Filed 9/14/17 In re M.C. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re M.C. et al., Persons Coming Under the Juvenile Court Law.	B280824 (Los Angeles County Super. Ct. No. DK19208)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MARVIN C. et al., Defendants and Appellants.	

APPEAL from orders of the Superior Court of Los Angeles County, Robin R. Kesler, Juvenile Court Referee. Affirmed in part, dismissed in part.

Darlene Azevedo Kelly, under appointment by the Court of Appeal, for Defendant and Appellant Marvin C.

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

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

This opinion involves dependency proceedings over two minors who share the same mother but have different fathers.[1] In one case, Ernest G. appeals from the dependency court's jurisdictional findings under Welfare and Institutions Code section 300, subdivisions (a) and (b)[2] pertaining to his son, E.G. He also appeals the court's dispositional orders removing E.G. from parental custody under section 361, subdivision (c). Ernest contends neither order is supported by substantial evidence. The Department has moved to dismiss as moot the portion of Ernest's appeal relating to the removal order because the court subsequently permitted E.G. to be placed with Ernest.

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[1] Our usual practice is to refer to parties by their relationship to the minor (e.g., father, mother, etc.). For clarity we refer to each father by first name in accordance with section 5:10 of the California Style Manual.

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

In the second case, Marvin C. appeals from the jurisdictional finding under section 300, subdivision (b), pertaining to his daughter, M.C. He contends the court erred in asserting dependency jurisdiction after he had identified a number of relatives to care for M.C. while he was incarcerated. He also appeals the order removing M.C. from his custody, arguing the court erred in failing to make a detriment finding under section 361.2, subdivision (a). Finally, Marvin contends that the Department's failure to comply with the dependency court's order to inquire into the possibility that G.J. (mother) had Indian ancestry in compliance with the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) was reversible error.

We conclude the court's jurisdictional findings that E.G. and M.C. are minors described by section 300, subdivision (b) are supported by substantial evidence. We dismiss as moot the portion of Ernest's appeal challenging the removal order relating to E.G. We affirm the order removing M.C. from Marvin's custody. We remand with directions to determine whether the Department has inquired of mother's relatives whether mother had any Indian heritage.

FACTUAL AND PROCEDURAL BACKGROUND

Mother was raising her 12 year old son, E.G., and her three year old daughter, M.C., when she was shot to death in

March 2016. After mother's death, Ernest took custody of E.G. and M.C. was being cared for by maternal relatives.

In early May 2016, Ernest dropped E.G. off with maternal relatives for a family event. A different maternal aunt (I.B.) told E.G. she wanted to take him to a cousin's birthday party, but instead took E.G. and M.C. to family law court in an attempt to gain custody of both children. Unable to locate E.G., Ernest filed a missing persons report. On May 3, 2016, I.B. was arrested for child abduction. The police took E.G. into protective custody and called the Los Angeles County Department of Children and Family Services (Department) to investigate. The Department conducted investigations into the safety of both E.G. and M.C. I.B. was released on May 6, 2016. The Department learned on October 3, 2016 that the Los Angeles District Attorney had declined to file charges against her.

A. Ernest and E.G.

Department interviewed E.G., Ernest, and his wife (L.L.). All three reported E.G. was doing fine in Ernest's home. Ernest was working and L.L. stayed at home to care for the children. Ernest explained that before their separation in 2007, he and mother would argue a lot and it became physical on one or two occasions. He also told the social worker he was gang-affiliated and was involved with drugs but he left the gang lifestyle and had changed his life, mostly for his children and family. The Department did a

follow-up visit on June 17, 2016. E.G. was doing well in school and at home.

Criminal history

On August 10, 2016, the Department requested a criminal history report (CLETS) for Ernest, which revealed that he "has an extensive criminal history and is registered as a controlled substance offender." E.G. reported that Marvin and mother were all part of the "Bloods," but that they had stopped probably five or six years ago.

