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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re JULIO G. et al., Persons Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

F. G. et al.,

Defendants and Appellants.

B241770

(Los Angeles County
Super. Ct. No. CK51331)

APPEAL from orders of the Superior Court of Los Angeles County, Terry Truong, Referee. Affirmed in part, reversed in part, and remanded with directions.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant and Appellant F. G.

Andre F. F. Toscano, under appointment by the Court of Appeal, for Defendant and Appellant Steven B.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Kim Nemoy, Principal Deputy County Counsel for Plaintiff and Respondent.

Three children of mother are dependents in this matter. Only the father of the youngest is a party to this appeal. Mother challenges the sufficiency of the evidence to support jurisdictional findings under Welfare and Institutions Code section 300, subdivision (b)¹ and the court's dispositional order. Steven B. is father of mother's youngest child, also named Steven². He appeals the jurisdictional findings and dispositional order as to his child only. Respondent Department of Children and Family Services (the Department) concedes that notice was not adequate under the Indian Child Welfare Act (25 U.S.C. § 1901 et seq., ICWA) and agrees that the matter must be remanded for compliance with those requirements.

We affirm the jurisdictional findings and dispositional orders of the juvenile court but conditionally reverse the finding that ICWA does not apply to minor Steven B. and remand with directions to conduct further proceedings on the ICWA issue as to him.

FACTUAL AND PROCEDURAL SUMMARY

Minor Julio G. was born June 2006, his sister F.B. was born January 2008, and their half-sibling Steven was born in June 2011. Mother has a prior history with dependency proceedings. Her older child, Manuel G., was declared a dependent child in 2003 based on sustained allegations of a positive toxicology screen at birth, mother's history of drug use, and exposure to mother's criminal conduct when she attempted to pass counterfeit money while in the possession of marijuana for sale. Dependency jurisdiction over Manuel was terminated in 2004 under a KIN-GAP order under which maternal grandmother is his legal guardian. Manuel is not a subject of this proceeding. In 2008, a new dependency case was opened as to Manuel and Julio. The juvenile court sustained the amended petition which alleged that minors were placed at risk because in December 2006, mother left the boys in a car, unsupervised for an extended time, while

¹ All statutory references are to the Welfare and Institutions Code.

² In order to avoid confusion, we refer to the older Steven B. as "father". References in this opinion to "parents" are to mother, and father Steven B.

she shopped at a department store. In addition, mother had a history of substance abuse and had failed to resolve family problems with prior services from the Department. Mother's daughter, F.B., was born in January 25, 2008 and was declared a dependent of the juvenile court pursuant to a sustained dependency petition shortly after birth based on the same allegations in the 2008 petition as to Manuel and Julio. The children other than Manuel were ordered home with mother and family maintenance services were ordered. Jurisdiction was terminated in February 2009.

In July 2011, officers of the Los Angeles Police Department executed a search warrant at parents' home in connection with the theft of a van and propane tanks. They found narcotics packaged in individual quantities in a bedroom closet along with a digital scale. A shotgun, a pistol, a handgun, a magazine for .380 caliber ammunition, and numerous rounds of various calibers of ammunition were found in the living room.³ Four surveillance cameras were mounted on the exterior of the residence. Mother and father each had outstanding warrants. They were charged with felony narcotics offenses and released on bail. One of the handguns was found to have been stolen. Family members took the position that Julio and F.G. were with their maternal grandmother at the time of the search. There is a factual dispute as to whether infant Steven was in the parents'

³ The weapons were found in a hole in the ceiling behind a loose light fixture.

home at the time.⁴ Law enforcement officers turned the child over to the paternal grandmother, who lived in the front half of the house.⁵

In November 2011, a caller to the Department alleged that minor Steven was being neglected by father, and that his mother was incarcerated. Father had applied for financial assistance to obtain food, formula and diapers for the minor but would not cooperate with the application process to receive benefits. A social worker investigated and met with mother, father, and the children. The children were clean and dressed appropriately, without any visible marks or bruises. The three older children denied abuse or neglect. The home was clean and apparently there was sufficient food and necessities for the baby. A Los Angeles Police Department detective spoke with the social worker and told her that the parents are drug dealers and that drugs were found in mother's bedroom in July 2011. According to the detective, mother is the main operator of the drug business. The social worker reported that parents were out on bail after arrests in July and August 2011.

