Filed 10/17/17 In re K'Na W. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re K'NA. W. et al., Persons Coming Under the Juvenile Court Law.	B281458
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. K.W., Defendant and Appellant.	Los Angeles County Super. Ct. No. DK05055

APPEAL from orders of the Superior Court of Los Angeles County, Akemi D. Arakaki, Judge. Conditionally reversed and remanded with directions.

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

Office of the County Counsel, Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Peter Ferrera, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

K.W. (father) appeals from the juvenile court's orders terminating his parental rights to his four children,[1] K'na M. (born June 2009), Kav. M. (born July 2011), K'on M. (born August 2012), and Kel. M. (born September 2014).[2] Father, who was not an offending parent and who was incarcerated in Arizona throughout the duration of the underlying proceedings, contends the juvenile court erred in terminating his parental rights for the following reasons: (1) the court failed to consider whether Arizona was the children's home state for jurisdictional purposes under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA); (2) the court never made a finding that it would be detrimental to return the children to father's custody before terminating father's parental rights; and (3) the court failed to comply with the Indian Child Welfare Act (ICWA) when it never inquired into whether father had American Indian ancestry.

We reject father's argument that the court did not make a detriment finding as to him before terminating his parental rights. We agree with father, however, that the court erred because it never considered whether Arizona was the children's home state under the UCCJEA and never inquired into whether father had American Indian ancestry, as required by ICWA. We therefore conditionally reverse the termination orders and remand the cause for compliance with the UCCJEA and, if necessary, ICWA.

---

[1] The court also terminated the parental rights of the children's mother, J.M. (mother), who is not a party to this appeal.

[2] To protect the children's privacy, we refer to them by three letters from their first names.

FACTUAL AND PROCEDURAL BACKGROUND

1. The initial investigation

On March 26, 2014, law enforcement and the Department of Children and Family Services (Department) contacted mother after receiving a report that she had used illicit drugs in the presence of her three children, K'na, Kav., and K'on, and was pregnant but not receiving prenatal care. Mother reported that she and the children lived in Arizona and were only visiting family in Los Angeles. They had left Arizona a few weeks earlier and were intending to stay in California for only "a couple of days." Father was incarcerated in Arizona at the time.

When they first arrived in Los Angeles, mother and the children stayed at mother's aunt's home. About a week before the Department contacted mother and the children, the aunt had put them up in a hotel because she was no longer getting along with mother. By the time the Department contacted mother and the children, they had apparently checked out of the hotel and were staying at a friend's apartment in Los Angeles.

Mother provided the Department with two sets of addresses and phone numbers: one set included the children's paternal grandmother's address and phone number in Arizona,[3] and the other included mother's aunt's address and phone number in Los Angeles. The paternal grandmother told the Department that mother and the children still lived with her in

---

[3] The address mother provided for the paternal grandmother's home did not match the address provided by the paternal grandmother when she later spoke to the Department. The address provided by mother was located in a different city in Arizona than the one provided by the paternal grandmother.

Arizona and that they had recently taken a bus to Los Angeles to visit family.

Mother also provided the Department with contact information for the children's doctors in Arizona. The doctor's receptionist reported that the children had not visited the office since 2011. Mother told the Department that she had not yet enrolled any of the children in school in Arizona because the school system there did not allow children to attend until they reached five years of age.

On March 27, 2014, the Department contacted mother a second time. At first, she refused to cooperate with the Department's investigation and threatened to take the children back to Arizona that evening. She eventually agreed, however, to submit a drug sample (which later tested positive for marijuana) and to participate in a safety plan, and she promised the Department that she would not take the children outside of Los Angeles County.

On April 1, 2014, the Department contacted the Arizona Child Protective Services, which reported that mother had been investigated for child endangerment on two prior occasions: first in September 2010 (alleged drug sales and use), and a second time in August 2012 (alleged marijuana use while pregnant with K'on). The Arizona agency had closed the first investigation after the allegations against mother went unsubstantiated, and it closed the second investigation after mother "declined services."

On April 3, 2014, mother told the Department that she was seeking housing in Los Angeles through the Los Angeles County Department of Public Social Services (DPSS). The Department contacted DPSS, which confirmed that mother had also applied

for "food stamps, cal works and hotel vouche[r]s" in early March 2014.

On April 15, 2014, mother reported that she and the children had yet to move into the apartment she had applied for through DPSS. They had, however, recently moved to a different friend's apartment in Los Angeles.

