Filed 12/16/16 In re T.S. and W.S. CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re T.S. and W.S., Persons Coming Under the Juvenile Court Law.	
CONTRA COSTA COUNTY CHILDREN & FAMILY SERVICES BUREAU, Plaintiff and Respondent, v. V.G., Defendant and Appellant.	A146985 (Contra Costa County Super. Ct. No. JI5-00705, J15-00706)

V.G. (mother) appeals from orders declaring her children T.S. and W.S. dependents of the juvenile court and removing them from her custody. (Welf. & Inst. Code, §§ 300, subd. (b), 361, subd. (c).)[1] She contends: (1) she was deprived of proper notice and due process at the detention hearing; (2) the evidence was insufficient to support the jurisdictional findings; (3) the evidence was insufficient to support the removal order; (4) the children should have been placed with their father, who was not named in the dependency petition; and (5) the court failed to comply with the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (ICWA). We affirm.

BACKGROUND

Mother gave birth to her son T.S. in 2013 and her daughter W.S. in 2014. The father, who is not a party to this appeal, is a very good friend of hers and they have coparented the children. Mother has a history of homelessness and drug use and has been arrested for numerous felony offenses.

In May 2015, the family came to the attention of the Contra Costa County Children and Family Services Bureau (Bureau) when mother admitted using methamphetamine while in a court-mandated substance abuse program. An emergency social worker visited the home where mother and the children were staying temporarily with mother's step-grandfather and found that home to be "nice and well stocked with food." Mother was forthcoming about her relapse and explained she was stressed and overwhelmed and was "caught in a moment of weakness." Mother denied breastfeeding and indicated she was looking for work but was not employable in her field (nursing) due to her criminal record. The emergency social worker concluded the meeting with plans to refer mother to the Path 2 program, where mother was accepted.

On May 20, 2015, mother appeared intoxicated at a scheduled court hearing and was seen breastfeeding. The sheriff found a pipe and a "shade key" (a tool used to break into cars) inside mother's diaper bag and noted she was "nodding off." Mother was also disrespectful to the judge during the hearing and was almost remanded into custody. She

---

[1] Further statutory references are to the Welfare and Institutions Code.

failed to attend the scheduled meeting for transition into the Path 2 program on May 21, 2015. Mother failed to make a number of rescheduled appointments and when the emergency social worker called her cell phone on June 1, 2015, father answered the phone and stated, "We have nothing to say to CPS! Stop calling!"

The Bureau filed dependency petitions alleging there was a substantial risk the children would suffer serious physical harm or illness due to circumstances involving mother's drug use. The emergency social worker reached mother by telephone on June 25, 2015, and advised her a detention hearing was scheduled for July 1, 2015. Mother told the social worker they no longer had an address and were homeless, but said she would be at the hearing. A Bureau supervisor called the same number and left a message advising the parents the detention hearing had been rescheduled for June 29, 2015.

Mother and father failed to appear at the detention hearing, at which the court followed the Bureau's recommendation and ordered the children detained outside the home. The Bureau obtained a protective warrant for the children and, after making unsuccessful efforts to reach mother, obtained an ex parte warrant for her arrest.

A jurisdictional hearing was set for July 10, 2015, at which time mother and father appeared without the children but advised the court of their whereabouts in the homes of relatives. The jurisdictional hearing was continued and on July 15, father was granted presumed father status. The children had by that time been taken into custody and the court ordered supervised visitation. A contested jurisdictional hearing was set for September 2, 2015.

In anticipation of the jurisdictional hearing, the Bureau submitted a memorandum reporting that father had admitted conducting a background check on the foster parent, causing concern about the security of the placement. The foster parent indicated she did not want the children moved because T.S. had come into the home with significant behavioral issues and was making progress. Mother made a successful motion for the appointment of new counsel, but did not appear in court on dates set for the appointment of new counsel. Counsel accepted the appointment on September 18, 2015,

notwithstanding mother's absence from the hearing, and a contested jurisdictional hearing was held October 5, 2016.

