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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

A.D.,

Defendant and Appellant.

E060627

(Super.Ct.No. RIJ104385)

OPINION

APPEAL from the Superior Court of Riverside County. Jacqueline C. Jackson,
Judge. Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and
Appellant.

Pamela J. Walls, County Counsel, Sophia H. Choi, Deputy County Counsel for
Plaintiff and Respondent.

Appellant A.D. (father) appeals from a juvenile court order returning A.D.Jr. and Al.D. (the children) to their mother, C.D. (mother) and terminating jurisdiction. Father contends that: (1) he was not provided with reasonable reunification services with regard to visitation and, thus, the juvenile court erred in not extending his services; and (2) the court erred in finding that proper notice was given under the Indian Child Welfare Act (25 U.S.C.A. § 1901 et. seq.) (ICWA). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 12, 2013, the Riverside County Department of Public Social Services (DPSS) filed a Welfare and Institutions Code¹ section 300 petition on behalf of the children. A.D.Jr. was 15 years old at the time, and Al.D. was 10 years old. The petition alleged that they came within the provisions of section 300, subdivision (b) (failure to protect). Specifically, the petition alleged that mother and father (the parents) had an extensive and unresolved history of domestic violence; that father was recently arrested for pushing mother down a flight of stairs; that father abused controlled substances and had been convicted twice of driving under the influence; that father was recently arrested for a domestic violence incident and for absconding with the children; and that mother had mental health issues. The petition also alleged that the parents had a history with the Orange County Children's Services Division due to substantiated allegations of neglect as to the children and one other child. Parental rights were terminated as to the other

¹ All further statutory references will be to the Welfare and Institutions Code section, unless otherwise noted.

child, and the dependency as to the children was terminated with family law orders in 2006, awarding physical custody to father.

The social worker filed a detention report, in which she reported that on January 19, 2013, the police responded to the parents' residence regarding an incident where father pushed mother down the stairs. Mother reportedly sustained scrapes, bruises, a sprained finger, and a bruised shoulder. She said there had been seven or eight incidents of domestic violence between her and father in the past several years. Father was not at home when the police arrived. He left the home with the children before the police got there. He was later arrested on a warrant, but would not tell the police where the children were. On March 8, 2013, the children were located, and a protective custody warrant was obtained. The children had been staying with a woman named Ms. Johnson. The children were taken into protective custody.

At the detention hearing on March 13, 2013, the court detained the children. Father indicated he might have Cherokee Indian ancestry through his mother, and the court found that ICWA may apply. The court ordered supervised visitation at a minimum of twice a week.

Jurisdiction/Disposition

The social worker filed a jurisdiction/disposition report on April 15, 2013, recommending that the children be declared dependents, and the parents be provided with reunification services. The social worker interviewed A.D.Jr. and noted that he appeared to have a strained relationship with father. He did not want to return to father's care. The social worker reported that the children had been having regular, supervised visitation

with mother and father, and that visitation was going well. The visits were for at least two hours each time. The social worker attached a case plan for father that required him to participate in a domestic violence program, general counseling, and a substance abuse program.

DPSS sent notice of the dependency proceedings to the Bureau of Indian Affairs (BIA), the Cherokee Nation of Oklahoma, the Eastern Band of Cherokee Indians, and the United Keetoowah Band of Cherokee Indians. The notice included the paternal grandmother's name, B.D. The BIA responded that it did not determine tribal eligibility. The United Keetoowah Band of Cherokee Indians and the Eastern Band of Cherokee Indians responded that they researched their records with the information supplied to them, and they found no evidence that the children were descendants of anyone from their tribe.

The social worker filed an addendum report on May 13, 2013, and reported that the children's foster mother said the children were afraid to tell father they did not want to live with him, but wanted to live with mother. Furthermore, the social worker reported that father had been confrontational and demanding with the foster mother, and she did not feel safe or comfortable around him. The social worker spoke with a maternal aunt to see if she would be willing to supervise visits. She was willing to supervise visits with mother, but not father. The maternal aunt believed father suffered from mental health issues and had a propensity for violence. The children reported that father had a history of alcohol abuse, and that when he got drunk, he became angry and/or violent.

