Filed 2/9/17 In re K.M. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re K.M., a Person Coming Under the Juvenile Court Law.	B272247 (Los Angeles County Super. Ct. No. DK13013)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RICHARD H., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Julie Fox Blackshaw, Judge. Affirmed.

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

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Brian Mahler, Deputy County Counsel, for Plaintiff and Respondent.

Valerie N. Lankford, under appointment by the Court of Appeal, for the Minor.

Richard H. (father) appeals from a dispositional order prohibiting contact between himself and his son, K.M. (born Jan. 2010). (Welf. & Inst. Code, § 362.1.)[1] He raises two arguments on appeal: (1) the juvenile court abused its discretion in ordering no contact because there was an insufficient showing of detriment and barring all contact would preclude meaningful reunification; and (2) the Department of Children and Family Services (DCFS) and juvenile court failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA).

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This family consists of father, Felicia M. (mother),[2] and K.M.

Detention

On August 24, 2015, DCFS filed a petition on behalf of K.M. pursuant to section 300, subdivision (b). The petition alleged physical abuse inflicted by mother's current boyfriend and mother's substance abuse.

At the detention hearing, mother informed the juvenile court that father was incarcerated in Pennsylvania, that he claimed to have Indian ancestry, which she disputed, and that she had no Indian ancestry. The juvenile court deferred ICWA findings as to father until he made his first appearance in the proceedings. K.M. was detained from mother and both parents were granted monitored visitation, although it ordered that father could not have any visits until he contacted DCFS.

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

[2] Mother is not a party to this appeal.

Jurisdiction/Disposition Report (Oct. 15, 2015)

DCFS interviewed mother in early October 2015. She denied that father had any Indian ancestry and identified the paternal grandparents as Sherry and Richard.

She also described father's violent abusive actions towards her and K.M. When mother and father lived in Pennsylvania, father repeatedly hit mother and once took K.M. from her. Then father was incarcerated and mother and K.M. moved to California. Sometime in 2013, father was released from incarceration and joined mother and K.M. The parents proceeded to use drugs together, and father was again abusive to mother. According to mother, when father used drugs, he acted like "the devil." In 2015, father struck mother, broke her nose, and locked K.M. in a hotel room for 45 minutes. During the incident, father was yelling and screaming and breaking things. K.M. was right next to mother when the assault occurred. Police were called and father was arrested on charges of corporal battery to a spouse and willful cruelty to a child.

In October 2015, K.M. was diagnosed with Post Traumatic Stress Disorder and began receiving mental health services to decrease his anxiety and acquire coping skills to deal with his past trauma.

DCFS recommended that father not have any contact with K.M. until father contacted DCFS, and only monitored contact thereafter.

First Amended Petition (Oct. 15, 2015)

On October 15, 2015, DCFS filed its first amended petition on behalf of K.M. The amended petition modified some language in the original petition and added allegations that father had a longstanding history of violence, had an unresolved and illicit substance abuse problem, had related convictions for

which he was currently incarcerated out of state, and was unable to arrange care for his child.

ICWA Parental Notification Forms

On December 27, 2015, and January 8, 2016, father completed two Judicial Council forms ICWA-020, titled "Parental Notification of Indian Status." Father reported that (1) K.M. may be affiliated with a Cherokee tribe, (2) Richard (the paternal grandfather) was a member of the Cherokee tribe, (3) the paternal great-grandfather (no name provided) may have been a member of the Cherokee tribe, (4) the paternal great-grandmother, Peggy H. (Peggy), is or was a member of a Cherokee tribe, and (5) a paternal aunt, Cherie H. (Cherie), had more information about Peggy's reported membership. The only contact information provided by father in these forms was a telephone number for Cherie.

Adjudication (Jan. 12, 2016, and Feb. 11, 2016)

Mother appeared at the hearing on the adjudication of the amended section 300 petition. Father remained incarcerated in Pennsylvania.

Mother pleaded no contest.

The trial court continued the adjudication hearing to February 11, 2016.

At the continued hearing, father remained incarcerated, but appeared by telephone. The juvenile court sustained the amended petition, ordered K.M.'s counsel to obtain a report from K.M.'s therapist, and ordered DCFS to further inquire as to K.M.'s possible Indian status and send notice to the Cherokee tribes.

ICWA Tribal Notice Forms

On March 7, 2016, DCFS completed Judicial Council form ICWA-030, titled "Notice of Child Custody Proceeding for Indian Child." The form listed

(1) K.M.'s name, birth date, and place of birth; (2) information about the upcoming disposition hearing; (3) the parents' respective names, birth dates, places of birth, and current addresses; (4) mother's indication that she had no Indian ancestry; (5) father's indication that the paternal grandfather and both paternal great-grandparents had Cherokee ancestry; and (6) the respective names of the paternal grandparents and the paternal great-grandmother. Other information about these family members, such as additional names, birth dates, places of birth, and addresses, was listed as "Unknown."

