Filed 11/17/17 In re Ariel D. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re ARIEL D., a Person Coming Under the Juvenile Court Law.	B277575 (Los Angeles County Super. Ct. No. CK98049)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. CURTIS D., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Joshua D. Wayser, Judge. Affirmed.

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

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Jacklyn K. Louie, Principal Deputy County Counsel, for Plaintiff and Respondent.

Curtis D. (Father) appeals the Los Angeles Superior Court dependency court orders sustaining the Welfare and Institutions Code section 300[1] petition brought by the Los Angeles County Department of Children and Family Services (DCFS) and ordering his daughter Ariel D. (Child) removed from Father's custody. Father contends that, both when sustaining the petition and when removing the Child from his custody, the dependency court improperly relied upon a "bunk bed" injury incident that is not in the record and, for that reason, the judgment must be reversed. He also contends Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA) notices were sent to the wrong tribes. Because we find that substantial evidence supports the court's August 10, 2016 orders and ICWA's placement requirements were met, we affirm the August 10, 2016 orders.

STATEMENT OF THE CASE AND FACTS

1. Referral and Detention

This matter first came to the attention of DCFS on October 23, 2015, when Keisha H. (Mother) walked in to the Los Angeles Police Department's Wilshire Division to make a domestic violence report. After referral by the police department to DCFS, Mother told a DCFS case worker (CSW) that she and Father had gotten into an altercation on October 20, 2015, regarding an affair he was having, and that he had become violent in the presence of the Child and a second child of the Mother. Mother stated the "abuse was ongoing," but this was the first time it had taken place in front of the children.

Based on Mother's report to DCFS and other information discussed below, DCFS filed a section 300 petition on March 4, 2016, on behalf of the

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[1] All further undesignated references are to the Welfare and Institutions Code.

Child and her half siblings, alleging that Father and Mother "have a history of engaging in violent physical altercations in the presence of the children."[2] The petition and accompanying DCFS report stated that Father allegedly "choked the mother and pinned the mother to a wall in the presence of the children" on October 20, 2015. He also "pushed the mother to the floor, placed his arm on the mother's neck, straddled the mother's body and repeatedly struck the mother's head and face with the father's fists, inflicting bleeding to the mother's face." Additional physical altercations were alleged to have taken place on October 19, 2015, and on "numerous prior occasions, [on which] [Father] struck the mother with [Father's] fists and pushed the mother in the children's presence." Father's conduct was alleged to have endangered all of the children, including the Child, and Mother was alleged to have failed to protect the children by providing Father with "unlimited access to the children."

Mother's dependency history was also alleged, including: detention of Mother's children on February 25, 2013, as a result of abuse and violence perpetrated in part by Mother; the children's removal on February 25, 2013; and the sustaining of a prior petition on May 10, 2013. Following that proceeding, the family complied with the court-ordered case plan and jurisdiction was terminated on January 15, 2015.

2. <u>The Detention Hearing</u>

The detention hearing in the present matter was held on March 4, 2016. Father did not appear as he had not yet been located. The court found Father to be the presumed father of the Child. The Child and the other

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[2] The Child was born in December 2014. The Child's half siblings are Nasir H., born March 2007, and George V. A. III, born May 2011, each of whom has a different father. The Child's half siblings are not parties to this appeal.

children of Mother were detained and the court ordered them maintained in Mother's custody. The court also ordered monitored visitation for Father "after he contacts DCFS/mother," with visits to be monitored by a person other than Mother and not to occur in the home.

3. The Jurisdiction and Disposition Hearings

In the Last Minute Information Report DCFS filed in advance of the April 28, 2016 trial setting conference, it reported on statements Father had made, including that "[Mother] is not doing her part. She is not letting [him] see the children. . . . I think [Mother] has mental problems. I don't hate [Mother], I just want to see my child." He also stated Mother had hit him. Father appeared in court for the first time at this hearing and was arraigned, and DCFS was ordered to set up a visitation schedule.

DCFS filed its jurisdiction and disposition report on June 16, 2016, prior to the jurisdiction and disposition hearing set for that date. DCFS included a family assessment which stated the parents had "exposed the children . . . to a detrimental home environment including ongoing domestic violence. The parents have engaged in violent altercations in the presence of the children." DCFS recommended the court find the children to be dependent children pursuant to section 300, subdivisions (a) and (b), and that visits by Father with the Child be monitored. At the request of counsel for the Child, the court continued the matter to August 10, 2016, so that further information could be obtained.