The social worker filed another addendum report on June 7, 2013. The foster mother reported that A.D.Jr. said father punched him multiple times and pulled a knife on him once. The social worker spoke with A.D.Jr., who begged her not to let him live with father. He explained that father punched him in the face more than once last year. Father also pinned him down and choked him to the point he could not breathe. A.D.Jr. was afraid that if he was sent back to live with father, father would “beat [his] brains in.” The social worker also spoke with Al.D., who said father was mean to her during visits. She did not want to live with father either.

The court held a contested jurisdictional hearing on June 12, 2013. DPSS filed an amended section 300 petition that day, as well. The amended petition changed the wording on some of the specific factual allegations. The court sustained the petition and adjudged the children dependents of the court. The court ordered the parents to participate in reunification services. The court also found that ICWA notice was sent and that ICWA did not apply to the children. As to both mother and father, the court ordered the prior visitation order to remain in full force, and authorized “the liberalization of visitation up to and including overnight, weekends, possible placement” upon compliance with the case plan. As to father, the court also ordered an individual counseling referral, and authorized conjoint or family therapy once father and the children were ready.

Addendum Report and Hearing on Visitation

The social worker filed an addendum report on October 2, 2013, stating that visitation between father and the children was scheduled for two hours a week. The social worker noted that visits were occurring regularly, but with minimal benefit, since

the children played games on father's computer or watched movies during the visits, and did not engage with father. The social worker further reported that the children had recently opened up about the abuse they received from father when they lived with him. They expressed that they were afraid of him and were not comfortable visiting with him. The social worker conferred with her supervisor, and it was determined that it was best not to force the children to visit if they refused and felt unsafe. Subsequently, the social worker met with the children and reassured them that they would be safe during visits, since the visits were held in a DPSS office. Both children were still reluctant. The children were participating in therapeutic services, focusing on addressing the violence, abuse, and trauma suffered while living with father. Nonetheless, between May 28, 2013, and June 26, 2013, A.I.D. refused all visits, and A.D.Jr. visited with father once. The social worker met with them again on July 29, 2013, and told them that choosing to terminate visitation was not an option. The children resumed visitation, despite maintaining that they did not wish to continue visiting with father. They participated begrudgingly.

The court held a hearing on October 2, 2013. Apparently, father's counsel set this hearing to discuss the matter of the children not consenting to visitation. Counsel asserted that father wanted to have therapeutic visitation with the children, even though the children's therapist said they are not ready. In the alternative, father requested supervised visitation at the DPSS office and noted his concern that people were telling the children they would not be safe with him if they visited without supervision. The children's counsel asserted that the children were not ready for conjoint therapy with

father, and that they were amenable to DPSS supervising the visits. The court stated that it reviewed the information provided by father's counsel, as well as the social worker's October 2, 2013, addendum report, and then it ordered the prior visitation orders to remain in full force and effect. Thus, the children were to continue supervised visits at the DPSS office, and DPSS was ordered to keep assessing, with the therapist, when conjoint therapy could begin. The court additionally noted that it received correspondence from the Eastern Band of Cherokee Indians, and that ICWA did not apply as to that tribe.

Six-month Status Review

The social worker filed a six-month status review hearing on December 5, 2013, recommending that the court order visitation with father to be at the children's discretion, supervised, and in a therapeutic setting. The social worker reported that the children were placed in mother's care on November 8, 2013. Mother filed for a divorce from father, which was pending. Mother reported that on October 1, 2013, she was granted an active restraining order protecting her and the children from father.

As to A.D.Jr., he was working with his therapist to address his feelings of anger toward father and said he was not ready for family therapy yet. A.I.D. was seeing the same therapist. A.I.D. reported that she continued to fear father and did not want to participate in family therapy with him, and that she did not want her father in her life. The children's therapist agreed that the children were not ready for family therapy. Both children were concerned that father may abscond with them and/or physically abuse them.

