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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re A.D. et al., Persons Coming Under the
Juvenile Court Law.

SOLANO COUNTY DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,
Plaintiff and Respondent,

v.

A.C. et al.,
Defendants and Appellants.

A134595

(Solano County Super. Ct.
Nos. J41179 & J41180)

A.C. (Mother) and L.B. (Father) appeal from an order of the Solano County Superior Court, Juvenile Division, entered in this dependency proceeding on January 20, 2012, after a combined jurisdictional and dispositional hearing. Father and Mother both claim substantial evidence does not support the juvenile court’s jurisdictional findings, sustained under Welfare and Institutions Code section 300, subdivisions (b) and (j),¹ and the dispositional finding made under section 361, subdivision (c)(1), which was necessary for an order continuing the removal from Mother’s custody of the minor boys—A.D. (born March 1998) and S.B. (born September 2008). Mother contends, in addition, there was prejudicial error under the notice provisions of the Indian Child Welfare Act (ICWA).

¹ Further statutory references are to the Welfare and Institutions Code unless otherwise indicated. References to rules are to the California Rules of Court.

As discussed below, we conclude the contested jurisdictional and dispositional findings are supported by substantial evidence, but conditionally reverse with directions to ensure compliance with the notice provisions of ICWA.

BACKGROUND

On November 14, 2011, A.D., who was then 13 years old, was found at school in the possession of a knife. The school summoned the Vacaville Police Department and when a responding detective interviewed A.D., the minor disclosed that Father² had hit him with a belt the previous week. Examining the boy, the detective observed and photographed visible bruises on his legs, upper thigh, and left arm. According to A.D., these were caused by the previous week's beating. The detective made an emergency referral to the Solano County Department of Health and Social Services (Department). The responding social worker (SW) interviewed A.D., who again said Father hit him with a leather belt on his legs, for "not doing the dishes." He said Father had begun using a belt to hit him about two months ago. A.D. reported that before that Father had hit him with his hands, referring to an incident in 2009 when Father had been arrested for doing so. The SW took A.D. into emergency protective custody that day.³ The detective found Father at home and placed him under arrest. Two days later, on November 16, the Department initiated this proceeding with a petition under section 300.

The petition stated the following allegation under section 300, subdivision (b) (the b-1 allegation): each of the minors "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 [the child's] parent . . . to adequately supervise or protect the child." (See § 300, subd. (b).) Specifically, both minors were "at substantial risk of physical harm" in that Father

² Father is the biological father of S.B., but not A.D. Nevertheless, A.D. refers to him as his "Dad." Father and Mother are not married, but have lived together since A.D. was about two years old, and since that time Father assumed a parental role and considers A.D. his son. A.D. is aware of his alleged father, C.B., but has had limited contact with him due to the latter's incarceration. When these appeals were taken, the juvenile court had found Father to be the presumed father of S.B. Both Father and C.B. sought to be declared A.D.'s presumed father, but that issue remained undecided.

³ S.B., at this time, remained in Mother's custody.

had “inflicted non-accidental physical injury” on A.D., on November 5 and on a prior occasion in 2009; in both instances Father had been arrested for child abuse; and Mother, aware of the prior incidence of abuse, was unable or unwilling to protect A.D.⁴

Orders issued after a continued detention hearing, signed November 20, returned A.D. to Mother’s custody and continued her custody of S.B. The juvenile court indicated its decision to allow both minors to remain in Mother’s care was predicated on both parents’ willingness to follow court orders temporarily prohibiting Father from having unsupervised contact with either minor. After a hearing on November 30, the court indicated it would issue such temporary restraining orders; and on December 6, the juvenile court issued temporary restraining orders prohibiting Father from having contact with either minor, and requiring him to stay away from their residence with Mother and their school or day care. The court, on December 13, signed further restraining orders after hearing, which extended these contact prohibitions and stay-away requirements through January 20, 2012, and specified further that Father was to stay 100 yards away from the children’s residence with Mother and their school or day care.

