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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re KARINA P. et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

MONICA A. et al.,

Defendants and Appellants.

D062257

(Super. Ct. No. SJ12747A-D)

APPEALS from a judgment of the Superior Court of San Diego County, Laura J. Birkmeyer, Judge. Affirmed in part and conditionally reversed in part with directions.

Monica A., the mother of Karina P., Monique M., Raymond R., Jr. (Raymond), and Danny T., Jr. (Danny), appeals the dispositional orders removing the children from her custody after the juvenile court sustained dependency petitions alleging the children were at risk because of domestic violence in the family home (Welf. & Inst. Code, § 361,

subd. (c)(1)).¹ Danny T., Sr. (Danny T.), the father of Danny, also appeals the removal of his son from parental custody. The parents contend the removal orders were not supported by substantial evidence. Monica also contends the court did not comply with the provisions of the Indian Child Welfare Act (ICWA) (25 U.S.C. §§ 1901-1963).

FACTS

On February 15, 2012, Monica and Danny T. argued after a meal of fish with too many bones. The three older children—Karina, Monique and Raymond—were upstairs. Monica, who was holding 15-month-old Danny, picked up the laptop computer, placed it on the flight of stairs and told Karina to retrieve the computer. Meanwhile, Danny T. approached Monica from behind, wrapped his left arm around her neck and squeezed until she started having difficulty breathing. With his right hand, Danny T. held the tip of a Phillips screwdriver to Monica's neck and threatened to stab her. After Danny T. released her, Monica called the police. Danny T. told her that he would spend only three days in jail and, when he was released, he would kill her and the children.

Monica told police that she and Danny T. had several prior domestic violence incidents that had not been reported to the police.

Karina, who was 11 years old, told police she witnessed Danny T. holding the screwdriver to Monica's neck when she retrieved the computer, but then returned upstairs because four-year-old Raymond was calling for her and Danny T. called her a "whore"

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

and a "bitch." Monique, who was eight years old, told police she heard Monica and Danny T. arguing. Monique also said she heard Danny T. call Karina a "shit."

Police arrested Danny T. for assault with a deadly weapon, brandishing a deadly weapon, making a terrorist threat and child endangerment.

On February 17, the superior criminal court issued a protective order, which restrained Danny T. from having any contact with Monica, Karina or Danny.

Later that month, Monica told a social worker that Danny T. had been depressed at the time of the domestic violence incident because his mother had died a week earlier. Monica also said she and Danny T. had not argued before during the four years they had been together. Monique told the social worker that Monica and Danny T. had argued in the past and once Danny T. tried to hit Monica in the face. Karina told the social worker that Danny T. is a "nice guy" and she is "not supposed to get involved in adult things." The following month the social worker reinterviewed Monica, who minimized the severity of the domestic violence incident by saying that she misunderstood Danny T. about threatening to kill her or the children. Monica also said the police did not understand what she and Karina had related to them. Karina told the social worker she had not spoken with the police and claimed she did not see any part of the argument.

On March 21, the San Diego County Health and Human Services Agency (Agency) filed dependency petitions on behalf of Karina, Monique and Raymond alleging each child was at risk of substantial harm stemming from exposure to domestic violence (§ 300, subd. (b)). The Agency also filed a dependency petition on behalf of

Danny, alleging that there was a substantial risk of serious physical harm to him based on the February 15 domestic violence incident between his parents (§ 300, subd. (a)).

Initially, the Agency recommended that the children be detained with Monica. The Agency also recommended Danny T. live outside the family home, have no contact with Karina, Monique and Raymond and have only third-party supervised contact with Danny. However, on March 22, during the detention hearing, minors' counsel reported that Monique had disclosed that Danny T. had been babysitting the children while Monica was at work. Monique made a similar statement to the social worker. The Agency changed its recommendation and asked the children be detained outside the family home. Monica and Danny T. denied he had gone to the family home or had any contact with the children in violation of the criminal court protective order. The juvenile court found "sufficient proof and information that neither [Danny T.] nor [Monica] [was] honoring the . . . criminal protective order." The court ordered the children be detained in licensed foster care and that Monica was not to have any conversations with the children about whether Danny T. returned home or about the case.

