Filed 12/16/19 In re K.T. CA2/7

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

| | |
|---|---|
| In re K.T., a Person Coming Under the Juvenile Court Law. | B298199<br><br>(Los Angeles County Super. Ct. No. 19CCJP00609A) |
| LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DARNELL H.,<br><br>Defendant and Appellant. | |

APPEAL from orders of the Superior Court of Los Angeles County, Sabina A. Helton, Judge. Reversed and remanded with directions.

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

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Olivia Raquel Ramirez, Deputy County Counsel, for Plaintiff and Respondent.

---

Darnell H., the presumed father of now-five-year-old K.T., appeals the juvenile court's jurisdiction finding that he failed to protect his daughter by allowing her to remain in the home of her mother, Tamika R., who has mental and emotional problems, and its disposition orders denying him custody of K.T., restricting his visitation with her and requiring him to drug test and to participate in parenting classes and individual counseling. Darnell also contends the juvenile court failed to ensure compliance with the mandates of the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) (ICWA) after Tamika indicated she may have Indian ancestry through her maternal grandmother. We reverse the jurisdiction finding and the order removing K.T. from Darnell's custody and remand the matter for further proceedings in light of current circumstances and for full compliance with the inquiry and notice provisions of ICWA and related California law.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *Prior Dependency Proceedings*

K.T. has five maternal half-siblings. Her four older siblings were the subject of dependency proceedings prior to K.T.'s birth based in substantial part on Tamika's history of substance abuse and ongoing use of illicit drugs. Three of those siblings have been adopted. The fourth was returned to Tamika's home under the supervision of the Los Angeles County Department of Children and Family Services (Department), but left home without

authorization and was the subject of a protective custody warrant during the pending proceedings. K.T.'s younger half-sibling was also the subject of a dependency proceeding because of Tamika's substance abuse. Dependency jurisdiction was terminated in November 2016 as to that child with her father being awarded custody. Tamika was permitted only monitored visitation.

A prior dependency petition was filed as to K.T. shortly after her birth. In January 2015 the juvenile court sustained allegations under Welfare and Institutions Code section 300, subdivision (b),[1] alleging K.T.'s mother Tamika had a history of illicit drug use, was a current user of marijuana and had tested positive for marijuana during her pregnancy with K.T., all of which rendered her incapable of providing regular care of the child. A section 342 petition alleging Tamika had continued to abuse illicit drugs during her participation in a treatment program was sustained in February 2016. K.T. was suitably placed. In June 2017 K.T. was released to Tamika under the Department's supervision. Dependency court jurisdiction was terminated eight months later in February 2018 with an order granting Darnell and Tamika joint legal custody with Tamika having tie-breaking authority, sole physical custody to Tamika, and monitored visits of nine hours per week for Darnell. The court's order explained visitation for Darnell, who has a history of marijuana use, was to be supervised because he had not completed, and had not made substantial progress in, random drug testing.

---

[1] Statutory references are to this code unless otherwise stated.

2. *K.T.'s Detention and the Sustained Petition*

In late January 2019, following a referral alleging general neglect, the Department filed another dependency petition seeking jurisdiction over K.T. due to a filthy, unsanitary and hazardous home environment and Tamika's untreated mental and emotional problems. The first count alleged pursuant to section 300, subdivision (b)(1) (failure to protect), that Tamika's bedroom "was observed to have an empty bottle of Hennessy, a cigar cutter, used and unused cigarettes, several lighters, a utility/box cutter knife, soiled towels, and cannabis near candy." The second count, also pursuant to section 300, subdivision (b)(1), alleged Tamika's mental and emotional problems included "auditory hallucinations, depression, anxiety and a diagnosis of Anxiety Disorder and Bi-Polar Disorder, which renders the mother incapable of providing regular care and appropriate supervision for the child. The mother failed to consistently participate in mental health treatment services and to regularly take the mother's psychotropic medication as prescribed." The petition alleged Darnell had failed to protect K.T. by allowing her to reside in Tamika's home although he knew of the home's filthy and hazardous environment and Tamika's mental and emotional problems.

At the detention hearing Darnell requested K.T. be released to his custody and indicated his willingness to drug test. His counsel also advised the court that Darnell and his fiancée, Summer H., had taken parenting classes. K.T.'s counsel objected to releasing the child to Darnell, noting the February 2018 custody order had restricted Darnell to monitored visitation based on his marijuana use. The court denied Darnell's request because it was unable to review the court file from K.T.'s prior

dependency case, but authorized the Department to place K.T. with Darnell upon proof he had complied with the prior case plan.