On December 21, the Department filed an amended petition, adding two allegations to the original b-1 allegation. The first, under section 300, subdivision (b) (the b-2 allegation), alleged Mother had “failed to comply with restraining orders and follow directives from the Juvenile Court,” in that Father, on December 18, had been arrested for assault on another person, Mother had “reported that [Father] was in her residence prior to the incident and that she assisted by providing [Father with] the bat which was used during the assault[, and Mother’s] “inability or unwillingness to follow” the court’s directives and orders “place[d] the children at substantial risk of physical harm.” The second, under section 300, subdivision (j) (the j-1 allegation), alleged Father

⁴ For convenience, we have summarized this allegation as it was modified in an amended petition, discussed below, and as it was further amended by the juvenile court to conform to proof. Of two other allegations in the original petition, under section 300, subdivision (g), one was later dismissed and the other is not pertinent to this appeal.

had “physically abused” A.D. on November 5 and on at least one prior occasion, and this placed S.B.—A.D.’s sibling—“at substantial risk of abuse.”⁵

In an addendum report, filed the same time as the amended petition, the assigned SW recommended that the juvenile court remove both minors from Mother’s custody and detain them, essentially on the basis of the circumstances underlying the new b-2 allegation. At the conclusion of a detention hearing on December 22, the court ordered the minors’ detention, and the Department placed them together in a foster home.

On January 20, 2012, after a combined jurisdictional/dispositional hearing, the juvenile court found true the above summarized b-1, b-2, and j-1 allegations. It also found, by clear and convincing evidence that both minors “would be placed [at] a substantial risk of harm, if returned to the care of their Mother.”⁶ The court also indicated its intent to issue new restraining orders to continue the existing contact prohibitions and stay-away requirements through April 19, 2012.⁷

Father’s and Mother’s appeals are from this order. (§ 395.)

⁵ Again, we have summarized the b-2 and j-1 allegations in accordance with the juvenile court’s subsequent amendment on the record. While the court’s reading on the record of the sustained b-2 allegation was not materially different from the language in the amended petition, the court did add a determination that the 100-yard stay-away requirement in the restraining orders included the curtilage of the apartment building where Mother lived, and thus Father’s presence on the grounds of the building, as well as inside the apartment, was in violation of the restraining orders. It appears the court regarded the b-2 allegation to be amended as such.

⁶ The juvenile court continued the matter for three weeks to make further dispositional findings and orders, including the determination of A.D.’s presumed father, if any. (See fn. 2, *ante*.)

⁷ The new restraining orders were filed on January 23, 2012. We note April 19, 2012, was the date the court set at this hearing for a 90-day placement review. The Department had requested the review in order to expedite the return of S.B. to Mother’s care as soon as the assigned SW had received some “feedback” regarding the parents, and especially Mother’s successful participation in the services they had only recently begun. In accordance with this request, the court’s order additionally authorized the SW to return S.B. to Mother’s care at any time after providing five days’ notice to counsel.

DISCUSSION

I. *The Jurisdictional Findings*

A. *Introduction*

Father and Mother contend the juvenile court erred in sustaining the jurisdictional allegations summarized above, as they are not supported by substantial evidence.

The “substantial evidence” test is the appropriate standard of review for jurisdictional findings. (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1433.) “The issue of sufficiency of the evidence in dependency cases is governed by the same rules that apply to all appeals. If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. [Citation] We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or evaluate the weight of the evidence. Rather, we draw all reasonable inferences in support of the findings, view the record most favorably to the juvenile court’s order, and affirm the order even if other evidence supports a contrary conclusion.” (*In re Christopher L.* (2006) 143 Cal.App.4th 1326, 1333 (*Christopher L.*.)

B. *The b-1 Allegation*

Concerning the b-1 allegation—that Father “inflicted non-accidental physical injury” upon A.D. on November 5, 2011—both parents reason there is no solid, credible evidence showing that Father’s physical discipline with a belt at that time was the cause of the marks and bruises observed on A.D.’s arms and legs the following week. On this point, both parents refer to the lack of any expert testimony, and more particularly, to evidence indicating that A.D. had a history of significant behavior problems including dishonesty and lying.