Ernest's criminal history included offenses committed as a juvenile, such as assault with a firearm at the age of 13 and robbery at the age of 15. His drug-related offenses started in 1999 when he was 18 years old and convicted of possession of narcotics or controlled substances and purchase for sale and was given three years probation. His drug-related crimes continued. In 2007, Ernest pled guilty to possession of cocaine or cocaine base for sale and was sentenced to three years in state prison In 2011, he entered a guilty plea for possession of cocaine or cocaine base for sale and was sentenced to three years four months in prison. In 2013, Ernest was required to register as a controlled substance offender.

Domestic violence

In 2010, when E.G. was five years old, the Department investigated a referral asserting that E.G. was the victim of physical and emotional abuse. Ernest was visiting E.G. and was driving recklessly with mother and E.G. in the car. Mother told Ernest to stop the car so she and E.G. could get out. Ernest pulled to a bus stop, but when mother attempted to get out, he slapped her across the face and pulled one of her earrings out of her earlobe. E.G. tried to protect mother by throwing a soda can at Ernest, who walked up to E.G. and slapped him across the face. Ernest drove away, and mother did not file a police report. The Department found the referral substantiated, but closed the matter because mother and E.G. did not live with Ernest, and mother agreed to obtain a restraining order against him.

A March 2014 police report summarized an incident of domestic violence between Ernest and L.L. According to the police report, L.L. had a drink at a bartending class and decided not to drive until she was sober. She arrived home around 5:00 a.m. and went to bed. Ernest was in the living room, and about 20 minutes later, he burst into the bedroom demanding L.L.'s phone. When she refused to give it to him, the argument began to escalate. She told Ernest she was leaving, walked to the adjacent apartment, and knocked on the door. While L.L. was facing the apartment door, Ernest grabbed her hair and neck and dragged her backwards into

her apartment. He told her, "Your [sic] not fucking going anywhere. Where's you [sic] fucking phone, I don't care if I go to jail." While still holding L.L.'s hair and neck, Ernest threw her into a living room wall, causing her left knee to punch a hole in the wall. She got to her hands and knees, but then Ernest dragged her to the master bedroom and struck her three or four times on the side of her head. When L.L. started to stand up, he pushed her onto the bed, sat on her chest and grabbed her by the throat. L.L. was unable to breathe for about six seconds before Ernest got off her. She ran to the neighbor's apartment, and Ernest left. He was convicted in April 2015 of inflicting corporal injury on a spouse or cohabitant.

Drug testing

On August 15, 2016, a social worker asked Ernest about his drug use. He admitted to smoking marijuana and sent the social worker a copy of his medical marijuana card. He agreed to drug test, and the results from his initial test were positive for cocaine metabolite (238 NG/ml) and cannabinoids (2350 NG/ml). The social worker asked Ernest about his test results, and he denied using any cocaine. He missed four drug test dates in September and November; his only test on September 22, 2016 showed higher levels of

cannabinoids (2,996 NG/ml), but was negative for cocaine.[3] Beginning November 14, 2016, Ernest had four consecutive drug tests over 17 days. The test results for all four urine tests showed low levels of cannabinoids, around 100 NG per milliliter.

Adjudication and disposition

The court held a jurisdiction and disposition hearing on December 27, 2016, admitting into evidence all the Department's reports and hearing argument from counsel. Ernest's counsel argued that the domestic violence incidents were too old and unrelated to any potential risk to E.G., and that the evidence regarding Ernest's drug use was insufficient to sustain the jurisdictional allegations. Counsel for the Department and for E.G. asked the court to sustain the petition in its entirety. The court sustained the petition allegations. On disposition, the court ordered E.G. to remain removed from Ernest's custody and ordered reunification services for Ernest.

[3] One additional test on September 13, 2016 is listed as a "no show," but father provided documentation that he checked into the testing center, but was not on their list. The record provides no explanation for why no drug tests were scheduled during the month of October 2016.