Following the detention hearing one of the Department's dependency investigators assessed Darnell's home, where he lived with Summer H. and their three children, boys aged three, four and 12 years. Darnell was cooperative and opened his home with no hesitation. Darnell told the investigator he was a stay-at-home parent, walked his children to school each morning, picked them up after school and helped with their homework. The investigator reported that Darnell was drug testing, had entered into a parenting class, and stated he wanted to reunify with K.T. and understood she needed therapy and a consistent home environment. The investigator observed that K.T. had her own bed, drawers of clothes and toys in the home. Summer H., who works full time at a membership-only retail warehouse store, reported she and Darnell had anticipated having K.T. live with them since 2016 and was excited to have a girl in the house. However, the dependency investigator recommended K.T. not be released to Darnell until he had completed a drug test with negative results.

Darnell did not report for a scheduled drug test on February 8, 2019. As a result, at a pretrial release investigation hearing on February 14, 2019 the court removed the Department's discretion to release K.T. to Darnell, but authorized the Department to liberalize Darnell's visitation. Darnell tested positive for cannabinoids on February 27, 2019 and again on March 13, 2019.

The court held a contested jurisdiction/disposition hearing on April 10, 2019 and May 22, 2019. At the April 10 hearing the court ordered Darnell and Tamika to submit to weekly drug

testing. Darnell tested negative for drugs on April 19, 2019, failed to appear for his test on April 24, 2019, tested negative on April 29, 2019 and tested positive for cannabinoids on May 10, 2019.

At the continued jurisdiction/disposition hearing on May 22, 2019, Darnell argued the court should not find he had failed to protect K.T. from Tamika's hazardous home conditions or her mental and emotional problems, explaining his relationship with Tamika since the February 2018 custody order was limited to exchanging the child for visits and he did not have sufficient contact with her to be aware of either the home environment or Tamika's current array of mental and emotional issues. In particular, Darnell and Tamika had no communication with each other after December 1, 2018; and Darnell was unaware Tamika had stopped taking her prescribed medication sometime in late January 2019, shortly before the referral to the Department. Tamika, who argued the entire section 300 petition should be dismissed, supported Darnell's position, asserting he knew nothing about the inside of her home or her mental health. K.T.'s attorney, however, pointed out that Darnell had told the Department in January 2019 that he was aware of Tamika's mental health issues, knew she was supposed to be taking medication and had concerns about the filthy condition of her home based on his last visit.

The court sustained the petition, amending the section 300, subdivision (b)(1), count regarding the condition of Tamika's home by deleting the allegation Darnell had failed to protect K.T. from Tamika's home environment. The section 300, subdivision (b)(1), count regarding Tamika's mental health problems and Darnell's failure to protect K.T. was sustained as

pleaded. The court explained Darnell had, "if not outright knowledge, a very strong suspicion that mother's not well. . . . Whether he believed that to come from the drugs[2] or that she wasn't taking her medication, there is evidence in the record that supports that father thought that mother had mental and emotional issues."

Proceeding to disposition the court found that permitting K.T. to remain in the home of her parents would pose a substantial risk of detriment to her physical health, safety, protection and/or physical or emotional well-being, declared her a dependent of the court and ordered her removed from the custody of both Tamika and Darnell. Addressing Darnell's request that K.T. be placed with him (§ 361.2, subd. (a)), the court stated his contact with K.T. "has not been very consistent over long periods of time. So I think there has to be a period of time where, you know, there's more time for [K.T.] to bond with you and have longer visits with you, and I don't know if eventually counseling might be necessary, but I'm not ready today to release to home of father." When Darnell's counsel pointed out that K.T. had been regularly visiting with Darnell throughout all of 2018, the court responded, "I do understand that, but I think with this particular young age of the child, and she's been in this one placement this entire time, it's in everybody's best interest that the transition be slower, and we ramp up properly for that."

---

2 Although not alleged in the section 300 petition, the Department introduced evidence at the hearing that Tamika had continued to use marijuana, which exacerbated her mental health issues. The court declined to amend the petition to conform to proof by adding a drug-related allegation.