The evidence admitted at the jurisdictional/dispositional hearing included A.D.’s initial disclosure, discussed above, that Father had hit him with a leather belt in early November 2011. Father, in his initial interview with an SW, admitted spanking A.D. “twice on his butt” with a belt, and added “any marks that I put on him weren’t intentional and I didn’t hit that hard.” He explained it was to discipline the child, whose behavior was constantly getting him into trouble, who was a “special needs child [with]

something . . . wrong in his head,” and who had lied before about Father abusing him. Father tried other methods of discipline, such as taking away A.D.’s privileges, but “nothing seems to work.” Mother, in her initial interview with an SW, conceded Father had caused *some* of A.D.’s bruises—that is, she said Father had not caused “*all* of them,” and the bruise on A.D.’s thigh was the result of the boy moving his leg, causing Father’s belt to hit A.D.’s thigh instead of his buttocks. (*Italics added.*) The assigned SW testified that, in her opinion, some of the bruises on A.D.’s body photographed on November 14, 2011, were caused by a belt, based on their “linear shape,” in particular, the bruise on his thigh.

About one week after his initial disclosure on November 14, 2011, A.D. wrote a letter stating he had lied about Father, that he had “bit[ten] himself on the leg which caused his bruises,” and he wanted Father to return home and have the restraining orders “disappear pretty please.” The SW, conceding A.D.’s “possible untruthfulness” and the fact he had recanted his original disclosure, nevertheless, concluded from the photographs his injuries were not self-inflicted, based on their “location, severity, and pattern.” The photographs themselves were admitted into evidence, and the juvenile court commented they were persuasive in its finding that Father had indeed used “excessive force” disciplining A.D.

In evaluating the foregoing evidence, we first note that neither Father nor Mother have cited any authority indicating that expert testimony as to the causation of A.D.’s physical injuries was necessary to establish the b-1 allegation by a preponderance of the evidence. With regard to A.D.’s history of untruthfulness, this history appears faithfully and abundantly in the admitted reports and testimony of the SW, as related or identified by family members, his foster caregiver, and even his Individual Education Plan. Trial counsel further had, and sometimes took, the opportunity to argue the issue of this history. As such, the juvenile court was well apprised of the issue of that history and its impact on the credibility of A.D.’s several statements. As trier of fact, it was that court’s duty to assess A.D.’s credibility. (Evid. Code, § 780.) As we have said, our review permits us neither to pass on the issue of credibility, nor resolve conflicts in the evidence,

nor evaluate the weight of the evidence, but requires that we draw all reasonable inferences in support of the findings, view the record most favorably to the juvenile court's order, and affirm the order, even if other evidence supports a contrary conclusion, when the findings are supported by substantial evidence. (*Christopher L., supra*, 143 Cal.App.4th at p. 1333.)

The court considered A.D.'s direct statement, that his bruises were the result of Father hitting him with a belt, combined with Mother's implicit concession that Father's physical discipline had caused *some*, if not *all*, of A.D.'s bruises, and had particularly caused the bruise on his thigh. To these we may further add the SW's opinion that some of the bruises, especially the bruise on A.D.'s thigh, were the result of being struck by a leather belt, due to their "linear shape." Father and Mother dismiss this opinion as "mere speculation" or "conjecture." The SW testified, however, to considerable training and experience not only with the effect of domestic violence on families, but also with the impact of physical discipline on children. Even if we assume her opinion on causation was not supported by her training and experience as a professional social worker, it is not necessarily a matter of pure speculation that a linear shaped bruise was formed by the abrupt impact of a linear strip of cowhide. Combining these statements with the photographs of the bruises themselves, which the juvenile court expressly deemed persuasive, we conclude substantial evidence supports the court's finding that Father "inflicted non-accidental injury" upon A.D. on November 5, 2011.

Both parents also argue that the b-1 allegation's mention of a prior claim of child abuse in 2009 was insufficient to establish jurisdiction under section 300, subdivision (b), because it failed to show a *present* risk to the minors of serious physical injury or illness at the time of the jurisdictional hearing. Father reasons the incident in 2009 was supported only by A.D.'s statements at that time, and due to his history of lying those statements are not to be believed. Mother cites *In re I.A.* (2011) 201 Cal.App.4th 1484, 1495, for the proposition that the single substantiated claim of physical abuse in 2009 is itself insufficient to establish a "present detriment" based on circumstances "then-prevailing" between Father and A.D.