On March 29, 2012, the criminal restraining order was modified to permit peaceful contact between Danny T., Monica and Danny.

A new social worker prepared the jurisdiction/disposition report. Karina recanted statements she made to the police and denied having seen Danny T. since the February 15 domestic violence incident. Monique said she had last seen Danny T. on the day of the incident. Monica minimized Danny T.'s conduct, recanted some of her statements to the police and denied any contact with him since his arrest. Both Monica and Danny T. were

willing to attend domestic violence and parenting classes. The Agency recommended the children remain in out-of-home care, reunification services be provided to Monica and Danny T., and they have supervised visitation.

By mid-May, Monica had completed two separate parenting programs. Monica's domestic violence counselor reported Monica minimized the violence with Danny T., was very codependent and was in the beginning stages of treatment. It was also reported by one of the child care providers that Monica talked about the case in front of the children and would stop when asked to do so.

On May 17, the juvenile court granted the Agency the discretion to detain the children with Monica if the maternal great-grandmother was in the home and minors' counsel concurred. However, Monica told the social worker that the maternal great-grandmother had already started living there, which was not true. The social worker reported her confidence in Monica's truthfulness was undercut by the falsehood.

In late May, the social worker reported that she had received a copy of Karina's Facebook page message dated December 21, 2011, which read: "I want to commit suicide because my mom's boyfriend in San Diego is being a [liar]." Karina's father had given the copy to the social worker. Karina told the social worker she did not remember writing the suicide statement.

In June, the Agency recommended Monique be placed with her father and requested discretion to place Karina with her father. The Agency also requested discretion to place Karina, Raymond and Danny with a relative or nonrelative extended family member.

At the contested jurisdiction hearing on June 8, the juvenile court sustained the allegations of the dependency petitions after the parties submitted on the documents. The court said the three older children remained at risk because of Monica's minimization.

The contested disposition hearing was held over several days in June.

Karina testified that she did not see any domestic violence between Monica and Danny T., and she did not remember talking to a police officer or the police coming to her home. Monique testified she did not remember telling the first social worker that Danny T. was babysitting her and her siblings.

The current social worker testified that in May Monica had related the signs of domestic violence that she had learned in class. Monica also said she did not want Danny T. in the home because she did not trust him with the children around and would call police if he showed up. Monica said on the day of the incident she should have taken the children for ice cream rather than staying in the home with Danny T.

The social worker also reported that Monica had text messaged Karina after the child's testimony. The worker said the message was "concerning because it was talking about the court case and placement issues . . . and it . . . appeared that it was discussing Karina's testimony." The worker had previously told the mother not to text her children. The worker also said Monica had called Karina's cell phone, which violated the court's orders for supervised contact. The worker did not trust Monica.

In her testimony, Monica admitted she had sent a text message to Karina. Monica said she was asking her daughter why she had not testified truthfully about the police interview. In a subsequent text, Monica told Karina that her testimony made it seem that

Monica was lying about the assault. Monica also told Karina to delete the messages. Monica denied calling Karina's cell phone unless the foster mother did not answer her telephone. Monica also testified she did not believe she had minimized the incident because she called the police.

On June 27, the juvenile court removed the children from the care of the mother (§ 361, subd. (c)(1)) and ordered supervised visitation, and gave the social worker the discretion to move to unsupervised visits and overnight visits with the concurrence of minors' counsel.² The court observed that it ordered removal because of the March violation of the criminal court protective order and the "constellation of other factors." The court ordered reunification services for Monica and Danny T. The court placed Monique with her father on the condition that he would make her available for visits with Monica and the other children and comply with the Agency at all times. The court gave the social worker discretion to place Karina with her father, with notice to the parties and concurrence with the minors' counsel. Raymond and Danny were to remain in foster care.

DISCUSSION

I. REMOVAL OF CHILDREN FROM MOTHER'S CUSTODY

Monica contends the juvenile court's order removing the children from her custody was not supported by substantial evidence. Danny T. contends the court's finding at the detention hearing that he and Monica violated the criminal court protective order,

² The court also removed Danny from the custody of Danny T.

permeated the proceedings, including the removal order, and was not supported by competent evidence. We disagree with both contentions.