B. Marvin and M.C.

The Department did not know M.C.'s whereabouts until it sought a warrant to detain her at large on August 5, 2016. When the social worker interviewed the police detective in connection with E.G.'s abduction, the detective stated there was no missing persons report for M.C. and she was not reported as living with Ernest and E.G. Ernest also did not know M.C.'s custody arrangements or her whereabouts. The social worker had unsuccessfully attempted to locate M.C. by visiting maternal aunt I.B.'s home and leaving I.B. a voice mail in June 2016. I.B. did not respond. In July and August 2016, the social worker communicated with Marvin and a woman named V.W. who identified herself as Marvin's wife. Marvin was incarcerated. V.W. claimed Marvin had written and notarized a document appointing her as M.C.'s guardian. Neither Marvin nor V.W. knew who was caring for M.C., or where she could be found. By August 5, 2016, the social worker had information that M.C. would be present in probate court with I.B. for a hearing on August 10, 2016. The social worker located and detained M.C.

At the detention hearing on August 10, 2016, the court ordered the Department to assess the following individuals for possible placement or visitation and to report on its investigation by August 24, 2016: (1) M.C.'s stepmother V.W.; (2) maternal grandmother J.M.; (3) maternal aunt I.B., (4) maternal great aunt S.H., (5) one other maternal aunt,

and (6) "any other appropriate relative or non related extended family member." Marvin, who was still in custody, appeared at a hearing two days later and was found to be M.C.'s presumed father. Marvin denied having any Indian ancestry, and the court ordered the Department to investigate mother's ancestry. Marvin's attorney vigorously requested for M.C. to be placed with V.W. "He really wants her to be placed there. She also has half-siblings at that location as well."

The Department's August 24, 2016 pre-release investigation report recommended against placement with any of the individuals identified by the court, listing various reasons, including past child neglect investigations, criminal histories, or that the Department had not yet been able to assess the home or obtain live scan results for all home occupants. At a hearing on August 24, 2016, the court noted the report was negative as to stepmother, acknowledged there were other individuals to consider, and indicated that it intended to order the Department to investigate all other appropriate relatives with discretion to place M.C. M.C.'s counsel acknowledged the obstacles to placement and asked the court to give the Department discretion to place with an appropriate relative. The court asked, "Are we even considering the stepmother at this time, based upon her long history? I would suggest not." M.C.'s counsel and Marvin's counsel both asked the court to order continued investigation of stepmother V.W., given the possibility of a criminal waiver. The court responded, "I'll have the Department

continue to assess her, but she's no longer top priority. We need to find individuals, if we can, that don't have the criminal history she has."

M.C. had a monitored visit with V.W. and V.W.'s three children (M.C.'s half-siblings) on August 31, 2016. The monitor observed that M.C. did not display any affection for V.W. or vice versa. M.C. was emotionally withdrawn, V.W. was talking on the phone, and her only interaction with the children was to give them commands.

The Department's October 12, 2016, jurisdiction and disposition report included Marvin's criminal history as an attachment, describing a 13- or 14-year prison sentence for second degree robbery and assault with a firearm in late 1998. Marvin was currently in custody awaiting his third trial in connection with 2014 charges for kidnapping and robbery. The report also provided some insight into possible antagonism between Marvin, maternal aunt I.B., and stepmother V.W. The report had attached "Facebook comments posted by [V.W.] which indicates there may be some gang involvement between the families and that she would be an inappropriate placement option for the child" and refers to another Facebook comment posted on the day mother was killed. M.C.'s godmother expressed concerns about placing M.C. with Marvin's wife, who godmother referred to as S.W., rather than V.W. On October 10, 2016, maternal aunt I.B. told a social worker she believes Marvin wants M.C. placed with his girlfriend because mother had a life insurance policy. Marvin did not consider I.B. to be an

appropriate placement, as he stated she is not nurturing, has been involved with the streets and gangs in the past, and does crystal meth.