Both mother and father have extensive criminal histories. Father had convictions for petty theft and narcotics offenses. Mother had been convicted of misdemeanor theft (1994), exhibiting a deadly weapon (2000), hit and run (2008), and driving with a suspended license (2008).

In January 2012, the Department decided that the three younger children were not safe in the custody of their parents. Initially mother refused to disclose their

⁴ The detention report summarized a telephone conversation between the social worker and a detective involved in the search of the parents' home. The report states that minor Steven was in the home when the dangerous items were found, and that he was turned over to his paternal grandmother by law enforcement officers. Father correctly points out that the police reports of the search of parents' home do not contain this information. In context, we conclude that this information was based on the social worker's conversation with the police detective. The court did not credit parents' arguments that the children were elsewhere at the time of the incident.

⁵ It is unclear from the record whether there are two separate residential structures on the property, or whether it is one building with two residences. Mother and father lived in the back unit, while paternal grandmother lived in the front unit.

whereabouts. The Department filed a petition pursuant to Welfare and Institutions Code section 300, subdivisions (b)(1) and (j)(1), alleging the parents created a detrimental home environment by having firearms (two handguns, a shotgun, a rifle, and a pistol), ammunition, cocaine, and heroin in the home.

A detention hearing was held in January 2012, and the children were detained for placement with maternal grandmother, where Manuel also lived. Mother and father were ordered to participate in random drug testing and were allowed monitored visitation.

A first amended petition was filed by the Department alleging the three children came within the jurisdiction of the court under section 300, subdivisions (b) and (j). It alleged that mother and father created a detrimental and endangering home environment because weapons and drugs were present. It also alleged that mother was arrested for possession of heroin or cocaine for sale, and that father was arrested on the same charges in addition to being a felon in possession of a gun and ammunition. On January 25, 2012, each parent missed a random drug test. On February 7, 2012, father tested positive for methamphetamine, and positive again on February 24, 2012, for amphetamines and methamphetamines. On February 13, 2012, mother tested positive for cannabinoids.

In the jurisdictional report, the Department reported that Julio, the oldest child, denied seeing guns or drugs in his home. Mother declined to discuss the case with a social worker, and referred the worker to her attorney. She said she had not visited the children because she was busy. She refused the social worker's offer to monitor visitation. Mother adamantly contended that she had been wrongly accused by law enforcement officers and was being framed by them. Like mother, father had not visited the children and refused an offer by the worker to monitor visits. Father also declined to speak with the social worker and referred her to his criminal attorney.

The juvenile court sustained section 300, subdivision (b)(1) allegations and found the children come within the jurisdiction of the court. The court rejected the argument that the children were not exposed to the drugs and weapons found in the home by the police. In April 2012, the Department submitted a last minute information for the court, attaching an assessment for all the children by the Multidisciplinary Assessment Team

(MAT). It also attached reports of missed random drug tests by both parents in March 2012. The MAT assessor reported that mother, father, and maternal grandmother refused to participate in the assessment. Mother was confrontational and mistrustful and encouraged maternal grandmother to prevent the children from being assessed.

At the disposition hearing, the Department recommended that the maternal grandmother be appointed as guardian of the children. But counsel for minors said she understood that parents no longer were willing to go forward with a guardianship, and that grandmother would not agree to guardianship without the consent of the parents. Mother filed a section 388 petition on the day of the disposition hearing, asking the court to consider a section 360, subdivision (b) dismissal.⁶ The court found mother had not demonstrated changed circumstances and that her request would not be in the children's best interests. The section 388 petition was denied.