After the juvenile court finds a child to be within its jurisdiction, the court must conduct a dispositional hearing. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248.) At the dispositional hearing, the court must decide where the child will live while under the court's supervision. (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1082.)

Before the court may order a child physically removed from his or her parents, it must find, by clear and convincing evidence, that the child would be at substantial risk of harm if returned home and there are no reasonable means by which the child can be protected without removal. (§ 361, subd. (c)(1); *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) "Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt." (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 695.) This is a heightened standard of proof from the required preponderance of evidence standard for taking jurisdiction over a child. (§§ 300, 355, subd. (a); *In re Basilio T.* (1992) 4 Cal.App.4th 155, 169, limited on other grounds by *In re Cindy L.* (1997) 17 Cal.4th 15, 31-35.)

The standard for review of a dispositional order on appeal is the substantial evidence test. (*In re R.V.* (2012) 208 Cal.App.4th 837, 849.) We consider the entire record to determine whether substantial evidence supports the juvenile court's findings. (*In re Kristin H., supra*, 46 Cal.App.4th at p. 1654.) We do not pass on the credibility of witnesses, resolve conflicts in the evidence or weigh the evidence. Instead, we review the record in the light most favorable to the juvenile court's order to decide whether

substantial evidence supports the order. (*In re Isayah C.*, *supra*, 118 Cal.App.4th at p. 694.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the court's findings or orders. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

At the same time, jurisdictional findings are *prima facie* evidence the child cannot safely remain in the home. (§ 361, subd. (c)(1).) The parent need not be dangerous and the child need not have been actually harmed before removal is appropriate. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1136, disapproved on another ground in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6; *In re Jamie M.* (1982) 134 Cal.App.3d 530, 536.)

We find substantial evidence supported the juvenile court's findings under section 361, subdivision (c)(1) that there was substantial danger to the children's physical and emotional well-being if they were to be returned to Monica's care. Although Monica timely called police for the February 15 domestic violence incident, since that time she increasingly minimized the seriousness of the event. There is no credible way to diminish the gravity of what happened. Danny T. choked Monica while she was holding Danny, who was then 15 months old, and held the tip of a screwdriver to her neck while threatening to stab her. Danny T.'s actions placed both Monica and Danny in imminent, serious physical danger. Danny T. also verbally abused Karina, who was only momentarily present. Presumably, the other two children were spared because they were upstairs during the entire incident. Moreover, after Monica called police, Danny T. threatened to kill Monica and all the children.

A little more than one month after the domestic violence, Monique told minors' counsel and a social worker that Danny T. was in the family home babysitting despite a criminal court protective order prohibiting him from having any contact with Monica, Danny and Karina. Monica and Danny T. denied his presence in the home, but the court, as well as the social worker and minors' counsel, believed Monique's report was accurate. As an appellate court, we do not second-guess the lower court's credibility findings. We do note, however, that throughout the proceedings, numerous acts and statements by Monica cast doubt on her credibility and trustworthiness, including her falsely stating the maternal great-grandmother was already in the home; and her texting Karina after the court ordered her not to communicate about the case with the children and the social worker specifically told her not to text Karina. In her appellate brief, Monica even admits that she, as well as Karina, "prevaricated on the facts when providing sworn testimony about the precipitating events."

Monica relies on *In re J.N.* (2010) 181 Cal.App.4th 1010 (*J.N.*) in support of her appellate position. In that case, the father, who was driving under the influence of alcohol, crashed into a pole while his three children were in the vehicle. (*Id.* at p. 1014.) The mother also was in the vehicle, and she, too, was intoxicated. (*Ibid.*) Two of the children required medical attention after the accident. (*Ibid.*) The lower court sustained the allegations of the dependency petitions under section 300, subdivision (b). (*Id.* at p. 1021.) The Court of Appeal found that, despite the profound seriousness of the parents' misconduct on the one occasion, there was no evidence from which to infer a substantial risk that such behavior would recur. (*Id.* at pp. 1022-1027.) The appellate

court noted the lack of evidence, including expert opinion testimony, that the parents were substance abusers based on the single episode. (*Id.* at p. 1026.) The appellate court added: "Significantly, both parents were remorseful, loving, and indicated that they were willing to learn from their mistakes." (*Ibid.*) The Court of Appeal reversed the jurisdictional findings. (*Id.* at p. 1027.)

