Filed 7/27/18 In re D.F. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re D.F., A Person Coming Under the Juvenile Court Law.	B285396 (Los Angeles County Super. Ct. No. CK66352)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. CARLA M., Defendant and Appellant.	

APPEAL from order of the Superior Court of Los Angeles County, Debra Losnick, Commissioner. Affirmed with directions.

Jacques Alexander Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Respondent.

Appellant Carla M. (mother) appeals from the jurisdictional findings and dispositional order as to her daughter, D.F. She argues the court erred when it did not order reunification services, and that notice was inadequate under the Indian Child Welfare Act (25 U.S.C. § 1901 et seq. (ICWA)). Respondent, Los Angeles County Department of Children and Family Services (DCFS), concedes that ICWA notice was inadequate, but argues the court appropriately denied mother reunification services. We conclude that notice was improper and remand with directions to comply with ICWA. In all other respects the juvenile court's order is affirmed.

FACTUAL AND PROCEDURAL SUMMARY

D.F., born May 2, 2015, came to the attention of DCFS in July 2016, when domestic violence between her parents was reported by a witness. The witness stated that mother hit father while he was holding D.F., who was a one-year-old at the time. The witness reported D.F. had a burn mark on her left arm, which the witness believed was caused by lack of supervision.

A DCFS social worker interviewed father, who stated he had been holding D.F. when mother "swung on him." He stated D.F. sustained the burn on her arm while crawling in the bathroom when her mother was not paying attention. He felt D.F. should have been taken to a doctor for the burn and discussed this with mother, but D.F. was not seen by a doctor.

He believed mother was schizophrenic. He said he loved mother and that they were in a relationship. The paternal grandparents also expressed concerns that they had seen marks on D.F.'s face from falling off of a bike and that she was not being properly supervised.

DCFS was initially unable to locate mother and D.F. A social worker eventually made contact with mother and the maternal aunt, who stated that father was the aggressor of the domestic violence in the parents' relationship. Mother claimed father and his family were lying about her to obtain custody of D.F. She stated father was "barely" a part of their lives. She claimed father was in a relationship with another woman who lived with him and that she wanted them to be together and leave her and D.F. alone. She stated she had severe depression.

When asked about the burn mark on D.F.'s arm, mother stated D.F. fell down. The social worker asked her to tell the truth, and she responded that D.F. sustained the burn from a wall heater in the bathroom. She claimed she had taken D.F. to a doctor a while after she was burned. When the social worker observed D.F., she had a black burn mark on her arm and no other marks.

The maternal aunt reported that mother smoked marijuana and had untreated mental health problems. Another resident at mother's home stated that everyone who lived there smoked marijuana. She also stated that mother had lied to the social worker about when she had moved into the residence.

In October 2016, DCFS filed a Welfare and Institutions Code section 300[1] petition alleging that: (1) mother had placed

[1] All subsequent undesignated statutory references are the Welfare and Institutions Code.

D.F. at risk of serious physical harm by engaging in physical altercations (§ 300, subd. (a)); (2) mother had failed to protect D.F.'s older sibling, J.M., from serious physical harm, leading to his removal from mother's custody and permanent placement (§ 300, subds. (a), (b) & (j)); (3) mother had failed to protect D.F.'s older sibling H.M. from serious physical harm, leading to her removal from mother's custody and permanent placement (§ 300, subds. (a), (b) & (j)); (4) mother failed to protect D.F. from father who had a history of physically abusing mother (§ 300, subd. (b)); (5) mother had serious emotional problems for which she refused to take prescribed medication and which rendered her incapable of caring for D.F. (§ 300, subd. (b)); and (6) mother was a current abuser of marijuana, which rendered her incapable of providing regular care for D.F. (§ 300, subd. (b)).[2]

The allegation regarding D.F.'s sibling, J.M., was based on his placement on life support at 10 months old, having suffered serious injuries including two subdural hematomas, a fractured wrist, retinal hemorrhages, and a bruised eye. These injuries were consistent with nonaccidentally inflicted trauma. Another sibling, K.W., who was in mother's custody when J.M. was hospitalized, was permanently placed with the maternal aunt following this incident. Mother had failed to complete court-ordered counseling when her parental rights with respect to J.M. and K.W. were terminated.

