Filed 4/24/14 In re Gabriel R. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re GABRIEL R., A Person Coming Under the Juvenile Court Law.	B250727 (Los Angeles County Super. Ct. No. CK99139)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. C.R., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Jacqueline H. Lewis, Judge. Reversed and conditionally remanded.

Jack A. Love, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, William D. Thetford, Deputy County Counsel, for Plaintiff and Respondent.

The juvenile court sustained a multi-count petition in which the Los Angeles County Department of Children and Family Services (DCFS or the department) alleged Gabriel R., age two, was put at risk of physical harm by Debbie R.'s (mother's) substance abuse and domestic violence perpetrated against mother by C.R. (father). The juvenile court detained the minor from mother and declined to place him with father pursuant to Welfare and Institutions Code sections 300, subdivision (b), and 361.2, subdivision (a).[1] Father challenges the jurisdictional and dispositional finding made as to him only, specifically that his history of domestic violence toward mother put the child at substantial risk of physical harm. Father also contends the court failed to make a proper inquiry to determine whether the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901, et seq.; ICWA) applied, a point DCFS concedes.

We conclude substantial evidence supports the jurisdictional and dispositional findings, but the juvenile court failed to make proper inquiries under the ICWA. Accordingly, we reverse the jurisdictional and dispositional orders and remand the matter for the limited purpose of investigating whether Gabriel has Indian heritage.

FACTS AND PROCEEDINGS BELOW

The family in this case consists of father, mother, Gabriel R., Gabriel's two half sisters, and their father. Only father is a party to this appeal. Mother and Gabriel often visited father, but mother and father did not live together and father never had custody of Gabriel.

On April 19, 2013, mother was arrested for driving under the influence of methamphetamine with Gabriel and another child in the car, unrestrained. The trial court found jurisdiction over Gabriel under section 300, subdivision (b) based on this arrest and mother's substance abuse. Father does not dispute this finding or the court's jurisdiction.

The court also found jurisdiction over Gabriel under section 300, subdivision (b) based on the following evidence:

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[1] Unspecified section references will be to the Welfare and Institutions Code.

A.G., Gabriel's fifteen-year-old half sibling, reported to social workers that mother seemed to be afraid of father and, after visits with father, would have bruises on her arms that she explained by stating a car door hit her. When family members would refuse to tell father where mother was, he would text them, saying he was going to kill himself. He verbally berated and denigrated mother, and, A.G. reported, a four-year-old family member told her he had seen father hit mother's mother, the maternal grandmother.

G.G., Gabriel's twelve-year-old half sibling, said mother always had bruises on her arms, thighs and legs, which she would explain as having been caused by a screen door or car door, or by her having bumped into a dresser. G.G. said father was always breaking mother's telephone and would yell at mother that Gabriel was not his son.

Both A.G. and G.G. reported they were afraid of father.

Monica G., an adult half sibling, confirmed A.G.'s report about father's text messaging and G.G.'s report about father breaking mother's telephone.

The maternal grandmother confirmed the children's reports about mother's bruises and reported father would leave voice messages cursing mother and calling her disgusting names.

Father disclosed that he was arrested for domestic violence in 2002 but attended counseling, resulting in the charges being dismissed. Father denied any domestic violence between him and mother and denied ever seeing bruises on mother.

Mother initially denied any domestic violence occurred between her and father, but upon further questioning by a social worker admitted father would get angry for no reason and become loud and aggressive, and had become violent on more than one occasion, including slapping mother's face in early 2013. The children did not witness the violence, but were in another room when it occurred. Mother stated father was jealous of the half siblings' father, and had threatened her. She was afraid of him. Mother also reported father had never hurt Gabriel R., but when asked who father would take out his anger on when mother, who was now incarcerated, was absent, mother said, "I know. I know what you're saying." Further investigation by DCFS revealed father's 2002 arrest actually resulted in a conviction for domestic violence. The police report

stated his victim had said father would become very upset when the victim went to her husband's home to pick up her daughter, and that was the cause of many of their arguments. He was ordered to complete a 52-week domestic violence program, but for years failed to do so, resulting in probation violations in 2003, 2004, 2005 and 2007. Father finally completed the program in 2008.

DCFS recommended against placing Gabriel with father, and recommended he be ordered to complete another 52-week domestic violence program, a parenting program, and individual counseling.