The jurisdiction and disposition hearing was held on August 10, 2016. All DCFS reports were received in evidence without objection. The court stated there was "no doubt" the "children were present when there was domestic violence." The court pointed to "context[ual]" evidence of anger between the parties and to the family having to move out of two rental

apartments because of Father's conflicts with other people as corroboration for Mother's statements of Father's propensity to violence and as to the events related by Mother. The court also noted that while court proceedings were underway, Father was at one point "fighting with the mother in the court's parking lot." The court highlighted third party corroboration of the fact that Father had "anger issues," and stated that one of the Child's half siblings reported being hit by Father.

The court found by clear and convincing evidence that there was substantial danger to the Child (and to all the children) if returned to the custody of Father. The court ordered the children removed "from the father, the parent with whom the children were residing at the time the petition was filed."[3] The court sustained the allegations of the petition, ordered all of the children to remain with Mother and their respective fathers (except Father), and ordered monitored visitation by Father with the Child, also giving discretion for DCFS to liberalize that visitation, provided that Mother was not to monitor the visits. The court also ordered a case plan for Father which included 52 weeks of domestic violence classes.

4. Facts relating to ICWA issue

Mother advised the dependency court on March 4, 2016, that she may have "Chickasaw" ancestry, and suggested that DCFS contact the Child's maternal grandmother, whose contact information she provided. At the detention hearing on that same date, the dependency court ordered DCFS to investigate the potential applicability of ICWA and provide a supplemental report regarding that investigation so the court "will then determine whether

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[3] According to the reporter's transcript, the court detained the Child from the Father "based on 360.1(c) and a substantial danger." There is no section of that number; the section cited was clearly section 361, subdivision (c)(1), which contains the elements the court had referenced.

that information triggers notice requirements." Father later reported no Native American ancestry.

In its June 16, 2016 Jurisdiction and Disposition Report, DCFS stated that "[o]n 03/04/2016, the Court found that the Indian Child Welfare Act may apply" and the CSW would "continue to investigate the mother's possible Chickasaw ancestry." Along with its August 10, 2016 Addendum Report, DCFS submitted address labels, forms, and proofs of service relating to its (supposed) compliance with ICWA. These documents show that DCFS notified three Choctaw tribes, as well as the Blackfeet tribe; however, DCFS provided no evidence that it had given notice of the proceeding to any Chickasaw tribe.

5. Appeal

Father filed a timely notice of appeal. (See §§ 360, 395; *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150 ["[T]he dispositional order in a dependency proceeding [is] the appealable 'judgment.'"].)

CONTENTIONS

Father contends the dependency court improperly relied upon an incident not in the record (the "bunk bed" incident, discussed *post*) in sustaining the petition and in removing the Child from Father's custody upon disposition; and for this reason the August 10, 2016 orders must be reversed. Father also argues that ICWA notices were sent to the wrong tribe.

DCFS contends both in briefing and by means of a separate motion to dismiss that this appeal is moot because, after the August 10, 2016 order was entered and this appeal was filed, the juvenile court terminated jurisdiction over the Child upon awarding full custody of her to Mother. DCFS also contends substantial evidence supports the August 10, 2016 orders, and that

Father forfeited the right to challenge the order removing the Child from him by failing to object or raise below the arguments now presented.

DISCUSSION

I. This Appeal Is Not Moot

DCFS contends this appeal is moot, arguing that the post-August 2016 orders of which we take judicial notice establish that the dependency court no longer has jurisdiction of the matter and "[a]ny remedy regarding custody and visitation now lies in family court."[4] DCFS argues, "'The family court, rather than the juvenile court, is [now] the proper forum for adjudicating child custody disputes'" and any remedy regarding custody and visitation now lies in family court.

We agree with Father that the appeal is not moot because the custody and visitation orders which Father contests alter the custody of the Child from that which it otherwise would be and the dependency court has the ability to grant Father effective relief. (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573.)

"[T]he critical factor in considering whether a dependency appeal is moot is whether the appellate court can provide any effective relief if it finds reversible error." (*In re N.S* (2016) 245 Cal.App.4th 53, 60.) Where a parent is subject to restrictive custody and visitation orders following the termination of jurisdiction, the Court of Appeal can consider an appeal from

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[4] We grant the request of DCFS to take judicial notice of the following orders of the dependency court: a February 16, 2017 order terminating jurisdiction and staying that termination order until receipt of a custody order; a February 24, 2017 order reflecting receipt of the custody order; and a February 27, 2017 order awarding Mother full custody of the Child, and providing Father with monitored visitation. (Evid. Code, §§ 452, subd. (c), 459, subd. (a); Code Civ. Proc., § 909; Cal. Rules of Court, rule 8.252; *In re Josiah Z.* (2005) 36 Cal.4th 664, 676.)

the jurisdictional findings. (*In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1547.) In *Joshua C.*, the jurisdictional findings were the basis for restrictive custody and visitation orders, which continued to negatively affect the parent after dependency jurisdiction was terminated. Under those circumstances, the court considered the jurisdictional findings because "[i]f the jurisdictional basis for [the orders] is found by direct appeal to be faulty, the orders would be invalid." (*Id.* at p. 1548.) That is the circumstance confronting Father in this case.