Mother and father filed signed waivers refusing reunification services of any kind at the disposition hearing. Counsel for mother stated that mother did not wish to reunify with the children or have them placed in her custody. But when the court explored the voluntariness of her waiver, mother said she had signed it against her will. The court then said it would not accept the waiver. At that point, counsel for father withdrew his waiver of services. Pending a finding under ICWA as to father, his counsel asked for guardianship with maternal grandmother.

Based on exhibits submitted by the Department, the court declared the children to be dependents under section 300, subdivision (b). It found by clear and convincing evidence that there was a substantial danger to the children if they were returned to the custody of mother and father. The children were ordered removed from mother and father, and their care, custody, and control was placed under the supervision of the Department. Mother and father were ordered to receive family reunification services

⁶ Section 360, subdivision (b) allows the court to order services for the family under the informal supervision of a social worker without adjudicating the child a dependent child of the court. (*In re Adam D.* (2010) 183 Cal.App.4th 1250, 1260.)

including random and on-demand weekly drug and alcohol testing and individual counseling to address the case issues. Parents were to have monitored visitation.

Mother and father appealed from the May 1, 2012 jurisdictional findings and disposition orders. Mother also appealed denial of her section 388 petition.

An interim review report prepared for July 10, 2012, stated that the children continued to be placed with their maternal grandmother. Mother's regular random drug tests had been negative, but she missed a test on May 10, 2012. She had been given referrals for substance abuse programs, parenting, and individual counseling. Mother had tried to enroll in individual counseling, but was either not able to enroll or was placed on a waiting list. Father had been in minimal compliance with reunification orders, missing substance abuse tests on May 10 and May 16, 2012. He tested positive for amphetamines and methamphetamines in June 2012. He said he was on a waiting list for an inpatient substance abuse program. Father did not appear for a scheduled appointment with the Department to discuss case issues. Both parents said they were attending parenting classes, but failed to provide verification of enrollment. Parents were having regular visits with the children, which were positive.

The children were observed to be well-groomed, appropriately dressed, and well nourished. Maternal grandmother's home was well-kept and free from visible hazards. The social worker believed the children's needs were being met by grandmother. Julio was doing well academically. But maternal grandmother continued to hinder the social worker's assessment of the safety and well-being of the children in the home by being resistant to providing information. As a result of grandmother's obvious resistance, "often the children shun away from talking" with the social worker. Julio told the worker that he "can't talk to you until my mom says it's ok" and F.G. told her uncle, "That's a social worker and she is bad." Maternal grandmother refused to accept funds to be used for the children's needs because she had to sign a document acknowledging receipt, and because she could not get a copy of the check stub, even though the social worker informed maternal grandmother that she could make a copy of the stubs if desired. A child care referral was closed due to maternal grandmother's refusal to participate.

The Department recommended that the parents continue to receive family reunification services, including completion of parenting and substance abuse programs that include random testing. It sought discretion to liberalize visitation. The court received and reviewed ICWA notices and responses and found that none of the three minors was an Indian child and that ICWA did not apply. Mother filed a timely appeal from the finding that ICWA did not apply. We ordered the appeals consolidated.

DISCUSSION

I

Where a parent challenges the juvenile court's jurisdictional findings, we consider the entire record to determine whether substantial evidence supports the court's findings. (*In re T.V.* (2013) 217 Cal.App.4th 126, 133 (*T.V.*)). "Evidence is "[s]ubstantial" if it is reasonable, credible and of solid value. [Citation.] We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or weigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order, and affirm the order even if other evidence supports a contrary finding. [Citations.] The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the findings or order. [Citation.]" (*Ibid.*)