The court ordered family reunification services for both Tamika and Darnell. As to Darnell, the court ordered weekly drug testing (random or on demand) with a full drug program if he tested dirty, missed a test or his cannabinoid levels did not decline; a parenting class; individual counseling to address case issues; and conjoint counseling with K.T. if recommended by her individual therapist. Darnell was limited to monitored visitation for a minimum of three hours per week.[3] The court granted the Department discretion to liberalize Darnell's visitation if he had negative drug tests.

A six-month review hearing (§ 366.21, subd. (e)) was scheduled for November 20, 2019. On that date the court began the hearing and then continued it to January 3, 2020 for a contest.[4]

Darnell filed a timely notice of appeal of the court's jurisdiction finding and disposition order as they relate to him. Tamika has not appealed.

## DISCUSSION

1. *Standard of Review*

When the sufficiency of the evidence to support a juvenile court's jurisdiction findings or disposition order is challenged on appeal, the reviewing court must "'look to see if substantial evidence, contradicted or uncontradicted, supports them. [Citation.] In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of

---

[3] Darnell and Tamika were ordered not to visit K.T. together.

[4] We take judicial notice of the juvenile court's November 20, 2019 minute order and the Department's status review report prepared for the six-month review hearing. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court.'" (*In re R.T.* (2017) 3 Cal.5th 622, 633; accord, *In re Alexzander C.* (2017) 18 Cal.App.5th 438, 446; *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1384 (*Kadence P*).)

2. *Justiciability*

Darnell does not challenge the juvenile court's jurisdiction findings as to Tamika. Those findings provide an independent basis for affirming dependency jurisdiction over K.T. regardless of any alleged error in the finding as to Darnell. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1492 [jurisdiction finding involving one parent is good against both; '"'"the minor is a dependent if the actions of either parent bring [him or her] within one of the statutory definitions of a dependent"'"']; see *In re M.W.* (2015) 238 Cal.App.4th 1444, 1452; *In re Briana V.* (2015) 236 Cal.App.4th 297, 310-311.) As a result, even if we were to strike the finding as to Darnell, the juvenile court would still be authorized to exercise jurisdiction over K.T. and to enter all reasonable orders necessary to protect her, including orders binding on Darnell that address conduct not alleged in the petition. (*In re Briana V.*, at p. 311; *In re I.A.*, at p. 1492; see generally § 362, subd. (a) [the juvenile court "may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child"].)

Although acknowledging this general principle of justiciability, Darnell asks us to exercise our discretion to reach the merits of his challenge to the jurisdiction finding as to him because that finding, which classifies him as an "offending" parent rather than a "nonoffending" one, could reasonably have

far-reaching consequences in these and future dependency proceedings. (See *In re Quentin H.* (2014) 230 Cal.App.4th 608, 613; *In re Christopher M.* (2014) 228 Cal.App.4th 1310, 1316-1317; *In re A.R.* (2014) 228 Cal.App.4th 1146, 1150.) The Department in its respondent's brief does not contend we should decline to review the merits of the jurisdiction finding, and we agree it is appropriate to do so in this case.

3. *Substantial Evidence Does Not Support the Jurisdiction Finding as to Darnell*

The purpose of section 300 "is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." (§ 300.2; see *In re Giovanni F.* (2010) 184 Cal.App.4th 594, 599.) 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 the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left . . . ." A jurisdiction finding under section 300, subdivision (b)(1), requires the Department to prove three elements: (1) the parent's neglectful conduct or failure or inability to protect the child; (2) causation; and (3) serious physical harm or illness or a substantial risk of serious physical harm or illness. (*In re L.W.* (2019) 32 Cal.App.5th 840, 848; *In re Joaquin C.* (2017)

15 Cal.App.5th 537, 561; see also *In re R.T.*, *supra*, 3 Cal.5th at p. 624.)

Although section 300 requires proof the child is subject to the defined risk of harm at the time of the jurisdiction hearing (*In re D.L.* (2018) 22 Cal.App.5th 1142, 1146), the court need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child. (*Kadence P.*, *supra*, 241 Cal.App.4th at p. 1383; *In re N.M.* (2011) 197 Cal.App.4th 159, 165.) The court may consider past events in deciding whether a child currently needs the court's protection. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1215-1216; *In re N.M.*, at p. 165.) A parent's "'[p]ast conduct may be probative of current conditions' if there is reason to believe that the conduct will continue." (*In re S.O.* (2002) 103 Cal.App.4th 453, 461; accord, *Kadence P.*, at p. 1384.)

