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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re J.R., a Person Coming Under the Juvenile Court Law.

SACRAMENTO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

R.R.,

Defendant and Appellant.

C070260

(Super. Ct. No. JD215812)

R.R., father of the minor, appeals from orders sustaining the supplemental petition, removing the minor from father’s custody, and returning to a permanent plan of long-term foster care. (Welf. & Inst. Code, §§ 387, 395; statutory references that follow are to the Welfare and Institutions Code unless otherwise noted.) Appellant contends there was insufficient evidence to support both the jurisdictional findings of the supplemental petition and the order removing the minor from his custody. Appellant further asserts

there was a failure to comply with the notice provisions of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901, et seq.). We conclude appellant is procedurally barred from raising the ICWA issue and that substantial evidence supports the juvenile court's findings and orders and affirm the orders.

FACTS AND PROCEEDINGS

J.R., then one year old, was first detained in May 1999 in Los Angeles County. The parents had a history of violence and appellant is developmentally delayed and an Alta Regional Center client (Alta). After 12 months of services, mother's services were terminated and the case was transferred to Sacramento County to facilitate services for appellant. By March 2001, the case was transferred back to Los Angeles County, the minor was placed with mother, and jurisdiction was terminated in October 2001.

Los Angeles County filed a new petition in September 2004 alleging mother caused the death of a sibling, thereby placing the minor at risk. The minor was detained and eventually placed with the paternal grandmother.

At the disposition hearing in December 2004, the court denied reunification services to mother and ordered services for appellant. The minor was in therapy with serious emotional and mental health issues. At the six-month review hearing, the court ordered further services for appellant.

The social worker filed a petition to transfer the case to Sacramento County because appellant and the minor resided there. The court transferred the case and Sacramento County accepted the transfer in September 2005.

At the 12-month review hearing in December 2005, the court terminated appellant's services and set a section 366.26 hearing. At the section 366.26 hearing, the court ordered a permanent plan of long-term placement for the minor.

The review reports from the Sacramento County Department of Health and Human Services (Department) in 2006 and 2007 indicated the minor had ongoing

emotional problems. By September 2007, the paternal grandmother was no longer able to care for the minor due to his behavior and he was removed from her care. The minor had very serious behavioral problems and was placed in a residential treatment facility.

During 2008 and 2009, the minor remained in the level 14 group home, showing slow improvement in his behavior and coping skills. Appellant visited the minor regularly.

In January 2010, appellant filed a petition for modification seeking placement of the minor or renewed services. The court granted the petition, ordering renewed services for appellant.

In March 2010, the minor moved to a level 9 group home. The review report in September 2010 stated the minor was emotionally immature, manipulative, demanded attention, shifted blame to others, saw himself as a victim, and continued to have emotional outbursts. The minor was morbidly obese, although he had recently lost weight when he participated in a martial arts class. The report stated appellant was easily controlled by the minor and placing the minor with appellant was not in the minor's best interests due to appellant's skill deficits. The minor was capable of performing at or above grade level in school but struggled somewhat due to his inability or unwillingness to focus. He attended school regularly and had few behavioral problems. The minor was now visiting appellant on weekends, but the Department had concerns about appropriate parenting and the minor's manipulation.

An addendum report discussed appellant's services, noting that, as an Alta client, appellant continued to receive support services and that he was referred to additional services to assist him in parenting and nutritional education. The social worker stated that appellant was deficient in his ability to apply the knowledge acquired from service providers. The minor was not actively participating in therapy and manipulated appellant with tantrums and tears. Further, the minor was aggressive to the point of abuse of appellant to get his way. The addendum concluded that the Department could not

recommend placing the minor in appellant's home. Notwithstanding this conclusion, the court ordered the minor returned to appellant in January 2011.

A Court Appointed Special Advocate (CASA) report in April 2011 stated that, in meetings, the minor spoke over, or for, appellant. The minor was in the fifth grade with fluctuating attendance and very poor grades.

A concurrent review report stated that appellant deferred to the minor in confusing situations. The minor had gained additional weight since placement; however, appellant avoided discussing the subject with the minor because "it upsets him." At school, the minor appeared to be angrier since placement with appellant and his negative behavior increased. The minor had to be restrained once at school for an angry outburst but thereafter his behavior was more positive. Therapy sessions were replaced by a Wrap Around (WRAP) program. The minor admitted he had anger management issues and engaged in verbal altercations with appellant. The minor was parentified and tended to take on responsibilities he felt appellant did not handle properly. Although intensive services were being provided to support and maintain the placement, both appellant and the minor were resistant to services. Appellant was unable to incorporate skills he learned into the daily challenges of raising the minor and refused to assert himself as a disciplinarian. Overall, there had been no progress since the minor returned to appellant. The report concluded that neither appellant nor the paternal grandmother could care for the minor and it was not in the minor's best interest to remain in the home.