At the adjudication and disposition hearing, the juvenile court stated it believed the statements of A.G., G.G., mother and the maternal grandmother. The court found father's domestic violence toward mother put Gabriel R. at substantial risk of physical harm, and ordered the child placed in a foster home, with monitored visits and family reunification services. The court ordered father to complete a 52-week domestic violence program and participate in individual counseling.

Father appealed the jurisdictional finding as to him (not as to mother) and the disposition. We invited the parties to provide supplemental briefing regarding the scope of father's contentions, and both did so. We have considered these and all other briefs.

DISCUSSION

1. Standard of Review

"On appeal, the 'substantial evidence' test is the appropriate standard of review for both the jurisdictional and dispositional findings. [Citations.] The term 'substantial evidence' means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion; it is evidence which is reasonable in nature, credible, and of solid value. [Citation.]" (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1433.) "In making this determination, all conflicts are to be resolved in favor of the prevailing party, and issues of fact and credibility are questions for the trier of fact. [Citation.] In dependency proceedings, a trial court's determination will not be disturbed unless it exceeds the bounds of reason. [Citation.]" (*In re Ricardo L.* (2003) 109 Cal.App.4th 552, 564.)

2. Jurisdiction over Gabriel R. under subdivision (b) based on father's domestic violence was supported by substantial evidence.

Father contends insufficient evidence supported the juvenile court's assertion of jurisdiction under subdivision (b) pertaining to his domestic violence. We disagree. As amended, count b-4 of the petition alleges that father "has a history of violent and assaultive behavior" and on prior occasions "slapped [mother] on the face" and caused "bruises on the mother's arms and face," which "endangers the child's physical health, safety and well being, creates a detrimental home environment and places the child . . . at risk of physical harm . . . ."

A child comes within the jurisdiction of the juvenile court under subdivision (b) of section 300 if he or she "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 . . . ." "[D]omestic violence in the same household where children are living . . . is a failure to protect [the children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it." (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194.) Children can be "put in a position of physical danger from [spousal] violence" because, "for example, they could wander into the room where it was occurring and be accidentally hit by a thrown object, by a fist, arm, foot or leg . . . ." (*Ibid*.)

"Both common sense and expert opinion indicate spousal abuse is detrimental to children." (*In re Benjamin D.* (1991) 227 Cal.App.3d 1464, 1470, fn. 5; see *In re Sylvia R.* (1997) 55 Cal.App.4th 559, 562; Fields, *The Impact of Spouse Abuse on Children and Its Relevance in Custody and Visitation Decisions in New York State* (1994) 3 Cornell J.L. & Pub. Pol'y 221, 228 ["Studies show that violence by one parent against another harms children even if they do not witness it."]; Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions* (1991) 44 Vand. L.Rev. 1041, 1055–1056 ["First, children of these relationships appear more likely to experience physical harm from both parents than children of relationships without woman abuse. Second, even if they are not physically harmed, children suffer enormously from simply

witnessing the violence between their parents. . . . [¶] Third, children of abusive fathers are likely to be physically abused themselves." (Fns. omitted.)].)

Father's past violent behavior, and current violent behavior toward mother, is an ongoing concern. "[P]ast violent behavior in a relationship is 'the best predictor of future violence.' Studies demonstrate that once violence occurs in a relationship, the use of force will reoccur in 63% of these relationships. . . . Even if a batterer moves on to another relationship, he will continue to use physical force as a means of controlling his new partner." (Comment, Beating Again and Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence (2000) 75 Wash. L.Rev. 973, 977–978, fns. omitted.)

The juvenile court had ample evidence from which to conclude father was chronically violent toward mother. Mother and several witnesses reported to DCFS that father abused mother emotionally and physically on numerous occasions, including slapping her and leaving bruises on her arms and legs, at least once when Gabriel R. and other children were present in the same house, albeit in another room. In 2002 he was convicted of domestic violence under circumstances similar to those surrounding the current abuse: Jealousy regarding his victim's relationship with the parent of her children. Father's completion in 2008 of a 52-week domestic violence program ordered six years earlier was anemic at best, and the evidence strongly suggests he received little or no benefit from the program. This evidence supports the court's finding that father's conduct endangered Gabriel R.

