Filed 9/13/12 In re David M. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 DAVID M., a Person Coming Under the Juvenile Court Law.	B238373 (Los Angeles County Super. Ct. No. CK90593)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. D.M., Defendant and Appellant.	

APPEAL from the orders of the Superior Court of Los Angeles County, Terry Truong, Juvenile Court Referee. Affirmed.

Joel F. Block, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Stephen D. Watson, Associate County Counsel, for Plaintiff and Respondent.

D.M. (father) appeals from the judgment of December 19, 2011, declaring his son a dependent of the court under Welfare and Institutions Code[1] section 300, subdivision (b) and ordering his son removed from his custody. Father contends substantial evidence does not support the jurisdictional findings or removal order. He further contends the finding that the Indian Child Welfare Act of 1978 (the ICWA) (92 Stat. 3069, 25 U.S.C. §§ 1901-1963) does not apply was an abuse of discretion. We affirm.

STATEMENT OF FACTS AND PROCEDURE

David M. was born in 2006 to father[2] and Kathleen B. (mother). David lived with mother, who abused drugs and alcohol and led a transient lifestyle.

Father and mother had an unstable relationship. They engaged in domestic violence in David's presence. David was afraid of father. Father was aware mother's lifestyle placed David at risk but did not participate in efforts to protect David because he did not want to get involved in mother's "mess." Father had an alcohol-related criminal conviction.

In the summer of 2011, the Department of Children and Family Services (Department) offered services to mother so she could keep David safely in her care, but she failed to comply. Father did not cooperate.

In late September 2011, mother died and father was critically injured in a motorcycle accident. Father drove the motorcycle into a car, causing mother to fly off and be run over by a tractor trailer. David went to live with a maternal relative, Monica S. Incapacitated, father lived in the home of a previous wife while recovering from his injuries.

On November 2, 2011, David was detained, and a dependency petition was filed.

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1 All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

2 The dependency court found father to be David's presumed father.

On December 19, 2011, David was declared a dependent of the court, based on sustained allegations under section 300, subdivision (b), that on prior occasions, father struck and pushed mother to the ground in David's presence and choked mother. Such violence placed David at risk of physical harm. Custody was taken from father, reunification services were ordered, and father was ordered to participate in individual counseling to address domestic violence and other case issues. Conjoint counseling was ordered at the discretion with the therapist. Father was granted monitored visits.

DISCUSSION

Substantial Evidence

Father contends substantial evidence does not support the jurisdictional findings or removal order. We disagree with the contentions.

In determining whether substantial evidence supports the factual findings, "all intendments are in favor of the judgment and [we] must accept as true the evidence which tends to establish the correctness of the findings as made, taking into account as well all inferences which might reasonably have been drawn by the trial court." (*Crogan v. Metz* (1956) 47 Cal.2d 398, 403-404.) "'"[The] [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could [make the findings made]."' [Citations.]" (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.) "[I]ssues of fact and credibility are the province of the trial court. [Citation.]" (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.)

"We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court." (*In re Matthew S., supra,* 201 Cal.App.3d at p. 321.) If supported by substantial evidence, the judgment or finding must be upheld, even though substantial evidence may also exist that would support a contrary judgment and the dependency court might have reached a

different conclusion had it determined the facts and weighed credibility differently. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) Thus, the pertinent inquiry when a finding is challenged on sufficiency of the evidence grounds is whether substantial evidence supports the finding, not whether a contrary finding might have been made. (*Ibid.*)

Jurisdictional Findings

Father contends substantial evidence does not support the jurisdictional findings, under section 300, subdivision (b), that father inflicted domestic violence on mother, which placed David at risk of harm. We reject the contention.

A. Section 300, subdivision (b)

Section 300, subdivision (b) describes in pertinent part a child who has suffered, or is a substantial risk of suffering, "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, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left[.]" "While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) The purpose of the juvenile court law is to provide "maximum safety and protection for children" being harmed or who are at risk of harm. (§ 300.2.)