On April 17, 2014, mother received a rent voucher for an apartment in Los Angeles. On May 1, 2014 mother signed a lease agreement for the apartment.

On May 13, 2014, mother told the Department that she and the children had returned to Arizona about two weeks earlier after someone robbed her and stole her cell phone and all of her money. Mother and the children had not in fact returned to Arizona, however, as mother was arrested and the children were detained in Whittier later that day, after law enforcement found them standing on the side of the 605 freeway. Mother told law enforcement that her boyfriend had left her and the children at a motel near the freeway and that she was trying to collect money to buy a bus pass to travel back to Arizona. Mother reported that she and the children had been evicted from their apartment because mother could no longer pay the rent.

After the children were detained, they were temporarily placed with their maternal great aunt[4] in Palmdale.

---

[4] The Department's detention report filed May 16, 2014 also refers to the children's maternal great aunt as a maternal great great aunt. We refer to her as the maternal great aunt in this opinion.

2. K'na, Kav., and K'on's dependency petition and detention hearing

On May 16, 2014, the Department filed a dependency petition on behalf of K'na, Kav., and K'on under Welfare and Institutions Code[5] section 300, subdivision (b), which as amended and found true alleged:

B-2: "On [May 13, 2014], [mother] placed the children in a detrimental and endangering situation by seeking money on the off ramp of a freeway, with the children who were wandering along the sidewalk, in extremely hot temperatures. . . . Such a detrimental and endangering situation established for the children by the mother endangers the children's physical health and safety, and place[s] the children at risk of physical harm, damage and danger."

On the same day the petition was filed, the juvenile court conducted a detention hearing. Mother stated that she did not have any American Indian ancestry, and the court found it did not have reason to know ICWA applied to the children's case. Mother also informed the court that father was incarcerated in Arizona.

After finding the Department had alleged a prima facie case under section 300, subdivision (b), the court detained the children and ordered them placed in shelter care, giving the Department discretion to place them in the home of any appropriate relative or non-relative extended family member. The court also found that father was the presumed father of all three children. The court then ordered the Department to

---

[5] All undesignated statutory references are to the Welfare and Institutions Code.

provide mother three, three-hour monitored visits per week and to provide father a one-hour monitored visit per week upon his release from custody.

3. K'na, Kav., and K'on's jurisdiction and disposition hearings

On July 9, 2014, the Department reported that father was being housed at the Maricopa County Correctional Facility in Phoenix, Arizona. The Department provided the contact information for the jail and indicated that father did not have a known release date.

As of July 9, 2014, the children were still residing with their maternal great aunt in Palmdale. By that time, mother had moved to Lancaster.

On July 18, 2014, the court conducted a jurisdiction hearing on the May 16, 2014 petition. Mother submitted a waiver of rights form and pled no contest to the allegations in the petition. The court sustained the b-2 allegation and continued the matter for a disposition hearing on September 4, 2014.

On August 8, 2014, mother tested positive for amphetamine and methamphetamine. She denied using methamphetamine (or even knowing what the drug was) and claimed that she had only taken Sudafed to treat a head cold.

On September 4, 2014, the court conducted a disposition hearing on the May 16, 2014 petition. The court declared K'na, Kav., and K'on dependents of the court under section 300, subdivision (b), and removed them from mother's and father's custody. The court found by clear and convincing evidence that there would be a substantial danger to the children if they were returned to their mother's and father's custody and that there were no reasonable alternative means to removal.

The court ordered the Department to provide family reunification services for mother and father, including drug testing, drug-treatment programs, counseling, and parenting classes. The court directed the Department to look into what type of programs were available to father while he remained in custody.

4. Kel.'s dependency petition and detention hearing

Mother gave birth to Kel. in late September 2014. The day after he was born, Kel. was placed on a hospital hold, and the following day he was placed in a confidential foster home. According to hospital staff, mother was acting suspicious after Kel. was born, refusing to submit to drug tests and interfering with the staff's attempts to test Kel.'s fecal matter and meconium for drugs. The hospital later reported that Kel.'s meconium had tested positive for methamphetamine and amphetamine.