Regarding visitation, the social worker reported that the children continued to be uncomfortable and extremely fearful of father at visits, even when the Children's Services staff supervised their visits. Al.D. said she did not want to attend any more visits. A.D.Jr. said he was not sure if he wanted to visit with father. On November 18, 2013, A.D.Jr. said he would possibly visit with father in the new year, but did not want his father to ruin the holidays. The children were nervous to talk about their feelings about visiting in court, with father present. They felt afraid and nervous to be honest in front of him, since they thought he might retaliate at a later time and physically harm them. The social worker reported that from May 31, 2013, to August 30, 2013, the children visited with father weekly seven times, with a few exceptions. There was one week in June when the children refused to visit, two weeks in June and July when A.D.Jr. visited, but Al.D. refused, and one week when father did not show up or call. During the visit on August 23, 2013, A.D.Jr. and father got into a heated argument, and they had to be redirected several times. The last time the children visited with father was on September 16, 2013. After that, from September 27, 2013, to November 26, 2013, they refused.

The social worker further reported that father began individual counseling on June 20, 2013, and was making steady progress. He also completed an anger management course and an outpatient substance abuse program.

The social worker additionally reported that the children were appropriately placed in mother's care, since she was meeting all their needs. They appeared to be thriving in her care.

At a six-month review hearing on January 8, 2014, the court requested an addendum report to address visitation between father and the children. The social worker filed an addendum report on January 29, 2014, and reported that there had been no visits between father and A.I.D. since December 18, 2013. A.I.D. was provided with the opportunity to have weekly visits at the DPSS office, including transportation and supervision by the DPSS staff, but she declined. A.D.Jr. was offered the same services, and he agreed to have a visit on December 20, 2013. Even though the visit was appropriate, A.D.Jr. said he did not want to have weekly visits. He stated that he preferred occasional contact with father and said he never wanted to live with father again.

On February 2, 2014, the court held a six-month status review hearing. Mother's counsel informed the court that the children were adjusting extremely well under mother's care, and that mother had completed her case plan. Mother's counsel then requested the court to terminate the dependency with an exit order. Father's counsel asserted that father had made substantive progress in his case plan, including in his counseling, anger management, and his outpatient program. Father's counsel then brought up the issue of the reasonableness of services, particularly regarding visitation. He asserted that, at the detention hearing, the court ordered supervised visitation, at a minimum of two times per week. Then, on June 12, 2013, the court authorized liberalized visitation to include unsupervised, overnight, and weekend visits, as the parents made progress in their case plans, and the children were ready. Father's counsel then reminded the court that he put the matter on calendar on October 2, 2013, for an ex

parte hearing because father had indicated that he was not having visitation or conjoint therapy. However, the court ordered the prior visitation orders to remain in full effect. Father's counsel noted that since the children had been returned to mother, they were not in therapy. The court noted that the children had to be referred to therapy because they changed counties. Father's counsel referred the court to *In re S.H.* (2003) 111 Cal.App.4th 310 (*S.H.*), which the court said it had read, arguing that visitation was an integral part of reunification, and it was the court's responsibility to ensure regular visitation, as well as provide flexibility in response to the changing needs of the children and to family circumstances. Father's counsel acknowledged that *S.H.* said the court had flexibility to not force the kids to visit, but it did not allow for a child to exercise veto power over visitation. Father's counsel asserted that because father was not really having visitation at that point, he could not address issues with the children in conjoint therapy. He further asserted that DPSS had not shown that visits were detrimental to the children. The court interjected that the therapist did not recommend conjoint therapy. Father's counsel argued that the case law said that the discretion to determine whether visitation should occur remained with the court, not therapists or children. Thus, father's counsel asked the court to make a finding that father had not been offered reasonable services, since he had not been afforded "any visitation." He further argued that it would be beneficial for the case to stay open.

The children's counsel then stated that she was in agreement to terminate the case. She noted that the children were doing well in mother's care, and the goal of the case was to reunify with one or both parents. The children's counsel stated that A.D.Jr. was

willing to have some communication and visitation with father, but he did not want to be held to a fixed schedule. However, Al.D. was still fearful of father and did not wish to have contact with him. The children's counsel requested to court to terminate the case and give mother sole legal and physical custody, with supervised visits with A.D.Jr. with his consent, but no visitation with Al.D.