In one of 11 prior referrals to the Department, one in 2009 included a claim of physical abuse by Father against A.D., which was substantiated. In this prior incident, A.D. had “presented with bruises,” and Father had been arrested for child abuse, although the criminal proceedings were later dismissed. A.D. later described the incident as one in which Father “hit him so hard that he fell into a toy box and got a ‘big bruise.’ ”

In answer to Father’s contention, suggesting that we essentially disregard the 2009 referral because it was based on A.D.’s statements, we refer to our discussion above regarding A.D.’s credibility. Moreover, we note the 2009 referral was substantiated not only on the basis of A.D.’s report, but also on the fact he “presented with bruises.” Concerning Mother’s contention, that the two-year-old referral for child abuse cannot be deemed to establish, by itself, a present risk of harm, we observe simply that it need not be considered by itself. To the 2009 incident, we note a similar occurrence of physical injury of A.D. by Father on November 5, 2011, establishing an *escalating* pattern of risk of harm—from hand to belt—that extends as recently as 11 days before the filing of the original petition. As such, these two incidents are sufficient to establish a *present risk of harm* as of the time of the jurisdictional hearing.⁸ (See *In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.)

Mother finally contends, as to the b-1 allegation, that the evidence of the physical discipline Father administered on A.D. on November 5, 2011, shows only a “reasonable use of corporal punishment [that] did not reach the level of physical abuse” so as to place A.D. at a substantial risk of serious harm.

We are not persuaded, under the particular facts of this case, that it is proper to regard Father’s use of a belt to cause physical injury to a 13-year-old boy—whom Father himself described as a “special needs child” with “something . . . wrong in his head”—a

⁸ On the issue of *present* risk, both parents also emphasize that the district attorney declined to charge formally or to prosecute Father for the assault for which he was arrested on December 18, 2011, due to a determination there was insufficient evidence. From this they urge the evidence relating to the December 18 incident cannot be considered sufficient to show that Father remained “prone to violence” or presented a *present* risk of harm to the minors at the time of the jurisdictional hearing. Given our conclusion, it is unnecessary to consider this evidence in the context of *present* risk.

reasonable use of corporal punishment that does not reach the level of a substantial risk of serious harm that is necessary to establish jurisdiction under section 300, subdivision (b). None of the authorities on which Mother relies in this argument are closely on point, yet one of them, which upheld jurisdiction under formal section 300, subdivision (a), (now see § 300, subd. (g)), affords a useful principle we may appropriately apply in this instance. In that case, the reviewing court held: “[w]hether discipline is excessive . . . must be measured in the light of an objective standard of reasonableness under all the circumstances.” (*In re Edward C.* (1981) 126 Cal.App.3d 193, 202 (*Edward C.*).

Here, the assigned SW testified to extensive training and experience with the issue of domestic violence or physical abuse and its impact on families, and had worked on “hundreds” of such cases. Based on her training, experience, and consultations with therapists regarding the impact on children of physical discipline, she gave as her professional opinion that physical discipline is “contraindicated” or counterproductive in the case of a child, such as A.D., who displays aggressive behavioral disorders. Further, the SW had a sense that Father’s physical discipline using a belt was an act of exasperation or frustration over A.D.’s behaviors, and in her experience working with abused children, many have received physical injuries from parents who inflict punishment in frustrated or aggravated reaction to the child’s behavior.

This evidence, in our view, provides substantial support for the juvenile court’s determination that Father used “excessive force” to discipline A.D., as determined under an objective standard of reasonableness under all the circumstances. (*Edward C.*, *supra*, 126 Cal.App.3d at p. 202.) Indeed, one reviewing court has suggested any corporal punishment using a belt, “crosse[s] the line over into abuse” and hence, such punishment can *never* be deemed appropriate under the measure of an objective standard of reasonableness. (*In re Jasmine G.* (2000) 82 Cal.App.4th 282, 291.) We conclude, in sum, the court properly rejected the closing argument by Mother’s trial counsel, that Father’s physical discipline of A.D. was “reasonable.”⁹

⁹ For this reason we need not reach a related argument, in which Mother claims she was not unable or unwilling to protect A.D., as stated in the b-1 allegation, because

C. The b-2 Allegation

With regard to the b-2 allegation—that Mother “failed to comply with restraining orders . . . to ensure the protection of her sons” from Father—Mother urges that any violation of the restraining orders, based on the events of December 18, 2011, was “academic” because there was no evidence that Father’s presence in her apartment placed the boys at a substantial risk of serious injury, whose presence there at the time was never determined. She accuses the juvenile court of “fabricating” evidence in its determination that Father’s presence on the grounds, or curtilage, of her apartment building amounted to another violation of the restraining orders. Asserting the lack of evidence that Father had any unsupervised contact with the children after his arrest on November 14, 2011, Mother regards the violation of the restraining orders on December 18 to be a single episode of parental “conduct,” insufficient by itself, absent other evidence of *current* risk, to support jurisdiction under the b-2 allegation. (Citing *In re J.N.* (2010) 181 Cal.App.4th 1010, 1022–1026.)

