Filed 3/21/17 In re Emiliano T. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re EMILIANO T., a Person Coming Under the Juvenile Court Law.	B277096
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. NOE T., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK92491)

APPEAL from an order of the Superior Court of Los Angeles County. Debra L. Losnick, Referee. Affirmed.

Mitchell Keiter, under appointment by the Court of Appeal, for Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Stephen D. Watson, Deputy County Counsel, for Respondent.

Noe T. (father) challenges a juvenile court jurisdictional order. Father contends the evidence was insufficient to support a finding under Welfare and Institutions Code section 300, subdivision (g) based on his inability to arrange for the care of his son, Emiliano.[1] We find no error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2015, father suffered a felony conviction for a violation of Penal Code section 136.1, subdivision (a)(2), witness or victim intimidation, and misdemeanor convictions for violating a protective order (Pen. Code, §§ 166, subd. (c)(1), 273.6, subd. (a).) He was sentenced to a 19-year prison term.

In June 2016, Emiliano T. (18 months old) and his two half-siblings, Edwin I. (four years old) and E.I. (three years old), were living with their mother, I.P.[2] The Los Angeles County Department of Children and Family Services (DCFS) became involved with the family after receiving a referral indicating Edwin I. had engaged in sexualized behavior with E.I. Upon investigation, DCFS learned mother had recently hit Edwin with a belt, cutting his cheek in the process. Mother had a history of substance abuse and refused to submit to drug testing. Mother told DCFS she believed her younger brother may have touched

---

[1] All future undesignated statutory references are to the Welfare and Institutions Code unless otherwise noted.

[2] Edwin I., Sr., the father of Edwin and E.I., was also incarcerated, serving a 20-year prison term that began in March 2015. The juvenile court asserted dependency jurisdiction over Edwin in 2012 as a result of mother's and Edwin I. Sr.'s substance abuse. This court affirmed the juvenile court jurisdictional order in an unpublished opinion (*In re E.I.* (Apr. 12, 2013), B242762.) Edwin was returned to his parents and jurisdiction was terminated in November 2013.

her children inappropriately; she knew he had shown Edwin pornographic material. Mother had not been able to procure services for herself or the children.

DCFS removed the children and placed them in foster homes. In late June 2016, soon after the children were detained, mother was placed in custody due to a robbery charge. Mother told DCFS father had never met Emiliano and that he was incarcerated before Emiliano was born. Father had never had contact with Emiliano. In late July 2016, a DCFS social worker requested a telephonic interview with father through prison authorities. The social worker reported the request was not approved by the time of the writing of the August 2016 jurisdiction and disposition report.

In early August 2016, DCFS filed an amended dependency petition asserting the children were persons described by section 300, subdivisions (a), (b), and (g). The petition alleged mother's conduct placed the children at risk of harm due to her physical abuse of Edwin, her inability to provide appropriate supervision to respond to Edwin's behavior, and her illicit drug use. As to father, the petition alleged: "[Father] has a criminal history of convictions of robbery with attempted robbery with a firearm, second degree robbery and prevent dissuade victim or witness. The father is currently incarcerated and sentenced to a [19-year] prison term. The father's criminal history, conduct and inability to make a plan of ongoing care and supervision places the child's physical safety and emotional well-being at risk [of] harm."

At the jurisdiction hearing, father argued DCFS had not established his criminal history posed a risk to Emiliano. Father's counsel contended father's conduct had not endangered Emiliano and there was no affirmative evidence showing his absence put Emiliano at risk of harm. DCFS argued father was not able to make a safe plan or arrangements for Emiliano.[3] The court sustained the section 300, subdivision (g) allegation. At disposition, the court declared the children dependents under section 300, subdivisions (a), (b), and (g) and removed them from the parents. The court did not order reunification services for father, pursuant to section 361.5, subdivision (e).[4] This appeal followed.

---

[3] Edwin I.'s counsel argued DCFS was evaluating his relatives for placement, so "my client would be able to make a plan and have the child with his relatives." Father's counsel did not make similar representations regarding his client.

[4] Section 361.5, subdivision (e)(1) provides, in relevant part: "If the parent or guardian is incarcerated . . . the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, the likelihood of the parent's discharge from incarceration, institutionalization, or detention within the reunification time limitations described in subdivision (a), and any other appropriate factors."