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[2] The petitions also alleged that father was a current substance abuser and had engaged in domestic violence, rendering him incapable of caring for D.F. and placing her at substantial risk of harm. The allegation that father was a current substance abuser was later removed by interlineation.

The allegation regarding D.F.'s sibling H.M. was based on a medical examination which found she had sustained first and second degree burns consistent with nonaccidentally inflicted trauma. Mother was found to have failed to obtain necessary medical services for H.M. Mother and her boyfriend, B.R., engaged in domestic violence which placed H.M. in danger. H.M. was permanently placed with the maternal aunt.

In October and November 2016, the court ordered D.F. detained from parental custody, and referrals for services were ordered for both parents. At the October hearing, father informed the court that he may have Indian ancestry. The court ordered DCFS to investigate the parents' ancestry and provide any necessary ICWA notices. DCFS interviewed the paternal grandmother who stated that her grandmother and grand uncle had Indian ancestry. The paternal great-grandmother also believed her mother and uncle had Indian ancestry. DCFS also interviewed the maternal aunt who stated she was "Indian and Creole" of possibly Blackfoot or Cherokee origins. At the November hearing, mother indicated she had Cherokee and Blackfoot heritage.

ICWA notices were mailed in January 2017 to the Blackfeet tribe and two of three Cherokee tribes. The Eastern Band of Cherokee Indians and the Blackfeet tribe responded that D.F. was not eligible for membership. In March 2017, the court ordered DCFS to provide ICWA notice to the United Keetoowah Cherokee Tribe. DCFS sent a notice to the tribe which stated that mother did not know or claim any Indian ancestry. The notice also stated "Not applicable" or "No information available" next to each maternal relative.

In May 2017, the section 300 petition was amended to add the allegation that D.F. sustained a burn while in mother's care and that both parents failed to obtain proper medical treatment for the burn. The allegations with respect to D.F.'s siblings were stricken by interlineation under section 300, subdivisions (a) and (b), but the allegation of sibling abuse under subdivision (j) remained.

Following a contested jurisdictional and dispositional hearing in June 2017 at which mother testified, the court sustained the petition allegations regarding both parents' engagement in physical altercations, mother's emotional problems, mother's substance abuse, both parents' failure to seek appropriate medical care for D.F.'s burn, and mother's failure to protect D.F.'s older siblings from abuse leading to their removal and permanent placement. The court found that D.F. was a dependent child under section 300, subdivisions (a), (b), and (j), and ordered her removed from parental custody.

At the time of the dispositional hearing, mother had failed to submit to random drug testing, but was participating in individual counseling, substance abuse treatment, parenting classes, and a domestic violence support group. The court stated that "even though the court's general and standard practice is to order reunification services, I cannot in good conscience do so in this case given the history of the very severe injuries that every child the mother seems to have given birth to that I am aware of has had, in addition to this child of this age having a burn." The court went on to state that mother's emotional problems were not being adequately addressed and were central to her parenting issues. Despite stating that mother had made progress, the court did not order reunification services for mother pursuant to

section 361.5, subdivision (b)(10) [past termination of reunification with a sibling and failure to make reasonable efforts to address problems which led to such termination]. The court stated that denying reunification services to mother also may have been proper under section 361.5, subdivision (b)(11) [past termination of parental rights over a sibling and failure to make reasonable efforts to address problems which led to such termination] and (15) [willful abduction of the child]. The court ordered mother to be psychiatrically evaluated, to attend individual counseling, and to submit to drug testing. It ordered monitored visits between mother and D.F.

At the time of the dispositional hearing, two of the Indian tribes who had been sent ICWA notices had not responded. At that hearing, the court set a progress hearing to address ICWA.

This timely appeal followed.

DISCUSSION

I

Appellant argues the juvenile court erred in denying her reunification services under section 361.5, subdivision (b)(10). We disagree.

The juvenile court's order denying reunification services is reviewed for substantial evidence. (*R.T. v. Superior Court* (2012) 202 Cal.App.4th 908, 914.) We resolve all conflicts and draw all reasonable inferences in favor of the juvenile court's orders. (*In re Katrina C.* (1988) 201 Cal.App.3d 540, 547.)