The evidence relating to the b-2 allegation indicated Father was arrested on December 18 for felony assault. (Pen. Code, § 245, subd. (a)(1).) Father and the adult male victim became engaged in a “verbal altercation” “in front of [Mother’s] residence.” Father then hit the victim in the back of the head with a baseball bat. Father also attempted, unsuccessfully, to stab the victim with a four-inch fixed-blade hunting knife. Police responded to the scene after receiving a dispatch shortly before midnight. They saw a male, later identified as Father, walking away from the scene. Mother initially told officers she had not seen Father in months, because of a restraining order. After police found and arrested Father nearby, the victim identified him as the attacker. When interviewed again, Mother disclosed Father had been inside her apartment earlier; he had gone outside to smoke a cigarette, and afterward she heard yelling and screaming outside. Father shouted to her that he needed a bat, and she dropped one out of her second floor

the evidence failed to show that incident was anything other than a reasonable use of corporal punishment that posed no risk of harm to A.D., and thus there was no need to protect him.

apartment window. Mother exited her apartment, saw Father with the bat, snatched it from him, and walked away. When police found a small bat in the yard of the apartment house, it appeared to have been washed off with a hose. When they recovered a hunting knife in another apartment, the victim identified it as the knife Father had used in his attempt to stab him. The knife appeared to fit the empty knife sheath Father was wearing when he was arrested. When police asked Mother to describe the knife Father carried in his sheath, she described the recovered knife perfectly.

This evidence, quite clearly, is sufficient to affirm the b-2 allegation. In our view, the juvenile court might have reasonably inferred that Father's confrontation with the victim, which occurred "in front of" Mother's apartment, violated the restraining orders' "100-yard" stay-away requirement, without ever considering the curtilage issue. Given the hour the police responded, the court also reasonably inferred that the minors were within the apartment where they were living with Mother. Nor do we regard the violations of the orders to be "academic." As discussed above, the juvenile court's decision to allow Mother to retain custody of the minors pending the dispositional hearing was squarely based on the agreement of both parents to abide by the restraining orders, yet the foregoing evidence indicates they disregarded those orders under circumstances that led to police intervention and Father's arrest, due to conduct that could only emphasize Father's ongoing anger management issues. This is sufficient to infer a *present* risk of substantial harm to both minors.

The district attorney's decision not to prosecute a felony, beyond a reasonable doubt, does not, as Father and Mother have urged, preclude the juvenile court from considering the evidence of this incident, as presented by the Department, for the purpose of determining, by a preponderance of the evidence, whether it should exercise dependency jurisdiction under the circumstances. To hold otherwise would result in drastic differences in dependency proceedings in which correlative criminal proceedings are instituted but dismissed, as distinguished from those in which they are not.

We conclude the b-2 allegation is supported by substantial evidence.

D. *The j-1 Allegation*

Concerning the j-1 allegation—that Father had physically abused A.D. and that A.D.’s sibling S.B. was therefore at risk of harm—Mother claims the allegation is dependent primarily on the b-1 allegation regarding Father’s abuse of A.D. and, as the b-1 allegation is not supported by substantial evidence for the reasons she has advanced, the j-1 allegation likewise cannot stand. Given our conclusion as to the b-1 allegation, we need not address that contention.

Mother also contends that even if we affirm the b-1 allegation—as we have—there is still no evidence that S.B. was at the same risk of physical abuse as his older brother, because S.B. does not share the behavioral problems that led to Father’s physical punishment of A.D., nor did the parents’ violation of the restraining orders on December 18, 2011 place S.B. at risk of harm.

We disagree for the following reasons. The SW testified that she considered S.B. to be at risk of physical harm from Father because the latter’s anger management issues might result in an uncontrolled reaction to the normal aggression or oppositional behavior of a three-year old, just as he had reacted excessively to the behaviors of a 13-year old “special needs” child. Further, there was evidence from A.D. that S.B. had sometimes attempted to stop Father when he punished A.D. with a belt. We conclude substantial evidence supports the j-1 allegation.