A second CASA report stated that, in late April 2011, the minor wanted to leave appellant's home and return to his last group home. The Department placed the minor in respite care. Within two days, the minor returned home, admitting he manipulated the situation. The CASA report further stated that both the minor and appellant needed to work on anger management, coping skills and communication and appellant needed to work on parenting. The CASA report recommended leaving the minor in the home.

The social worker's report of May 2011 discussed the minor's brief removal and return, noting that services and support were in place, plans were made but no progress had occurred. There was ongoing resistance to services although the WRAP team continued to try to find appropriate solutions and programs acceptable to both appellant and the minor. The social worker's attempts to work with the team and appellant were fraught with discord due to appellant's attempts to manipulate circumstances to his benefit. Again, the Department concluded there had been no progress and, somewhat resignedly, indicated services would continue to be provided while the minor was in appellant's home. The court ordered services to continue.

By June 2011, the CASA reported there were ongoing issues over the minor's weight loss efforts which led the minor to again request removal. The CASA felt the minor saw the group home as less restrictive and was concerned the minor was trying to manipulate the WRAP team.

A supplemental report in July 2011 catalogued the minor's complaints about appellant's parenting, including shouting and physical altercations, one of which resulted in appellant biting the minor. Appellant denied or minimized the minor's concerns. The minor continued to act in a parental role when circumstances were challenging and appellant behaved like the minor's peer, rather than a parent, to avoid confrontation. Appellant overindulged the minor by giving him expensive things to such an extent that appellant did not always have money to pay bills. The social worker saw the family as deficient in skills and unwilling to commit to any program which required effort, instead ignoring, rejecting, or terminating services.

In September 2011, the Department filed a supplemental petition to remove the 13-year-old minor from appellant's home, alleging appellant failed to provide a safe home and meet the minor's medical and mental health needs. Both the minor and appellant reported ongoing conflict in the home; the most recent incident involved a knife. The minor stated he no longer felt safe in the home and refused to return.

Although there were conflicting reports about what happened in the most recent incident, both appellant and the minor agreed that the minor had threatened suicide with a knife and the minor's behavior had escalated out of control. The minor expressed frustration because appellant was not able to adequately parent him, was not supportive of his weight loss attempts, and could not meet the minor's needs because he had trouble meeting his own needs. Appellant said he had stopped taking his own medications because he was afraid to sleep with the minor in the house.

The October 2011 review report stated that, following the minor's removal, appellant told the social worker to leave him alone. The minor was placed in a foster home. In contrast to the struggles the minor had with his feelings and emotions when in appellant's care, in foster care he was more at ease and less agitated. The minor's school vice principal told the social worker there was a decline in the minor's character and affect after he was placed with appellant and felt that removal was in the minor's best interests. The report stated that extensive services had not been successful in reducing the risk in the home and recommended termination of reunification services with a permanent plan of long-term foster care with a goal of guardianship.

The jurisdiction/disposition report said appellant believed that he could take care of the minor. Appellant explained that, after the recent knife incident, he disposed of all the knives in the home by putting them in a locked dumpster. Appellant believed the minor wanted to be removed because appellant could not buy enough "stuff" for him and that the minor took advantage of him: stealing his credit card to buy games, selling games bought for him, and using the satellite television to view pornography. Appellant said the minor forged a note to the school to avoid his special diet and was often awake until early morning playing video games. Appellant described a physical altercation between the minor and himself in August 2011 which resulted in his biting the minor.

The minor now told the social worker he wanted to return home. The minor believed he was responsible for the removal because he was angry and frustrated with all

the programs he had to attend. The minor also said he wanted to return to his last group home because he perceived that less would be required of him there. He said he pulled a knife and threatened to harm himself because he did not get his way. He admitted he had learned no new skills or developed any new tools to help him with his behavior while living with appellant.

The program manager for the WRAP team stated he had contact with the family five days a week and provided emergency services seven days a week. He said that appellant wanted the minor's approval and tried to get it by buying him things which the minor then sold. He told the social worker that appellant had difficulty applying concepts to changing situations but had made some progress. The program manager estimated that appellant would need at least another year of intensive services to provide basic care for the minor.

The vice principal of the minor's school stated the minor appeared happier since removal. She also said that the minor behaved more like a parent than the father did.