Mother challenges the jurisdictional findings as to all three minors, while father's challenge is limited to minor Steven. They contend the findings must be reversed because there was no substantial evidence at the time of the March 1, 2012 adjudication that the minors were at substantial risk of serious physical harm or illness due to any *future* conduct by parents. They also contend there is no evidence that the children were inadequately supervised or protected, or that any of them had ever suffered serious physical harm or illness as a result of neglect. Mother's reasoning is that police officers had removed the items that raised a concern about the safety of the children (firearms, ammunition and drugs) six months before the March 1, 2012 adjudication hearing. She points to the lack of evidence that the items had been returned to the home. In addition, mother and father argue that at the time of the police seizure, the only child living in the

home was six-week-old Steven, who could not independently come into contact with any of the items. She contends the other children, Julio and F.G., were not exposed because they had been in the care of their maternal grandmother.

“‘[T]he three elements for jurisdiction under section 300, subdivision (b) are: “(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) “serious physical harm or illness” to the [child], or a “substantial risk” of such harm or illness.’” [Citation.]’ [Citation.]” (*In re John M.* (2012) 212 Cal.App.4th 1117, 1124.) Mother argues there is insufficient evidence of each of these elements.

Parents attempt to limit the relevant evidence to circumstances surrounding the execution of the search warrant at their home in July 2011. Father acknowledges that he had a pending criminal case during these proceedings which could impact his ability to care for minor Steven if he was incarcerated. But he argues that by the time the jurisdictional hearing was held, the criminal case had not been resolved, and hence there was no evidence that demonstrated his inability to care for the child. But the evidence which supports jurisdiction under section 300, subdivision (b) is not so limited.

“Although ‘the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm’ [citation], the court may nevertheless consider past events when determining whether a child presently needs the juvenile court’s protection. [Citations.] A parent’s past conduct is a good predictor of future behavior. (*In re Petra B.* (1989) 216 Cal.App.3d 1163, 1169–1170.) ‘Facts supporting allegations that a child is one described by section 300 are cumulative.’ (*In re Hadley B.* (2007) 148 Cal.App.4th 1041, 1050.) Thus, the court ‘must consider all the circumstances affecting the child, wherever they occur.’ (*Id.* at p. 1048.)” (*T.V., supra*, 217 Cal.App.4th at p. 133; see also *In re Adam D., supra*, 183 Cal.App.4th 1250, 1261 [proof of current risk of harm not required to support the initial exercise of dependency jurisdiction under section 300, subd. (b), if there is a substantial risk that the child will suffer serious physical harm or abuse].)

Father argues that minor Steven was not present at the time the search warrant was executed, and suggests that he was with his paternal grandmother. He bases this

argument on the police reports of the execution of the warrant, which do not mention minor Steven as being present. The court rejected this argument: “I do not find a convincing argument that the children were placed or slept somewhere else at the time that this incident occurred. They were still in the custody of [mother and father]. [¶] That is not a good argument that just because, for whatever reason, the parents have the children somewhere else does not mean they could not just as easily that night go and get the children and have them back in their home.”

Father also cites *In re J.N.* (2010) 181 Cal.App.4th 1010 for the proposition that a single episode of parental misconduct is insufficient to support dependency jurisdiction. That case involved a single incident in which two of the three children were injured when their drunken father drove into a street sign. Mother also was drunk. Unlike our case, the parents in that case had no criminal or substance abuse histories, and did not have present criminal charges pending. The parents were cooperative with the social services agency.

Here mother and father had extensive criminal histories with new criminal charges brought in July 2011. Three prior dependency petitions had been sustained as to children of mother. In addition, both mother and father had lengthy histories of substance abuse. In ruling on jurisdiction, the court must consider information based on facts previously litigated. (*In re Hadley B., supra*, 148 Cal.App.4th at p. 1050.) The evidence established that parents had not turned away from their immersion in a criminal culture involving substance abuse. There was evidence that they were engaged in the sale of narcotics and were in possession of stolen property, including a van, propane tanks, and a gun. Their house had an arsenal and surveillance cameras, as well as narcotics packaged for sale, and a digital scale. At the time of the police search, although the firearms were concealed in a ceiling cavity, ammunition was within reach in the living room. Narcotics were in a bedroom closet. Even if the some of the children were staying with a grandmother at the time of the police search, they were still in mother’s custody. This is substantial evidence that supports the jurisdictional order. If allowed to remain in the custody of parents, there is a substantial risk of harm to the children under these circumstances.