DISCUSSION

I. Although Father Does Not Challenge the Court's Jurisdictional Findings Based on Mother's Conduct, We Review Father's Claims

As an initial matter, DCFS argues this court need not consider father's claims because he does not challenge the jurisdictional findings based on mother's conduct.

It is well established that the juvenile court may declare a minor a dependent if either parent's actions provide a basis for jurisdiction. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762; *In re I.A.* (2011) 201 Cal.App.4th 1484, 1491-1492.) If the appealing parent does not challenge the juvenile court's findings based on the other parent's conduct, the appeal may raise only academic questions of law since the appellate court "cannot render any relief . . . that would have a practical, tangible impact on [the appealing parent's] position in the dependency proceeding." (*I.A., supra,* 201 Cal.App.4th at p. 1492.) Yet, the reviewing court may "decide on a case-by-case basis whether subsequent events in a juvenile dependency matter make a case moot and whether our decision would affect the outcome in a subsequent proceeding. [Citations.]" (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1404.)

Courts have frequently considered one parent's appeal of jurisdictional findings based on that parent's conduct alone, despite the lack of a challenge to findings based on the other parent's conduct, when the jurisdictional allegations rendering the appealing parent "offending" may have a significant effect on subsequent dependency proceedings, including placement decisions. (See e.g., *In re D.M.* (2015) 242 Cal.App.4th 634, 639; *In re Christopher M.* (2014) 228 Cal.App.4th 1310, 1317; *In re*

Christopher R. (2014) 225 Cal.App.4th 1210, 1219, fn. 7; *In re Drake M., supra,* 211 Cal.App.4th at p. 763.) Such was the case here. The jurisdictional finding as to father rendered him an "offending" parent, and it was followed by removal from both parents under section 361, subdivision (c) and an order of no reunification services for father. The jurisdictional finding could be prejudicial to father in the ongoing dependency proceedings. Under these circumstances, we find it appropriate to consider father's arguments on appeal. (*In re Andrew S.* (2016) 2 Cal.App.5th 536, 542, fn. 2 (*Andrew S.*).)

II. Substantial Evidence Supported a Finding of Jurisdiction Under Section 300, Subdivision (g)

Father contends there was no substantial evidence that he was unable to arrange for Emiliano's care. We disagree.

" ' "In reviewing the sufficiency of the evidence, our review requires that all reasonable inferences be given to support the findings and orders of the juvenile court and the record must be viewed in the light most favorable to those orders. [Citation.]" ' [Citations.] 'Evidence sufficient to support the court's finding must be reasonable in nature, credible, and of solid value; it must actually be substantial proof of the essentials that the law requires in a particular case. [Citation.]' [Citation.] '[W]e . . . must uphold the trial court's findings unless it can be said that no rational factfinder could reach the same conclusion. [Citation.]' [Citation.]" (*In re Athena P.* (2002) 103 Cal.App.4th 617, 628-629.)

Section 300, subdivision (g) provides a basis for jurisdiction when "the child has been left without any provision for support," or "the child's parent has been incarcerated or institutionalized

and cannot arrange for the care of the child." " '[S]ection 300, subdivision (g) applies when, at the time of the hearing, a parent has been incarcerated and does not know how to make, or is physically or mentally incapable of making, preparations or plans for the care of his or her child.' [Citation.]" (*Andrew S., supra,* 2 Cal.App.5th at p. 543.) "[N]either incarceration alone nor the failure to make an appropriate advance plan for the child's ongoing care and supervision is sufficient to permit the exercise of jurisdiction under subdivision (g)." (*Ibid.*) "Section 300, subdivision (g) applies only when the parent is unable to provide or arrange for care *at the time of the hearing*." (*In re Christopher M., supra,* 228 Cal.App.4th at p. 1320.)

Father asserts DCFS failed to meet its burden to show he was unable to make a plan for Emiliano at the time of the hearing. We disagree. The evidence before the juvenile court was that father was incarcerated when Emiliano was born. Father had never seen Emiliano. Father had never contacted Emiliano. Father had made no arrangements for Emiliano and did not assert at the jurisdiction hearing that he was capable of arranging care for Emiliano.