II. Substantial Evidence Supports the Judgment

Father contends there is no substantial evidence to support either the jurisdictional finding that the Child was at serious risk of substantial physical harm while in his custody or the dispositional order removing the Child from his custody. We disagree.[5]

A. Standard of Review

"'In reviewing the jurisdictional findings and disposition, we look to see if substantial evidence, contradicted or uncontradicted, supports them. [Citation.] In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court.' (*In re Heather A.* [(1996)] 52 Cal.App.4th [183,] 193; see *In re I.J.* (2013) 56 Cal.4th 766, 773.)" (*In re R.T.* (2017) 3 Cal.5th 622, 633.) Thus, we review the record in the light most favorable to the

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[5] We reject respondent's assertion that Father forfeited any argument against the orders made. At the August 10, 2016 hearing, Father contested both the factual basis underlying the court's finding of jurisdiction and its determination that there was clear and convincing evidence to support the removal order.

juvenile court's order to decide whether substantial evidence supports the order. (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 694-695; see also *In re Mark L.* (2001) 94 Cal.App.4th 573, 581 [on appeal we "'have no power to judge the effect or value of the evidence, to weigh the evidence [or] to consider the credibility of witnesses . . . .' [Citation.]")

As part of the review for substantial evidence, the appellant bears the burden of showing there is no evidence of a sufficiently substantial nature to support the court's findings or orders. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947, citing *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

B. Additional Facts

This case arose from a report by Mother of domestic violence committed by Father on October 20, 2015. On that date, Mother answered Father's cell phone while he was sleeping to hear the voice of a woman who told her the caller was having an affair with Father, the caller was now pregnant, and Father was going to leave Mother. When Mother awoke Father and confronted him with this information, Mother stated Father screamed at her, pushed her to the floor, put his arm on her neck, punched her in the face and stated "this is why I f. . . other bitches because you don't shut the f. . . up." Mother started screaming, asking Father to stop, awakening the two children staying with Mother and Father in their hotel room. The children began to cry. Just then, the hotel manager knocked on the door; Father left the room to talk to him. When Father returned, he pushed Mother against the wall, punched her in the face and stated, "you make me want to kill you." He next choked her. One of the children then said, "stop don't hit mommy." Father shoved Mother into the closet and punched her twice in the face; one of his blows reopened a wound from a punch he had struck her with the night before. There were incidents of abuse predating these October 2015 episodes.

According to Mother, this was the first incident in which children were present.

The CSW spoke with the four-year-old half sibling of the Child, who had been present in the hotel room on October 20. (The Child was 11 months old at the time of this incident.) The half sibling described that evening's events to the CSW, saying he was "scared," adding "[Father] likes to be mean. He popped me when I was (not listening)." Another of the children told DCFS he had witnessed Father hit Mother on occasions prior to October 20. George A., the father of one of the children, reported that he had witnessed Father approach and yell at Mother in the parking lot near the building housing the dependency court on their June 2016 hearing date, and described Father as "hav[ing] a tantrum" during a court-ordered scheduled visit with the children. At that visit, Father also "went after" George A.

At the jurisdiction and disposition hearing on August 10, 2016, the dependency court judge told Father's counsel, "There's plenty of evidence that your client has anger issues. And it's corroborated by a number of third party independent sources."

Father focuses his argument that there is no substantial evidence to support the orders made on the circumstance that the trial court made specific reference to a "bunk bed incident" as to which there is no evidence in the record, quoting the following from the record of proceedings on August 10, 2016: "Well, there's no doubt about that. I mean the thing with the bunk bed, there no doubt." DCFS agrees there is no evidence in the record to support this purported fact, instead focusing on the evidence that children were present during the October 20, 2015 altercation and on other evidence in the record to support the dependency court's findings and orders.

Our review of the evidence cannot be limited to a single factor, as Father contends. Notwithstanding the trial court's citing one "fact" which does not appear in the record, we consider the whole record and do so in the light most favorable to the juvenile court's order. (*In re R.T.*, *supra*, 3 Cal.5th at p. 633; *In re Isayah C., supra*, 118 Cal.App.4th at pp. 694-695.) Father voiced no objection when the trial court asked if any party had any objection to admission of the reports and other evidence containing the facts set out above (and others); and all of the reports were received in evidence.