B. Substantial Evidence

Pursuant to section 355,[3] father objected to the hearsay statements of five maternal relatives contained in the jurisdiction/disposition report. The dependency court sustained the objection to the statements of four of the relatives[4] and ruled that the record was sufficient to support the allegations under section 300, subdivision (b) without those statements. Father contends on appeal that, without the statements of the four relatives, the evidence was insufficient to support the allegations. The contention is meritless. As the record contains evidence supporting the allegations without the statements of the four relatives, the statements of the four relatives are "competent evidence" and may be considered with the rest of the record in determining whether substantial evidence supports the findings. (§ 355, subd. (b).)

The record contains the following evidence supporting the findings of domestic violence and risk of harm to David. Mother disclosed to the social worker that father had a history of hitting her. In June 2011, he physically assaulted her in David's presence. Describing a June 2011 incident of domestic violence, mother stated father "socked" her multiple times on the arm, causing bruising that was still apparent to the social worker weeks later.

David told the social worker, "'one time [father] pushed my mom and I helped her get up.'" David said father hit or pushed mother "'another time[,] when we were living in a hotel. He was choking her and wouldn't let her go.'" When mother and father

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[3] Section 355 provides in pertinent part: "(b) A social study prepared by the petitioning agency, and hearsay evidence contained in it, is admissible and constitutes competent evidence upon which a finding of jurisdiction pursuant to Section 300 may be based, to the extent allowed by subdivisions (c) and (d). . . . [¶] . . . [¶] (c)(1) If any party to the jurisdictional hearing raises a timely objection to the admission of specific hearsay evidence contained in a social study, the specific hearsay evidence shall not be sufficient by itself to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based . . . ."

[4] The four relatives are Connie H., Marshall H., Carol H., and Joann B.

fought, David "'would watch TV or close my eyes so I wouldn't see.'" He said he "'would get scared and cry.'" David further revealed: "'[I] saw my father have a gun. I also saw my dad and mom fight for the gun.'" David was frightened of father and told the social worker he did not want to live with him because he "'hurt my mom.'" After a visit with father in December 2011, David expressed a fear of father and weapons, noting father had previously hurt mother. David sought reassurance that father knew not to hurt children.

Monica told the social worker that David disclosed to her, "'my daddy was choking my mommy and said that he would do it to me if I didn't be quiet.'" David told Monica father had a gun.

Father denied hitting or choking mother but admitted he pushed "her to move her out of the way." He had a history of not being willing to cooperate in insuring David's safety, and he did not participate in a program to rehabilitate himself.

The four relatives reported that David or mother disclosed father hit mother, hit mother's face causing bleeding, choked mother, had weapons, shot mother in the finger, threatened to kill mother, left mother stranded in Utah at a biker gang gathering, and took mother on scary rides when he was under the influence. Marshall reported father had a reputation as "nothing but a druggie and pusher," and Carol reported father had a reputation of being "always loaded."

The foregoing evidence of father's past and recent infliction of domestic violence, denial of his role, reluctance to cooperate in protecting David, and lack of rehabilitation amply supports the allegations sustained by the dependency court. Accordingly, substantial evidence supports the findings under section 300, subdivision (b).

Removal Order

Father contends the order removing David from his physical custody under

section 361, subdivision (c)(1)[5] must be reversed, because substantial evidence does not support the finding David was at substantial risk of harm in father's custody, and the dependency court did not consider reasonable alternative means to protect David. As David resided with maternal relatives, not with father, when the petition was filed, removal of David from father's custody was not required. (See § 361, subd. (c)(1).) Accordingly, father's contention is moot.

Were we to review father's contentions, we would disagree with them. The evidence of father's past and recent infliction of domestic violence, denial of his role, reluctance to cooperate in protecting David, and lack of rehabilitation is substantial evidence supporting the finding David was at substantial risk of harm in father's custody. (§ 361, subd. (c)(1).) Father's assertion the dependency court did not consider whether there were reasonable alternative means to protect David is incorrect. The dependency court's finding—"I do find . . . there are no reasonable means by which [David's] physical health can be protected without removing him from his father's physical custody"—establishes the court considered the issue.

