Filed 10/16/18 In re Naomi F. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 NAOMI F., a Person Coming Under the Juvenile Court Law.	B286124 (Los Angeles County Super. Ct. No. CK69482)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JAMAL F., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, S. Patricia Spear, Judge (Retired Judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.). Dismissed.

Anne E. Fragasso, under appointment by the Court of Appeal, for Defendant and Appellant.

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

The juvenile court sustained a dependency petition pursuant to Welfare and Institutions Code section 300, subdivisions (b) (general neglect and failure to protect) and (j) (abuse of sibling),[1] alleging Rebecca R. and Jamal F., the mother and presumed father of Naomi F., had failed to provide proper care for Naomi due to Rebecca's use of marijuana and had inappropriately disciplined Naomi's half-brother by hitting him in the buttocks with a belt. The court ordered Naomi to remain in Rebecca's home and ordered family maintenance services, including requiring Jamal to drug test. On appeal Jamal argues the court's jurisdiction finding he hit Naomi's half-brother with a belt was not supported by substantial evidence. He also argues the court's order he submit to drug testing was an abuse of discretion and the court failed to adequately investigate his claim of Indian ancestry. Because we cannot grant Jamal any effective relief, we dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Petition*

On May 2, 2017, after Rebecca tested positive for methamphetamine, marijuana and opiates during a visit to urgent care, the Los Angeles County Department of Children and

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[1] Statutory references are to this code.

Family Services (Department) filed a nondetain dependency petition under section 300, subdivisions (b) and (j), pertaining to Naomi, now two years old, and her three half-siblings, A.R., now eight years old, T.F., now six years old, and A.F., now almost four years old.[2] On May 30, 2017 a first amended petition was filed under section 300, subdivisions (a), (b) and (j), alleging 11 separate counts. Under subdivision (a) the Department alleged, in two separate counts, that Rebecca and her boyfriend Jamal had physically abused A.R. by striking his buttocks with a belt. The first amended petition contained five counts under subdivision (b), alleging Rebecca had a history of substance abuse and was a current user of amphetamine, opiates and marijuana and Jamal knew or reasonably should have known of Rebecca's substance abuse; Jamal was a current abuser of marijuana and alcohol; Rebecca had a history of mental and emotional problems; and, repeating the allegations in subdivision (a), Rebecca and Jamal had hit A.R. with a belt. The four allegations under subdivision (j) repeated the (b) allegations, omitting only the allegation as to Jamal's substance abuse. The first amended petition alleged Jamal was the father of Naomi only.

At the detention hearing the court found Jamal was the presumed father of Naomi. The children were released to Rebecca and family maintenance services were ordered.

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[2] Rebecca is also the mother of two older children, who received permanent placement services in 2009 due to Rebecca's substance abuse and mental health issues. A.R. and T.F. were the subjects of a petition in 2012, which was dismissed in 2013, and of an additional petition in 2014, which was sustained and jurisdiction terminated in 2015. A.R., T.F., A.F. and Naomi were the subjects of another petition in 2016, which was dismissed three months prior to filing of the current case.

2. *The Jurisdiction and Disposition Hearing*

In reports prepared for the jurisdiction and disposition hearing the Department summarized interviews with the family. Jamal and Rebecca had known each other since 2014. Jamal did not live with Rebecca and the children but visited at least a few days a week. A.R. referred to Jamal as "dad."

Jamal admitted to the Department social worker he used medical marijuana approximately twice per week for dietary issues, insomnia and back pain from a car accident. He stated he never used marijuana around the children. Jamal had agreed to a voluntary, on-demand drug test in April 2017 prior to the filing of the petition. He had tested positive for low levels of marijuana and alcohol at that time. Rebecca also admitted to using medical marijuana for back pain. She tested positive for high levels of marijuana on nine tests between May and July 2017. T.F. reported she had seen Rebecca and Jamal roll cigarettes and smoke them in the garage or outside the house.

T.F. told a social worker Jamal would hit A.R. with a belt when he had hurt one of his sisters. T.F. also said Rebecca had hit A.R. with a belt. T.F. reported being scared of Jamal. Rebecca and Jamal denied ever hitting A.R. with a belt. When asked if Jamal ever hit him, A.R. changed the subject.

The jurisdiction/disposition hearing was held on August 22, 2017. After hearing arguments from counsel the court dismissed the counts alleging serious physical harm inflicted nonaccidentally under subdivision (a). The court also dismissed the subdivision (b) and (j) counts regarding Rebecca's mental health issues and the subdivision (b) count alleging Jamal was a

current abuser of marijuana and alcohol.[3] The court amended by interlineation the subdivision (b) and (j) counts regarding Rebecca's drug use to remove the allegations Rebecca was a current abuser of methamphetamine and opiates, but retained the allegations concerning her abuse of marijuana. Those counts were sustained as amended. Finally, the court sustained the subdivision (b) and (j) counts regarding Rebecca and Jamal's use of a belt to discipline A.R.

