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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re O.M. et al., Persons Coming Under
the Juvenile Court Law.

B254946

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. CK82691)

Plaintiff and Respondent,

v.

D.B. et al.,

Defendants and Appellants.

APPEAL from orders of the Superior Court of Los Angeles County. Rudolph Diaz, Judge. Affirmed in part; reversed in part; remanded with directions.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant D.B.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant and Appellant C.H.

Mark J. Saladino, County Counsel, Dawyn R. Harrison, Assistant County Counsel, Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

The juvenile court declared 14 year old O.M. and 4 year old J.B. dependent children of the court under Welfare and Institutions Code section 300, subdivisions (b) and (c) and removed them from their parents' custody. D.B. (Father), the father of J.B., appeals the court's jurisdictional findings as to him and its removal of J.B. from his physical custody. C.H. (Mother), the mother of both children, contends the cause must be remanded as to O.M. so that the Department of Children and Family Services (DCFS) can comply with the notice and inquiry provisions of the Indian Child Welfare Act (ICWA).¹

We reverse the jurisdictional and dispositional findings as to Father and remand the cause to the juvenile court with directions to consider J.B.'s placement with Father as a nonoffending custodial parent under Welfare and Institutions Code section 361, subdivision (c)(1). The jurisdictional and dispositional findings as to Mother are affirmed and the cause is remanded to the juvenile court with directions to order DCFS to comply with the inquiry and notice provisions of the ICWA as to O.M., if it has not already done so. If after proper inquiry and notice the court determines that the provisions of ICWA apply to O.M., her parents may petition the juvenile court to invalidate orders that violated that statute.

FACTS AND PROCEEDINGS BELOW

In November 2013, DCFS removed O.M. and J.B. from the home they shared with Mother and Father based on Mother's conduct, including drug use and keeping a loaded gun in the home in reach of the children.

At a contested hearing in 2014, the court found jurisdiction over the children under Welfare and Institutions Code section 300, subdivisions (b) and (c)², based on Mother's conduct described above. With regard to Father's conduct, involving alleged domestic violence, the court found jurisdiction under subdivision (b) only. Mother does not

¹ A.M., the father of O.M., is not a party to this appeal.

² All statutory references are to the Welfare and Institutions Code.

challenge the court's finding of jurisdiction over the children based on her conduct. Therefore, we only address whether substantial evidence supports jurisdiction based on Father's conduct in the home when the children were present.³

The evidence at the jurisdictional hearing showed that during an argument in 2009 Father struck Mother in the face causing her a black eye. There was no evidence that either child witnessed this battery. In 2013, during an argument, Mother locked Father out of their apartment and Father punched his fist through a glass kitchen window to try to gain entry. O.M. was in the living room when this happened and Juliet was asleep during the incident. In 2012, O.M. twice saw Father hit the wall of their apartment during arguments with Mother. O.M. testified that it scared her when Father did this but all in all Father was "a pretty decent guy," "pretty peaceful" and "not aggressive." In her opinion, her half-sister, J.B., would be safe living with him.

On the basis of this evidence with respect to Father the court found, under section 300, subdivision (b), that Father and Mother "have a history of engaging in violent altercations in the children's home" and that "[s]uch violent conduct on the part of [Father and Mother] endanger[s] the children's physical health and safety and places the children at risk of physical harm, damage and danger."

The court removed the children from their parents' custody and ordered DCFS to find them suitable placements. Father was ordered to participate in drug and alcohol

³ Respondent contends that we need not consider Father's challenge to the jurisdictional findings as they relate to him because, even if his challenge is successful, the children would remain dependents of the court based on the unchallenged findings against Mother. We reject this contention. In this case, of course, a reversal may result in JB being placed with father. In any case, erroneous jurisdictional findings as to Father could also affect him adversely in the future if dependency proceedings were again initiated or even contemplated with regard to these children or with regard to his future children, if any. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763.) Moreover, refusal to address such jurisdictional errors on appeal "has the undesirable result of insulating erroneous or arbitrary rulings from review." (*In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1548.) For these reasons we will address Father's challenge to the jurisdictional finding as to him.

testing based on a previous dependency case involving both parents' substance abuse and to enroll in a domestic violence intervention program and individual counseling. The court further ordered that Father be allowed monitored visits with his daughter J.B.

DISCUSSION

I. THERE IS INSUFFICIENT EVIDENCE THAT FATHER'S TEMPER POSED A SUBSTANTIAL RISK OF HARM TO THE CHILDREN.

Section 300, subdivision (b) authorizes jurisdiction if a 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 the parent to adequately supervise or protect the child. "[T]he statutory definition consists of three elements: (1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) 'serious physical harm or illness' to the minor, or a 'substantial risk' of such harm or illness." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) In *Rocco M.* the court emphasized that before the juvenile court can exercise jurisdiction under subdivision (b) "there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness." (*Id.* at p. 823.)