According to a last minute information report dated October 19, 2016, foster mother monitored separate visits with maternal aunt I.B. and stepmother V.W. M.C. appeared to have a bond with maternal aunt and cried when she had to leave, but did not have a bond with stepmother. An addendum report dated October 31, 2016 stated that the Department had not yet requested criminal waivers for V.W. or I.B., because it had not received a marriage certificate from V.W. and three letters of reference for I.B. The report noted that a different social worker reported on October 20, 2016 that a maternal cousin, V.P. had come forward expressing interest in placement. V.P. "knows the family has gang involvement and there may be safety issues, but she is still interested in being a placement option for the child." V.P.'s live scan results showed no criminal history, and the social worker submitted an "ASFA home request." The record is silent about the outcome of the request, and there is no additional information regarding V.P.'s suitability as a placement option for M.C.

On October 31, 2016, Marvin's counsel informed the court that V.W. was willing to cooperate with the Department and provide a marriage certificate. Counsel also expressed that Marvin opposed placing M.C. with I.B., even though the Department was close to approving I.B.'s home for placement. The court rescinded the Department's

discretion to place M.C. with any appropriate relative, and directed that the case was to be "walked on" if any home was approved for placement.

A November 18, 2016 addendum report stated that neither I.B. nor V.W. was an appropriate placement for M.C. The concerns around I.B. related to child abduction charges against her based on taking E.G. and M.C. in May 2016, leading to Ernest filing a missing person report. In addition, the Department had concerns about I.B.'s home and needed to do an ASFA (Adoption and Safe Families Act) assessment. The Department reported that V.W. "still has failed to provide [the Department] with a birth certificate verifying her marriage with [Marvin] and her relationship with the child." In addition, E.G. had expressed concern about M.C.'s safety if she was placed with V.W. because one of V.W.'s older children had broken a younger sibling's arm.

On November 22, 2016, the court granted the Department discretion to release M.C. to stepmother V.W. if her criminal waiver was approved. A court form dated January 31, 2017, states that no report had been prepared due to a miscommunication by county counsel and the matter was being continued to February 7, 2017. On February 7, 2017, the Department filed a Last Minute Information report notifying the court that V.W.'s criminal waiver was denied on January 10, 2017. It also recommended assessment of additional family members for M.C.'s placement, including paternal cousin V.P., paternal

cousin D.D., paternal great aunt I.A, and paternal great aunt P.H.

On February 7, 2017, the court received the Department reports into evidence and heard argument from all counsel. Marvin's counsel argued the court should dismiss the petition because Marvin had identified a number of relatives to care for M.C., his incarcerated status alone was not a sufficient basis for jurisdiction, and there was no nexus between Marvin's criminal history and any risk to M.C. Marvin's counsel gave three additional names of people described as relatives who could care for M.C., and argued that because Marvin had an abundant number of people to care for M.C., he had made an appropriate plan for her care while he was in custody.[4]

The Department emphasized that Marvin had not made an appropriate plan, as evidenced by the fact that he did not know M.C.'s whereabouts after mother's death, and that for the duration of the case, his preferred placement was his wife who had an extensive criminal history and had been determined not to be an appropriate placement.

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[4] The names provided by Marvin's counsel were D.D., P.H., and V.P. All three names appear in the Department's February 7, 2017 Last Minute Information. The Department had identified V.P as a placement possibility in October 2016, because she was interested in placement. The Department determined she had four children in the home, and no criminal history. A social worker submitted an ASFA home request, but the record contains no additional details about the results.

County counsel noted that the other names had not been provided earlier, and the Department had not had the opportunity to determine whether they were appropriate. M.C.'s counsel initially argued that the court should not sustain the petition because there was a plan in place for I.B. to be M.C.'s caregiver, and I.B. had gone to probate court to carry that plan out. When the court pointed out that without a sustained petition, it would not have jurisdiction to address M.C.'s placement, counsel said she would leave it up to the court, but that "the child should really be placed with [I.B.]."