Darnell contends substantial evidence does not support the dependency court's finding he failed to protect K.T. from Tamika's mental and emotional problems, emphasizing that the court had awarded sole physical custody of K.T. to Tamika in February 2018 when it terminated dependency jurisdiction in the prior dependency proceedings. The evidence established that from that time forward, Darnell and Tamika's interaction was limited to arranging for Darnell's visits with K.T., and even that minimal amount of contact ceased in December 2018 when Tamika stopped allowing Darnell to see K.T. As a result, Darnell insists, he had no knowledge of the extent of Tamika's mental and emotional condition when the family again came to the attention of the Department in January 2019; and he was unaware Tamika had ceased taking her medication earlier that month. Darnell's general concerns about Tamika's mental health

issues between 2014 and 2017 had been raised in the prior proceedings, but were insufficient to persuade the court to permit Darnell to have even shared physical custody of K.T.

The court's finding Darnell failed to protect K.T. from Tamika, the Department responds, is supported by evidence that Darnell told the Department's social worker during an interview on January 25, 2019 that he "knew something was happening" and expressed his continuing concerns that Tamika was not fit to be a mother. In addition, in subsequent interviews during the next few weeks, Darnell repeated his misgivings about Tamika's mental stability and parenting skills, as well as his distress that Tamika was not allowing him to visit with K.T. According to the Department, this evidence supports the finding Darnell was sufficiently aware of the threat to K.T. to require some form of protective response.

Even were we to agree this meager evidence was sufficient for the court to find Darnell had failed to protect K.T. in December 2018 and January 2019, nothing in the record supports a finding that by the jurisdiction hearing on May 22, 2019 Darnell's purported inattention to the need to protect K.T. from Tamika continued, creating, as to him, a basis for the court's dependency jurisdiction. (See *In re Christopher R.*, *supra*, 225 Cal.App.4th at p. 1216; *In re S.O.*, *supra*, 103 Cal.App.4th at p. 461.) To the contrary, Darnell repeatedly expressed his desire to be an active parent, requesting as early as the detention hearing that K.T. be placed in his home, where he and his fiancée were considered to be fully appropriate parents for their three sons. Moreover, once the court determined K.T. should be removed from Tamika's custody, Darnell's lack of ongoing contact with Tamika and his unfamiliarity with the depths of her mental

and emotional problems could not pose any significant risk of physical or emotional harm to K.T. Under these circumstances, as of the jurisdiction/disposition hearing, the juvenile court had no basis for sustaining either of the allegations under section 300, subdivision (b)(1), as they related to Darnell.[5]

4. *The Evidence Is Insufficient To Support an Order of Removal from Darnell or the Finding of Detriment Required by Section 361.2, Subdivision (a)*

a. *Removal of K.T. from Darnell's custody*

"Based on the facts found true in the sustained petition along with the evidence considered," the juvenile court found remaining in the home of either of her parents would pose a substantial risk to K.T.'s physical health and safety. Accordingly, the court removed K.T. from her parents' custody and vested care, custody and control of the child with the Department for suitable placement.[6] Because we reverse the jurisdiction finding

---

[5] Although the Department and the court had concerns regarding Darnell's ongoing use of marijuana, the section 300 petition contained no allegation, and no evidence was introduced at the jurisdiction/disposition hearing, that his use of marijuana in any way endangered K.T.'s physical health or safety or placed her at risk of serious physical harm. (See *In re L.W.*, *supra*, 32 Cal.App.5th at p. 849 ["our case law stands for the proposition that drug use or substance abuse, without more, is an insufficient ground to assert jurisdiction in dependency proceedings under section 300"]; *In re Rebecca C.* (2014) 228 Cal.App.4th 720, 728 [substance abuse without more is insufficient to support jurisdiction].)