On September 30, 2014, the Department filed a petition on Kel.'s behalf under section 300, subdivisions (b) and (j), which as amended and found true alleged:

B-1: "[Mother] has a history of illicit drug use including marijuana and is a current user of methamphetamine and amphetamine, which periodically renders the mother incapable of providing regular care for the child. The mother used methamphetamine and amphetamine during the mother's pregnancy with the child. On [August 8, 2014], the mother had a positive toxicology screen for methamphetamine and amphetamine. Such illicit drug use by the mother endangers the child's physical health and safety and places the child at risk of physical harm."

J-1: "On [May 13, 2014], [mother] placed the child's siblings . . . in a detrimental and endangering situation by

seeking money on the off ramp of a freeway, [while] the child's siblings were wandering along the sidewalk, in extremely hot temperatures. Such a detrimental and endangering situation established for the child's siblings by the mother endangers the child's physical health and safety, and place[s] the child at risk of physical harm, damage and danger."

The court conducted an emergency detention hearing on September 30, 2014. The court found the Department alleged a prima facie case under section 300, subdivisions (b) and (j), and made an emergency detention finding, temporarily placing Kel. in the Department's custody.

On October 2, 2014, mother signed an ICWA-020 form, stating that she may have "Vichi" Indian ancestry through her paternal grandfather. Thereafter, the court ordered the Department to investigate mother's claim that she may have American Indian ancestry.

5. K'na, K'on, and Kav.'s status review period and Kel.'s jurisdiction and disposition hearings

At a hearing held on November 19, 2014, the court found ICWA did not apply to the children's dependency proceedings after the Department investigated mother's claim that she may have American Indian ancestry. Mother also provided the court with information about the identity of Kel.'s father. Although father was Kel.'s biological parent, a man named Kel. K. had held himself out as the child's father and financially supported mother while she was pregnant with the child. The court deferred making a paternity finding as to Kel.

On January 7, 2015, the Department interviewed mother about the identity of Kel.'s father. Mother reported that although father was the child's biological parent, Kel. K. had been with

mother throughout her pregnancy, had taken responsibility of the child, and was willing to sign the child's birth certificate.

On March 4, 2015, Kel. K. informed the court that he may have Cherokee Indian ancestry. On that same date, the court ordered paternity testing to determine the identity of Kel.'s father.

On April 29, 2015, the Department reported that father had recently been convicted of four counts of aggravated assault and two counts of endangerment, and that he had received an eight-and-a-half-year sentence, with an expected release date of December 24, 2021. Father told the Department that he could not participate in any court-ordered programs and classes at his then-current place of incarceration. He reported that if he were moved to a different facility, he would inquire about the availability of suitable programs and classes there.

On May 13, 2015, the court found father was Kel.'s biological father. The court also found the Department did not need to further investigate Kel. K.'s claim that he had American Indian ancestry.

On May 26, 2015, the court held a combined jurisdiction and disposition hearing on Kel.'s petition and a contested review hearing concerning K'na, Kav., and K'on, at which father appeared telephonically. The court ordered counsel not to be appointed for father as to Kel., because father was only the child's biological parent. Mother signed a waiver of rights form and pled no contest to the allegations in the September 30, 2014 petition. The court sustained the b-1 and j-1 allegations in that petition, declared Kel. a dependent of the court, removed him from mother's custody, and ordered family reunification services for mother; the court ordered no services for father because he

was only Kel.'s biological parent. As to K'na, K'on, and Kav., the court continued mother's reunification services and terminated father's services.

On January 29, 2016, the court terminated mother's reunification services as to all four children and set a section 366.26 permanency selection hearing.

6. The section 366.26 hearing for all four children

After numerous continuances, the court conducted the section 366.26 hearing on February 22, 2017. Although father was scheduled to appear telephonically, the court could not make contact with him. The court denied father's counsel's request to continue the hearing. The court also denied counsel's request for a contested hearing to allow father to present evidence to establish the beneficial parent-child relationship exception to the termination of parental rights.

The court found by clear and convincing evidence that all four children were adoptable. The court then found it would be detrimental to return K'on, Kav., K'na, and Kel. to their parents' custody and terminated mother's and father's parental rights to all four children.

Father filed a timely appeal from the orders terminating his parental rights.