Under section 361.5, subdivision (b)(10), the juvenile court may deny reunification services to a parent upon finding (1) that the parent failed to reunify with a sibling and (2) that the parent has not made reasonable efforts to treat the problems which led

to that failure to reunify. These findings must be supported by clear and convincing evidence. (*Ibid.*) Under section 361.5, subdivision (c)(2) the court is forbidden from granting reunification services to a parent described under subdivision (b)(10) unless the court finds by clear and convincing evidence that reunification is in the best interest of the child.

Mother argues the juvenile court erred in finding she had not made reasonable efforts to treat the problems which led to the termination of reunification services with respect to D.F.'s older siblings. The efforts made by a parent with prior DCFS history need not completely resolve his or her problems in order to be considered reasonable. (*Renee J. v. Superior Court* (2002) 96 Cal.App.4th 1450, 1464.) On the other hand, the fact that a parent has made some progress does not necessarily indicate that he or she has made reasonable efforts. (*R.T. v. Superior Court, supra,* 202 Cal.App.4th at p. 914.)

There was substantial evidence to support the juvenile court's finding that mother's participation in services following D.F.'s detention was insufficient to constitute "reasonable efforts." Although she had made some progress by participating in various programs following D.F.'s detention, the problems which had led to the failure of reunification with the older siblings, including failure to sufficiently address emotional problems by refusing to complete court-ordered counseling, continued with respect to D.F., as evidenced by the finding that mother was refusing to take prescribed medication for her emotional problems. In fact, the court found that mother's emotional problems were at the heart of her parenting deficiencies.

Mother has the opportunity to file a section 388 petition to seek reunification if she makes further progress. It was not error for the court to find that reasonable efforts had not yet been made to resolve the problems that led to termination of reunification with respect to D.F.'s older siblings.[3]

Mother also argues in the alternative that the juvenile court should have ordered reunification under section 361.5, subdivision (c)(2), which allows reunification services to be ordered for parents described under subdivision (b)(10) where such services would be in the child's best interest. We disagree.

Mother argues that it is in D.F.'s best interest to establish a healthy relationship with her and that family preservation is the goal of dependency proceedings, citing *Renee J. v. Superior Court, supra,* 96 Cal.App.4th at page 1464. As respondent argues, the general prioritization of family preservation is not dispositive. Instead, the juvenile court must consider a number of factors in deciding whether to order reunification services for a parent with a prior history of failure to reunify, including the strength of the parent-child bond, the parent's history, the parent's current efforts and fitness, and the gravity of the issue which led to the child's dependency. (*In re Ethan N.* (2004) 122 Cal.App.4th 55, 66-67.) Here, mother's history of failing to reunify with D.F.'s older siblings, the gravity of the problems which led to D.F.'s dependency which included physical harm, and the fact that mother's emotional problems had been

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[3] Though the juvenile court indicated that its order denying reunification may have been proper under section 361.5, subdivision (b)(11) and (15), we do not address these provisions as the court clearly made its order under subdivision (b)(10).

insufficiently addressed, all indicated that reunification was not in D.F's best interest. The court did not err in so concluding.

II

Appellant and respondent agree that the ICWA notice requirements were not met because the notices sent contained inaccurate and incomplete information. We agree.

Appellant argues that it was reversible error for the juvenile court to proceed with the dispositional hearing without first ensuring ICWA compliance. Although some courts have held that failure to comply with ICWA is prejudicial and reversible error, others have found that the appropriate remedy is to remand for ICWA compliance. (Compare *Nicole K. v. Superior Court* (2007) 146 Cal.App.4th 779, 781 [finding lack of ICWA notice should be remedied by vacating juvenile court orders] with *In re Veronica G.* (2007) 157 Cal.App.4th 179, 188 [remanding for ICWA compliance]; *In re Brooke C.* (2005) 127 Cal.App.4th 377, 383 [finding that when notice requirements of ICWA are not met, case may be remanded prior to termination of parental rights].) We decline to follow those courts which have reversed based on lack of ICWA compliance, finding remand to be the appropriate remedy.

Upon remand, if the court finds that D.F. is an Indian child after providing proper notice, it shall conduct a new dispositional hearing in compliance with ICWA and related California law. (*In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1388-1389.)

DISPOSITION

The matter is remanded to the juvenile court with directions to comply with the inquiry and notice provisions of

ICWA as stated in this opinion. In all other respects, the court's orders are affirmed.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

COLLINS, J.