ICWA Finding

Father contends the finding there was no reason to know David is an Indian child was an abuse of discretion because, in failing to interview Helen S., the Department did

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[5] Section 361 provides in pertinent part: "(c) A dependent child may not be taken from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence[:] [¶] (1) There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody. [¶] . . . [¶] (d) The court shall make a determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal of the minor from his or her home[.]"

not provide the court with sufficient information to make a finding. We disagree with the contention.

"'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' [Citations.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) Abuse of discretion is established if the determination is not supported by substantial evidence. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 796.) In determining whether substantial evidence supports the factual findings, "all intendments are in favor of the judgment and [we] must accept as true the evidence which tends to establish the correctness of the findings as made, taking into account as well all inferences which might reasonably have been drawn by the trial court." (*Crogan v. Metz, supra,* 47 Cal.2d at pp. 403-404.)

Section 224.1, subdivision (b) provides in pertinent part: "As used in connection with an Indian child custody proceeding, the term 'Indian child' . . . means an unmarried person who is 18 years of age or over, but under 21 years of age, who is a member of an Indian tribe or eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe"

Section 224.2, subdivision (a) provides in pertinent part: "If the court, a social worker, or probation officer knows or has reason to know that an Indian child is involved, any notice sent in an Indian child custody proceeding under this code shall be sent to the minor's parents or legal guardian, Indian custodian, if any, and the minor's tribe[.]"

Section 224.3, subdivision (b) provides in pertinent part: "The circumstances that may provide reason to know the child is an Indian child include, but are not limited to, the following: [¶] (1) A person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe."

Section 224.1, subdivision (c) provides in pertinent part: "As used in connection with an Indian child custody proceeding, the term[] 'extended family member' . . . shall be defined as provided in Section 1903 of the Indian Child Welfare Act."

Section 1903 of the ICWA provides, in pertinent part: "'extended family member' shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent[.]" (25 U.S.C. § 1903(2).)

On July 7, 2011, mother told the social worker David might have Indian ancestry. On November 2, 2011, Monica, who was David's maternal second cousin, told the court the family had American Indian heritage and her mother, Helen, would know what tribe. Monica provided Helen's telephone number to the court, and the court ordered the Department to contact Helen.

In interviews with the social worker, maternal relatives stated the following. The maternal great grandmother stated, "It has been reported in the family that there is Indian heritage, but 'that's way back'. I can't remember what side it was on. I guess on my husband's side, his grandma maybe. They got some money one time a long time ago.'" She stated she did not know what tribe the family might have heritage in and all family members who would know more were deceased. Maternal aunt Joann H. stated she believed there was Indian heritage somewhere on the side of her father. She stated she did not know anything about it. She thought the name of the tribe was "Chachuni." No Chachuni tribe is listed in the Federal Registry's list of federally-recognized Indian tribes. The record does not indicate the social worker contacted Helen.

On December 5, 2011, father stated he had no Indian ancestry. The dependency court found the ICWA did not apply and there was no reason to know there is any American Indian heritage in mother's background.

It was not an abuse of discretion to find there was no reason to know David is a member of a tribe or eligible for membership and his parent was a tribal member. (See § 224.1, subd. (b) [definition of the term "Indian child"].) There was evidence any Indian

heritage that might exist in this family was "'way back'" and was conjecture only. David's maternal great grandmother, mother, and maternal aunt were not members of a tribe. Monica's statement that Helen could identify the tribe was contradicted by the evidence there was no one alive who might identify the Indian heritage. Because questions of credibility were for the trial court and we review the evidence in the light most favorable to the judgment, we conclude Helen did not know what tribe the family had ancestry in. It was not an abuse of discretion for the court to make its "no reason to know" finding in the absence of information, if any, from Helen. Moreover, as Helen was David's first cousin once-removed,[6] and, thus she was not an extended family member, it could reasonably be concluded that Helen's familial relationship with David was too remote for her information to provide reason to know. (See § 224.3, subd. (b)(1); 25 U.S.C. § 1903(2).) The dependency court's finding there was no reason to know David was an Indian child and the ICWA did not apply was not an abuse of discretion.

DISPOSITION

The orders are affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J. MOSK, J.

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6 David was Monica's second cousin, and Helen was Monica's mother.