This case thus differs from those in which reviewing courts found substantial evidence did not support a section 300, subdivision (g) finding. Those cases correctly apply the principle that it is DCFS's burden to show the parent cannot arrange for the child's care, and that the parent may prevail without making any factual showing at all. (*In re M.R.* (2017) 7 Cal.App.5th 886, 897, citing *In re S.D.* (2002) 99 Cal.App.4th 1068, 1078.) Still, in such cases, there was some indication that the parent could possibly arrange for care, such as the existence of family members or other individuals who had cared for the child or

whom the parent mentioned or had contacted as possible caretakers. (See e.g., *In re M.R., supra,* at p. 897; *Andrew S., supra,* 2 Cal.App.5th at p. 541; *In re M.M.* (2015) 236 Cal.App.4th 955, 965; *Maggie S. v. Superior Court* (2013) 220 Cal.App.4th 662, 672; *In re S.D., supra,* 99 Cal.App.4th at p. 1078.) Further, in such cases, the incarcerated parent typically had some form of relationship with the child. (See e.g., *In re M.R.*, 7 Cal.App.5th at p. 897 ["[A]lthough [father] had not been able to physically care for the children since his incarceration, there was some evidence that he took an interest in them, and attempted to provide for them to some degree from prison.]; *Andrew S., supra,* 2 Cal.App.5th at p. 541 [father was caring for children before his incarceration].)

In contrast, here the evidence established father had no connection whatsoever with Emiliano. This case is thus similar to *In re J.O.* (2009) 178 Cal.App.4th 139 (*J.O.*) and *In re James C.* (2002) 104 Cal.App.4th 470 (*James C.*), in which the reviewing courts found substantial evidence supported a finding that the incarcerated parent was unable to make arrangements for the care of the children. In *J.O.*, the father had no contact with the family for several years before the children were detained. (*J.O.,* at p. 145.) The father was living in Missouri and had not provided the children financial support. (*Id.* at p. 146.)

The juvenile court made findings based on the father's conduct under section 300, subdivision (g), which the reviewing court interpreted as applying where the parent is unable to provide or arrange care for the children at the time of the jurisdictional hearing. The court found substantial evidence supported this finding as to the father, reasoning: "According to the uncontested evidence, appellant had given no financial

support to his family for at least eight years. The court could reasonably infer from this fact that he was incapable of doing so, despite his professed 'interest' in obtaining custody. [Citation.] Moreover, appellant had no relationship with the children. He had not lived with them for more than a dozen years and, when he left, the oldest had barely entered pre-school. Even his rare telephonic contacts ceased at least three years prior to the detention. His scant interest in the children was demonstrated by his failure to make inquiry concerning their welfare over the years. Even after the case was pending and his children were placed in foster care, he made no affirmative attempt to communicate with DCFS or DIF to establish his circumstances and present ability to care for them. . . . Appellant's failure to provide financial support for over a decade, combined with his demonstrated lack of interest in the children's welfare before and after DCFS intervention, supported the court's jurisdictional finding under subdivision (g)." (*J.O., supra,* 178 Cal.App.4th at p. 154, fn. omitted.)

Similarly, in *James C.*, the father was incarcerated and had never seen the child. (*James C.*, *supra*, 104 Cal.App.4th at p. 476.) His release date was beyond the period allowable for reunification services. (*Id.* at p. 479.) On appeal, the father argued the section 300, subdivision (g) finding was not supported by substantial evidence because there was no evidence "he did not know how to make or was physically or mentally incapable of making preparations or plans for the care of the children." (*Id.* at p. 484.) The court disagreed: "The record shows that the father was incarcerated all of the children's lives. There is no evidence he ever attempted to care for the children during their lifetimes. The absence of evidence suggesting that the father was ever

interested in the welfare of the two toddler children during the entire time of his incarceration was sufficient for the juvenile court to infer that he either could not or was incapable of making preparations for their care. Thus, substantial evidence supports the juvenile court's determination that, with respect to the father, jurisdiction was appropriate under section 300, subdivision (g)." (*Ibid.*)

We find this reasoning persuasive here. Father has never met Emiliano and there is no indication he ever showed any interest in Emiliano or his welfare. Father has been incarcerated since Emiliano's birth. At no point in the proceedings below did father indicate he had any interest or desire in assuming responsibility for Emiliano. On this record, the juvenile court could reasonably infer that father could not or was incapable of making preparations for Emiliano's care. Substantial evidence supported the juvenile court's finding under section 300, subdivision (g).