DISCUSSION

1. The juvenile court must determine whether it had subject matter jurisdiction under the UCCJEA.

1.1. Applicable law

The UCCJEA is the exclusive method for determining the proper forum to decide child custody issues involving other

jurisdictions. (*In re Cristian I.* (2014) 224 Cal.App.4th 1088, 1096 (*Cristian I.*); see Fam. Code, § 3421, subd. (b).) The UCCJEA "governs juvenile dependency proceedings as well as actions to terminate parental rights." (*In re Angel L.* (2008) 159 Cal.App.4th 1127, 1136.) "Subject matter jurisdiction over a dependency action or other child custody proceeding either exists or does not exist at the time the petition is filed, and jurisdiction under the UCCJEA may not be conferred by mere presence of the parties or by stipulation, consent, waiver, or estoppel." (*In re A.C.* (2017) 13 Cal.App.5th 661, 668 (*A.C.*).)

"Under the UCCJEA, the state with absolute priority to render an initial child custody determination is the child's home state on the date of commencement of the first custody proceeding or, alternatively, the state which had been his home state within six months before commencement if the child is absent from the home state but a parent continues to live there. ([Fam. Code,] § 3421, subd. (a)(1).) ' "Home state' " means 'the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.' ([Fam. Code,] § 3402, subd. (g).)" (*In re Marriage of Nurie* (2009) 176 Cal.App.4th 478, 491.)

If California is not the child's home state under Family Code section 3421, subdivision (a)(1), at the time the dependency proceedings are commenced, a California juvenile court may nevertheless have jurisdiction over the child under one of the

following circumstances set forth in Family Code section 3421, subdivision (a):

" '(2) A court of another state does not have jurisdiction under paragraph (1), or a court of the home state of the child has declined to exercise jurisdiction on the grounds that this state is the more appropriate forum under Section 3427 or 3428, and both of the following are true: [¶] (A) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence. [¶] (B) Substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships.

" '(3) All courts having jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 3427 or 3428.

" '(4) No court of any other state would have jurisdiction under the criteria specified in paragraph (1), (2), or (3).' " (*A.C.*, *supra*, 13 Cal.App.5th at p. 669.)

Aside from the jurisdictional bases enumerated in Family Code section 3421, a juvenile court may also establish temporary emergency jurisdiction over a child under Family Code section 3424, "if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to, or threatened with, mistreatment or abuse." (Fam. Code, § 3424, subd. (a).) "An 'emergency' exists when there is an immediate risk of danger to the child if he or she is returned to a parent. [Citation.] Although emergency jurisdiction is generally intended to be short term and limited, the juvenile court may

continue to exercise its authority as long as the reasons underlying the dependency exist. [Citation.]" (*In re A.M.* (2014) 224 Cal.App.4th 593, 599 (*A.M.*).)

Although a juvenile court may exercise temporary emergency jurisdiction, it may not address the merits of the dependency petition or make a final custody determination until the court has assumed "home state" jurisdiction under Family Code section 3421, subdivision (a). (See *In re Gino C.* (2014) 224 Cal.App.4th 959, 966 (*Gino C.*).) If, at the time it exercises temporary emergency jurisdiction, the court is aware that a court of another state qualifies as the child's home state, the California court must contact a court of that state to provide it the opportunity to exercise jurisdiction over the child. (*Ibid.*; see also Fam. Code, §§ 3421, subd. (a)(2) & (3), 3424, subd. (b).) If the court from the child's home state expressly or implicitly declines to exercise jurisdiction over the child, the California court may assume jurisdiction over, and enter a final custody determination concerning, the child if at least one of the circumstances for establishing jurisdiction described in Family Code section 3421, subdivision (a)(2) through (a)(4), is satisfied. (See *Gino C.*, *supra*, 224 Cal.App.4th at pp. 965–966.)

1.2. Remand is necessary to allow the juvenile court to determine if Arizona was the home state and, if so, to allow Arizona to exercise its jurisdiction.

During the underlying proceedings, the Department never raised, and the juvenile court never considered, whether Arizona was the children's home state when the dependency petitions were filed and, if it was, whether California could properly exercise jurisdiction to make child custody orders beyond issuing temporary emergency orders. Since the juvenile court never

made these jurisdictional determinations, and because it is for the lower court in the first instance to resolve any conflicts in the evidence, we conditionally reverse the orders terminating father's parental rights and remand the cause to allow the court to proceed in conformity with the UCCJEA.