At the jurisdictional hearing, mother did not appear but her appointed attorney asked that the children be returned to her care. Counsel argued mother had not been provided with notice of the detention hearing, and advised the court that mother denied having an ongoing substance abuse problem. The court found true the allegation that the children were dependents under section 300, subdivision (b), because "[t]he mother has a serious and ongoing substance abuse problem that impairs her ability to care for the child in that On [or] about May 20, 2015, the mother admitted to using methamphetamine on an ongoing basis while engaged in a court mandated substance abuse program. and while caring for the child."

Meanwhile, a dispositional report prepared on September 2, 2015, indicated that mother, who was then 23 years old, had a "very turbulent" childhood and had started using methamphetamine when she was 18 years old. Before she met the father in 2011, mother's life was in "shambles" and she was running the streets and doing drugs. Mother maintained she had not done anything to place her children at risk or warrant their removal from her care; when asked why she had absconded with them after the Bureau first became involved she said "those are my children." Mother avoided talking with the social worker and was resistant to utilizing services or being accountable for her actions. As for the children, T.S. was healthy and bright but had angry outbursts and was acting out sexually. W.S. was a healthy infant but displayed " 'serious' signs of emotional neglect." Mother had only called the foster parent to check on the children a few times, and the social worker was concerned she had provided the telephone number to relatives who were calling to harass the foster parent.

On October 1, 2015, the Bureau submitted a memorandum advising the court that mother had signed an ICWA 020 form in July indicating she had Cherokee Native American heritage, but had not cooperated in providing any additional information. Relatives contacted by the Bureau had similarly failed to provide information about mother's possible Native American ancestry. Father had filed an ICWA 020 form stating

he had Cherokee and Blackfeet Native American ancestry, but he had refused to provide additional information.

The dispositional hearing was originally scheduled for October 23, 2015, but was continued because mother had advised her counsel she would be late and counsel told her not to come, believing mother could not get to court on time. Father was also not present and his attorney advised the court his phone had been disconnected. The court continued the hearing until November 17, 2015, following a brief discussion about T.S.'s sexualized behaviors and the need to get him into therapy. The court noted that his behaviors (which included pulling his pants down and climbing onto his diaperless infant sister) were "pretty alarming for a child this young."

Mother and father failed to appear for the continued dispositional hearing on November 17, 2015. The parties stipulated that the parents had missed visits on October 27, November 3, and November 10, 2015, the last visit being cancelled because they showed up one hour late. Mother's counsel requested that the children be returned to mother with family maintenance services, but did not present any evidence. The court followed the Bureau's recommendation and ordered the children removed from mother's physical custody with reunification services to be provided to the parents. The court found the ICWA did not apply at that time because the parents had not cooperated in giving the Bureau the information needed to fill out the notice form, but this ruling was made without prejudice. The Bureau indicated if it received further information from the parents triggering ICWA notification it would send the notices.

DISCUSSION

I.

Notice of and Due Process at Detention Hearing

Mother contends reversal is required because the court did not provide her with adequate notice of the detention hearing (at which she did not appear) and deprived her of due process by (1) failing to appoint counsel at that hearing; (2) failing to allow mother to represent herself; (3) conditioning visitation on mother appearing in court and obtaining counsel; (4) failing to advise her of her right to a contested detention hearing; (5)

preventing her from receiving a copy of the detention report; and (6) failing to advise her of her right to a rehearing upon the appointment of counsel. We disagree.