Proceeding to disposition the court ordered the children placed with Rebecca under the supervision of the Department. Jamal was ordered to participate in drug and alcohol counseling and to submit to six random or on demand drug tests. The court stated that, if Jamal were to miss any test or if his marijuana levels increased, he would be ordered to complete a full drug rehabilitation program.

Jamal filed a timely notice of appeal on September 1, 2017. Rebecca is not a party to this appeal.

3. *Termination of Jurisdiction*

On August 30, 2018, after briefing had been completed in this appeal, the juvenile court found the conditions justifying assumption of jurisdiction under section 300 no longer existed and terminated its jurisdiction over Naomi. Naomi was released

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[3] The court stated, "[A]s to father's alcohol and drug use . . . I'm going to dismiss that. I'm not happy with it, but I'll dismiss it. I think it is—mom is the primary caretaker. She is the one who is using an awful lot of marijuana, and I think it is interfering with her ability to take care of the children . . . ."

to the joint legal and joint physical custody of Rebecca and Jamal.[4]

DISCUSSION

1. *Jamal's Challenge to the Juvenile Court's Jurisdiction Finding Is Not Justiciable*

Jamal argues the juvenile court's jurisdiction finding he hit A.R. with a belt was not supported by substantial evidence, stating, "The court based its true findings on scant evidence that father had disciplined the half-siblings inappropriately, but there was no evidence to suggest such discipline had been frequent or was ongoing." Jamal does not challenge the court's findings Rebecca hit A.R. with a belt or the findings Rebecca abused marijuana and Jamal knew or should have known of that substance abuse. Those findings provide independent bases for affirming dependency jurisdiction over Naomi regardless of any alleged error in the findings as to Jamal's inappropriate discipline of A.R. (See *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 also *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 struck the jurisdiction findings as to Jamal's inappropriate discipline, the juvenile court would still be empowered to order all reasonable services necessary to protect Naomi, including services directed to Jamal and addressing

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[4] We take judicial notice of the juvenile court's minute order dated August 30, 2018 pursuant to Evidence Code sections 459 and 452, subdivision (d).

conduct not alleged in the petition or sustained by the court. (See *In re Briana V.*, at p. 311 ["The problem that the juvenile court seeks to address need not be described in the sustained section 300 petition. [Citation.] In fact, there need not be a jurisdictional finding as to the particular parent upon whom the court imposes a dispositional order"]; *In re I.A.*, at p. 1492 ["[a] jurisdictional finding involving the conduct of a particular parent is not necessary for the court to enter orders binding on that parent, once dependency jurisdiction has been established"]; 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"].) Thus, any order entered on Jamal's appeal "will have no practical impact on the pending dependency proceeding, thereby precluding a grant of effective relief." (*In re I.A.*, at p. 1491.)

Jamal urges us to consider his appeal on the merits, arguing the finding he inappropriately disciplined A.R. could have an adverse impact in any future dependency proceedings. In limited circumstances reviewing courts have exercised their discretion to consider a dependency appeal challenging a jurisdiction finding despite the existence of an independent and unchallenged ground for jurisdiction when the jurisdiction findings "could be prejudicial to the appellant or could impact the current or any future dependency proceedings" or "the finding could have consequences for the appellant beyond jurisdiction." (*In re J.C.* (2014) 233 Cal.App.4th 1, 4; see *In re D.P.* (2015) 237 Cal.App.4th 911, 917; *In re Drake M.* (2012) 211 Cal.App.4th 754, 763.)

Jamal has failed to identify any specific prejudice or adverse consequence that could possibly flow from the

jurisdiction findings in this case. Any future dependency proceeding would have to be based on conditions existing at that time. A past jurisdiction finding would have limited, if any, relevance and does not create a high risk of prejudice. (See *In re I.A., supra,* 201 Cal.App.4th at p. 1495.) Because Jamal has not established any actual or threatened prejudice from the jurisdiction finding as to him, we dismiss his appeal as to that finding on the ground there is no justiciable controversy for which we can grant any effective relief. (*In re Briana V., supra,* 236 Cal.App.4th at pp. 309-310; *In re J.C., supra,* 233 Cal.App.4th at p. 4; *In re I.A.*, at p. 1492.)

2. *Jamal's Challenge to the Disposition Order Is Moot*

Jamal challenges the portion of the disposition order requiring him to drug test, contending the allegation regarding his drug use had been dismissed and there was no nexus between his drug use and the sustained counts in the petition. The juvenile court's recent termination of jurisdiction and return of Naomi to her parents render Jamal's contention moot. Jamal is no longer subject to the juvenile court's order to submit to drug testing. Accordingly, we cannot provide any effective relief. (See *In re A.B.* (2014) 225 Cal.App.4th 1358, 1364 ["'[w]hen no effective relief can be granted, an appeal is moot and will be dismissed"']; *In re Dani R.* (2001) 89 Cal.App.4th 402, 404 ["'[A]n action that originally was based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. A reversal in such a case would be without practical effect, and the appeal will therefore be dismissed"'].)