1.2.1. K'na's, Kav.'s, and K'on's proceedings

At the outset, we note that the record could support a finding that K'na's, Kav.'s, K'on's and mother's stay in California was only a "temporary absence" from Arizona. (See Fam. Code, § 3402, subdivision (g).) When the Department first contacted mother in March 2014, mother reported that she and the children had come to California from Arizona only a few weeks earlier to visit family, and she claimed that they had intended to stay in California for only a few days before returning to Arizona. When the Department spoke to mother in late March 2014, the children's paternal grandmother confirmed that mother and the children had only recently traveled to Los Angeles. Thus, the evidence available to the Department and the court at the time K'na, Kav., and K'on were detained and their dependency petition was filed in mid-May 2014 demonstrates that the children had only been in California for two months. Put another way, since there is no evidence that the children had lived in California for at least six consecutive months before the dependency petition was filed, California could not have been K'na's, Kav.'s, and K'on's home state as of May 2014. (See Fam. Code, § 3402, subd. (g).)

There was, however, evidence to support a finding that Arizona was K'na's, Kav.'s, and K'on's home state, or that it had jurisdiction over the children, at the time the dependency petition was filed in California. (See Fam. Code, § 3421, subd. (a)(1); Ariz.

Rev. Stat. Ann. § 25-1031, subd. (A)(1).) That is, there was evidence that K'na, Kav., and K'on had lived in Arizona for at least six consecutive months before they came to California around early March 2014. As noted, when the Department first contacted the family on March 26, 2014, mother and the paternal grandmother reported that mother and the children lived in Arizona and had only traveled to Los Angeles a few weeks earlier to visit family. In addition, there are records showing that at least some of the children had visited a doctor in Arizona as early as 2011, and that mother had been investigated by the Arizona Child Protective Services in 2010 and 2012. Further, it was undisputed that father lived in Arizona (where he was incarcerated) at the time K'na, Kav., and K'on were detained and their petition was filed. Accordingly, even if mother had intended to permanently leave Arizona when she took K'na, Kav., and K'on to California, Arizona still could have been their home state under the UCCJEA. (See Fam. Code, § 3421, subd. (a)(1) [a court has jurisdiction to make a custody determination concerning a child if the court's state "was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in [that] state"].)

As the facts we just discussed make clear, Arizona could have qualified as K'na's, Kav.'s, and K'on's home state under the UCCJEA when their dependency petition was filed. Because the juvenile court never considered the issue of subject matter jurisdiction during the children's proceedings, and because it must resolve any conflicts in the evidence affecting jurisdiction, we remand the cause to allow the court to comply with the UCCJEA. (See *A.M.*, *supra*, 224 Cal.App.4th at pp. 599–600.) If

the court determines that, at the time K'na's, Kav.'s, and K'on's dependency proceedings were commenced, Arizona was their home state, or that Arizona otherwise had jurisdiction over those children under Family Code section 3421, subdivision (a)(1), it must contact the court in Arizona to provide it the opportunity to exercise jurisdiction over the children. (See *Gino C.*, *supra*, 224 Cal.App.4th at p. 966.) If the Arizona court declines to exercise jurisdiction over K'na, Kav., and K'on (or if the court in this case determines Arizona does not have jurisdiction over the children and that it therefore does not need to contact the Arizona court), then the court in this case shall determine whether California was the appropriate jurisdiction for the children's proceedings under any of the other circumstances set forth in Family Code section 3421, subdivisions (a)(2) through (a)(4), as of the time the proceedings were commenced in May 2014.

1.2.2. Kel.'s proceedings

With respect to Kel., we note that at the time K'na's, Kav.'s, and K'on's proceedings were commenced, he had not yet been born. Thus, a jurisdiction determination under the UCCJEA concerning the three other children would not apply to Kel., since his dependency proceedings were commenced several months after the other children's proceedings were commenced. (See *A.C.*, *supra*, 13 Cal.App.5th at p. 668 [jurisdiction under the UCCJEA is determined at the time a child's proceedings are commenced].)

Although Kel. was born in California, the Department removed him from mother's custody only two days after his birth. Accordingly, the fact that Kel. was born in California does not necessarily establish that California was his home state at the time his proceedings were commenced in late September 2014.