"Parties may raise issues pertaining to the detention hearing (the earliest orders in a case) in an appeal from the disposition, but a detention order is nonappealable in a practical sense because it is usually rendered moot by the subsequent orders made at the jurisdictional and dispositional hearings." (Cal. Juvenile Dependency Practice (Cont. Ed. Bar, 2010) § 10.2, pp. 769–770; see *In re Raymond G.* (1991) 230 Cal.App.3d 964, 967.) Such is the case here. Mother was given proper notice of the jurisdictional and dispositional hearings and was represented by counsel at those hearings. The orders made at those hearings, by which the children were declared dependents and removed from mother's custody, required higher standards of proof than the detention hearing. Mother has offered no cogent argument as to how the alleged defects in the detention hearing infected the outcome of the jurisdictional and dispositional hearings. (Cf. *In re Dylan T.* (1998) 65 Cal.App.4th 765, 769 [challenge to lack of visitation order while parent was in prison was not mooted by parent's release because inability to visit impacted the relationship and virtually assured the termination of reunification services and parental rights].)

We recognize that review of a moot issue might be appropriate if it presents an unsettled issue of public importance that is capable of repetition but evading review. (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1404.) Mother's challenges to the conduct of the detention hearing were fact specific and do not present unsettled issues of public importance.

Mother suggests the failure to provide proper notice of the detention hearing deprived the court of jurisdiction to proceed with the jurisdictional and dispositional hearings. The cases on which she relies are inapposite. In *In re Claudia S.* (2005) 131 Cal.App.4th 236, 243–250, the court remanded the case for a new jurisdictional hearing because the parents were not provided with adequate notice at the detention hearing, but the parents never appeared at any subsequent hearing and reunification services were terminated before the family had even been located and the children taken into protective

custody. (*Id*. at p. 249.) And, unlike in this case, the mother and father were not provided with appointed counsel at the jurisdictional and dispositional hearings. (*Ibid*.) In *In re Arlyne A.* (2000) 85 Cal.App.4th 591, 598–600, the Court of Appeal reversed orders adjudicating the minors as dependents because the father had not received actual notice of the proceedings and the trial court's finding of due diligence in locating the father was not supported by the record. These authorities do not support mother's assertion that defects in the detention stage of the proceedings require a reversal of the jurisdictional and dispositional orders, which were made after the parents had been provided with counsel and proper notice.

II.

Sufficiency of the Evidence—Jurisdiction

Mother argues the evidence was insufficient to support the jurisdictional finding under section 300, subdivision (b), because her substance use alone did not create a substantial risk of serious physical harm to her children. We are not persuaded

"In a challenge to the sufficiency of the evidence to support a jurisdictional finding, the issue is whether there is evidence, contradicted or uncontradicted, to support the finding. In making that determination, the reviewing court reviews the record in the light most favorable to the challenged order, resolving conflicts in the evidence in favor of that order, and giving the evidence reasonable inferences. Weighing evidence, assessing credibility, and resolving conflicts in evidence and in the inferences to be drawn from evidence are the domain of the trial court, not the reviewing court." (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 450–451 (*Alexis E.*).)

Section 300, subdivision (b)(1), provides that a child may be declared a dependent when "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of . . . the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse." Mother suggests that while the evidence supports a finding she had used drugs while caring for the children, it was insufficient to show they were endangered as a consequence. She also asserts her homelessness did not

warrant a jurisdictional finding where there was no evidence the children were not being properly cared for by relatives, and notes that her failure to cooperate with the Bureau did not warrant jurisdiction in this case.

We have no quarrel with mother's assertion that drug *abuse*, not simply drug *use*, is required for a dependency determination (See *In re Drake M.* (2012) 211 Cal.App.4th 754, 764–765 (*Drake M.*).) Here, mother used methamphetamine while caring for the children, despite being in a court-mandated drug program, and she had been seen breastfeeding W.S. while apparently under the influence. It was quite reasonable for the court to conclude she was engaging in drug abuse and was placing her very young children at risk. (See *Alexis E. supra*, 171 Cal.App.4th at p. 451–452.) In cases involving children of tender years, a "finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm." (*Drake M.*, at p. 767.)