The court stated that it had read and considered all reports submitted. It stated that ICWA did not apply and noted that mother's progress in her case plan was satisfactory. It found that father's progress in his case plan was adequate but incomplete. The court found that the conditions justifying removal no longer existed. The court considered joint legal custody, but in light of the restraining order against father, it ordered sole legal and physical custody of the children to mother. The court ordered the matter to be terminated upon the filing of family law orders. It also ordered that father was to receive reasonable visitation, supervised by a third party approved by mother, or a professional monitor, or visits in a therapeutic setting. The court encouraged the children to try to rebuild their relationship with father.

ANALYSIS

I. The Court Properly Ordered Visitation and DPSS Provided Reasonable

Services to Father

Father claims that the court improperly delegated its discretion, to determine whether any visitation would occur, to the children. In other words, he argues that the court gave the children the authority to refuse visits. He further contends that he was not provided with reasonable services because DPSS failed to provide him with "any

substantial visitation” between late August 2013 and February 2014. As such, father contends that the court erred in not extending his services, and he requests this court to reverse and remand the case for the trial court “to enforce a reasonable visitation schedule.” We find no error.

A. *The Court Did Not Improperly Delegate its Power*

“Every order placing a minor in foster care and ordering reunification services must provide for visitation between the parent and the minor as frequently as possible, consistent with the well-being of the minor. [Citation.] The court may deny a parent visitation only if visitation would be harmful to the child’s emotional well-being. [Citation.] The juvenile court has the sole power to determine whether visitation will occur and may not delegate its power to grant or deny visitation to the department of social services. The court may, however, delegate discretion to determine the time, place and manner of the visits. Only when the court delegates the discretion to determine whether any visitation will occur does the court improperly delegate its authority and violate the separation of powers doctrine. [Citations.]” (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1009.) The discretion to determine whether visitation occurs must remain with the court, not with social workers, therapists, or the dependent child. (*S.H., supra*, 111 Cal.App.4th at pp. 317-318.)

The record does not support father’s claim that the juvenile court gave the children the discretion to decide whether visits with him would occur. The court ordered supervised visitation at a minimum of two times per week. There was no delegation of judicial power to the children. (See *In re Danielle W.* (1989) 207 Cal.App.3d 1227, 1237

(*Danielle W.*) [court found that visitation order was not an improper delegation of power, even though the order stated that visitation was, in part, at the children’s discretion].) The order was not similar to the one in *S.H.*, *supra*, 111 Cal.App.4th 310, wherein the court reversed a juvenile court’s visitation order which explicitly stated that “if the children refuse a visit, then they shall not be forced to have a visit.” (*Id.* at p. 313.) The *S.H.* court noted that the order failed to mandate any minimum number of monitored visits per month, or even to order that some visitation must occur each month. (*Id.* at p. 319.) In contrast, the visitation order at issue here stated that supervised visitation was to be a minimum of two times per week.

Father insists that the trial court gave the children the “de facto discretion” of whether or not to visit, since it failed to “enforce” the visitation order. He now wants the case remanded for the court to “provide visitation . . . that will actually take place.” We acknowledge that, although the court made a proper visitation order, the children sometimes refused to visit father because they were afraid of him. However, *the court* never gave the children the discretion to refuse visits. (See *In re Christopher H.*, *supra*, 50 Cal.App.4th at p. 1009 [the court cannot delegate its discretion to determine whether any visitation would occur].) Furthermore, a juvenile court is not required to force a child to visit a parent against his or her will. (*Danielle W.*, *supra*, 207 Cal.App.3d at pp. 1237-1238.)

We conclude that the court’s visitation order did not constitute an improper delegation of judicial power.

B. DPSS Provided Reasonable Services With Regard to Visitation

In addition to faulting the court's visitation order, father contends that he was denied reasonable services because DPSS permitted the children "to veto any visitation at any time they so desired."

"The adequacy of reunification plans and the reasonableness of the [DPSS's] efforts are judged according to the circumstances of each case. [Citation.] Moreover, [DPSS] must make '[a] good faith effort to develop and implement a family reunification plan.' [Citation.]" (*Robin V. v. Superior Court* (1995) 33 Cal.App.4th 1158, 1164.)