[6] Although Tamika had sole physical custody of K.T. and K.T. was residing with her at the time the dependency petition was initiated, if the evidentiary record had supported a finding that the order was reasonable and necessary for the protection of

as to Darnell, the disposition order removing K.T. from Darnell's custody must be reversed as well. (*In re R.M.* (2009) 175 Cal.App.4th 986, 991; see *In re Jesus M.* (2015) 235 Cal.App.4th 104, 114.)

b. *Section 361.2, subdivision (a), and the rights of a noncustodial parent*

Section 361.2, subdivision (a), requires a child who has been removed from his or her custodial parent to be placed with a parent with whom the child was not residing if that parent requests custody unless the court finds "that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a); see *In re Liam L.* (2015) 240 Cal.App.4th 1068, 1073.) This provision "evinces the legislative preference for placement with the noncustodial parent when safe for the child." (*In re Patrick S.* (2013) 218 Cal.App.4th 1254, 1262; see *In re Austin P.* (2004) 118 Cal.App.4th 1124, 1132.)

A finding of detriment pursuant to section 361.2, subdivision (a), must be made by clear and convincing evidence. (*In re Abram L.* (2013) 219 Cal.App.4th 452, 461.) "Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt." (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426.)
Beginning at the detention hearing Darnell, the noncustodial parent, asked that K.T. be placed with him. As discussed, the court denied that request, explaining that it believed a slower

---

the child, the juvenile court would be authorized pursuant to sections 361, subdivision (a), and 362, subdivision (a), to suspend the custodial rights of Darnell, who had joint legal custody of K.T. (*In re Anthony Q.* (2016) 5 Cal.App.5th 336, 347-351.)

transition with more consistent visitation between Darnell and K.T., which would allow K.T. to develop a stronger bond with her father, was "in everybody's best interest." The court's observation as to the level of bonding between K.T. and Darnell might be accurate, although, as Darnell's counsel pointed out, K.T. had been regularly visiting with Darnell throughout 2018 and he continued to have positive, monitored visitation with her in 2019 after the detention hearing.[7] But the issue before the court was not whether K.T. and Darnell were sufficiently bonded (whatever that may mean) or even whether it would be better to defer K.T.'s placement with Darnell until additional visits took place, but whether the Department had introduced clear and convincing evidence that placing K.T. in Darnell's home would be detrimental to the child: "If no detriment exists, the court orders placement of the child with that parent." (*In re Austin P.*, *supra*, 118 Cal.App.4th at p. 1132.) A lack of adequate bonding without more—for example, proof of emotional harm (see *In re Luke M.*, *supra*, 107 Cal.App.4th at pp. 1425-1426)—does not equate to detriment. (See *In re Abram L.*, *supra*, 219 Cal.App.4th at p. 464 ["an alleged lack of a relationship between father and the

---

[7] In an April 10, 2019 last minute information report from the Department, the monitor described a March 24, 2019 visit during which K.T. appeared comfortable with Darnell, who demonstrated problem-solving capabilities and appropriate parenting skills while they were together for two hours at a park. According to the monitor, K.T. was sad when the visit ended even though K.T.'s caregiver had allowed her to stay at the park after Darnell left. A May 22, 2019 last minute information report described a subsequent visit between Darnell and K.T., indicating K.T. was comfortable in Darnell's presence and responded well to him.

children is not, by itself, sufficient to support a finding of detriment for purposes of section 361.2, subdivision (a)"].)

To be sure, the Department had continuing concerns about Darnell's apparently extensive use of marijuana and his failure to prove through drug testing that he was reducing that use, which was the basis for the court's orders restricting Darnell to monitored visits with K.T. But the court did not identify Darnell's marijuana use as a factor in its decision to deny his request for a home-of-parent order; and there was no evidence in the record that would support a finding that Darnell's substance use in any way negatively affected his parenting, let alone that it would imperil K.T.'s safety. (Cf. *In re L.W.*, *supra*, 32 Cal.App.5th at p. 849 [a parent's drug use, without more, does not support a finding of a substantial risk of serious physical harm sufficient for dependency jurisdiction].)

In sum, the court's order denying Darnell's request for placement of K.T. pursuant to section 361.2 is not supported by substantial evidence. On remand the court is to reconsider that request in light of Darnell's and K.T.'s current circumstances.

5. *The Court Has Discretion To Order Darnell To Participate in Drug Testing and Counseling*

The juvenile court has broad discretion under section 362, subdivision (a), to determine what best serves and protects the dependent child's interest and to fashion appropriate orders that further that interest, including orders that address conduct not alleged in the section 300 petition. (*In re Briana V.*, *supra*, 236 Cal.App.4th at p. 311; *In re I.A.*, *supra*, 201 Cal.App.4th at p. 1492.) Moreover, if on remand the court places K.T. with Darnell pursuant to section 361.2, subdivision (a), it may condition his custody of K.T. on supervision by the court and

order Darnell to participate in services that will "allow that parent to retain later custody without court supervision." (§ 361.2, subd. (b)(3).)