(See *In re R.L.* (2016) 4 Cal.App.5th 125, 139 ["a temporary hospital stay in a state incident to birth, by itself, is insufficient to confer home state jurisdiction under section 3421, subdivision (a)(1)"].) Therefore, on remand, the juvenile court shall also determine whether Arizona or California has subject matter jurisdiction over Kel.'s dependency action as of September 30, 2014, the date the Department filed its petition, and proceed in conformity with the UCCJEA.[6]

2. The court found returning the children to father's custody would be detrimental to their well-being.

Father next argues the juvenile court violated his due process rights by terminating his parental rights without first making a finding by clear and convincing evidence that he was

---

[6] In remanding the cause to allow the juvenile court to make jurisdictional findings, we recognize that some courts have held we independently reweigh jurisdictional facts when reviewing a lower court's findings under the UCCJEA. (See e.g., *In re R.L., supra,* 4 Cal.App.5th at p. 136; *A.M.*, *supra*, 224 Cal.App.4th at p. 599; *In re S.W.* (2007) 148 Cal.App.4th 1501, 1508.) Recently, however, several courts have disapproved of this approach and applied a traditional substantial evidence standard when reviewing a court's jurisdictional findings under the UCCJEA. (See e.g., *Schneer v. Llaurado* (2015) 242 Cal.App.4th 1276, 1286; *A.C., supra,* 13 Cal.App.5th at p. 669.) We do not need to determine which approach is appropriate here because, unlike all of the cases cited above, the juvenile court in this case never considered the issue of jurisdiction under the UCCJEA. As a result, we do not have a fully developed record concerning the issue of jurisdiction or any findings to review. Accordingly, we believe it is appropriate for the juvenile court to conduct a new hearing focused on the issue of jurisdiction in the children's proceedings at the times those proceedings were commenced and to make jurisdictional findings in the first instance.

unfit as a parent or that returning the children to his custody would be detrimental to their well-being. The Department asserts the court made the requisite detriment finding at the September 4, 2014 disposition hearing. We agree with the Department that the court made the necessary detriment finding.

2.1. Applicable law

Parents have a fundamental interest in the care, custody, and companionship of their children. (*In re P.A.* (2007) 155 Cal.App.4th 1197, 1210–1211 (*P.A.*).) " 'Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.' [Citation.] 'After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge.' [Citation.] 'But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.' [Citation.]" (*In re Gladys L.* (2006) 141 Cal.App.4th 845, 848 (*Gladys L.*), quoting *Santosky v. Kramer* (1982) 455 U.S. 745, 747–748, 760, 102 S.Ct. 1388, 71 L.Ed.2d 599.)

"California's dependency system comports with [due process] requirements because, by the time parental rights are terminated at a section 366.26 hearing, the juvenile court *must* have made prior findings that the parent was unfit. [Citation.] 'The number and quality of the judicial findings that are necessary preconditions to termination convey very powerfully to the fact finder the subjective certainty about parental unfitness and detriment required before the court may even consider ending the relationship between natural parent

and child.' [Citation.] The linchpin to the constitutionality of the section 366.26 hearing is that prior determinations ensure 'the evidence of detriment is already so clear and convincing that more cannot be required without prejudice to the interests of the adoptable child, with which the state must align itself.' [Citation.]" (*Gladys L., supra,* 141 Cal.App.4th at p. 848, quoting *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254, 256.) "California's dependency scheme no longer uses the term 'parental unfitness, but instead requires the juvenile court make a finding that awarding custody of a dependent child to a parent would be detrimental to the child. [Citation.]" (*P.A.*, *supra*, 155 Cal.App.4th at p. 1211.)

Before terminating a parent's rights, the juvenile court is not required to first make a jurisdictional finding of unfitness as to that parent. (*P.A.*, *supra*, 155 Cal.App.4th at p. 1212.) The court therefore may terminate the parental rights of a nonoffending parent, such as father, so long as the "actions of either parent bring the child within the statutory definitions of dependency" and the court makes a prior detriment finding by clear and convincing evidence as to the nonoffending parent. (*Ibid.*; see also *In re A.S.* (2009) 180 Cal.App.4th 351, 362 ["A sustained section 300 petition as to each parent is *not* a required precursor to termination of parental rights."].)

Finally, only a presumed parent is entitled to a detriment finding before his or her parental rights may be terminated. (*A.S.*, *supra*, 180 Cal.App.4th at p. 362.) Thus, a juvenile court may terminate a biological father's parental rights without first making a particularized finding of detriment or unfitness. (*Ibid.*)

The court in this case found father to be the presumed parent of K'na, Kav., and K'on, and it found father to be only

Kel.'s biological father. Accordingly, the court was required to make a detriment finding before terminating father's parental rights to K'na, Kav., and K'on, but it was not required to do so before terminating his parental rights to Kel.