Based on our review of the entire record, we find there is substantial evidence to support both the finding of jurisdiction and the disposition order. Father's reliance on the argument that the trial court was mistaken in citing the "bunk bed" incident is insufficient for Father to meet his burden to establish there is no evidence of a sufficiently substantial nature to support the court's findings or orders. (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 947.) The trial court's use of the "bunk bed" incident was harmless when considered with the totality of the facts of this case. (See *In re Dakota H.* (2005) 132 Cal.App.4th 212, 226.)[6]

Mother's account of Father's pattern of domestic violence was corroborated by at least three independent sources. One of the Child's half siblings said Father had "popped" him; another reported he had witnessed Father hitting Mother when they lived together; and George A. (who the record reflects himself had a custody dispute with Mother) stated that Father "went after him" at a visit by Father with a child, a visit that was being monitored. Contrary to Father's arguments, the evidence establishes, as alleged in the petition, the violence "harmed the children or placed them at

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[6] We also reject Father's argument that the trial court's mistaken belief there was a bunk bed incident constitutes judicial misconduct.

risk of harm," and the "'the violence is ongoing or likely to continue . . . .' [Citation.]" (*In re M.W.* (2015) 238 Cal.App.4th 1444, 1453.)

Ongoing domestic violence in a household where children are living, by itself, "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.*, *supra*, 52 Cal.App.4th at p. 194, overruled on other grounds in *In re R.T., supra*, 3 Cal.5th at p. 628.) Father's behavior around and toward the young children constitutes substantial evidence in support of the orders made; the evidence in the record substantially supports the inference of an ongoing pattern of violent and dangerous behavior by Father (*In re Isayah C., supra,* 118 Cal.App.4th at pp. 694-695) and fully supports the dependency court's order removing the Child from his custody.

While at the August 10 hearing the juvenile court twice referred to a "bunk bed" injury incident that is not contained in the record, the court also said there was "context to corroborate" Mother's statements concerning Father's violent conduct toward her in the presence of the children, including evidence of "anger issues" and "conflict with other parties." The court also noted other evidence of Father's violent conduct: that the Child's half sibling stated he had been hit by Father and at one point Father was "fighting with the mother in the court's parking lot."

With regard to the order that Father's visits be monitored, Father's conduct toward the children, including "popping" the Child's half sibling for not listening, and the same child's stated fear of Father, support this dependency court determination. In addition, DCFS had reported that Father had not demonstrated any substantial desire to keep the visits that had been scheduled; as of the August 10, 2016 hearing, Father had had only "two visits with the child despite DCFS offering him numerous choices for

visitation. [Father] rejected most of DCFS' arrangements for visitation. . . . On [June 26, 2016, Father] was scheduled to visit with [the Child] for three hours but after an hour and [a] half [Father] asked that the visit end early." Father's lack of interest in visits with the Child did not go unnoticed.

For all of the above reasons, we hold that substantial evidence supports the August 10, 2016 jurisdictional and dispositional orders.

III. The ICWA Error Was Harmless

Mother advised the dependency court that she may have Native American ancestry. The notices required by ICWA to be sent to the appropriate tribe were not sent. Father, who reported no Native American ancestry, raises the issue of compliance with ICWA; he has standing to do so. (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 339.)

Although Father is correct that DCFS did not fully comply with ICWA notice requirements, the error is harmless: The Child remains in Mother's custody, that of the one family member with possible Native American ancestry.

ICWA was enacted "out of an increased concern . . . [over] child welfare practices that separated large numbers of Indian children from their families and tribes, and placed them in non-Indian homes." (*In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1299.) "The stated purposed of the ICWA is to 'protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster care or adoptive homes which will reflect the unique values of Indian culture . . . .' (25 U.S.C. § 1902.)" (*Ibid.*) Thus, ICWA serves to protect children who are at risk of being separated from their birth families.

No such separation has occurred in this case. The Child has not been removed from Mother, the only parent with Native American heritage. And, the court has terminated jurisdiction with an order placing the Child with Mother. ICWA's purposes are not served by notifying tribes when there is no longer any issue regarding the potential removal of a child within its protections from her family, placement of the child in foster care or adoption.

Compliance with ICWA is subject to harmless error analysis. Where remand would exalt form over substance, reversal and remand are not appropriate. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413.) We need not remand for technical compliance with ICWA requirements under the orders made in this case as the outcome could not result in a different custody order. (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 652-653.)

DISPOSITION

The August 10, 2016 jurisdictional and dispositional orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

CHAVEZ, Acting P.J.

HOFFSTADT, 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.