Accordingly, even though the evidence introduced at the jurisdiction/disposition hearing did not support a finding that Darnell had failed to protect K.T. from Tamika's mental and emotional instability or that placement of K.T. in his home would be detrimental to her safety or physical or emotional well-being because of Darnell's ongoing use of marijuana, on remand it would be well within the court's discretion to again order Darnell to participate in drug testing to protect K.T. from any inchoate dangers that may be related to her father's fluctuating levels of marijuana use and her potential exposure and access to marijuana in his home. (Cf. § 300.2 ["[t]he provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child"]; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 825 disapproved on another ground in *In re R.T.*, *supra*, 3 Cal.5th at p. 628.)[8] Similarly, in light of assessments that K.T. had experienced significant trauma from living with a mentally and emotionally unstable mother in a filthy and hazardous home environment,[9] it is reasonable for the court to require Darnell to participate in counseling "to address case issues" as a condition of K.T.'s placement in his home or an

---

[8] In its status review report for the six-month review hearing on November 20, 2019, the Department advised the court that Darnell had completed a 12-week parenting class. Accordingly, Darnell's challenge to this aspect of the disposition order is moot.

[9] K.T. is being treated for posttraumatic stress disorder, as well as for attention deficit hyperactivity disorder.

element of his reunification services if K.T. remains in her current suitable placement.

6. *On Remand the Department and the Juvenile Court Must Address ICWA Error*

a. *Governing law*

ICWA reflects a congressional determination to protect Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards a state court must follow before removing an Indian child from his or her family. (25 U.S.C. § 1902; see *In re Isaiah W.* (2016) 1 Cal.5th 1, 7-8; *In re W.B.* (2012) 55 Cal.4th 30, 47.) For purposes of ICWA, an "Indian child" is an unmarried individual under age 18 who is either a member of a federally recognized Indian tribe or is eligible for membership in a federally recognized tribe and is the biological child of a member of a federally recognized tribe. (25 U.S.C. § 1903(4) [definition of "'Indian child'"] & (8) [definition of "'Indian tribe'"]; see Welf. & Inst. Code, § 224.1, subd. (a) [adopting federal definitions].)

Notice to Indian tribes is central to effectuating ICWA's purpose, enabling a tribe to determine whether the subject of a dependency proceeding is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the matter. (*In re Isaiah W.*, *supra*, 1 Cal.5th at pp. 8-9.) Accordingly, ICWA requires that "[i]n any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe" of the pending proceedings and its right to intervene. (25 U.S.C § 1912(a).) Similarly, California law requires notice to the

parent, legal guardian or Indian custodian and the Indian child's tribe if the Department or court "knows or has reason to know . . . that an Indian child is involved" in the proceedings. (Welf. & Inst. Code, § 224.3, subd. (a); see Cal. Rules of Court, rule 5.481(b)(1) [notice is required "[i]f it is known or there is reason to know that an Indian child is involved in a proceeding listed in rule 5.480," which includes all dependency cases filed under section 300].)

The burden of developing information to determine whether an Indian child may be involved and ICWA notice required in a dependency proceeding does not rest entirely—or even primarily—on the child and his or her family. (*In re Michael V.* (2016) 3 Cal.App.5th 225, 233.) Juvenile courts and child protective agencies have "an affirmative and continuing duty to inquire" whether a dependent child is or may be an Indian child. (§ 224.2, subd. (a); *In re Isaiah W., supra*, 1 Cal.5th at pp. 9, 10-11; see Cal. Rules of Court, rule 5.481(a); see also *In re W.B.*, *supra*, 55 Cal.4th at pp. 52-53.) This affirmative duty to inquire is triggered whenever the child protective agency or its social worker "knows or has reason to know that an Indian child is or may be involved . . . ." (Cal. Rules of Court, rule 5.481(a)(4).) At that point, the social worker is required, as soon as practicable, to interview the child's parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to have information concerning the child's membership status or eligibility. (§ 224.2, subd. (e); Cal. Rules of Court, rule 5.481(a)(4); see *Kadence P.*, *supra*, 241 Cal.App.4th at p. 1386; *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1539.)

b. *The Department has conceded ICWA error*

In connection with the detention hearing on January 30, 2019, Tamika completed Judicial Council Forms, form ICWA-020, Parental Notification of Indian Status, stating, "I may have Indian ancestry through maternal grandmother." She wrote the Indian tribe was "unknown." The court questioned the maternal grandmother, who was present in court. The maternal grandmother said, based on what she had been told by her mother, she believed they were "Cherokee" but did not know the specific tribe, had never been to the reservation and did not know if her mother was a "card carrying member" of the tribe.