2.2. Father has not demonstrated the court failed to make the necessary detriment findings.

Father contends the court erred in terminating his parental rights because it did not first make a finding that it would be detrimental to return K'na, Kav., and K'on to his custody. As we explain below, father has not demonstrated the court failed to make the necessary detriment finding before terminating his parental rights.

At the September 4, 2014 disposition hearing, the court found by clear and convincing evidence that there would be a substantial danger to K'na's, Kav.'s, and K'on's well-being if they were returned to both parents' custody. This finding satisfies the requirement that a juvenile court must find it would be detrimental to return the children to their parent's custody before it terminates that parent's rights. (See *P.A.*, *supra*, 155 Cal.App.4th at p. 1212 [the court made the necessary detriment finding as to the father whose whereabouts were unknown when it found by clear and convincing evidence at the disposition hearing that " 'there exists a substantial danger to the children and there's no reasonable means to protect them without removal from the *parents'* custody' "], italics in original.)

Father does not address the September 4, 2014 detriment finding in his opening brief. On reply, however, father contends the court erred in making that finding because, among other reasons, the court did not expressly state the facts upon which it relied in making the finding. (See § 361, subd. (d).) Father never

appealed from the orders issued at the September 4, 2014 dispositional hearing at which that finding was made. As a result, that finding is now final and binding. (See Cal. Rules of Court, rule 8.406, subd. (a); see also *In re A.H.* (2013) 218 Cal.App.4th 337, 351 [an " 'unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order' "].)

3. The court did not inquire into father's potential American Indian ancestry under ICWA.

Father next contends the juvenile court and the Department failed to comply with their duties under ICWA to inquire into whether father had any American Indian ancestry. The Department concedes error but argues such error was harmless because father has not suggested that any such ancestry exists.

"[S]ection 224.3, subdivision (a), and California Rules of Court, rule 5.481(a), impose upon both the juvenile court and [the Department] 'an affirmative and continuing duty to inquire' whether a dependent child is or may be an Indian child. The social worker must ask the parents if the child has Indian heritage (Cal. Rules of Court, rule 5.481(a)(1)), and upon a parent's first appearance in a dependency proceeding, the juvenile court must order the parent to complete a Parental Notification of Indian Status form (Cal. Rules of Court, rule 5.481(a)(2))." (*In re N.E.* (2008) 160 Cal.App.4th 766, 769, fn. omitted.) Failure to comply with ICWA's inquiry requirement is subject to harmless error analysis. (*Id.* at p. 769.)

Here, there is nothing in the record that demonstrates either the Department or the court complied with ICWA's inquiry requirements with respect to father. Although the court and the

Department made several inquiries of mother whether she believed she had American Indian ancestry, neither the court nor the Department ever asked father about potential Indian ancestry or inquired through mother whether father had such ancestry.

The failure to inquire into father's potential Indian status was error. (*In re J.N.* (2006) 138 Cal.App.4th 450, 461–462.) Because father was never provided the opportunity below to indicate to the court or the Department whether he believes he has American Indian ancestry, we do not believe it is appropriate to speculate on appeal what father's response to an ICWA inquiry would be. (See *id*. at p. 461.) Accordingly, on remand, if the court determines California is the appropriate forum for the children's proceedings under the UCCJEA, it shall also inquire into whether father believes he has American Indian ancestry. If the court determines father has or may have such ancestry, it shall direct the Department to give notice of the underlying proceedings to the Bureau of Indian Affairs and any identified tribes. (See *id*. at pp. 461–462 [where there is no evidence the court or the social services agency inquired of the parent whether the children had American Indian ancestry, remand for compliance with ICWA's requirements is appropriate].)

DISPOSITION

We conditionally reverse the February 22, 2017 termination orders and remand the cause for the court to make findings as to the children's home state under the UCCJEA. If the court finds Arizona is the children's home state, it shall contact the Arizona court to determine whether that court intends to exercise jurisdiction over the children. If the Arizona court assumes jurisdiction and commences dependency proceedings, the juvenile court shall proceed in conformity with the UCCJEA. If the court determines California is the appropriate forum for the children's proceedings, it shall conduct an inquiry under ICWA into whether father has or may have American Indian ancestry and, if so, comply with ICWA's notice requirements. If the court retains jurisdiction over the children's proceedings after complying with the UCCJEA and ICWA, the termination orders shall automatically be reinstated.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

STONE, J.*

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.