We review the court's finding of a risk of harm for substantial evidence. (*In re Isabella F.* (2014) 226 Cal.App.4th 128, 137.) Under this test, a decision supported by a mere scintilla of evidence will not be affirmed. The term "substantial evidence" is not synonymous with "any evidence." If the word "substantial" is to mean anything at all it clearly implies that the evidence be of "ponderable legal significance . . . reasonable in nature, credible, and of solid value.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Finally, while substantial evidence may consist of inferences, such inferences must be the product of logic and reason; inferences that are the result of mere speculation or conjecture cannot support a finding. (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.)

Appellate courts have consistently held that a juvenile court cannot exert jurisdiction under section 300, subdivision (b) unless there is substantial evidence at the time of the jurisdictional hearing that a parent poses a substantial risk of serious physical

harm to the child. We so held in *In re Daisy H.* (2011) 192 Cal.App.4th 713, 717. This rule stems from the final provision of subdivision (b) which states: “The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness.”

Although we do not condone or excuse Father’s physical violence against Mother in the past, we believe that the single act of battery committed by Father on Mother outside the presence of the children four years before the jurisdictional hearing is too remote to support a finding that Father poses a present substantial risk of harm to the children. (Cf. *In re Daisy H.*, *supra*, 192 Cal.App.4th at p. 717 [a single act of physical violence between the parents occurred at least two years prior to the petition].)

The only other evidence in support of jurisdiction consisted of a few displays of temper in which Father punched a wall or a window. The evidence fails, however, to show a nexus between Father’s anger and a risk of harm to the children. There was no evidence that Father ever targeted his anger at the children or that his temper blinded him to the well-being of the children, neither of whom were in the vicinity of the two instances of loss of temper. DCFS failed to show anger of a frequency, duration or quality that would indicate the children lived in an environment that exposed them to, or threatened them with, “a substantial risk” of “serious physical harm or illness.” (§ 300, subd. (b).)

Based on the record before us we conclude that the court’s determination O.M. and J.B. were at a substantial risk of serious physical harm caused by Father is not supported by substantial evidence.

Our conclusion that there is insufficient evidence to base dependency jurisdiction on Father’s conduct means that Father is a nonoffending custodial parent and may be entitled to physical custody of his daughter, J.B., under section 361, subdivision (c)(1). That section states in relevant part: “A dependent child may not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and

convincing evidence of any of the following circumstances listed in paragraphs (1) to (5), inclusive[.] (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody. . . . The court shall consider, as a reasonable means to protect the minor," each of the following: (A) "[T]he option of removing an offending parent or guardian from the home." (B) "[A]llowing a nonoffending parent or guardian to retain physical custody as long as that parent or guardian presents a plan acceptable to the court demonstrating that he or she will be able to protect the child from future harm."

We note that there is already evidence before the court that "Mother has agreed to move out of the residence in order for [J.B.] to be returned home to her dad."

The matter of the custody of J.B. will be remanded to the juvenile court for a determination of custody under section 361, subdivision (c)(1).

II. MOTHER IS ENTITLED TO A LIMITED REMAND SO THAT DCFS CAN COMPLY WITH THE ICWA NOTICE REQUIREMENTS.

Mother contends that the cause as to O.M. must be remanded to the juvenile court because DCFS did not fully comply with ICWA's inquiry and notice requirements. DCFS does not oppose a limited remand in order for it to interview O.M.'s paternal great-grandfather about O.M.'s possible Cherokee heritage and to give additional notice if necessary and for the court to make an appropriate finding under ICWA. We will so order.

Mother is not, however, entitled to a reversal of the court's jurisdiction and disposition orders as to O.M. because the court has not terminated Mother's parental rights. (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 186-188.)

DISPOSITION

The jurisdictional and dispositional findings as to Father are reversed and the cause is remanded to the juvenile court with directions to consider J.B.'s placement with Father under Welfare and Institutions Code section 361, subdivision (c)(1).

The jurisdictional and dispositional findings as to Mother are affirmed and the cause is remanded to the juvenile court with directions to order DCFS to comply with the inquiry and notice provisions of the ICWA as to O.M., if it has not already done so. If after proper inquiry and notice the court determines that the provisions of ICWA apply to O.M., her parents are entitled to petition the juvenile court to invalidate orders that violated ICWA. (Cal. Rules of Court, rules 5.481 & 5.482.)

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ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.*

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