Monica's reliance on *J.N.* is misplaced. *J.N.* was an appeal of the juvenile court's jurisdictional findings and an order. Here, Monica and Danny T. appeal the court's dispositional orders. Moreover, *J.N.* was concerned with a single incident of injury drunk driving because the parents had no other history of alcohol abuse. In contrast, Monica told police she had been involved with previous domestic violence incidents with Danny T., although she later recanted this statement. Monica also was involved in domestic violence incidents with Karina's and Monique's fathers. Given this history and Monica's inconsistency on whether she and Danny T. previously engaged in domestic violence, the juvenile court reasonably could infer that Monica was not yet prepared to protect the children from exposure to domestic violence. Monica had begun domestic violence classes, but not shown significant progress. Moreover, rather than the parental remorse that was apparent in *J.N.*, this case is dominated largely by Monica's minimization of the February 15 domestic violence incident.

Danny T. challenges the order removing the children from Monica's custody because it was based, to a large extent, on the juvenile court's conclusion that he and Monica had violated the criminal court's protective order—a finding that was originally made at the March 22 detention hearing purportedly without competent evidence. Danny

T. claims that the court reached its conclusion on the basis of unsworn statements by counsel, which is not evidence. However Danny T. did not raise the issue at the detention hearing.³ Accordingly, Danny T. has forfeited the issue.

Putting aside the forfeiture issue, we find this detention issue is now moot, and in any event, harmless. "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.) This is the situation here. The social worker who interviewed Monique during the detention hearing testified at the disposition hearing about Monique's disclosure. Thus, to the extent the juvenile court removed the children on the basis that Monica and Danny T. violated the criminal court protective issue, that reason was supported by competent evidence presented at the dispositional hearing.

II. ICWA

Monica contends the juvenile court failed to comply with the notice provisions of ICWA after receiving information that the maternal great-grandmother might have been born in Ajo, Arizona, and might be a member of the Papago Tribe.

³ Although Danny T.'s counsel denied violating the criminal protective order, counsel did not object that there was no competent evidence presented at the hearing to establish a violation.

At the beginning of the case, Monica said she did not have Indian ancestry. In April, the Agency reported that Monica said her brother, Ramon A., might be a tribe member, but she did not have contact information for him. Monica also said her paternal grandmother, who had passed away, was a member of an Indian tribe. Monica did not know the name of the tribe. The juvenile court deferred ruling on ICWA. On May 7, the court ordered Monica to fill out the ICWA-030 (Notice of Child Custody Proceeding for Indian Child) form and submit it to the Agency by May 11.

On May 14, an Agency social worker spoke with the maternal grandmother, who said she did not know if her son was an enrolled member of a tribe and did not have contact information for him. She also said her husband and his family, who were born and raised in Sonora, Mexico, might be Indian, and, if so, it was more than likely through a Mexican tribe.

The court reviewed the ICWA-030 form that Monica filled out in June and found that it was incomplete. The court asked the maternal great-grandmother, who was present in court, whether she was a member of an Indian tribe. The great-grandmother said she was not. Upon further inquiry, the great-grandmother said Monica's father, Manuel B., was a member of an Indian tribe. The court ordered the great-grandmother and Monica to meet with the social worker to correctly fill out the ICWA-030 form.

Later in June, the social worker reported she had spoken with Manuel, who said his family might have some Mexican Indian heritage from a Sonora, Mexico, tribe called Papago, through his mother Maria B., who was born in Mexico or Ajo, Arizona. Manuel also said no one in his family was an enrolled member with any tribe, and, as far as he

knew, no family member had ever lived on an Indian reservation or near an Indian community, received benefits from an Indian community, spoken native languages or participated in either Indian politics or Indian cultural events.

At the June 27 hearing, the court found reasonable inquiry had been made to determine whether the children were Indian children and notice pursuant to ICWA was not required because the court knew the children were not Indian children and ICWA did not apply.

ICWA imposes on the juvenile court and social service agency an affirmative duty to inquire whether a child subject to a dependency proceeding is or may be an Indian child. (*In re K.M.* (2009) 172 Cal.App.4th 115, 118-119.) Proper notice allows tribes to determine whether a child is or may become a member and to assert their right to intervene in the dependency proceedings. (*In re J.T.* (2007) 154 Cal.App.4th 986, 994.)