3. *Jamal's Contention the Department Failed To Investigate His Claim of Indian Ancestry Is Moot*

On May 2, 2017 Jamal submitted a Judicial Council form ICWA-020, Parental Notification of Indian Status, checking the box stating, "I may have Indian ancestry." Jamal did not indicate any specific tribes of which he may be a descendent. During the detention hearing on that date Jamal explained to the court that he was a descendent of two tribes on each side of his family, but he did not have any other information. The court ordered the Department to investigate. Jamal subsequently provided the Department with contact information for his grandmother. He attempted to provide contact information for his father, but had been unable to reach him. At the hearing on May 30, 2017 the court ordered the Department to continue its investigation and to give notice to the Bureau of Indian Affairs (BIA) and the Secretary of the Interior. The Department's status review report dated August 22, 2017 stated ICWA did not apply to this case. No further information regarding the results of the Department's inquiry was provided, nor did the report contain copies of any ICWA notices sent by the Department.

The Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) 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 (*Isaiah W.*); *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 § 224.1, subd. (a) [adopting federal definitions].)

As the California Supreme Court explained in *Isaiah W.*, notice to Indian tribes is central to effectuating ICWA's purpose, enabling a tribe to determine whether the child involved in a dependency proceeding is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the matter. (*Isaiah W.*, *supra*, 1 Cal.5th at p. 8.) Notice to the parent or Indian custodian and the Indian child's tribe is required by ICWA in state court proceedings seeking foster care placement or termination of parental rights "where the court knows or has reason to know that an Indian child is involved." (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 in accordance with section 224.2, subdivision (a)(5), if the Department or court "knows or has reason to know that an Indian child is involved" in the proceedings. (§ 224.3, subd. (d); see *In re Breanna S.* (2017) 8 Cal.App.5th 636, 649; *In re Michael V.* (2016) 3 Cal.App.5th 225, 232; 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].)

Once an agency has reason to know a child may be an Indian child, it has the duty to "make further inquiry as soon as practicable by" "[i]nterviewing the parents, Indian custodian, and 'extended family members' as defined in 25 United States Code section[s] 1901 and 1903(2), to gather the information listed in

[section] 224.2(a)(5)." (Cal. Rules of Court, rule 5.481(a)(4)(A); see § 224.3, subd. (c) [requiring social workers "to make further inquiry regarding the possible Indian status of [a] child" once the court or social worker knows or has reason to know an Indian child is involved in a child custody proceeding]; *In re Robert A.* (2007) 147 Cal.App.4th 982, 989 [a "'social worker has "a duty to inquire about and obtain, if possible, all of the information about a child's family history"' required under regulations promulgated to enforce ICWA"].) When, as was the case here, no tribal name has been provided, the agency must pursue all reasonable investigative leads to determine the child's Indian ancestry, if any. (See *Isaiah W.*, *supra,* 1 Cal.5th at pp. 9, 10-11 [emphasizing the affirmative and continuing nature of the child protective agencies' duty to inquire whether a child in dependency proceedings may be an Indian child].) If the court has reason to know an Indian child may be involved in the pending dependency proceeding but the identity of the child's tribe cannot be determined, ICWA requires notice be given to the BIA. (25 U.S.C. §§ 1903(11), 1912(a); see *Isaiah W.,* at p. 8; *In re Breanna S., supra*, 8 Cal.App.5th at p. 650, fn. 7.) California has a similar notice requirement. (§ 224.2, subd. (a)(4); *Isaiah W.*, at p. 9.)

Jamal argues the Department failed to comply with the inquiry and notice requirements of ICWA because there is no record the Department attempted to contact Jamal's relatives or provided notice to the BIA or the Secretary of the Interior. The Department agrees remand is appropriate to allow further investigation into Jamal's claims of Indian ancestry.

Despite the Department's concession, we decline to remand because the issue is moot. As discussed, ICWA applies when a

child may be placed in foster care. (See *In re Jennifer A.* (2002) 103 Cal.App.4th 692, 700 [ICWA applies where the "issue of possible foster care placement was squarely before the juvenile court"]; see also 25 U.S.C. § 1903(1)(i) [ICWA applies to a "child custody proceeding" in which an Indian child may be removed from its parent for temporary placement in a foster home or institution and where the parent cannot have the child returned upon demand].) Once the juvenile court placed Naomi in her parents' custody and terminated jurisdiction over her, the prospect of out-of-home placement and, therefore, the applicability of ICWA, ceased. (See *In re J.B.* (2009) 178 Cal.App.4th 751, 760 ["the legislative intent behind ICWA expressly focuses on the removal of Indian children from their homes and parents, and placement in foster or adoptive homes," italics omitted]; *In re Alexis H.* (2005) 132 Cal.App.4th 11, 15 [ICWA's purpose does not come into play if an Indian child is not placed with another family].)

DISPOSITION

The appeal is dismissed.

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.