The minor was currently in a foster home and said he was benefitting from the guidance of the foster parents. The minor was behind academically, but was completing homework and had no behavioral problems at school.

The social worker reported that both appellant and the minor agreed that the minor picked up a knife, brought it to his wrist, and appellant took the knife away. The father and the minor both placed responsibility for the minor's behavior on the minor. This recent event was the latest of several verbal altercations which escalated to physical confrontations. The minor was the dominant individual in the relationship and appellant admitted the minor manipulated him. The social worker concluded the minor would be at risk of abuse or neglect if returned to appellant's care and that appellant had not benefitted from the intensive and extensive services provided during the dependency proceedings.

The October 2011 CASA report said that the minor's attempts to be controlling were handled appropriately by the foster father and the minor responded well to him. The CASA believed that, despite the minor's expressed desire to return to the level 9 group home, the current foster placement was a good match for him.

At the contested hearing in December 2011, the parties presented no evidence beyond the several reports which were filed. The court sustained the supplemental petition, removed the minor from appellant's custody, and placed him in foster care with a specific goal of guardianship. The court explained that, while the minor had special needs, appellant had his own special needs and the question was whether appellant had the ability to parent the minor. The court found that appellant did not have the skills necessary to parent a special needs child.

Additional facts appear where relevant in the following discussion.

DISCUSSION

I

Indian Child Welfare Act

Appellant contends the juvenile court failed to comply with ICWA notice requirements.

In the first dependency, Los Angeles County established that the minor and mother were eligible for membership in the Choctaw Nation but were not enrolled. In December 2000, after the case was transferred, the tribe informed the Sacramento Superior Court that it declined to intervene although it wanted to monitor the case. When the case was transferred back to Los Angeles County, an Indian expert appointed by the court indicated the tribe would intervene. The tribe did intervene in July 2001 and expressed support of reunification for the minor's sibling prior to termination of dependency jurisdiction as to the minor in October 2001.

Los Angeles County sent notice of the second dependency proceedings in September 2004 to the Choctaw Nation. After receiving notice of the jurisdiction/disposition hearing, the tribe responded in November 2004 that they had made numerous attempts to get mother and the minor enrolled without any response from the family. Accordingly, the tribe declined to make any formal recommendations regarding the new proceeding. The Indian expert reported that the tribe would not intervene. At the disposition hearing in December 2004, the Los Angeles County Superior Court found the case was not an ICWA case based on the November 2004 letter from the tribe. The review report stated the social worker had called the tribe about enrollment but received no response. At a review hearing in June 2005, the court reiterated that this was not an ICWA case. The order transferring the case from Los Angeles County to Sacramento County also stated the case was not an ICWA case.

In September 2005, following the transfer to Sacramento County, the tribe requested a status update on the case. The Department sent a new notice of the proceedings to the Choctaw Nation in November 2005 and attached the tribe's letter of December 2000. Thereafter, the Department and the court treated the case as an ICWA case. The tribe expressed support of the Department's plan of guardianship with the paternal grandparents in the spring of 2007, although the plan was not ordered because the minor was removed from the paternal grandmother in the fall of 2007. Copies of orders entered in the case were sent to the tribe during 2007.

In December 2007, the Department filed a motion to modify the prior finding that ICWA applied to the case. The motion stated that neither the mother nor the minor were enrolled, thus, the minor did not meet the definition of an Indian child within the meaning of ICWA. The motion was served on the tribe six days prior to the scheduled hearing. At the hearing on the motion, the court found the minor was not an Indian child, although eligible, and no further notice need be provided to the tribe. The tribe did not appear at

the hearing. However, a copy of the order was served on the tribe. Copies of orders in the case continued to be sent to the tribe until September 2010.

Appellant argues the tribe did not have adequate notice of the motion and hearing because the tribe did not receive the notice 10 days before the hearing as required by section 224.2, subdivision (d).

While, as amply demonstrated by cases cited by appellant, parents can challenge lack of notice of the proceedings at any time, it is less clear that, once a tribe has notice of the proceedings and has participated in them, that a parent may still assert the tribe's right to proper notice of a hearing in the ongoing proceedings. (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 739.)

Even assuming appellant has standing to challenge the validity of the order on notice grounds, he is not asserting that the tribe did not have notice of the proceedings, but only that a time requirement, the 10-day rule, as to a single hearing was not met. The relevant order was entered in December 2007 without objection and has long been final. Appellant has forfeited the challenge by failing to assert it by a timely appeal. (*In re Daniel K.* (1998) 61 Cal.App.4th 661, 667; *John F. v. Superior Court* (1996) 43 Cal.App.4th 400, 404-405.)