II. *The Dispositional “Removal” Finding*

A child may not be removed from the physical custody of the parent with whom the child resides at the time a dependency petition is initiated, unless the juvenile court makes one or more of five specified findings under the clear and convincing evidence standard. (§ 361, subd. (c).) The first among these is that “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 . . . parent[s’] . . . physical custody.” (§ 361, subd. (c)(1).) In this case, the juvenile court effectively made this finding when it found by clear and convincing

evidence that the minors’ would be “at substantial risk of harm, if returned to the care of their mother.” Both Father and Mother challenge this finding.

A removal order is proper if based on proof of parental inability to provide proper care for the child and proof of a potential detriment to the child if he or she remains with the parent. The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child. (*In re N.M.* (2011) 197 Cal.App.4th 159, 169–170.) In determining whether a child may be safely maintained in the parent’s physical custody, the court may consider the parent’s past conduct and current circumstances, and the parent’s response to the conditions that gave rise to juvenile court intervention. The court must also consider whether there are any reasonable protective measures and services that can be put into place to prevent the child’s removal from the parent’s physical custody. (*In re Maria R.* (2010) 185 Cal.App.4th 48, 70 (*Maria R.*))

Notwithstanding the requirement that the juvenile court find clear and convincing evidence of danger, we apply the substantial evidence test in reviewing an order of removal. (*In re N.M., supra*, 197 Cal.App.4th at p. 170.) Our review on appeal follows the ordinary rules for substantial evidence, notwithstanding that the finding below had to be made by clear and convincing evidence. Viewing the evidence in the light most favorable to the finding, and presuming all reasonable inferences, we ask whether any rational trier of fact could have made the finding by the requisite standard. (*In re H.E.* (2008) 169 Cal.App.4th 710, 723–724.) Under this standard, we have no power to pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or determine where the weight of the evidence lies. Rather, we accept the evidence most favorable to the order as true and discard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1135, disapproved on other grounds in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.)

Turning to the parents’ contentions, Mother expresses, at great length, her position that even if we should conclude—as we have—that the jurisdictional findings are

supported by substantial evidence, there is, nevertheless, *no* substantial evidence to support the “removal” finding since the latter requires proof of a “substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor” under the higher standard of clear and convincing evidence.¹⁰ Mother further objects the court below failed to consider alternatives less drastic than removal, particularly a plan of family maintenance supervision, as required by the second prong of section 361, subdivision (c)(1). Finally, both parents contend that even if we might conclude that substantial evidence supports the “removal” finding as to A.D., the evidence does not support that finding as to S.B. because S.B. is much differently situated. That is, Father’s physical discipline of A.D. was prompted solely by A.D.’s difficult behavioral problems, and S.B. has never displayed such problems.

In the SW’s opinion, A.D. could not presently return safely in Mother’s care because of the parents’ conduct on December 18, 2011 violating the restraining orders, because Mother had not adequately addressed A.D.’s mental health needs and some of his medical needs, and because the parents had only recently begun to engage in the services recommended by the Department. For example, A.D. had significant, ongoing behavior problems that began when he was about five years old, and had been diagnosed with Attention Deficit Hyperactivity Disorder, mild mental retardation, oppositional defiant disorder, and nonspecified mood disorder, for which he needed ongoing psychotropic medication management and behavioral therapy. Mother, however, had discontinued A.D.’s psychotropic medication about a year ago and had discontinued his therapy in October 2011. The SW did not believe A.D. would presently be safe in Mother’s care even with Father out of the home, because of the restraining order violations, and the fact that Father never provided the Department with a separate living address so that she could verify where he was living.

¹⁰ Father, more briefly, takes this position as well. He also argues there is necessarily a lack of substantial evidence to support the “removal” finding under section 361, subdivision (c)(1), given the lack of substantial evidence to uphold the jurisdictional b-1 allegation. As discussed above, we have upheld the b-1 allegation and, therefore, need not address the latter contention.