On the question of disposition, Marvin's counsel objected to any jurisdictional findings and dispositional orders. Counsel asked to either have M.C. returned to Marvin to make an appropriate plan, or to place with one of three named individuals, one of whom counsel stated was a licensed foster care provider.

The court declared M.C. to be a dependent, and found that under section 361, subdivision (c) that there was clear and convincing evidence of a substantial danger if M.C. was returned to Marvin's custody. Care, custody and control of M.C. would continue to be with the Department.

DISCUSSION

Ernest and Marvin both contend the court's jurisdictional findings with respect to their children are not supported by substantial evidence.

"On appeal, the 'substantial evidence' test is the appropriate standard of review for both the jurisdictional and dispositional findings. [Citations.]" (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1433.) We resolve all conflicts in support of the determination, examine the record in a light most favorable to the dependency court's findings and conclusions, and indulge all legitimate inferences to uphold the court's order. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1379; *In re Tania S.* (1992) 5 Cal.App.4th 728, 733-734.)

Dependency jurisdiction is warranted 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." (§ 300, subd. (b)(1); *In re R.T.* (2017) 3 Cal.5th 622, 625.) Section 300, subdivision (b)(1) "authorizes dependency jurisdiction without a finding that a parent is at fault or blameworthy for her failure or inability to supervise or protect her child." (*In re R.T.* 3 Cal.5th at pp. 627–633, 636–637, fn. 6 [disapproving *In re Precious D.* (2010) 189 Cal.App.4th 1251, and rejecting the reasoning requiring parental neglect for jurisdiction as set forth in *In re Rocco M.* (1991) 1 Cal.App.4th 814, 820].) To sustain an allegation based on risk of future harm to the child, that risk must be shown to exist at the time the court makes the jurisdictional finding, but the court need not wait until the child is seriously injured to assume jurisdiction. (*In re Yolanda L.* (2017) 7

Cal.App.5th 987, 993.) "A section 300, subdivision (b) jurisdictional finding may not be based on a single episode of endangering conduct in the absence of evidence that such conduct is likely to reoccur. [Citation.]" (*Ibid.*)

A. Jurisdictional findings as to E.G.

The court sustained jurisdictional allegations under section 300, subdivisions (a) and (b), based on two prior incidents of domestic violence. It also sustained an allegation under subdivision (b) based on risks to E.G. associated with Ernest's substance abuse. There is substantial evidence to support both allegations under subdivision (b).

Ernest argues that the domestic violence incidents cannot establish that E.G. is at risk of harm, because the first incident took place seven years ago, and E.G. was not present during the more recent incident. He also points out that by the time of the jurisdiction hearing, he was already more than halfway to completing a 52-week course for domestic violence. However, it was reasonable for the court to infer from the facts that despite currently attending a class in connection with his 2015 domestic violence conviction, Ernest could return to a pattern of domestic violence absent dependency jurisdiction. E.G. had only been living with Ernest for a little over two months before the Department's involvement, and while the facts could be viewed differently, it is not unreasonable to see the severity of the two documented incidents as indicative of a more general propensity towards violence.

Similarly, although Ernest denied using or abusing cocaine, there is substantial evidence to support the court's

finding that E.G. is at risk of substantial harm based on Ernest's past and present involvement with drugs, and his spotty record of appearing for court-ordered drug testing. In 2011, Ernest was convicted of possession of cocaine base for sale and sentenced to 40 months in prison. He is also a registered controlled substance offender. After testing positive for cocaine metabolite in August 2016, he missed four consecutive drug tests, which the court could rationally consider as the equivalent of positive test results. (*In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1217.)

"When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court's jurisdiction, a reviewing court can affirm the juvenile court's finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence." (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.) Because we conclude there was substantial evidence to support the court's jurisdictional findings under subdivision (b) of section 300, we decline to consider Ernest's arguments regarding the court's finding under subdivision (a).