In any case, failure to comply with the 10-day rule is not jurisdictional and is subject to harmless error analysis. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1410-1411.) Where the tribe has participated in the proceedings or expressly indicated it does not intend to do so, errors in notice are harmless. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424.)

Here, the tribe had notice of the proceedings and, while not considering the minor an Indian child because neither he nor the mother were enrolled, nonetheless, expressed opinions on court actions when asked to do so. The tribe had notice of the motion hearing and was served a copy of the order. It made no effort, despite being served with

ongoing orders, to object to the order or assert its interest in the proceedings or the minor. Failure to comply with the 10-day rule was harmless error.

II

Sufficiency of the Evidence

Appellant contends the evidence is insufficient to support the allegations of the supplemental petition that placement with him was ineffective in rehabilitating or protecting the minor. Appellant further argues that the evidence was insufficient to support the order removing the minor.

When the sufficiency of the evidence to support a finding or order is challenged on appeal, even where the standard of proof in the trial court is clear and convincing, the reviewing court must determine if there is any substantial evidence--that is, evidence which is reasonable, credible and of solid value--to support the conclusion of the trier of fact. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.) In making this determination we recognize that all conflicts are to be resolved in favor of the prevailing party and that issues of fact and credibility are questions for the trier of fact. (*In re Jason L., supra*, 222 Cal.App.3d at p. 1214; *In re Steve W.* (1990) 217 Cal.App.3d 10, 16.) The reviewing court may not reweigh the evidence when assessing the sufficiency of the evidence. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

A. The Supplemental Petition

The supplemental petition sustained by the court alleged: (1) The previous disposition was not effective in the rehabilitation or protection of the child because appellant failed to provide a safe home for the minor and he was unable to meet the minor's special needs; (2) Both the minor and appellant reported ongoing conflict in the home and that, in the most recent incident, a knife was involved; (3) The minor no longer felt physically safe in the home and refused to return home; and (4) Appellant was not willing to consent to respite care.

Prior to placement in appellant's care, the minor was showing slow improvement in his behavior and coping skills and was making some progress in losing weight. The minor was able to control appellant through manipulation and aggression. He struggled academically due to his lack of focus and was not participating in therapy.

Within four months of his placement with appellant, the minor's attendance at school was fluctuating, and his grades were poor. He appeared to be angrier at school and his negative behavior increased to the point of needing restraint. The minor was not merely manipulating appellant, but acting in a parental role. The minor engaged in verbal and physical altercations with appellant, culminating in the knife incident. The minor had gained weight and appellant would not discuss the subject with him. Both the minor and appellant were resistant to services. The minor began to ask to return to the group home and complained that appellant could not meet his needs.

It was clear that appellant was unable to benefit from the intensive services to provide direction, structure, and parental guidance to the minor. The reports were clear that, far from rehabilitating and protecting the minor, placement with appellant had increased the risks to the minor's health due, in part, to the growing number of physical altercations. Further, the minor's behavioral issues had escalated and his academic performance had deteriorated. Appellant was completely unable to meet the minor's special health, mental, and emotional needs. There was ample evidence to sustain the allegations of the supplemental petition.

B. Removal

To support an order removing a child from parental custody, the court must find clear and convincing evidence "[t]here 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." (§ 361, subd. (c)(1).)

As previously discussed, the minor's frustration with appellant's inability to parent him resulted in increasingly serious physical altercations between them. Further, the minor's behavior was escalating and appellant could not apply skills learned from the intensive services to deal with the minor. Once removed, the minor's behavior at school stabilized and his attempts to control the foster father were met with appropriate parental techniques which the minor accepted. As the minor told the social worker, appellant could not parent him and had trouble meeting his own needs. Appellant's solutions to the minor's behavioral issues, such as not taking his own medication because he was afraid to sleep with the minor in the house and throwing away all the knives, showed that appellant's concrete thinking and inability to adapt the skills he was learning left him unable to deal with the daily challenges the minor presented. Even with WRAP intensive services, appellant would need at least a year before he would be able to manage basic care for the minor. Appellant simply could not provide for the minor's physical and emotional well-being and allowed the minor to do as he pleased. Substantial evidence supports the juvenile court's order removing the minor from appellant's custody.

DISPOSITION

The orders of the juvenile court are affirmed.

_____ HULL _____, Acting P. J.

We concur:

_____ BUTZ _____, J.

_____ MURRAY _____, J.