“[C]ases finding a substantial physical danger tend to fall into two factual patterns. One group involves an *identified, specific hazard* in the child’s environment—typically an adult with a proven record of abusiveness. [Citations.] The second group involves children of such tender years that the absence of adequate supervision and care poses an inherent risk to their physical health and safety. [Citations.]’ [Citation.] And we also hold that, in cases involving the second group, the 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.” (*In re Drake M.* (2012) 211 Cal.App.4th 754, 767; see also *In re Lana S.* (2012) 207 Cal.App.4th 94, 104 [substantial evidence to support jurisdiction under section 300, subd. (b) where mother had lengthy history of drug abuse, an older child was removed from her custody because of her drug abuse; and drug paraphernalia was found in the home].) Here mother and father had long histories of substance abuse and missed random drug tests ordered in this proceeding. Both tested positive for drugs when tested during the pendency of this case. Father applied for benefits with the Department of Public Social Services in August and October 2011, but was denied because he did not bring proof of paternity, claimed that minor Steven was his nephew, and missed appointments. The parents’ obstruction of the Department’s efforts to protect the children is further evidence supporting jurisdiction because it indicates they will not protect the children from future risk of harm. We find substantial evidence to support jurisdiction under section 300, subdivision (b). (*In re E.B.* (2010) 184 Cal.App.4th 568, 575.)

Mother relies on *In re James R.* (2009) 176 Cal.App.4th 129. The case is distinguishable. In *James R.*, the mother was hospitalized due to a reaction to consumption of alcohol and prescription ibuprofen. She had a history of hospitalizations for mental health issues, but denied attempting to harm herself. She and the father of the children were devoted to the children; they had stable income and housing. They were both bonded with the children and were meeting their medical, educational and developmental needs. The father was willing to participate in services and was eager to cooperate. They were supported by extended family members. Neither a psychotherapist

nor the social worker were concerned about the safety of the children. The Court of Appeal reversed a jurisdictional finding because there was no evidence of actual harm to the children or any substantial risk of serious harm to them. (*Id.* at p. 136.) It found no specific defined risk of harm to the minors resulting from the mother’s mental illness or substance abuse. (*Id.* at p. 137.)

Unlike the circumstances in *In re James R.*, *supra*, 176 Cal.App.4th 129, the juvenile court’s findings that the minors were at risk of harm in this case were not based on speculation. Both parents were resisting efforts by the Department to aid the children because of concerns about their pending criminal cases. Each had missed drug tests and had tested positive for narcotics. For similar reasons, another case cited by mother, *In re David M.* (2005) 134 Cal.App.4th 822, is distinguishable. The mother in that case had a history of substance abuse and both parents had mental health issues. But the child was being raised in a clean, tidy home, and there was no evidence that the parents’ problems impacted their ability to provide a decent home for their child. In contrast, here, the home of parents was used for multiple criminal activities including drug dealing and possession of stolen property, and parents had a poor record of tests for substance abuse.

II

Both mother and father also challenge the court’s dispositional orders. ““After the juvenile court finds a child to be within its jurisdiction, the court must conduct a dispositional hearing. [Citation.] At the dispositional hearing, the court must decide where the child will live while under the court’s supervision” [Citation.] “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. [Citation.] ‘*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.*’ [Citation.] The court may consider a parent’s past conduct as well as present circumstances.” [Citation.]” (*In re Lana S.*, *supra*, 207 Cal.App.4th at p. 105, italics added.) We review a dispositional finding for substantial evidence. (*Ibid.*)

Mother and father argue that if we reverse the jurisdictional findings, we also must reverse the dispositional orders. They raise no other challenge to the dispositional order. We have recounted parents' lengthy history of substance abuse, criminal activity, and mother's prior sustained dependency petitions. Both parents repeatedly refused to cooperate with the Department during these proceedings, blaming law enforcement officers rather than taking responsibility for their circumstances. They missed some random drug tests and tested positive for narcotics during this proceeding. This evidence demonstrates that there was no reasonable alternative to removal of the children from parents' custody.