B. Order removing E.G.

Ernest also appeals from the disposition order removing E.G., arguing that substantial evidence did not support the court's finding that there was no reasonable alternative to removing the child from his care. (§ 361, subd.

(c)(1).) The Department filed a motion to dismiss this portion of Ernest's appeal based on the dependency court's June 26, 2017 order terminating its earlier placement order and placing E.G. in Ernest's custody, conditioned on Ernest completing his case plan and continuing to test negative for drugs and alcohol.

"'An appeal becomes moot when, through no fault of the respondent, the occurrence of an event renders it impossible for the appellate court to grant the appellant effective relief. [Citations.]' (*In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1054.)" (*In re Anna S.* (2010) 180 Cal.App.4th 1489, 1498.) Here, Ernest's appeal only challenged the removal order, not the orders to complete reunification services such as drug testing and the domestic violence program. Because E.G. has now been returned to Ernest's custody, there is no effective relief that can be given on appeal and his appeal of the disposition order is moot.

C. Jurisdictional findings as to M.C.

The court sustained the following jurisdictional allegations with respect to the child M.C. under subdivision (b) of section 300: "The child, [M.C.] has no parent able to provide care and supervision of the child in that the child's mother . . . died on 3/13/16. The child's father, Marvin [C.], is incarcerated and is unable to provide ongoing care and supervision of the child. The father has a criminal history of convictions of Kidnapping, Robbery: Second Degree, Assault

with Firearm on Person, Transport/Sell/Controlled Substance. Said lack of a parent to provide care for the child and father's criminal history of violent related conduct and convictions endanger the child's physical health and safety and place the child at risk of serious physical harm and damage." The petition did not contain any allegations under subdivision (g), which establishes dependency jurisdiction when a "child's parent has been incarcerated or institutionalized and cannot arrange for the care of the child . . . ." (§ 300, subd. (g).)

In his appeal, Marvin tries to separate the allegation into two parts: (1) he is incarcerated and unable to provide care, and (2) his criminal history puts the child at risk of harm. However, the court sustained the allegation as a whole, and there is substantial evidence to support the determination that M.C. is a dependent under section 300, subdivision (b).

Marvin's incarcerated status alone is not a sufficient basis for finding jurisdiction. (*In re S.D.* (2002) 99 Cal.App.4th 1068, 1077.) But the basis for the court's decision to declare M.C. a dependent was not based solely on the fact that Marvin was incarcerated and did not make arrangements for M.C.'s care. He had been convicted of violent crimes such as assault with a firearm, kidnapping and robbery. At almost every hearing since the detention hearing on August 12, 2016, Marvin asked the court to place M.C. with V.W. or approve her for visitation. There is evidence in the record supporting an inference that V.W. had

gang affiliations, and might be connected to mother's shooting. The Department's October 31, 2016 addendum report stated that V.W. was not an appropriate caregiver, because "she has failed to show proof of her marriage with the father, is possibly involved in gang activity . . . , has an extensive criminal history which includes felonies which may not be waived through ASFA and appears to have no bond with the child" as noted by neutral observers. By the time the petition was adjudicated, V.W.'s criminal waiver request had also been denied. The Department was not alone in its concern for M.C.'s safety. E.G. expressed concern about M.C.'s safety if she were to be placed with V.W.

At the February 7, 2017 hearing, Marvin's counsel shifted focus, providing names as potential placements for M.C. Counsel stated that D.D. was a licensed foster parent in San Bernardino, and also identified paternal great aunt P.H. and V.P. County counsel responded that those names were not necessarily provided at the beginning of the case, and the Department had not yet determined whether any of them were suitable placement options.