Father argues the evidence cited above is unreliable for a number of reasons, but "[i]t is the trial court's role to assess the credibility of the various witnesses, to weigh the evidence to resolve the conflicts in the evidence. We have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses or to resolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence. [Citations.] Under the substantial evidence rule, we must accept the evidence most favorable to the order as true and discard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact. [Citation.]" (*In re Casey D.*

(1999) 70 Cal.App.4th 38, 52-53.) The juvenile court was entitled to find mother, the maternal grandmother, and Gabriel R.'s half siblings to be credible. Their statements to DCFS provided substantial evidence to support the juvenile court's conclusion that father's domestic violence toward mother presented a substantial risk of serious physical harm to Gabriel.

3. *Substantial evidence supported the juvenile court's placement order*

Father contends no substantial evidence supported the order placing Gabriel R. in a foster home rather than with him.[2] We disagree.

"Section 361.2, subdivision (a) governs placement of a child after the dependency court has acquired jurisdiction of a child." (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1420.) Section 361.2 states, "(a) When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." Section 361.2, subdivision (c) requires the court to make a finding "either in writing or on the record of the basis for its determination under subdivision[] (a)." "In an appropriate case, all that might be required is a finding such a placement would impair the emotional security of the child." (*In re C.C.* (2009) 172 Cal.App.4th 1481, 1490.)

Even if the juvenile court had not found father's penchant for domestic violence presents a risk of physical harm to Gabriel R., the evidence discussed above amply supports the court's determination that Gabriel R. should not be placed with father, who

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[2] Gabriel R. could not be placed with the half siblings' father because he tested positive for methamphetamines, and even the half siblings were removed from his custody.

was at all pertinent times a noncustodial parent, if only due to the possibility that such a placement would impair the child's emotional security.

4. *The department has not complied with the notice requirements of the ICWA*

Father contends the department failed to comply with the notice requirements of the ICWA because it failed to order notice sent to the Pala Band of Mission Indians, of which he could be a member. DCFS concedes ICWA notice requirements were not met, but argues reversal is not required. We agree.

"The ICWA establishes minimum federal standards, both procedural and substantive, governing the removal of Indian children from their families. [Citation.] An 'Indian child' for purposes of the ICWA means 'any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.' [Citation.] The ICWA seeks to protect the interests of Indian children and promotes the stability and security of Indian tribes and families. [Citation.]" (*In re H. A.* (2002) 103 Cal.App.4th 1206, 1210.)

The ICWA requires a party seeking foster care placement of an Indian child to notify the child's tribe of the proceedings. (25 U.S.C. § 1912(a).) A notice to a tribe must include, if known, the name of the child's grandparents and great-grandparents; their current and former addresses; "maiden, married and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information." (25 C.F.R. § 23.11(a) & (d)(3); *In re C.D.* (2003) 110 Cal.App.4th 214, 225.) The department and juvenile court have a duty to inquire about and if possible obtain the information. (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.) The notice provision is triggered "where the court knows or has reason to know that an Indian child is involved." (25 U.S.C. § 1912(a); *In re Nikki R.*, *supra*, at p. 848.) No foster care placement proceedings "shall be held until at least ten days after receipt of notice" by the tribe. (25 U.S.C. § 1912(a).) If the notice provision is not followed, an Indian child, parent, or the tribe "may petition any court of competent jurisdiction to invalidate such action . . . ." (25 U.S.C. § 1914; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 739.) The

appellate court must then vacate the challenged orders and order a conditional remand for further proceedings that comply with the ICWA notice requirements. (*In re Jonathan D.* (2001) 92 Cal.App.4th 105, 111.) If after proper ICWA notice is given the juvenile court receives no information indicating the children are Indian children, its prior orders shall be reinstated. (*Ibid*.) If the court receives a tribal determination that the children are Indian children, the court must conduct new hearings in compliance with the ICWA. (*Id*. at pp. 111-112.)

Here, Father informed the juvenile court he could be eligible for membership in the Pala Band of Mission Indians, but the court did not order notice sent to the Pala Band until after the disposition hearing. DCFS concedes this was inadequate and accedes to reversal and conditional remand on that ground.

DISPOSITION

The orders of the juvenile court asserting jurisdiction over Gabriel R. and placing him in foster care are reversed. On remand, the juvenile court is directed to conduct a limited remand restricted to ordering DCFS to comply with the notice provisions of the ICWA. If after proper inquiry and notice no tribe indicates Gabriel is an Indian child within the meaning of the ICWA, the juvenile court shall reinstate its orders. If a tribe determines Gabriel is an Indian child, the juvenile court shall not reinstate its orders.

NOT TO BE PUBLISHED

CHANEY, Acting P. J.

We concur:

JOHNSON, J. MILLER, J.*

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