The SW believed S.B. was at risk if he was presently returned to Mother's care, even if Father was out of the home, for similar reasons. That is, S.B.'s young age, Mother's failure to protect his older brother from Father's physical abuse, the parents' recent violation of the restraining orders designed to protect both children, and the SW's present inability to verify where Father was living. The SW was also of the opinion that S.B. was at risk of physical harm from Father because the latter's anger management issues might result in his reacting violently to a normal three-year-old child's behavior, just as he had reacted to the difficulties of an older "special needs" child. On this point, we note also that during the interview on November 14, 2011, A.D. told the initial SW that S.B. had attempted to intervene on his behalf, as recently as "the other day," when Father hit him with a belt.

Before recommending the return of either child to Mother, the SW believed it was necessary to monitor, for at least some period beyond the present date of the jurisdictional/dispositional hearing, the parents' progress with their services and their further compliance with the restraining orders. The SW also needed to be able to verify that Father was living at a separate address.

This testimony, combined with the evidence supporting the jurisdictional allegations discussed above, is in our view sufficient to support the court's removal finding under section 361, subdivision (c)(1), in effect providing sufficient evidence for a rational trier of fact to make the finding under the clear and convincing standard of proof. The evidence showed an escalating pattern of physical abuse on Father's part that Mother had not taken effective steps to prevent. When, after the initial detention proceedings, Mother was permitted to resume custody of both minors, on the basis of both parents' representations that they would abide by the juvenile court's restraining orders, Mother and Father disregarded those orders during an incident that only served to underscore Father's continuing inability to control his anger. The latter incident was, in effect, a wholly inappropriate response to the conditions that gave rise to the court's intervention. (*Maria R.*, *supra*, 185 Cal.App.4th at p. 70.) Nor are we persuaded the court failed to consider reasonable protective measures to avoid removal as to both minors. (*Ibid.*)

From the record, it is apparent the court carefully considered the option of family maintenance versus that of removal, with respect to A.D. and more particularly with respect to S.B. Moreover, the court adopted the Department's recommendation to schedule a 90-day placement review, in order to facilitate S.B.'s return to Mother's care well before the date set for the six-month status review—as the court put it, “sooner than later.” It further adopted the Department's recommendation authorizing the SW to return the child immediately to Mother's care after five days' notice to counsel. (See fn. 7, *ante*.) We conclude substantial evidence supports the challenged “removal” finding.

III. ICWA Requirements

On November 23, 2011, Father filed a notice of Indian status, indicating his belief that he shared Cherokee ancestry through his own father. The juvenile court afterwards determined Father was S.B.'s presumed father. Under these circumstances, the Department was on notice that S.B. might be an Indian child, and it necessary for it to comply with the inquiry and notice requirements of ICWA.¹¹ (See rule 5.481.) Because Father provided particular identifying information, the Department was required, in particular, to provide notice of S.B.'s dependency proceeding to the three federally recognized Cherokee tribes, and also to provide the court with specific proof that such notice was given to, and received by, these tribes. (See *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1200; rules 5.481(b)(1), 5.482(b).)

Mother points out that the record in this case fails to show adequately the Department provided proper notice to the three tribes, and it fails to prove the tribes actually received such notice. In her view, the error is prejudicial and requires reversal of the juvenile court's findings and orders entered January 20, 2012. The Department, while conceding that its compliance with ICWA notice provisions was deficient, asks us simply to remand to ensure compliance.

In our view, the proper course is to reverse the order of January 20, 2012, but to direct that it be reinstated if, on remand, proper notice under ICWA is given and no tribe intervenes in S.B.'s dependency proceeding. (See *In re Francisco W.* (2006) 139

¹¹ 25 U.S.C. § 1901 et seq.

Cal.App.4th 695, 704–705.) Such a limited reversal is “well adapted to dependency cases [when] the only error is defective ICWA notice.” (*Id.* at p. 705.) It is, moreover, consistent with the public policy underlying the dependency scheme, which favors a prompt resolution of dependency proceedings. (*Id.* at p. 706.)

DISPOSITION

The order of January 20, 2012 is affirmed to the extent it applies to the minor A.D. It is reversed as to the minor S.B., and the proceedings are remanded to the juvenile court with directions to order the Department to comply with notice requirements of ICWA, with respect to the proceeding involving S.B., and to file all required documentation with the juvenile court for that court’s inspection. If, after proper notice, a tribe claims S.B. is an Indian child, the juvenile court shall proceed in conformity with all the provisions of ICWA. If no tribe claims that S.B. is an Indian child, the order shall be reinstated.

Marchiano, P.J.

We concur:

Dondero, J.

Banke, J.