Marvin points to *In re Maggie S.* (2013) 220 Cal.App.4th 662 (*Maggie S.*) as support for his argument that because he identified individuals willing to care for M.C., there is no basis for dependency jurisdiction. The court in *Maggie S.* reversed a lower court's assertion of jurisdiction and all subsequent orders, reasoning that there was no basis for dependency jurisdiction because mother had

designated an individual to care for her child while she was incarcerated, and the Department did not contend the minor was at substantial risk of serious harm. (*Id*. at pp. 672–673.) The facts and allegations at issue in *Maggie S.* make it distinguishable from the present case. The *Maggie S.* court found no substantial evidence of risk, where the only evidence put forward was that the designated caretaker had possessed a foster care license and lost it at some unspecified time and an application to be a foster parent had been rejected at an unspecified time based on the caretaker's failure to release her medical records. (*Id*. at p. 673.) Here, the record establishes that the Department's safety concerns were focused on stepmother V.W.'s gang ties, her criminal history, and earlier injuries suffered by her children. Despite the concerns shared by the Department and the court, Marvin continued to press to have M.C. placed with V.W., arguing she should be with her half-siblings. Ultimately, the Department submitted a request for a criminal waiver, which was denied.

Marvin tries to blame the Department for failing to demonstrate the unsuitability of the three new individuals his counsel named at the hearing, but the factual scenario is very different from that at issue in *Maggie S.* where mother had designated a caretaker in writing, and the Department had misinformed the court about mother's designation and the Department's communications with the caretaker. The Department's report stated that the social worker had been unable to reach the caretaker, when in fact she had spoken

to the caretaker, who was willing to care for the child. (*Maggie S., supra*, at pp. 666-668, 672.) In the case before us, the Department has investigated the relatives identified by Marvin and reported back about various obstacles to placement.

D. Order removing M.C.

Marvin contends that if we reverse the jurisdictional finding, we must also reverse the dispositional order removing M.C. from his custody. We find no basis for reversing the jurisdictional finding, and Marvin offers no argument about why the court's removal order lacks evidentiary support.

Marvin further contends that as a noncustodial parent, he is entitled to a finding that placement with him would be detrimental. (§ 361.2, subd. (a).) However, the section he relies on applies only when a noncustodial parent seeks placement of a minor who is being removed from the custodial parent under section 361, subdivision (c). (See, *In re Dakota J.* (2015) 242 Cal.App.4th 619, 630 [section 361.2 "governs placement of a child after the court issues a valid removal order"].) The court here had not removed M.C. from mother's custody, because mother was deceased. Even if we were to find section 361.2 applicable, any error was harmless because there was substantial evidence supporting an order limiting Marvin's custody rights to protect M.C. from risk of

harm. (*In re Anthony Q.* (2016) 5 Cal.App.5th 336; 345–356; *In re Julien H.* (2016) 3 Cal.App.5th 1084, 1089, fn. 8.)

E. ICWA compliance

Marvin also contends the Department's failure to investigate the possibility that mother had Indian ancestry constitutes reversible error. The Department concedes a limited remand is appropriate.

The court directed the Department to investigate whether mother had any Indian ancestry, and despite having contact with maternal relatives, the Department did not ask about any possible Indian ancestry. At this point in the proceedings, there is insufficient information to determine whether notice to any relevant tribe in accordance with ICWA and California law is required. (25 U.S.C. § 1912(a); §§ 224.1, 224.2, 224.3.) The Department shall make an inquiry as ordered by the court and file relevant documentation with the court. The court shall then determine whether the ICWA inquiry and notice requirements have been satisfied and whether ICWA is applicable.

If a tribe later determines that mother's children are Indian children, "the tribe, a parent, or [the children] may petition the court to invalidate an action of placement in foster care or termination of parental rights 'upon a showing that such action violated any provision of sections [1911,

1912, and 1913].' (25 U.S.C. § 1914.)" (*In re Damian C.* (2009) 178 Cal.App.4th 192, 200.)

DISPOSITION

The jurisdictional findings as to E.G. and M.C. are affirmed. Ernest's appeal of the order removing E.G. from Ernest's custody is dismissed as moot. The order removing M.C. from Marvin's custody is affirmed. The case is remanded with directions to comply with ICWA's inquiry and notice requirements.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

RAPHAEL, J.*

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