DCFS mailed copies of the form and the amended section 300 petition to mother, father, the Sacramento Area Director of the Bureau of Indian Affairs, the United States Secretary of the Interior, and three recognized Cherokee tribes (Cherokee Nation of Oklahoma, Eastern Band of Cherokee, and United Keetoowah Band of Cherokee).

Disposition (Mar. 7, 2016)

Father remained incarcerated at the time of the disposition hearing and was not present. Mother testified at the hearing regarding the requested no contact order as to father. She stated that during a visit with K.M. the day before, he told her that he was scared of father and did not want to see him. K.M. did not know father very well, but what he did know about him was that he was violent. K.M. had seen father beat up mother and had been locked in a hotel room by father.

Regarding the incident when father broke mother's nose, K.M. was present at the time and had tried to pull father off of mother.

The parties stipulated that K.M. would testify that he had no desire to have any contact with father.

Based upon this evidence, the juvenile court removed K.M. from both parents, granted mother continued monitored visitation with K.M., and ordered no contact between K.M. and father. In so ruling, the juvenile court found "by clear and convincing evidence that there would be a substantial detriment to [K.M.'s] physical health, safety, protection, or physical or emotional well-being" if he were to have contact with father. The juvenile court's finding was supported by both K.M.'s fear of father and the facts. After all, as the juvenile court noted, during "the short few months that he did know his father, K.M. was subjected to violence at the hand of the father by being locked in a room, being screamed at, being yelled at. He also witnessed incredible violence by the father against the mother where her nose was broken."

The juvenile court then scheduled a hearing to address whether ICWA applied.

Receipt of ICWA Tribal Notice Forms

Between March 11 and 17, 2016, DCFS received certificates of receipt indicating that the ICWA forms had been received by all, except mother.[3] On March 11, 2016, the United Keetoowah Band of Cherokee notified DCFS that the tribe had searched its enrollment records and found no evidence that K.M. descended from "anyone on the Keetoowah roll."

Last Minute Information for the Court (Apr. 6, 2016)

DCFS advised the juvenile court that it had interviewed mother, who stated that father did not have any Indian ancestry. DCFS attempted to contact Cherie on January 29, 2016, and March 5, 2016, using the telephone number that father provided in his ICWA parental notification forms; no one

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[3] Mother's letter was marked "return to sender; insufficient address; unable to forward."

answered these telephone calls and DCFS left messages both times. As of the date of DCFS's report, DCFS had not received any response to those messages. DCFS did contact a maternal great-aunt named Connie D. (Connie) on January 29, 2016. She reported that she did not have any contact information for Cherie, who was on the other side of the family.

ICWA Hearing (Apr. 6, 2016)

At the progress hearing, the juvenile court found that there was no reason to know if this was an ICWA case. The juvenile court noted that there were pending ICWA notices from two other tribes. Thus, it scheduled a second ICWA hearing for May 16, 2016.

Appeal

On April 14, 2016, father timely filed a notice appeal.

DISCUSSION

I. *No Contact Order*

Father challenges the juvenile court's no contact order.

A. Standard of review

In reviewing a juvenile court's order regarding visitation, some appellate courts have applied the abuse of discretion standard and some have applied the substantial evidence standard. (*In re Brittany C.* (2011) 191 Cal.App.4th 1343, 1356; *In re Mark L.* (2001) 94 Cal.App.4th 573, 577.) The practical differences between these two standards are not significant. "'[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only "'if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that [she] did.' . . .'"' (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) It is

the appellant's burden to affirmatively show error. (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

B. Relevant law

Under section 362.1, subdivision (a), visitation for a child with his parent is a mandatory element of the reunification plan with the single exception that "[n]o visitation order shall jeopardize the safety of the child." (§ 362.1, subd. (a)(1)(B); see *In re S.H.* (2003) 111 Cal.App.4th 310, 317, fn. 9.)

C. Analysis

Based upon the evidence presented here, the juvenile court had more than sufficient evidence to order no contact between K.M. and father. Father has an extensive criminal history in California and Pennsylvania that includes violent and assaultive behavior. After father was released from prison, he lived with mother and K.M. in California for a few short months until father's abusive behavior caused mother to leave. During the time that they lived together, father used drugs and, when he did so, he became "crazy . . . like the devil." K.M. was in the room and witnessed father hit mother and break her nose. He tried to pull father off of mother. Father locked K.M. in a hotel room for 45 minutes while father screamed, yelled, and threw things. These incidents led to father's arrest for spousal battery and willful cruelty to a child.