III. No ICWA Error

Finally, father contends the juvenile court and DCFS failed to make a proper inquiry to determine if Emiliano has Indian ancestry. We find no error.

"Congress passed [the Indian Child Welfare Act, (25 U.S.C., § 1901 et seq; ICWA)] 'to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children "in foster or adoptive homes which will reflect the unique values of Indian culture. . . ." ' [Citations.] [¶] A social worker has 'an affirmative and continuing duty to inquire whether a child [in a § 300 proceeding] is or may be an Indian

child . . . ' (§ 224.3, subd. (a).) If the social worker 'has reason to know that an Indian child is involved, the social worker . . . is required to make further inquiry regarding the possible Indian status of the child, and to do so as soon as practicable, by interviewing the parents, Indian custodian, and extended family members to gather the information' required to be provided in the ICWA notice. (§ 224.3, subd. (c).) However, neither the court nor [the social services agency] is required to conduct a comprehensive investigation into the minor's Indian status." (*In re C.Y.* (2012) 208 Cal.App.4th 34, 39.)

Father does not contend Emiliano is an Indian child, or that the juvenile court erred in failing to require ICWA notice. Instead, father argues only that the juvenile court and DCFS failed to make sufficient inquiry to determine whether Emiliano has Indian ancestry. We find no error in the court's actions with reference to ICWA.[5] Contrary to father's assertion on appeal that neither parent was asked about Indian ancestry, the record indicates a DCFS social worker interviewed mother about Indian heritage at the outset of the case. The social worker accordingly indicated Emiliano had no known Indian ancestry.

At a June 15, 2016 hearing, the court found there was no reason to know the case was an ICWA case. Father was not

---

[5] We note the juvenile court has an " 'affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . has been . . . filed is or may be an Indian child in all dependency proceedings. . . .' " (*In re Isaiah W.* (2016) 1 Cal.5th 1, 11, citing section 224.3, subd. (a).) In *Isaiah W.*, the California Supreme Court interpreted section 224.3 to mean the juvenile court's duty to inquire continued even after the juvenile court made an initial finding that it had no reason to know the child was an Indian child. (*Ibid.*)

present or represented by counsel at that hearing. However, at a subsequent August 1, 2016 hearing, at which father was present and represented by counsel, the court found ICWA did not apply. The record does not include a reporter's transcript from either hearing. We must presume the juvenile court complied with its official duties, and that, to the extent it was required to do so, the court made an inquiry of father regarding possible Indian heritage before making its finding. (*In re L.B.* (2003) 110 Cal.App.4th 1420, 1424; Evid. Code, § 664.)

On this record, we cannot conclude the juvenile court failed to make, or direct DCFS to make, sufficient inquiry regarding whether Emiliano has any Indian heritage. This case is unlike *Andrew S.*, in which the father told a social worker he may have Indian ancestry, thus triggering a need for additional inquiry, and in which the reviewing court could discern from the record that the court did not inquire about the child's Indian heritage during the proceedings.[6] (*Andrew S., supra,* 2 Cal.App.5th at p. 545.)

---

[6] In his reply brief, father points out the record does not include a judicial council form ICWA-020 completed by either mother or father. Under California Rules of Court, rule 5.481(a)(2), the court is required to order parents in a dependency case to complete the ICWA-020 form. However, even assuming the juvenile court failed to order the parents to complete the form in this case, we would find the error harmless. Father has not asserted Emiliano may have Indian ancestry or suggested what he (or mother) would have said had they been required to complete the form. Mother was asked about Indian ancestry and reported Emiliano had none. Without an affirmative representation of Indian ancestry either in the dependency court or on appeal, father cannot show that any juvenile court error in

DISPOSITION

The juvenile court order is affirmed.

BIGELOW, P.J.

We concur:

FLIER, J.

SORTINO, J.*

---

failing to order completion of the ICWA-020 form was prejudicial. (*In re H.B.* (2008) 161 Cal.App.4th 115, 121-122.)

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