" 'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).) The tribe determines whether a child meets these criteria. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254-255.) The juvenile court and the Agency "have an affirmative and continuing duty to inquire whether a child . . . is or may be an Indian child." (§ 224.3, subd. (a).) If there is reason to know the case involves an Indian child, the Agency must give notice "to all tribes of which the child may be a member or eligible for membership." (§ 224.2, subds. (a)(3) & (b); 25 U.S.C. § 1912(a).) Notice must be given if "a member of the child's extended family provides information suggesting the

child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe." (§ 224.3, subd. (b)(1); *In re Damian C.* (2009) 178 Cal.App.4th 192, 198.)

Because family members "are not necessarily knowledgeable about tribal government or membership and their interests may diverge from those of the tribe" (*In re Mary G.* (2007) 151 Cal.App.4th 184, 212, quoting *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1425), a relative's statement that the family lacks sufficient information to determine Indian heritage does not absolve the Agency of its duty to provide ICWA notice (*In re Damian C.*, at p. 199).

In *In re Damian C.*, *supra*, 178 Cal.App.4th 192, the mother said she might have Pasqua Yaqui ancestry through the maternal grandfather. (*Id.* at pp. 195, 199.) The maternal grandfather said "he had heard his father . . . was either Yaqui or Navajo Indian, but later was informed the family did not have Indian heritage." (*Id.* at p. 195.) The maternal grandfather did not know which Yaqui or Navajo Tribe might be involved or where the tribe might be located. (*Id.* at pp. 195, 199.) He said the family's attempts to research their possible Indian heritage had been unsuccessful because they lacked enough information. (*Id.* at pp. 195-196, 199.) His father lived in Temecula, California, but the maternal grandfather did not know the address or telephone number. (*Id.* at pp. 196, 199.) The juvenile court found ICWA did not apply (*id.* at pp. 194, 196), but this court remanded for an ICWA inquiry and notice (*id.* at pp. 199-200), stating: "[The above] information constituted a 'reason to know that an Indian child is or may be involved' and triggered the requirement to make further inquiry. The Agency additionally was required

to provide notice to the federally recognized Navajo and Yaqui [T]ribes because, even though [the maternal grandfather] reported the family had been unsuccessful in establishing the family's Indian heritage, the question of membership in the tribe rests with the tribe itself." (*Id.* at p. 199.)

The situation here is similar. The possibility that a maternal relative might have been born in Arizona rather than Mexico and have possible tribal enrollment triggered a duty to give notice to any tribes related to the Papago Indians. (See *In re Nikki R.* (2003) 106 Cal.App.4th 844, 848 ["[T]he juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement"]; *In re Francisco W.* (2006) 139 Cal.App.4th 695, 702; § 224.2.)

"Since the failure to give proper notice of a dependency proceeding to a tribe with which the dependent child may be affiliated forecloses participation by the tribe, notice requirements are strictly construed. [Citation.] Notice is 'absolutely critical' under the ICWA. [Citation.] Courts have held that without discharging their duty to provide the notice required under the ICWA, state courts do not have jurisdiction to proceed with the dependency proceedings. [Citations.] Thus the failure to provide proper notice is prejudicial error requiring reversal and remand." (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1267.)

We remand the case to the juvenile court with directions to order the Agency to provide ICWA notice to any pertinent Papago Tribes. (*In re Francisco W.*, *supra*, 139 Cal.App.4th at p. 711.)

DISPOSITION

The judgment with respect to the dispositional orders is affirmed. The finding that ICWA does not apply is conditionally reversed and the matter is remanded to the juvenile court with directions to order the Agency to comply with the notice provisions of ICWA. After proper notice under ICWA, if it is determined that the children are Indian children and ICWA applies to these proceedings, the children, Monica or the relevant tribe may petition the juvenile court to invalidate any orders that violated ICWA. If, after proper notice, the court finds the children are not Indian children, the finding that ICWA does not apply shall be reinstated.

IRION, J.

WE CONCUR:

NARES, Acting P. J.

McINTYRE, J.