During a visit between mother and K.M. the day before the disposition hearing, K.M. said that he was scared of father and did not want to see him. But, the juvenile court did not base its no contact order on K.M.'s wishes alone, as father suggests. Rather, that rightly was just one component of the juvenile court's decision. (*In re Julie M.* (1999) 69 Cal.App.4th 41, 50–51.)

The fact that the juvenile court did not have any input from K.M.'s therapist at the time the no contact order was made is irrelevant. The

juvenile court had evidence of father's violent tendencies, which is sufficient to sustain the juvenile court's finding of detriment.

Finally, father urges reversal on the grounds that the juvenile court did not consider other options for either limited monitored therapeutic visitation by telephone or written communication facilitated in a therapeutic setting. What father is asking is for this court to reweigh the evidence and make a different finding, which we cannot and will not do. (*In re R.V.* (2012) 208 Cal.App.4th 837, 847.)

II. *ICWA*

"The ICWA, enacted by Congress in 1978, is intended to 'protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.' [Citation.] 'The ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource.' [Citation.]

"'The ICWA confers on tribes the right to intervene at any point in state court dependency proceedings. [Citations.] "Of course, the tribe's right to assert jurisdiction over the proceeding or to intervene in it is meaningless if the tribe has no notice that the action is pending." [Citation.] "Notice ensures the tribe will be afforded the opportunity to assert its rights under the [ICWA] irrespective of the position of the parents, Indian custodian or state agencies." [Citation.]' [Citation.]" (*In re Karla C.* (2003) 113 Cal.App.4th 166, 173–174; see also *In re H.A.* (2002) 103 Cal.App.4th 1206, 1210.)

The ICWA contains the following notice provision: "In 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 the 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, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided,* That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding." (25 U.S.C. § 1912(a).)

The juvenile court and DCFS "have an affirmative and continuing duty to inquire whether a child . . . is or may be an Indian child." (§ 224.3, subd. (a); Cal. Rules of Court, rule 5.481(a).) That inquiry includes, inter alia, interviewing the parents and extended family members to gather as much information as reasonably possible in order to satisfy the ICWA. (Cal. Rules of Court, rule 5.481(a)(4).)

Consistent with the foregoing principles, DCFS and the juvenile court satisfied their duty. Father provided only limited information to DCFS. He gave DCFS the name (Cherie) of a paternal aunt and her telephone number. DCFS twice attempted to reach Cherie at that telephone number. No one answered theses calls; DCFS left messages; no one responded to DCFS's messages. In addition, DCFS contacted Connie, a maternal great-aunt, but she did not have any contact information for Cherie.

Despite this limited information, DCFS was able to notify three Cherokee tribes of these proceedings. The ICWA notice provided enough

information for the tribes to investigate and determine if K.M. were a tribe member or eligible for membership. (See, e.g., *In re Karla C.*, *supra*, 113 Cal.App.4th at p. 175.) Any technical defects in the notice were harmless because the tribes indicated that they would not intervene. (See, e.g., *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413–1414 & fn. 4.) By the time of the April 6, 2016, hearing, the juvenile court learned that the United Keetoowah Band of Cherokee Indians had no record of K.M.'s ancestry and no intent to intervene in these proceedings. And, while this appeal was pending, the juvenile court received responses from the other two tribes, prompting it to find that it did "not have a reason to know that [K.M. was] an Indian Child."[4]

The tribes determined that K.M. was not a tribe member or eligible for tribal membership, which is the purpose of ICWA. Under ICWA, the tribe has the definite word, and its determination is conclusive. (§ 224.3, subd. (e)(1).)

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[4] An agency's alleged failure to comply with ICWA notice requirements may be cured while an appeal is pending. (See *Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 866–867 [augmented record showed proper notice sent to tribes]; *In re Christopher I.* (2003) 106 Cal.App.4th 533, 564–565 [failure to give notice harmless where no evidence child had Indian heritage]; *In re S.M.* (2004) 118 Cal.App.4th 1108, 1117, fn. 5.) We take judicial notice of the juvenile court's May 16, 2016, minute order, a hearing that occurred after father filed his appeal. While we rarely review evidence for the first time on appeal, we do so in this case because the document does not require that we resolve factual issues or substitute our judgment for that of the juvenile court. (Code Civ. Proc., § 909; *In re Louis S.* (2004) 117 Cal.App.4th 622, 630, fn. 4.)

DISPOSITION

The juvenile court's order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

CHAVEZ, J.

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