While mother is correct that homelessness is not itself a basis for jurisdiction (*In re G.S.R.* (2008) 159 Cal.App.4th 1202, 1212), there is no suggestion the court's jurisdictional finding was based on her housing situation as opposed to her drug abuse. Nor does it appear the court relied on her lack of cooperation with the Bureau.

The decision in *In re Baby Boy M.* (2006) 141 Cal.App.4th 588, 597–598, on which mother relies, has no bearing on the issues before us. In that case, the court concluded the mother's " 'obstructive conduct' " before the dependency petition was filed did not trigger the disentitlement doctrine or require the dismissal of the mother's appeal. The Bureau in this case is not suggesting mother is barred from challenging the jurisdictional order on appeal, but argues instead that the order is supported by substantial evidence. It is.

III.

Sufficiency of the Evidence—Dispositional Order

Mother argues the dispositional order should be reversed as unsupported by substantial evidence. Again we disagree.

Children who are declared dependents of the juvenile court "shall not be removed from the home in which they are residing at the time of the petition unless there is clear and convincing evidence of a substantial danger to the child's physical health, safety, protection, or physical or emotional well-being *and* there are no 'reasonable means' by which the child can be protected without removal." (*In re Jasmine G.* (2000) 82 Cal.App.4th 282, 288.) As the dispositional report made clear, mother was in denial about her substance abuse and the effect her behavior was having on her children. She had not been cooperating with the Bureau or availing herself of the resources they offered her. She had also missed a number of scheduled visits with the children. Substantial evidence supports the order removing the children from her home.

IV.

Failure to Place the Children with Father

Mother argues the court should have placed the children with their father, a non-offending, non-custodial parent. We reject the claim.

Section 361.2, subdivision (a) provides, "When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. *If that parent requests custody*, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." (Italics added.) This provision "comes into play *after* a child has been removed from the physical custody of his or her parents. . . ." (*In re A.A.* (2012) 203 Cal.App.4th 597, 608.) Assuming father was indeed a non-custodial, non-offending parent, he did not appear at the dispositional hearing or otherwise request custody of the children. Absent such a request, the court was not required to consider him as a placement.

V.

ICWA

At the time of the dispositional hearing, mother and father had provided information suggesting they might have Blackfeet and Cherokee heritage for purposes of the ICWA. The Bureau did not send notices to the tribes identified because the parents refused to cooperate with the inquiry, and the court ruled, without prejudice, that the children were not at that time Indian children within the meaning of the ICWA. Mother argues this ruling was in error and asks us to conditionally reverse the judgment and remand the case so that proper notices can be sent to the tribes.

The Bureau responds that the issue is moot because ICWA notices were sent prior to the six-month review hearing held on June 29, 2016, at which the court determined the ICWA did not apply. We now grant the Bureau's request for judicial notice of court documents from the six-month review hearing, including the transcript of that hearing and copies of the ICWA notices sent and the responses from the tribes indicating the children were not tribal members or eligible for membership. We agree the notices and the court's finding at the six-month review hearing render moot mother's argument that conditional reversal of the dispositional order is required for ICWA compliance. (See *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1388 and fn. 12 [when ICWA notice subsequently provided to Cherokee tribe, remand was not necessary to provide notice to that tribe; judicial notice taken of post-disposition ICWA notices].)

Mother argues the post-disposition ICWA notices were insufficient and should not be the basis for affirming the dispositional order. We disagree. Notice has now been given to the tribes identified by the parents and based on the tribes' responses, the court has ruled ICWA does not apply. If mother believes those notices were inadequate, her remedy was to challenge them by way of a writ taken from the six-month review hearing.[2]

---

[2] Because the court terminated reunification services and set the case for a hearing under section 366.26, the order from the six-month review hearing was at that juncture reviewable only by writ rather than by appeal. (§ 366.26, subd. (l).)

DISPOSITION

The judgment is affirmed.

_____

NEEDHAM, J.

We concur.

_____

JONES, P.J.

_____

BRUINIERS, J.