that violated ICWA.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.