The record demonstrates that DPSS made reasonable efforts to provide visits. At the start of the dependency, the children had regular, supervised visitation with father, and the visits went well. The visits were for at least two hours each time. Visits continued to occur regularly, but with minimal benefit; the social worker observed that the children played games on father's computer or watched movies during the visits, and did not engage with him. The children subsequently told the social worker about the abuse they received from father when they lived with him, and said they were not comfortable visiting with him. The social worker met with the children to reassure them they would be safe during visits. Nonetheless, between May 28, 2013, and June 26, 2013, A.D. refused all visits, and A.D.Jr. visited with father once. The social worker met with the children again on July 29, 2013, and told them they could not stop visiting father. Consequently, the children resumed visitation. From May 31, 2013, to August 30, 2013, the children visited with father weekly seven times, with a few exceptions. The last time the children visited with father was on September 16, 2013. After that, from

September 27, 2013, to November 26, 2013, they refused. DPSS continued to provide the children with the opportunity to have weekly visits at the DPSS office, by offering to provide transportation and supervision by the DPSS staff. Although Al.D. declined, AD.Jr. had a visit with father on December 20, 2013.

Despite DPSS's reasonable attempts to facilitate visitation, the children (particularly Al.D.) adamantly refused to visit. Visitation must be "consistent with the well-being of the child." (§ 362.1, subd. (a)(1)(A).) Moreover, "a child's aversion to visiting an abusive parent may be a 'dominant' factor in administering visitation," although it is not the sole factor. (*In re Julie M.* (1999) 69 Cal.App.4th 41, 51.) Short of physically coercing the children, there was little more DPSS could do to facilitate visitation.

We conclude that father was provided with reasonable services with respect to visitation.

II. The Department's Failure to Comply With ICWA's Notice Requirements is Harmless Error

Father next contends that the court erred in finding that proper ICWA notices were sent and that ICWA did not apply here. He argues that DPSS failed to provide the tribes with adequate information regarding the paternal grandmother. We agree, but find the error harmless at this point.

Congress enacted the ICWA "to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children 'in foster or adoptive homes which will reflect

the unique values of Indian culture.’” (*In re Levi U.* (2000) 78 Cal.App.4th 191, 195.)

The act states that “[i]n any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe.” (25 U.S.C. § 1912(a).) “One of the purposes of giving notice to the tribe is to enable it to determine whether the minor is an Indian child. [Citation.] Notice is meaningless if no information or insufficient information is presented to the tribe to make that determination. [Citation.]” The notice must include information such as the child’s name, date of birth, and place of birth, the names and addresses of the child’s parents, grandparents, and great-grandparents, along with dates of birth or death and/or other identifying information. (*In re Louis S.* (2004) 117 Cal.App.4th 622, 630.) However, “[b]y its own terms, the act requires notice only when child welfare authorities seek permanent foster care or termination of parental rights.” (*In re Alexis H.* (2005) 132 Cal.App.4th 11, 14.) In other words, “[w]hen authorities remove a child of Native American descent from his home, the act promotes foster care or adoption by a Native American family in the hope of preserving tribal culture. If, however, authorities do not move the child to another family, the purpose does not come into play.” (*Id.* at p. 15.)

Here, father indicated that he may have Cherokee Indian ancestry through his mother, B.D. DPSS sent notice to the Cherokee Nation of Oklahoma, Eastern Band of Cherokee Indians, United Keetoowah Band of Cherokee Indians, and the BIA. However, the record reflects that the notice failed to provide the tribes with sufficient identifying

information regarding paternal grandmother, B.D. The notice only included her name. It did not include other required information, such as her maiden, married and former names or aliases, birthdate, places of birth and death, former addresses, tribal enrollment numbers, and/or other identifying information. (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1116.) Thus, the notice was inadequate.

However, even though the notice was inadequate under the ICWA, any error was harmless. The court ultimately terminated the dependency by giving mother full legal and physical custody of the children. In other words, DPSS is no longer seeking foster care or the termination of parental rights. (See *In re Alexis H.*, *supra*, 132 Cal.App.4th at p. 14.) Thus, at this point, ICWA does not apply, and there is no need to remand the case for proper notice to be sent. However, if DPSS ever pursues any additional action, which might lead to foster care or adoption, it should ensure that the notice sent to the tribes contains complete and accurate information. (See *Id.* at p. 16.)

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

KING
J.

MILLER
J.