The court ordered the Department to investigate the matter further, including additional contact with the maternal grandmother, and to prepare a report for the April 10, 2019 jurisdiction/disposition hearing that included details of who had been interviewed and the dates and places of birth of relatives as far back as could be determined. Notwithstanding the order for additional inquiry, the court found, based upon the information received, it did not have reason to know that K.T. was an Indian child within the meaning of ICWA.

In its jurisdiction/disposition report for the hearing on April 10, 2019, the Department stated ICWA "does or may apply."[10] It noted, although Darnell had originally indicated he had no Indian ancestry, Darnell stated in a March 2019 interview he may have Blackfeet ancestry and would need to get further information on K.T.'s paternal lineage. There is no additional information in the record regarding any further investigation of Tamika's or Darnell's claims of possible Indian ancestry.

---

[10] The status review report for the six-month review hearing on November 20, 2019 again stated ICWA "does or may apply."

In his opening brief Darnell contends the juvenile court failed to ensure compliance with ICWA's inquiry and notice requirements. In its respondent's brief the Department (or at least its appellate counsel) concedes there were ICWA compliance errors—specifically, the Department acknowledges it did not fulfill its duty of inquiry, although expressly ordered to do so by the court; and agrees with Darnell the court did not fulfill its own duty of inquiry at the April 10, 2019 and May 22, 2019 jurisdiction/disposition hearing when it failed to follow up on the maternal family's claims and did not address Darnell's statement about his family's possible Indian ancestry.

Having conceded error, the Department's brief, filed September 26, 2019, states, "The Department and trial county counsel have been notified of the need to address the ICWA inquiry issues." In addition, the Department does not oppose a limited remand for the purpose of the completion of proper ICWA inquiries, indicating in its brief that "[o]n remand, to correct this error, the Department will investigate with mother and available maternal relatives whether [K.T.] might have Cherokee Indian ancestry, and will investigate with father and available paternal relatives whether [K.T.] might have Blackfeet Indian ancestry."

In a letter to all counsel on October 28, 2019 this court explained that correction of the now-conceded ICWA violations need not await resolution of other issues raised by Darnell's appeal and strongly suggested the ICWA compliance errors should be brought to the attention of the juvenile court at the six-month review hearing scheduled for November 20, 2019. Notwithstanding this advisement and appellate counsel's representation that trial county counsel and the Department had been notified at least one month earlier of the need to address the

ICWA inquiry issues, neither the Department's status review report, filed on November 7, 2019, nor the minute order from the review hearing on November 20, 2019 reflects any effort by the Department and the juvenile court to fulfill their important federal and state statutory obligations. This unexplained dereliction of duty is entirely unacceptable.

On remand the juvenile court must promptly direct the Department to conduct a meaningful and thorough investigation of Tamika's and Darnell's claims of possible Indian ancestry, including making genuine efforts to locate family members who might possess information bearing on K.T.'s possible Indian ancestry. If that investigation produces information substantiating Tamika's and/or Darnell's claims, notice must be provided to any tribe that is identified or, if the tribe cannot be determined, to the Bureau of Indian Affairs. The Department shall thereafter notify the court of its actions and file certified mail return receipts for any ICWA notices that were sent, together with any responses received. The court shall then determine whether the ICWA inquiry and notice requirements have been satisfied and whether K.T. is an Indian child. If she is, all further proceedings in this matter must be conducted in compliance with ICWA and related California law.

## DISPOSITION

The jurisdiction finding and disposition orders as to Darnell are reversed, and the matter remanded to the juvenile court for further proceedings consistent with this opinion, including compliance with the inquiry and notice provisions of ICWA and related California law and a determination pursuant to section 361.2, subdivision (a), in light of Darnell's and K.T.'s current circumstances, whether it would be detrimental to K.T.'s safety, protection or physical or emotional well-being to be placed in Darnell's home.

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.