III

The Department concedes that this matter should be remanded for further compliance with ICWA. Since these appeals are from jurisdictional and disposition findings and orders rather than a termination of parental rights, the Department seeks affirmance and remand.

"ICWA is a federal law giving Indian tribes concurrent jurisdiction over state court child custody proceedings that involve Indian children living off of a reservation. [Citations.]" (*In re W.B.* (2012) 55 Cal.4th 30, 48 (*W.B.*)). "Among ICWA's procedural safeguards is the duty to inquire into a dependent child's Indian heritage and to provide notice of the proceeding to any tribe or potential tribes . . . and, under some circumstances, to the Bureau of Indian Affairs." (*In re G.L.* (2009) 177 Cal.App.4th 683, 690.)

Father filled out a form Parental Notification of Indian Status stating that he may be eligible for membership in the Tegua⁷ and Cherokee tribes, Tegua (Pueblo) band. At the detention hearing, he told the court that his father, mother and grandmother have Tegua background. He said his father's grandmother has a tribal registration number. He did not know whether any family member at the level of Steven's paternal great-great-grandparent was registered or enrolled in an Indian tribe, but was investigating that

⁷ At some places in the record, this tribal name is spelled "Tigua."

background by talking to his father. He also claimed Cherokee background. Mother denied Indian ancestry. The court found ICWA inapplicable as to mother, but ordered the Department to conduct additional investigation regarding father's ancestry. Subsequently, father refused to be interviewed by the Department and did not give any information about his possible Indian heritage. At the jurisdictional hearing, the court again ordered the Department to follow up with Steven's paternal grandfather regarding American Indian heritage.

At the April 2012 disposition hearing, the court noted that the Department had not noticed the Cherokee tribe and had sent notice to the Pueblo Isleta tribe to the wrong address. The disposition hearing was continued to May 2012. At that time, the court concluded it could not make an ICWA finding as to father. An interim review report in July 2012 stated that notices had been sent to Pueblo Isleta and all Cherokee tribes. Pueblo of Isleta had replied that paternal grandfather was not listed and was ineligible for membership. The Cherokee Nation Indian Child Welfare office responded that it needed additional information. The social worker was unable to contact father or paternal grandfather. The court ruled that ICWA does not apply to minor Steven, noting that only one tribe had failed to respond to notice and that time had expired to do so.

The Department points out that father provided additional detailed information about his father, who lived and went to school in Isleta, Texas. In the ICWA notice sent by the Department, this information is attributed to Lawrence T., the child's great-great-grandfather, rather than to Larry B., the child's paternal grandfather. In addition, the Department notes that the Cherokee Nation Indian Child Welfare office sought additional information regarding the father's paternal grandmother. The social worker reported that she would notify the court if she obtained additional information from father. The results of any additional investigation or correspondence with the tribe are not reflected in the record.

We agree the information provided by father was sufficiently specific to trigger the notice requirements of ICWA and that the Department was not in full compliance

with the act. (*In re Alice M.* (2008) 161 Cal.App.4th 1189, 1198–1201.) We remand for compliance with ICWA.

DISPOSITION

The jurisdictional findings and dispositional order are affirmed. The finding that ICWA does not apply to minor Steven is conditionally reversed and remanded for compliance with the notice requirements of ICWA. If, after inquiry and proper notice, the court finds that Steven is an Indian child under ICWA, the court shall proceed in conformity with ICWA. If, however, the juvenile court finds that Steven is not an Indian child, the finding that ICWA does not apply shall be reinstated.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.